Article

BEYOND LIBERTY VERSUS EQUALITY: RECONFIGURING THE LIBERTARIAN-EGALITARIAN DEBATE ON FREE SPEECH IN THE PHILIPPINE SETTING

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I. INTRODUCTION

A. THE GLOBAL CONTEXT

In his book *The End of History and the Last Man*,[2] Francis Fukuyama theorized, in a curiously Hegelian fashion, that with the collapse of Communism, we are witnessing the end of history: that is, the end of humanity's fascination with ideology and the establishment of the universality of Western-style liberal democracy as the supreme and definitive form of government.

While indeed, it is true that the old political ideologies like Marxism and Socialism have been undermined and even the circa Nineteenth century idea of the Nation-State has been weakened by globalization,[3] he could not have been more

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[2]F. FUKUYAMA, THE END OF HISTORY AND THE LAST MAN (1992). The book is actually an expanded treatment of the same theme first expressed in a 15-page essay he had written for the conservative magazine *National Interest* Summer 1989 issue.

[3] See A. Contreras, *Globalization, the Political Theory of the State and Civil Society, and the Politics of Identity in the Context of Environmental Governance*, 14 KASARINLAN 9-19 (1999). Contreras outlines how the onslaught of globalization has weakened the Nation-State, and the consequent failure of governance associated with the liberal state founded on constitutional constraints, as well as the place of civil society in the emergent,

wrong. Indeed, nothing could have been a more emphatic, if it is not already a gruesome refutation of his thesis than the events in the United States on September 11, 2001, when the world witnessed a new kind of terror never seen before. Indeed, the 9/11 attacks on the World Trade Center and the Pentagon were epochal events, because, in the language of one critical scholar of international affairs, they may yet mark a "turning point" in a new re-ordering of international law. That non-state actors like the Al-Qaida could actually expose the vulnerability of a superpower like the United States has led the way to a transformation of the international legal order – one in which, in the rise of a new form of terrorism, we see "a new kind of networking of orders of state sovereignties, where a large number of national, regional, and global agencies crisscross to fashion unusual, even extraordinarily shifting, yet vital strategic alliances."[4] It is an alliance that, of course, is led by the world's Super Cop, the United States. On the other hand, the attacks have also brought to larger-than-life proportions the reality that other societies and cultures may indeed have conception of societal good diametrically opposed to that espoused by a liberal democratic society like the United States. The international media have more than adequately reported on the conduct of the alleged bombers who carried out the attacks, outlining how they surrendered themselves to what they ostensibly considered as a higher reason – the demand of their fundamentalist faith – and launched the apparently simultaneous suicide missions.[5] Indeed, at a time described by philosophers as the "postmodern age", a new societal reality has arisen – one marked by social fragmentation, the collapse of traditional social patterns and the rise of mass communication as primary source of social cohesion in many regions of the world.[6] The situation now is more like Samuel Huntington's

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political, economic and cultural schema, where "identity politics" such as those linked to gender and ethnicity, and even popular culture, predominate.

[4] Upendra Baxi, *Operation 'Enduring Freedom': Towards a New International Law and Order?* A paper read at the *Kalinaw*-Asian Peace Alliance Conference, University of the Philippines, Diliman, Quezon City, Aug. 29, 2002.

[5] See <http://www.time.com/time/covers/1101020909/index.html>

[6] J.F. LYOTARD, THE POSTMODERN CONDITION: A REPORT ON KNOWLEDGE 303-324 (Geoff Bennington &Brian Massumi trans., 1984). The French philosopher terms the era's philosophical attitude as *postmodernism*, defining it as an "incredulity towards metanarratives." He uses the term "metanarrative" to mean the legitimating explanation of truth claims. It is an attack on claims to universal truth and knowledge, to the idea of the absolute and the foundational. Liberal democracy, which is built upon the edifice of the Enlightenment, is one such truth-claim based on a vision of societal order anchored on reason. Gary Peller explains how *postmodernism* attacks the tenets of liberal thought itself: "Indeed, the whole way that we conceive of liberal progress (overcoming prejudice in the name of truth, seeing through the distortions of ideology to get at reality, surmounting ignorance and superstition with the acquisition of knowledge) is called into question. Postmodernism suggests that what has been presented in our socio-political and our intellectual traditions as knowledge, truth, objectivity, and reason are actually merely the effects of a particular form of social power, the victory of a particular way of representing the world that then presents itself as beyond mere interpretation, as truth itself." Quoted in H. GIROUX, BORDER CROSSINGS, CULTURAL WORKERS AND THE POLITICS OF EDUCATION, 53 (1992).

Clash of Civilizations,[7] in which we read about emergent conflicts in the various regions of the world in the Post-Cold War Era brought about largely by a resurgence of fundamentalist religion, especially of the Islamic persuasion, and the revival of ethnic and racial animosities, than a liberal democratic haven. In a word, the failure of Enlightenment universal rationality – anchor of liberal democracy – to provide a truly persuasive account of the world.

What we saw on television in graphic terms in 9/11 was a clear rejection of a particular conception of self-identity that, for the last three hundred years or so, has been prevalent in the West and other societies which have embraced liberal democracy – a self-identity found in the duties and privileges of citizenship in a political society. Philosopher Tom Bridges argues that civic life in the postmodern era is no longer defined exclusively by the essentialism and universalism that liberal thought espoused.[8]

Where once, the ideas associated with thinkers like Locke, Rousseau, Bentham, Kant, and Mill held sway, providing the dominant interpretation of the basic liberal democratic ideals of individual freedom and equality, today, such ideas no longer provide a "rhetoric that appealed to notions of popular sovereignty, social contract, natural human rights, and to related ideas of authentic individuality and autonomous personhood" with an "immediate intelligibility and validity."[9] He attributes this demise of liberal political philosophy that has informed liberal democracies for a long time to four reasons:[10]

First, the universalism and essentialism of the Enlightenment all too often have served as a cultural license for Western imperialism. Modern European claimed to the possession of a privileged cognitive standpoint and therefore a privileged insight into universally valid metaphysical truths invited and legitimized disparagement of non-Western cultures, a disparagement entirely consistent with military conquest and economic exploitation.

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[7] S.P. HUNTINGTON, THE CLASH OF CIVILIZATION AND THE REMAKING OF THE WORLD ORDER (1996). The full text may be downloaded at http://www.lander.edu/atannenbaum/Tannenbaum%20courses%20folder/POLS%20103%20World%20Politics/103_huntington_clash_of_civilizations_full_text.htm <last visited March 10, 2003>.

[8] T. BRIDGES, THE CULTURE OF CITIZENSHIP: INVENTING POSTMODERN CIVIC CULTURE (1994). The author is a professor of philosophy at Montclair State University. This essay will refer repeatedly to the Internet version of the book, which may be downloaded in its entirety at http://www.civsoc.com/site3.html#download <last visited March 12, 2003>.

[9] BRIDGES, *op. cit. supra* note 7.

[10] *Ibid.*

Second, the very notion that universally valid knowledge can be arrived at by the mere application of a single cognitive method now seems a vast oversimplification. Needless to say, research enterprises are more important than ever. But their organization is now viewed by most as far more sociologically complex, their procedures and rhetoric as far more intellectually diverse, than Enlightenment conceptions of truth and knowledge could ever fully grasp.

Third, worldwide intercultural communication has become so routine and so economically important that any form of culture claiming a metaphysically privileged status for one particular model of political organization now seems hopelessly parochial and even an obstacle to international cooperation. Modernist liberal doctrine was based upon ideas that gave such privileged ontological status to liberal political institutions.

Fourth, in America during the last 100 years, programs of civic and technical education based upon Enlightenment conceptions of scientific objectivity and modernist liberal doctrine have been implemented extensively. However, today it is apparent to many that these programs are failing not only as civic education, i.e. failing to produce citizens in the full cultural sense, but also as forms of technical education.

Bridges calls this demise as a crisis of "civic culture"[11] – such a culture being defined as "a body of narratives, representations, and discourses that serve to render intelligible and support the effective internalization of the norms proper to liberal democratic citizenship."[12] Such a crisis is a problem of reproducing citizens who somehow believe in the primacy of such conviction about the role of the citizen in relation to the idea of liberal democratic citizenship over their specific ethnic, religious or familial contexts and allegiances.[13] Courts today more than ever

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[11] *Ibid.*

[12] *Ibid.*

[13] *Ibid.*; see also W. G. JEANROND, CALL AND RESPONSE 7-8 (1995). Alas, even Christianity has to contend with the postmodern challenge. Prominent Catholic theologian Werner G. Jeanrond notes: "Thus, those representatives of Christian traditionalism who celebrated prematurely the end of modernity may find now that they have not only been freed from an oppressive modern system based on autonomous reason, agency and critique, but equally from the terrors of any *system* of thinking, including their own, particular one. All systems trying to advance a total claim of one sort or another have been deconstructed by contemporary philosophy. Reason is not dead, but its attempt to ground itself upon an unshakable foundation has been exposed as impossible. The post-modern critique of human thought and praxis can also be seen as a potential contribution to the general reassessment of religion. Of course, any systematic claim to exclusive and total knowledge would be rejected by post-modern thinkers. But once all claims to a total grasp of our self-understanding and to strong ontological certainty are subjected to the post-modern critique, the individual and communal search for experiences of God's presence in our world receives a new urgency."

face pressures that arise out of the clash of values and belief systems that increasingly characterize this crisis in civic culture.

B. TUG-OF-WAR: LIBERTY VS. EQUALITY

The tensions in liberal democracy brought about by changing conceptions of societal good is seen more clearly in present-day debates over free speech. This clash of values is perhaps best expressed in a candid confession of political conviction made by the late philosopher of science, Sir Karl Popper, whose political philosophy has acquired the tenor of an *apologia* for absolute liberty in an open society:

> I remained a socialist for several years, even after my rejection of Marxism; and if there could be such a thing as socialism combined with individual liberty, I would be a socialist still. For nothing could be better than living a modest, simple and free life in an egalitarian society. It took some time before I recognised this as no more than a beautiful dream; that freedom is more important than equality; that the attempt to realize equality endangers freedom; and that, if freedom is lost, there will not even be equality among the unfree.[14]

Indeed, for the late philosopher of science, it is a foregone conclusion: freedom above anything else.

C. EMERGENT VIEWS ON FREE SPEECH

> What matters for a legal system is what words *do*, not what they say, and therefore, the law should only direct its attention to the use of words which do something illegal, not their use to say something. Looking at the words alone, instead of at what the difference they make in the full set of circumstances in which they are uttered, is simply insufficient to determine their significance for a legal system generally, or for first amendment adjudication, in particular.[15]

In his 1996 book *The Irony of Free Speech*,[16] Yale Sterling Professor Owen

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[14] Nicolas Aroney, *Taking Liberty Seriously*, 45 AM. J. JUR. 226 quoting K. Popper, Unended Quest (1975); See also K. POPPER, OPEN SOCIETY AND ITS ENEMIES (1945) where he developed his political philosophy to the fullest. For a treatment of his political philosophy from a variety of perspectives, see POPPER'S OPEN SOCIETY AFTER 50 YEARS, (Ian Jarvie and Sandra Pralong, eds. 1999)

[15] Edward J. Bloustein, *Holmes: His First Amendment Theory and His Pragmatist Bent*, RUTGERS L. REV. 283, 299 (1988).

[16] O. FISS, THE IRONY OF FREE SPEECH (1996).

Fiss lays bare for us a tug-of-war between two constitutional values -- equality and liberty -- over what is at once, a cherished institution in a democratic society. On the one hand, libertarians of today insist upon the primacy of the *First Amendment* [17] in the conduct of public affairs; for them, that the free speech clause occupies the top rung of constitutional declarations is more than symbolic. It is, in fact, a right *preferred* [18]over the others.

The dominant libertarian discourse follows a long tradition of political philosophy traceable to the emergence of liberal thought itself, which abhors state limitations on the freedom of the individual. This conviction is made concrete in the doctrine of *content neutrality*, which, to Fiss's considerable consternation, is now – at least, according to him -- sustained to a fault by the present US Supreme Court.[19] According to this doctrine, government has no business minding what is being said in a given speech situation.

"This principle of content neutrality," to quote Fiss, "bars the state from trying to control the people's choice among competing viewpoints by favoring or disfavoring one side in a debate."[20] This repulsion against state regulation underscores a primal fear nurtured by libertarians that, in the words of Prof. Erwin Chemerinsky, "government will target particular messages and attempt to control a topic by regulating speech."[21] For libertarians, the state must both be "viewpoint neutral" and "subject neutral."[22] Indeed, contemporary libertarian discourse follows a long tradition of political philosophy traceable to the emergence of liberal thought itself, which abhors any state limitation on the freedom of the individual.

Chemerinsky explains that according to this putative concept, the state cannot regulate speech based on the topic or the ideology of the message. To do so would be prior restraint, and a violation of the fundamental principle of due process.[23]

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[17] U.S. CONST. amend. I: "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

[18] United States v. Carolene Products Co., 304 U.S. 144, 152 (1938). The famous footnote by Justice Stone in this case is the basis for the phrase; see also *Murdock v. Pennsylvania*, 319 (U.S.)105 (1943), where the American High Court made the first explicit reference to free speech as a preferred right.

[19] FISS, *op. cit supra*, note 15 at 21.

[20] *Ibid.*

[21] Erwin Chemerinsky, *The First Amendment: When the Government Must Make Content-Based Choices* 42 CLEV. ST. L. REV. 199 (1994)

[22] *Ibid.*

[23] *Ibid.*

On the other hand, there is a growing body of work advocating a novel form of state intervention in free speech issues, that of the state acting for the good of groups in the margins of society according to the mandates of the *Fourteenth Amendment*, or the equal protection clause.[24] (Fiss shares in some ways the contentions of advocates of a school of thought known as *Critical Legal Studies* (CLS) although the former may be described as largely a liberal of the egalitarian side of the debate. Indeed, he has been seen as one of its most vocal critics, accusing the CLS adherents, also known as radical democrats, of contributing to the "death of law" as an inspiring ideal for reform.)[25]

For instance, one school of thought, the Critical Legal Studies (CLS), argues that conventional hermeneutic on free speech issues espoused by the libertarian school no longer suffices to address systemic social ills such as prejudices of race, ethnicity and gender, which are deeply rooted in social *psyche*.[26] For a critic of the libertarian approach like Fiss, the traditional conception of the free speech clause works only in well defined issues, such as in the categories by which media are allowed to criticize public officials in the conduct of their official duties.[27] But arguing for affirmative action, Fiss echoes the view of radical democrats, questioning the *irony* of situations where too much free speech defeats its very purpose of full and unimpeded discussion of public issues. For him, such situations call for the lowering down of the voices of some so that others, who have been denied that right, may speak. This "counter-value" presents a "compelling quality" that, in the view of the author of *The Irony of Speech*, "shatters the liberal consensus."[28] The *bete noire* of Fiss's proposed jurisprudence are hate speech, pornography and campaign finance. By "liberal consensus" we take it to mean the

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[24] U.S. CONST. amend. XIV § 1: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

[25] Sanford V. Levinson, *Issues in Legal Scholarship*, THE ORIGINS AND FATE OF ANTI-SUBORDINATION THEORY (2002): Article 5. http://www.bepress.com/jls/iss2/art5. <last visited March 15, 2003>.

[26] In the context of the American multi-cultural experience, examples are drawn by CLS adherents from attempts to curb racist speech in campuses, which, for the libertarian ethic, is answered not by restricting speech, but by leaving its resolution to a reasoned out dialogue among members of the community. CLS adherents say that this romantic theory of the campus – or society, for that matter – as a "market place" of ideas, fails to factor in ways in which expression, and more basically, language, work. Language, they contend, is more than a purveyor or conveyor belt of meaning. For it is by language that we construct categories to describe the world. By language, they contend we construct narratives about ourselves, about others, and indeed, our existence; it is our subjective window to the objective word. See Tracy E. Higgins, *"By Reason of their Sex": Feminist Theory, Postmodernism, and Justice* 80 CORNELL L. REV. 1536-1596 (1995); See also J. HABERMAS AND R. RORTY, DEBATING THE STATE OF PHILOSOPHY 31-47 (Niznik and Sanders, eds., 1995).

[27] FISS, *op. cit. supra* note 15 at 8.

[28] *Id.* at 7.

libertarian strain in American jurisprudence, which hews well with the classical understanding of the free speech clause. Fiss however, does not abide with the anti-foundationalist tendency exhibited by adherents of the CLS. Fiss is a *First Amendment* scholar who may be considered as a modern liberal, in that he proposes to consider the other side of the issue – equality – and attempts to see whether the concern of both value and counter-value may be adequately met at the same time in a given free speech controversy.

He proposes an alternative way of looking at things; that is, that "the regulation in question can be seen as themselves, furthering, rather than limiting, freedom of speech."[29] By assuming this perspective, people may begin considering the state as a " fair-minded parliamentarian"[30] balancing the interests of two liberties: the libertarian and the democratic, or egalitarian, approaches. Thus, they may now be seen as two faces of the same coin. While this approach is not a guarantee that disagreements would end, it would "make the controversy over regulation less a battle over ultimate values...[which comes first], and more a disagreement among strong-minded people working to achieve a common purpose: free speech."[31]

The Yale professor is not saying one should be privileged over the other, nor is he stressing equality over liberty. (In fact, he says that he is even ready to acknowledge "the difficulty, perhaps the impossibility, of discovering a method between these two values"[32] largely because there is nothing in the Constitution that shows us how that choice is exactly made).

Rather, he is only arguing that the *doctrine of content-neutrality* cannot be applied in a straightjacket fashion. He enumerates three genres of speech issues: hate speech, pornography, and campaign finance, where traditional libertarian explanations, if applied, defeat the very purpose of democracy. He says *content neutrality* cannot be extended to such issues, where private parties are actually "skewing debate"[33] and distorting its outcome while the state itself is not the threat. In each of these issues, the state assumes the posture of a friend of freedom, and not its natural enemy, as the traditional framework would like to put it. The state then, acts as a "fair-minded parliamentarian, devoted to having all views presented."[34]

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[29] *Id.* at 15.
[30] *Id.* at 21.
[31] *Id.* at 15.
[32] *Id.* at 12-13.
[33] *Id.* at 21.
[34] *Ibid.*

> The call for state intervention is based not on the theory that the activity to be regulated is inherently a violation of the First Amendment...but only on the theory that fostering full and open debate--making certain that the public hears all that it should--is a permissible end for the state. [35]

Therefore, state regulation of hate speech, pornography and campaign finance is covered again by equality concerns, but this time, such concerns are not rooted on the Fourteenth Amendment but on the First Amendment, in that the issue now is not just the social standing of the marginalized groups but their very claim "to a full and equal opportunity to participate in public debate -- the claims of these groups to their right to free speech, as opposed to their right to equal protection."[36] We have then, come to a full circle.

In Chemerinsky, we find the same arguments against the folly of insisting on the traditional idea of free speech, particularly in situations where the government assumes the role of allocator of scarce resources.[37]

The author cites the case of *Rust v. Sullivan,*[38] where the court upheld the constitutionality of a federal regulation which prohibited Planned Parenthood clinics receiving federal funds from engaging in abortion counseling and referrals. Critics foisted a *First Amendment* challenge by arguing that the state was impermissibly conditioning receipt of federal funds on doctors and health care providers giving up their free speech right. The Supreme Court held the ban was constitutional because the government was simply choosing to fund some sectors and not the others. According to Chemerinsky, this was prior restraint in conventional libertarian interpretation but the greater reality is that of government, which, when faced with a situation of limited resources, must decide who to support and who not to. In these situations, the state acts as the speaker and protects its right to free speech.[39]

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[35] *Id.* at 17.
[36] *Id.* at 18.
[37] CHEMERINSKY, *op. cit. supra* note 20, at 213-214.
[38] 500 U.S. 173 (1991)
[39] CHEMERINSKY, *op. cit. supra* note 20 at 213-214.

D. IF NOT FREE SPEECH, THEN WHAT?

Given the conflicting polemics between proponents of liberty and equality, it is not difficult to see why some observers have often characterized the tension between the two values as an irreconcilable difference, an either/or question that cannot have a satisfactory resolution. Is there a way out of this deadlock? Fiss has proposed one way, as did Chemerinsky.

Part II of this essay treats in full the various philosophical influences that have informed the debate between the libertarians and the egalitarians. It also tackles attempts to fuse a dialectic or a synthesis between these two tendencies within the liberal camp, as seen in the work of thinkers we call the "postmodern liberals." Finally, we look at a fourth perspective – the communitarian critic of the liberal view – as a viable alternative to the tug-of-war between the libertarians and the egalitarians.

Part III of the essay traces the development of Philippine jurisprudence on free speech, beginning with the liberal influences on Philippine constitutional history. We note that Philippine jurisprudence on free speech is largely libertarian, although we have sensed a "theoretical break" that could well serve as a foundation for a more egalitarian interpretation of the free speech clause in the future.

Part IV attempts to see what the communitarian view augurs for Philippine jurisprudence on free speech. We argue that is quite possible to talk about liberty and equality as proper concerns of community. Indeed, we can talk of reconfiguring the libertarian-egalitarian debate, looking at it as a means to enlarge and enhance our sense of community. Ours is an argument for communitarianism as expounded by Alisdair MacIntyre and amplified by other authors. Here we discuss the possibility of "reimagining" the Filipino nation as well as reconfiguring the dominant discourse in the public sphere on cultural identity so as to contribute to the building of community.

II. PHILOSOPHIES LOCKED IN A RAGING DEBATE

A. GOALS OF FREE SPEECH

In *The Future of Free Speech Law,* R. George Wright argued on behalf of the classical philosophers of liberalism -- Socrates, Mill, Locke, Hume, and Milton -- and reaffirmed what these thinkers have espoused as the goals of free speech: (1) the development of the faculties of the individual; (2) the happiness to be derived

from engaging in the activity; (3) the provision of a safety valve for society; and (4) the discovery and spread of political truth. [40]

For the liberals, according to George Wright, the maintenance of a system of free speech is as necessary as the maintenance of a system of free expression as it is a "(1) method of assuring individual self-fulfillment; (2) as a means of attaining the truth; (3) as a method of securing participation by the members of the society in social, including political, decision-making; and (4) as a means of maintaining the balance and change in the society."[41] Dean Stone in his *Content Regulation and the First Amendment*, on the other hand, classified the goals of free speech into: (1)search for truth; (2) meaningful participation in self-government; and (3) individual self-fulfillment.[42]

Meanwhile, in his *Free Speech in the United States*, Z. Chaffee said that free speech has been the means by which the interests of the individuals are served. Chaffee argues that the system of free speech has been maintained "in the need of many men to express their opinions on matters vital to them if life is to be worth living, and a social interest in the attainment of truth, so that the country may not only adopt the wisest course of action but carry it out in the wisest way."[43]

B. COVERAGE OF FREE SPEECH

The coverage of the free speech clause is always determined by the range of values of the liberal society. When values are not significantly observed under any given expression or conduct in the liberal society they do not underlie the free speech clause, and hence, not entitled to protection.

Among the most contemporary American scholars who have sought to limit the scope of coverage of free speech clause have been Alexander Meiklejohn, Alexander Bickel, Alexander Borke, George Anastaplo, and Archibald Cox. Alexander Meiklejohn, in *Political Freedom*, limited the coverage of free speech to "issues with which voters have to deal".[44] These issues, clarifies Meiklejohh, are issues that "we must address as voters, expansive as such a category may ...seem a felicitous way of capturing what we recognize intuitively as at least among other free speech values: our personal growth...intellectual, emotional, asethetic,

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[40] R. GEORGE WRIGHT, THE FUTURE OF FREE SPEECH 2-4 (1990).
[41] *Id.* at 3.
[42] Stone, *Content Regulation and the First Amendment*, 189 WM. & MARY L. REV. 193 (1973)
[43] Z. CHAFEE, FREE SPEECH IN THE UNITED STATES 33, (1967)
[44] A. MIEKLEJOHN, POLITICAL FREEDOM (1965)

profession, vocational, civic, and moral."[45] His distinction between speech implicating public welfare and speech implicating merely private goods is flexible enough to provide the distinction between the protected and the unprotected speech values.[46]

Alexander Bickel in his *The Morality of Consent*, reconfiguring the broad speech formulation, confines the scope from "social interests" to " interests in the successful operation of the political process."[47] Bickel clarifies that "the political can obviously be defined in narrower or broader terms, and conceptions of what is required to successfully operate a constitutional government vary in breadth."[48] Robert Bork in his *Neutral Principles and Some First Amendment* limited free speech to "explicitly and predominantly political speech".[49] He contends that:

> The First Amendment indicates that there is something special about speech. We would know that even without a first amendment, for the entire structure of the Constitution creates a representative democracy, a form of government and its policies. Freedom for political speech could and should be inferred even if there were no first amendment.[50]

But R. George Wright, in his *The Future of Free Speech Law*, suggested that the free speech debate should create "broader formulations of the scope and values underlying free speech."[51] This is because, according to Wright, the formulations of the scope and values underlying the free speech clause tend to be unduly arbitrary. He has, however, clarified that these broader formulations of free speech values are not unproblematic. His recommended solutions, though, are congruent with Martin Redish's *Autonomy 1 and Autonomy 2* [52] or Isaiah Berlin's Positive Liberty.[53] He writes:

> Writers such as Martin Redish have explicitly recognized that what is variously referred to as the value of self-realization, or development, or self-fulfillment, or autonomy, conceals an ambiguity. For convenience, this ambiguity will be referred to in terms of autonomy 1 and autonomy 2. Autonomy which can safely be regarded as

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[45] WRIGHT, *op. cit. supra* note 39 at 22. See also Bonstein's , *The Origin, Validity and Interrelationships of the Political Values Covered by Freedom of Expression*, 33 RUTGERS L. REV. 13 (1948).

[46] A. MIEKLEJOHN, FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT 98 (1948).

[47] A. BICKEL, THE MORALITY OF CONSENT 62 (1978).

[48] See Bickel, *Freedom of Expression: Essay on Theory and Doctrine*, 78 NW. U. L. J. 1137 (1983)

[49] R. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L. J. 76 (1971)

[50] *Id.* at 43.

[51] WRIGHT, *op. cit. supra* note 39 at 1.

[52] *Id.* at 5.

[53] *Ibid.*

> a Millian Value and is at least arguably defensible as a coherent element of the set of distinctive free speech values, is connected with self-realization in the sense utilized by Mill and draws on the developmental dynamic that is described by writers as diverse as Aristotle and Hegel. This sense of autonomy or self-realization is associated with what Isaiah Berlin has referred to as 'positive liberty'.[54]

George Anastaplo confines free speech to "political speech, speech having to do with the duties and concerns of self-governing citizens."[55] He argues:

> The First Amendment to the Constitution prohibits Congress, in its lawmaking capacity, from cutting down in any way or for any reason freedom of speech and of the press. The extent of this freedom is to be measured not merely by the common law treatises and cases available on December 15, 1791—the date of the ratification of the First Amendment—but also by the general understanding and practice of the people of the United States and insisted upon, had written for them, and ratified (through their State legislatures) the First Amendment. An important indication of the extent of this freedom is to be seen in the teachings of the Declaration of Independence and in the events leading up to the Revolution. Although the prohibition in the First Amendment is absolute—we see here a restraint upon Congress that is unqualified, among restraints that are qualified—the absolute prohibition does no relate to all forms of expression but only to that which the terms "freedom of speech, or of the press" were then taken to encompass, political speech, speech having to do with the duties and concerns of self-governing citizens. Thus, for example, this constitutional provision is not primarily or directly concerned with what we now call artisitc expression or with the problems of obscenity. Rather, the First Amendment acknowledges that the sovereign citizen has the right freely to discuss the public business, a privilege therefore claimed only for members of legislative bodies.
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> Absolute as the constitutional prohibition may be with respect to Congress, it does not touch directly the great State power to affect Freedom of Speech and of the Press. In fact, I shall argue, one condition for effective negation of Congressional Power over this subject (which negation is important for the political freedom of the American People) is that the States should retain some power to regulate political expression. It seems to me, however, that the General Government has the duty to police or restrain the power of the States in this respect, a duty dictated by such commands in the Constitution of 1787 as that which provides that the

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[54] *Ibid.*.

[55] G. Anastaplo, *Law and Literature and the Christian Heritage: Explorations*, 40 BRANDEIS L.J. 460 (2001).

> United States shall guarantee to every State in this Union a Republican Form of Government.[56]

Archibald Cox, on the other hand, in his *Freedom of Expression*[57] limits the coverage of free speech to "assertions of political power, including the power to change the men who govern them." Cox writes:

> Only by unihibited publication can the flow of information be secured and the people informed concerning men, measures, and the conduct of government. Only by freedom of expression can the people voice their grievances and obtain redress. Only by speech and the press can they exercise the power of criticism. Only by freedom of sppech, of the press, and of association can people build and assert political power, incuding the power to change the men who govern them.

Cox observes that "the political foundations of the first amendment are often emphasized in the opinions of the Supreme Court of the Unites States."[58]

In *Garrison v. Louisiana*,[59] for example, Cox finds Justice Brennan explaining: "Speech concerning public affairs is more than self-expression; it is the essence of self-government."[60] He however finds Justice Harlan's thoughtful and eloquent opinion for the Court in *Cohen v. California* as without doubt one of the few statements to reach for a deeper philosophic chord. Justice Harlan opines:

> The constitutional right of free expression...is designed and intended to remove governmental restraints from the arena of public discussion, putting the 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.[61]

C. FREE SPEECH AND THE LIBERAL DEMOCRATIC POLITY

The debates have classified the liberals into the classical and the modern -- configurations that seem to be antinomies. Classical liberals hold that free speech is one highest form of liberty accorded the adult members who are allowed to

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[56] *Id.* at 460-461.
[57] A. COX, FREEDOM OF EXPRESSION (1980)
[58] *Ibid.*
[59] 379 U.S. 64 (1974).
[60] *Ibid.*
[61] COX, *op. cit. supra* note 56 at 3-4.

do whatever they want, provided that no one, but at most, themselves is harmed by doing it. The modern liberals, on the other hand, maintain that free speech is one of the distributed rights in the liberal polity where adult members are *enjoying an equal standing, and (hence) an equal right to life, to liberty and secure possession of property.* This seeming irreconcilability has posed a challenge – how to reconfigure the debate on free speech without creating antinomies and antipodeans.

Indeed, Liberalism has regarded free speech as one of the significant values in the liberal polity. As to how free speech is regarded in the liberal polity (societal order) depends on the theoretical framework of the liberalism that is being applied. There are two frameworks, viz. classical and modern. Both advance the idea that the individual has at least a modicum of values which the polity shall respect and tolerate. They differ, though, in terms of how the polity helps in identifying, sustaining and realizing these values.[62]

1. Classical Liberalism as Natural Liberty

What distinguishes the liberal polity which classical liberalism maintains from that of modern liberalism or other societal orders is the high, if not absolute, degree of liberty which it accords its members who are assumed to be rational adult. Under this liberal framework, the polity uniquely grants its rational adult members the liberty to "do whatever they want, provided no one but, but at most, themselves is harmed by doing it."[63]

Adam Smith, in his *Wealth of Nations*, best describes this measure of liberty observed in classical liberalism as:

> Every man, as long as he does not violate the laws of justice, is left perfectly free to pursue his own interest his own way.... The sovereign has only three duties to attend to...: first, the duty of protecting the society from the violence and invasion of other independent societies; secondly, the duty of protecting, as far as possible, every other member of it; and, thirdly, the duty of erecting and maintaining certain public works and certain public institutions (such as ports and roads), which it can never be for the interest of any individual, or small number of individuals, to erect and maintain... though it may frequently do much more than repay it to a great society.[64]

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[62] We note however that both the classical and the modern liberals belong to the same camp in the sense that advocates from either side continue to hold on to the tenets of the Enlightenment project; that is, they essentially uphold the vision of modernity and the universality of reason as a common source of political identity, of citizenship, culture, and autonomy.

[63] D. CONWAY, CLASSICAL LIBERALISM: THE UNVANQUISHED IDEAL 9 (1995)

[64] A. SMITH, THE WEALTH OF NATIONS 687 (R.H. Campbell and A.S. Skinner, eds. Vol. 2, 1987).

Essentially, classical liberalism defines liberty as the "absence of any legal or other form of deliberately imposed human restraint or impediment designed to prevent some person or persons from doing something."[65] The most notable of such forms of restraint and impediment are, first, actual physical restraint such as being tied up, handcuffed, or imprisoned, and second, the threat of legal or other penalties, if some possible act is carried out or not carried out.[66]

Indeed classical liberalism claims a polity or a societal order that is known for its goal to remove any form of restraint or impediment that stands in the way of an individual in performing some particular acts.

Plato, the grand forebear of classical liberalism, in his *Republic*, maintained that "our purpose in founding our state was...to promote the happiness."[67] Aristotle in his *Politics*, argues that the reason the polity has been created is that "men desire to live together."[68]

Or listen to Thomas Hobbes, who in his *Leviathan*, on the other hand:

> The office of the sovereign (be it a monarch or an assembly) consisteth in the end for which he was trusted with sovereign power, namely the procuration of the safety of the people... But by safety here is not meant a bare preservation.[69]

Similarly, John Locke in his *Two Treatises of Civil Government* maintained that: "[t]he end of civil society (is) to avoid, and remedy those inconveniences of the state of nature... The only way whereby anyone divests himself of his natural liberty..."[70]

Like Adam Ferguson,[71] Henry Sedgewick has declared that:

> The true standard and criterion by which right right legislation is to be distinguished from wrong is conducivenss to the general "good" or "welfare"... interpreting the "good" or "welfare" of the community to mean, in the last analysis, the happiness of the individual human beings who

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[65] CONWAY, *op. cit. supra* note 62 at 11.
[66] *Id.* at 10.
[67] PLATO, REPUBLIC (D. Lee, ed., 2nd ed, 1974).
[68] THE BASIC WORKS OF ARISTOTLE 1184 (R. Mckeon, ed., 1941).
[69] T. HOBBES, LEVIATHAN 376 (C.B. Macpherson, ed., 1968).
[70] J. LOCKE, TWO TREATISES OF GOVERNMENT II (P. Laslett, ed., 1960).
[71] A. FERGUSON, THE HISTORY OF CIVIL SOCIETY (D. Forbes ed., 1966).

> compose the community, provided we take into account not only the human beings who are actually living but those who are to live thereafter.[72]

2. Modern Liberalism as Liberal Equality

The kind of liberal polity which modern liberalism maintains favors equal opportunities for all its rational adult members. This involves "giving preferential treatment to members of disavantaged minorities so as improve their life-prospects."[73] Such task is motivated by the modern liberalism's "overarching commitment to an ideal of equality."[74]

This is the reason why modern liberals are also known as welfare-state liberals or affirmative action advocates. They favor not only equal opportunities legislation in all its various forms but also affirmative action and reversing discrimination in education and employment.[75]

This is not to infer, though, that it is only in modern liberalism that there exists equality. As discussed earlier, classical liberalism also advocates equality among individuals whose interests shall be protected and tolerated by the existing polity. But equality for modern liberals differs as for them the law recognizes each member of society as "enjoying an equal standing and hence an equal right to life, to libery and to acquire secure possession of property."[76] Clearly, the modern liberals do not take excuse from the inequalities arising from "among the members of society when they are accorded a measure of liberty which permits them to do what they want provided what they do not worsen the lives of others."[77] We have already discussed above the views of one modernist liberal, Owen Fiss, on the free speech controversy. In the following discussion we look at the philosophies of other thinkers who may be classified along with him in the same tradition of thought.

3. John Rawls' Justice as Fairness

John Rawls's "justice as fairness" is the most recent of the modern liberal *equality* fameworks. In his *Theory of Justice*, Rawls argues for the reconfiguration of the liberal polity for the desired equality.

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[72] CONWAY *op. cit. supra* note 62 at 12; citing H. SWEDGWICK, THE ELEMENTS OF POLITICS 34 (1891)

[73] CONWAY, *op. cit. supra* note 62 at 26.

[74] *Ibid.*

[75] *Ibid.*

[76] *Id.* at 26.

[77] *Id.* at 10.

He argues that, "[s]ociety is a cooperative venture for mutual advantage..., a more or less self-suffficient association of persons who in their relations to one another recognize certain rules... (which) specify a system of cooperation designed to advance the good of those taking it."[78]

What Rawls means by "society" is "the basic structure of society which comprises all major institutions of the society."[79] It is this basic structure of the society, according to Rawls, that distributes "fundamental rights and duties and determines the division among the members of society of the advantages gained from social cooperation."[80] The basic structure therefore is the functional space which can exert enormous influence upon the life-prospects of its individual members. Through this structure, the members are given the opportunities to know "what they can expect to be and how well they can hope to do." Rawls, however, recognizes that there are considerations which must be made by the *set of institutions* comprising the basic structure of society for the advantages created by the social cooperation between its members can be distributed among them fairly. The following principles which make Rawls's formulation shall be considered:

> I) Each person has an equal right to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with a similar scheme for all.
>
> II) Social and economic inequalities are to satisfy two conditions. They must be attached to offices and positions open to all under fair equality or opportunity; and second, they must be to the greatest benefit of the least advantaged members of society.[81]

Rawls argues that the first principle specifies the conditions which the chief *political institutions* must satisfy to be just. The second principle, continues Rawls, specifies the conditions which must be satisfied by the chief economic insitutions to qualify for the same accolade (principle of fair equality or opportunity, and difference principle). It is to be noted however that for Rawls every member of society has to be placed in the "original position" to obtain "fair equality or opportunity".

Rawls writes:

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[78] J. RAWLS, A THEORY OF JUSTICE 4 (1972).
[79] *Id.* at 3.
[80] *Id.* at 72.
[81] *Ibid.*

> No one deserves his greater natural capacity nor merits a more favorable starting place in society... We are led to the difference principle if we wish to set up the social system so that no one gains or loses from his arbitrary place in the distribution of natural assets or his initial position in society without giving or receiving compensating advantages in return."[82]

It is to be noted too that for Rawls, "men undertake to avail themselves of the accidents of nature and social circumstances only when doing so is for the common benefit. The two principles of justice are a fair way of meeting the arbitrariness of fortune."[83]

While in Rawls's society, similar talents but different uses of the same and different talents but similar uses of the same are permitted, these talents and uses would define different but acceptable life-prospects in the society. Accordingly, society permits some to acquire better life-prospects than others on the basis of "social circumstances and such chance contingencies as accident and good fortune."[84] Of the different life-prospects acquired by otherwise similarly endowed individuals, Rawls holds that "intuitively, the most obvious injustice of the system (society) ... is that it permits distributive shares to be improperly influenced by these factors so arbitrary from moral point of view."[85] For him "injustice" arises when society is regarded purely as a political conception rather than as a purely moral one. He insists, on the one hand, that while "justice as fairness" should be treated as a political concepton, it should also be treated as a moral conception, on the other. "The political," suggests Rawls, "is thus not to be contrasted with the moral."[86] In summary, the whole point of Rawls's "justice as fairness" is that the society grants its people the liberty to form, revise and pursue their conceptions of the "good". This does not mean however that "justice as fairness" is concerned merely with the "good". It is also concerned with the "right." What is accurate to conclude, however, is that, as Rawls extended the theory of "justice as fairness" to "rightness as fairness", the theory is more concerned with the "right" rather than the "good", and with the "moral" rather than the "political". The above observation, however, suggests that in determining which values are significant the relations taking place in the society are to be adjudged using the available, primarily, the moral and incidentally the political, principles. With Rawls's concept of "justice as fairness," it can be supposed that free speech is one of the highest values which need to be distributed to the members of the society,

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[82] J. RAWLS, *Justice as Fairness: Political, Not Metaphysical, An Essay*, in PHILOSOPHY & PUB. AFF. 227 (1972).

[83] RAWLS, *op. cit. supra* note 80 at 227.

[84] *Ibid.*

[85] *Ibid.*

[86] *Id.* at 28.

the conception of which should not only be political but also moral. In fact, Rawls himself suggests that free speech, among other things, can securely be understood by appealing to the Kantian interpretation of the principles of justice. This is to be counted, continues Rawls, as "a comprehensive view inasmuch as it invokes a particular conception of the good: a conception according to which the highest good of human being is to express their free and equal rational values, which they can do only by committing themselves in advance to acting justly."[87]

4. Thomas Nagel on Impartiality, Inequality, Sacrifice and Legitimacy

In his *Equality and Partiality* Thomas Nagel argues against a liberal order of inequalities even when "it incorporates a guaranteed minimum."[88] Nagel recognizes that a more egalitarian order is morally forced upon us because of our being able to view the world from two different ways: personal and impersonal standpoints. When the world is viewed in terms of how things affect each of us personally that view is known as the personal standpoint. On the contrary, when the world is viewed without considering personal interests, the view is known as the impersonal standpoint.

Nagel claims that when the world is viewed through the impersonal standpoint, "we consider the world without reference to which person we happen to be within it."[89] The necessary implication of this, according to Nagel, is that "we cannot but be impartial between ourselves and others."[90] Nagel suggests that it is from this impersonal standpoint that "we must attach equal equal importance to the lives of everyone, ourselves included."[91]

However, there is always a clash between the personal and the impersonal standpoints, according to Nagel. While impartiality is possible through impersonal standpoint, so is partiality where our own interests assume greater importance to us than the comparable interests of others. Thus, for Nagel, since the personal and impersonal standpoints are inescapable, an acceptable social ideal which would satisfy both standpoints should be formulated.

Interestingly, Nagel himself proposes the formulation of such social ideal or order by introducing the concepts of legitimacy and illegitimacy. These concepts

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[87] *Id.* at 72.
[88] T. NAGEL, EQUALITY AND PARTIALITY, 76 (1991).
[89] *Ibid.*
[90] *Ibid.*
[91] *Ibid.*

would reconfigure the morally unacceptable liberal order operating on the personal standpoint to the morally acceptable (The liberal-capitalist order, for example, although, operating on at least a guaranteed minimum would still fail to be morally acceptable because it would still lack legitimacy). Nagel writes:

> If a system is legitimate, those living under it have no grounds for complaint against the way its basic structure accommodates their point of view, and no one is morally justified in withholding his cooperation from the functioning of the system, trying to subvert its results, or trying to overturn it if he has the power to do so.
>
> An illegitimate system, on the other hand, treats some of those living under it in such a way that they can reasonably feel that their interests and point of view have not been adequately accommodated—so that, even taking into account the interests of others, their own point of view puts them reasonably in opposition to the system.[92]

It can be inferred from the above formulation of Nagel that for personal interests to be accommodated (thus averting the greater danger where interests clash), the individuals should be given the chance to complain agaist the inequality of the established order or against its illegitimacy. He writes:

> What makes it reasonable for someone to reject a system, and therefore makes it illegitimate, is either that it leaves him too badly off or too demanding depends on the cost to others, in the same terms of the alternative.[93]

With the above formulation, the social order can be rejected anytime once its illegitimacy is declared by those who advance their personal interests. Such advancement of legitimate personal interests, as recognized by Nagel, can easily be satisfied by the liberal instituting the *minimum guaranteed.* Those whose personal interests are at least satisfied by the *minimum guaranteed* would not longer advance their greater personal interests. Nagel has this solution:

> It is simply false that the worse off cannot reasobly reject the guaranteed minimum in favor of the standard...(of) equality. If they were to accept it, foregoing a more egalitarian system, they would be foregoing benefits above the minimum for themselves, merely in order to avoid depriving the better off of the benefits they can enjoy only under the guarantedd minimum, and which they would not enjoy under more equal system... It is not reasonble for the better off to reject systems significantly more equal than guaranteed minimum,

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[92] *Ibid.*

[93] *Id.* at 38-39

> on the ground that the sacrifice demanded of them by such systems is excessive. Such a standard does not ask enough of our impartiality, as applied to the choice of social ideal.[94]

Nagel has also introduced the concepts of "sacrifice" and "impartiality" to explain the possibility of equalizing transfer of resources from the well-off to the less well-off. This means the well-off making a lesser sacrifice of their interest than does the no-transfer of their non- resources having to make. Impartiality should lead, suggests Nagel, to a universal preference for whichever system involves smaller sacrifices of interest to be made. He writes:

> Transferable resources will usually benefit a person with less more than they will benefit a person with significantly more. So if everyone's benefit counts the same from the ...(impartial) standpoint, and if there is a presumption in favour of greater benefit, there will be a reason to prefer a more equal to a less equal distribution of a given quantity of resources. Impartiality is also...egalitarian in itself mean(ing) that impartiality generates a greater interest in benefitting the worse off than in benefitting the better off—a kind of priority over the latter. The claims on our impartial concern of an individual who is badly off present themselves as having some authority over the claims of each individual who is better off: as being ahead in the queue, so to speak.[95]

How compelling is the above discussed Nagel's conception of equality to free speech debate? Nagel's assumption of the ideal but realistic social order can be considered in avoiding the clash among the different groups articulating different forms of free speech. His assumption implies that the less well-off in the society who sacrifice greater benefits than what they would be able to enjoy in some egalitarian order shall be granted the right to reject the society which allows no-sacrifice and impartiality by the well-off.

In relation to the free speech debate which presents the problem of giving equal opporunites to all forms of articulating, this assumption offers a solution. While members of the society are given, among other things, equal liberty in speech, some exercise their liberty to speech at the expense of the others. Those who already have more in life, therefore should make a sacrifice to allow the less well-off to exercise theirs. As suggested by Nagel, that sacrifice is only possible when the well-off will look at the less well-off from the the impersonal standpoint.

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[94] *Ibid.*

[95] *Id.* at 65-68.

5. Richard Dworkin on Equal Worth, Equal Treatment and Equality of Resources

In *What is Equality?* Dworkin argued that any government which permits inequalities created by its citizens is morally illegitimate. However, he qualifies that a liberal order can be justified in tolerating such inequalities only when "it fails to treat all its citizens with that degree of equal concern and respect to which they are all entitled as human beings."[96] Dworkin argues that for the government to be considered as treating its citizens as equals, "it is not enough that they all be accorded equal rights to life, liberty, and property, in the sense of an equal right to acquire and hold property."[97] The government, suggests Dworkin, must also accord them a right to equal property, in the sense of a right to an equal share in the resources at the disposal of the society.

Hence the legal philosopher argues: "(T)reating people as equals requires that each be permitted to use, for the projects to which he devotes his life, no more than an equal share of the resouces available."[98] And like any other modern liberal, Dworkin believes that:

> For government to treat its citizens as equals...resources and opportunities should be distributed, so far as possible, equally, so that roughly the same share of whatever is available is directed to satisying the ambitions of each. Any other general aim of distribution will assume either that the fate of some people should be of greater concern than that of others, or that the ambition of talents of some are worthy, and should be supported more generously on that account.[99]

Dworkin's formulation of equality may create a heuristic device in the egalitarian treatment of the different forms of free speech. With this formulation, the government shall provide equal rights for all the citizens for the articulation of their talents and desires without restraint. Likewise, the government has the obligation to redistribute opportunities to its citizens in articulating themselves so as to correct for differences between individual members in luck, natural talent and social class. The government should therefore create a system of rules, which is not only moral but also political, which is applied uniformly to all citizens. The government in its redistribution of opportunites, shall also consider that no coercive measures shall be resorted to in the redistribution.

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[96] R. Dworkin, *What Is Equality?*, PHILOSOPHY & PUB. AFF. (Fall 1981; Winter 1981)

[97] Ronald Dworkin, *Why Liberals Should Believe in Equality*, 30 NEW YORK REVIEW OF BOOKS 1 (1983) < http://www.nybooks.com/articles/article-preview?article_id=6331>

[98] *Ibid.*

[99] *Ibid.*

6. Kai Nielsen on Radical Egalitarianism and the Formal Principle of Justice

Kai Nielsen puts forth a theory of radical egalitarianism by invoking a principle he calls the "formal principle of justice." Nielsen, however, admits that while such a measure of equality is desirable, it is not clear why. He writes:

> We are, I believe, so close to bedrock here that it is difficult to know what to say. That such a condition is desirable gives expression, to speak autobiographically for a moment, to a root pre-analytical (pretheoretical) conception of what fairness between persons comes to.... I have in mind the sense of unfairness which goes with the acceptance, where something non-catastratophic could be done about it, of the existence of very different life prospects of equally talented, equally energetic children from very different social backgrounds: say the children of a successful businessman and a dishwasher. Their whole life prospects are very unequal indeed and, given the manifest quality of that difference, that this should be so seems to me very unfair. It conflicts sharply with my sense of justice.[100]

While the above realization hardly amounts to an argument for radical egalitarianism, Nielsen recognizes that it "appeals to the formal principle of justice which states that we must treat like cases alike."[101] This intuitive moral principle is aimed at justifying the "equality of life propects" which he wants to see in the liberal order. He writes:

> We all, if we are not utterly zany, want a life in which our needs are satisfied and in which we can live as we wish and do what we want to do. Though we differ in many ways, in our abilities, capacities for pleasure, determination to keep on with a job, we do not differ about wanting our needs satisified or being able to live as we wish. Thus, ceteris paribus, where questions of desert, entitlement, and the like do not enter, it is only fair that all of us should have our needs equally considered and that we should, again *ceteris paribus*, all be able to do as we wish in a way compatible with others doing likewise. From the principle of justice and a few key facts about us, we can get to claim that *ceteris paribus*, we should go for this much equality. But this is the core content of radical egalitarianism.[102]

Nielsen maintains that although the society shall always "provide the social basis for equality of life prospects such that there cannot be anything like the

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[100] K. NIELSEN, EQUALITY AND LIBERTY: A DEFENSE OF RADICAL EGALITARIANISM (1985).
[101] *Id.* at 7-8.
[102] *Ibid.*

vast disparities in whole life prospects that exist now,"[103] the social basis shall always be the principle of justice which *treat like cases alike*. Nielsen's radical egalitarianism and principle of justice are compelling in the free speech debate. Since there is always a problem on the clash of the different forms of free speech by the different individuals, the liberal order shall see to it that the rules governing treatment of these forms of speech are anchored on that principle.

7. Postmodern Reconstruction of Liberalism

Despite what we call the *antinomies sans dialectics* created by the classical-versus- modern-liberal (or the libertarian contra egalitarian) debate, some thinkers have attempted to reconfigure the premises of liberalism as a political thought. Thinkers in the line of John Gray, Isaiah Berlin, Joseph Raz and Tom Bridges – whom we call "postmodern liberals" -- have deconstructed the heuristic concepts of liberalism, viz., autonomy, culture, state, and citizenship.

The most articulate of the postmodern liberals is John Gray who in his *Post-Liberalism*, denied that the "liberal polity is the best for all human beings"[104]on the basis of other three doctines, viz., radical value liberalism (which is originally Isaiah Berlin's), personal autonomy, and autonomy as a non-universal good.

a. Gray's Radical Value Pluralism

Conway explains that for Gray,

> There is such a variety of uncombinable and incommensurable human goods that there is no one single form of well-being or flourishing that holds true for all human beings." Rather, there is variety of incommensurable forms of human well-being. Each consist in the attainment of some set of combinable human goods. Each of these sets of human combinable goods is incommensurable with any other set. There is, therefore, no rational way of demonstrating the superiority of any one of these forms of well-being to any other.[105]

Gray recognizes that it is through these sets of goods that human beings achieve well-being. It is by no means possible, admits Gray, for every human being to attain all these forms of well-being; indeed, only some of the specific forms of well-being are genuinely possible for everyone.

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[103] *Id.* at 58.
[104] J. GRAY. POST-LIBERALISM 37 (1993).
[105] CONWAY; *op. cit. supra* note 62 at 114.

However, Gray agrees with Berlin that how these specific forms of well-being can be made genuinely possible is a function of the kind of society in which the particular human being is acculturated. With this formulation, Gray regards the human being as primordially indeterminate, one whose personality is so much like a social artifact. The human being under this theoretical construction, according to Gray, is capable of those forms of well-being which are possible within that form of society in which the human being has been acculturated.

Generally, Gray advances his conservative rejection of liberalism by two arguments. The first is that there is no form of human well-being for the attainment of which by every member of society for which the liberal or societal order is sufficient. The second is that, in the case of all other forms of human well-being (than that for which a liberal regime is necessary), these forms of well-being can only be attained in polities which are not liberal in form.[106]

b. Autonomy

Gray's second reason for rejecting liberalism is that it is incapable of enhancing every human being's autonomy. Autonomy is the sole form of well-being that makes the liberal political institutions necessary. It is the "condition in which a person can be at least part author of his life, in that he has before him a range of worthwhile options, in respect of which his choices are not fettered by coercion and with regard to which he possesses the capacities and resources presupposed by a reasonable measure of success in his self-chosen path among these options."[107] Autonomy is an essential ingredient of well-being, according to Gray. This refers to the individual's awareness of the alternative ways of living in a given societal order and to choose for themselves their individual particular forms of life from among the plurality of forms available to them.

And yet Gray is pessimistic that the liberal polity is capable of supplying its members with everything they need for worthwhile autonomy. His pessimism rests on the claim that for a human being to enjoy personal autonomy, certain of his or her basic needs have to be satisfied. Gray's pessimism, interestingly, has focused on the details of autonomy. For example, he doubts the capability of liberal polity to ensure the "satisfaction of the basic needs of all its members" like the case of the "members who unable to provide for themselves because they are

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[106] *Ibid.*

[107] *Id.* at 120.

physically or mentally disabled, or else, though able-bodied, cannot find work."[108] Even with the institutional resources allocated for these members, adds Gray, the satisfaction of their basic needs may not be met unless welfare state and social market economy come to play.

That is why for Gray, the liberal project of promulgating the liberal polity to be the best form of society is misconceived. Gray suggests that this project should be abandoned. He has realized that the liberal polity is significant only in pluralistic societies. Regarding the well-being of members of pluralistic societies, Gray advances two claims. The first is that for them to enjoy well-being, it is necessary that they possess personal autonomy. The second is that for them to be able to enjoy well-being, it is not sufficient that the polities of which they are members be liberal ones. Gray's treatment of personal autonomy, however, is that it is instrumental.

He writes:

> For those who live in an autonomy-supporting environment there is no choice but to be autonomous. There is no other way to prosper in such a society..... The value of personal autonomy is a fact of life. Since we live in a society whose social forms are to a considerable extent based on individual choice, and since our options are limited by what is available in out society, we can prosper in it only if we can be successfully autonomous.... [U]ltimately those who live in an autonomy enhancing culture can prosper only by being autonomous."[109]

Personal autonomy is needed, according to Gray, for individuals in the society, (the pluralistic, in particular), to prosper. Within a society, an individual should be allowed to make choices as to matters like career, marriage and religion which should be autotonomous, i.e. *the choices have to be made by the individual with the consciousness of what he or she is doing from among worthwhile alternatives and free from coercion and manipulation by others.*

c. Autonomy as Non-Universal Good

Gray observes that autonomy is a constitutive ingredient in any form of the good life in societies particularly characterized by a high degree of mobility, pluralism in lifestyles and individualism in ethical culture. This does not mean, however, that autonomy is a universal good; rather, it is a contingent good that

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[108] *Id.* at 121.
[109] *Id.* at 121-123.

defines life for the individual. Gray argues for example that if we lack even a modicum of autonomy, "if we are not even part authors of our lives-- if our jobs, our marriages, our place of abode, or our religion are assigned to us or chosen for us – we would consider our individuality stifled and the goodness of our lives diminished."[110] He argues:

> The claim being made here is not that autonomy is a universal good, but that it is an essential element in any good life that can be lived by us. No inhabitant of modern pluralistc, mobile and discursive society can fare well without at least a modicum of the capabilities and resources needed for autonomy.... Autonomy is not a necessary element in human flourishing tout court. It is an essential element of the good life for people situated in our historical context as inheritors of a particular, individualist form of life.[111]

D. Joseph Raz on Multiculturalism

Extant in Joseph Raz's writings is the deconstruction and redaction not only of liberal concepts like autonomy, good, and pluralism but also culture and ethics. In his essay *Multiculturalism*, as the title suggests, Raz recognizes that some political societies are multicultural, i.e., they are composed of diverse cultural communities with desires to sustain and perpetuate themselves.[112] These multicultural societies in their primordial nature, according to Raz, are characterized by clashes, debacles, and resentment among the diverse communities constituting them, thus, the need for a preventive theoretical condition such as "multiculturalism".

By "multiculturalism" Raz means "the condition in which a political society recognizes the equal standing of all existing stable and viable cultural communities comprising it."[113] This equality is genuinely possible, according to Raz, if the political society operates on toleration principle and some considerations of public peace and social harmony. While a multicultural society, according to Raz, tolerates all diversity of desires and actions among the cultural communities comprising it, such toleration is not absolute. The multicultural society may invoke principles to justify restrictions of values of some cultural communities which denigrate the values of the other communities. For this goal, Raz suggests the Harm Principle which maintains that "people may not be coerced except in order to restrain them for causing harm to others".[114] However, according to Raz, political

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[110] *Id.* at 120.
[111] J. GRAY, THE MORAL FOUNDATIONS OF INSTITUTIONS 63 (1992).
[112] J. RAZ, MULTI-CULTURALISM, DISSENT 67 (Winter 1994).
[113] *Id.* at 68
[114] *Ibid.*

actions respecting "multiculturalism" must operate on two evaluative judgments, viz; (1) The belief that individual freedom and prosperity depend on full and unimpeded membership in a respected and flourishing group, and (2) the belief in value pluralism, among others.[115] Moreover, Raz's multiculturalism creates and sustains the rights of the diverse communities against discrimination for national, ethnic, racial grounds or sexual orientation.

E. The Case Against Liberalism

The classical liberals despise the modern liberals for their liberal equality and the postmodern liberals for their illiberalism. The modern liberals despise the classical liberals for their natural liberty and join the classical liberals in their case against the postmoderns. The postmodern liberals on the other hand take the pleasure of rejecting both versions of liberalism by conceptual deconstructionism and pragmatic redactionism.

As expected it is the non-liberals like the communitarians who have severely made indictments against liberalism. The communitarians, for example, contend that liberalism deprives the individuals of (1) the benefits of the community (like friendship and cooperation for the realization of the individual desires) and (2) scope for the Aristolerian virtues as well as for moral beliefs which admit of rational justification. The communitarians also maintain that liberal polity is a failure as it turns out a contradition in itself. The truth is that, according to the communitarians, every liberal polity imposes legal restrictions on the pursuit of self-interest by its members, let alone the members are not permitted to pursue their private goods in ways that harm others.[116]

Conway for example, has noted that for the communitarians, the liberal polity (1) advances the measure of indivuadualism, where individuals are merely concerned with their interests, (2) does not legally compel its members to assist one another, and (3) is not a state of nature "as it recognizes the need for every member to avoid harming others."[117]

Michael Sandel argues that liberalism is responsible both for the "fear that, individually and collectively, we are losing control of the forces that govern our lives...(and) the sense that, from family to neighborhood to nation, the moral

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[115] *Id.* at 67

[116] See notes 129-158 *infra* subsequent discussions on communitarianism

[117] CONWAY *op. cit. supra* note 62 at 65.

fabric of community is unraveling around us."[118] "Liberalism," adds Sandel, "has much to answer for, since these 'two fears --for the loss of self-government and the erosion of community'--together define the anxiety of the age."[119] Peter Berkowitz agrees with Sandel's analysis that although the primacy of individual freedom and human equality is presssuposed in liberalism, it must still be "reproached and repudiated not because it is too illiberal but because it is too liberal, because it leaves individuals too free; and because it persuades them to leave government uninvolved in the great moral issues of the day."[120]

Meanwhile, Roger Scruton observes that in the field of education, contemporary liberalism favors a "progressive approach that encourages students to learn by doing and to acquire knowledge by discovering it for themselves."[121] This, argues Scruton, makes children "ridiculously unfree, it gives them a false feeling of independence while making them dependent upon a teacher who must be an ever-present but invisible guide and overseer, carefully manipulating the child's environment to give the child the illusion that his achievements are all his own; it deprives students of the accumulated wisdom stored up in history and literature; and by jettisoning habit, drills and memorization it leaves students undisciplined, bereft of the benefits of routine and rigor."[122] Berkowitz also observes that in law, "contemporary liberalism has, in the name of freedom and equality, exhibited a tendency to evacuate moral judgements from consitutional questions."[123] Like Sandel, Berkowitz observes that "the Supreme Court has embraced a relativism that not only breaks with moral principles in which the Constitution is actually grounded but is itself incoherent and a menace to individual freedom."[124] Berkowitz provides as example the 1992 case of *Planned Parenthood v. Casey*[125] where the Court in upholding a woman's constitutional right to abortion, declared that 'at the very heart of liberty is the right to define one's own concept of existence, of meaning of the universe, and of the mystery of life:"[126] By such a declaration, the Supreme Court, according to Berkowitz, proclaimed that: "...as a matter of law,... the beginning and value of life is what each individual thinks it to be." It (the Court) appears to believe that "it shows respect for women and secures their right to abortion."[127] However, this formulation,

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[118] M. SANDEL, DEMOCRACY'S DISCONTENT 3 (1996).
[119] *Ibid.*
[120] Peter Berkowitz, *Freedom And The Vulnerabilites of Virtue*, 45 AM. J. JUR. 52 (2000)
[121] R. SCRUTON, THE BETRAYAL OF LIBERALISM (1999).
[122] *Id.* at 19-42.
[123] BERKOWITZ, *op. cit. supra* note 119 at 53.
[124] *Ibid.*
[125] 505 US 833 (1992)
[126] *Ibid.*
[127] BERKOWITZ, *op. cit. supra* 119 at 54.

according to Berkowitz, "leaves all rights more vulnerable by suggesting that at the heart of liberty is pure choice, rather than a fixed and determinate understanding of human nature, a notion of what it is about men and women that makes their varied choice, within limits, worthy of respect by the law."[128] Berkowitz, citing the admission of liberal thinker Jean Elhstan, observes that while contemporary liberalism upholds the separation between church and state it exhibits "open hostility claims of faith, demanding that religion alone among systems of belief and forms of life confine itself to the private sphere."[129] In this sitution, liberalism not only acts intolerantly but also separately from the "profound source of insight into the human condition" and "denies a public life to key institution that teaches self-restraint on which morality in a democracy depends."[130]

F. Ethical and Rational Community: The Public Sphere of Free Speech

Communitarian thinker Alisdair MacIntyre, in his *After Virtue*[131] wrote that it is the community which transforms human acts to justifiable moral values. He believes that the community does not only possess a particular ethics but also a certain rationality.

MacIntyre's community is a reconfiguration of the Enlightenment-created liberal society whose project is "to produce a rational ethic that would have to be accepted by any rational being."[132] MacIntyre argues that a liberal society is bound to fail because it is merely rational; that is, it is not ethical at the same time. The liberal society, according to him, suffers from a moral calamity, i.e., the values of the society are without moral criteria providing adequate rational justification.[133] He writes that "[t]he nature (of)....moral judgment in distinctively moral societies is such that it is no longer possible to appeal to moral criteria in way that has been possible in other times and places..."[134] In the liberal society, the ultimate value is the individual's welfare which is a set of personal interests. This value has made the rational justification for any moral act unneccessary. Moral values, anyway, are formed simply out of the served welfare of the individuals.

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[128] *Ibid.*
[129] *Ibid.*
[130] *Ibid.*
[131] A. MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY (2nd ed, 1985)
[132] *Id.* at 172
[133] *Id.* at 56.
[134] *Id.* at 172.

But MacIntyre sees the need to convert this set of self-interests into a set of moral values for which there is an adequate rational justification. This is possible, according to MacIntyre, when these interests operate not in a liberal society but in a community. The call for moral values is therefore a call for community.

By "community", MacIntyre means, "any form of human association in which every member experiences concern for and pursues the good of every other members well as their own."[135] Like the Greek *polis*[136], the "community" is where "common project for its members in a form of 'friendship'. In the community, every individual can pursue his or her own individual good, foremost of which, is to be human."[137] Within each of the members, however, the particular private good is advanced in respect of the public good.

Essentially, MacIntyre's community, operates on the following principles:

> 1) Every member is bound to every other member through a tie of friendship which involves each in possessing a concern for goods for which every other member also possesses a concern; and
> 2) The creating and sustaining of the life of the community is a project in which every member participated.[138]

There are however three varieties of the life-form which constitute the community where human beings are provided with scope and reason for acquiring and exercising values, viz; 1) narrative unity, 2) tradition and 3) practice

1. Practice

MacIntyre observes that every ethical community has a particular rationality that has been developed through the practices of the community.

By "practice", MacIntyre, means "... any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity

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[135] *Id.* at 56.
[136] See John Finnis, *Natural Law and the Ethics of Discourse* 43 AM. J. JUR. 53-73 (1998).
[137] MACINTYRE *op. cit. supra* note 130 at 56; See also CONWAY *op. cit. supra* note 61 at 66.
[138] *Id.*, at 67.

with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended."[139] MacIntyre has provided as an example of practices some of the vocabulary of science which survives but in such a way that it is disconnected from the tradition of investigation that gave rise to it. He writes:

> In such a culture men would use expressions such as "neutrino", and "mass", specific gravity", "atomic mass" in systematic and often interrelated ways which would resemble in lesser or greater degrees the ways in which such expressions had been used in earlier times before scientific knowledge had been largely lost. But many of the beliefs presupposed by the use of these expressions would have been lost and there would appear to be an element of arbitrariness and even of choice in their application which would appear surprising to us.[140]

This situation, MacIntyre asserts, is similar to how modernity developed its ethics. The cataclysm (ie. fragmentation of ethical thought) characterizing modern ethics was not a single event but the course of Western philosophy over the last 300 years.

The less than two centuries-old academic history, adds MacIntyre, is itself a product of the cataclysm. For continuity, there should be a good sense of history. There could have been no way that the scientific tradition could be lost. However, there had been too much forgetting along the way, leaving sense of historical relatedness to emotivism. Eventually, every individual has practically become free to do what feels good at the time. One reason for the loss of ethical sources, according to MacIntyre, is the loss of any understanding of what human life is for; that is, loss of teleology. This is the reason, adds MacIntyre, that the disengaged reason failed to produce a universal rational ethic, for reason is unable to define ends, it can only give means. When the question is asked: "what is human life for?" reason is dumb.[141]

Thus MacIntyre suggests that to know the present morality is to know the past. We can understand what has happened in the last 300 years and the predicament that we now find ourselves in is to write a history of ethical thought. When we do we find that all moral thought arises out of an historical context and is never free of that context. He writes:

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[139] *Id.* at 56.
[140] *Id.* at 78.
[141] *Ibid.*

> Consider certain beliefs shared by all the contributors to the project. All of them ...agree to a surprising degree on the content and character of the precepts which constitute genuine morality. Marriage and family are *au fond* as unquestioned by Diderot's rationalist *philosophe* as they are by Kierkegaard's Judge Wilhelm; promise-keeping and justice are as inviolable for Hume as they are for Kant. Whence did they inherit these shared beliefs? Obviously from their shared Christian past compared with which the divergences between Kant's and Kierkegaard's Lutheran, Hume's Presbyterian and Diderot's Jansenis-influenced Catholic back-ground are relatively unimportant.[142]

Indeed, for MacIntyre no philosophical idea is universal and non-contingent. For example, in his other book *Whose Justice? Which Rationality?*[143] MacIntyre traces the idea of justice from Plato to the Scottish enlightenment and concludes that there is no such thing as universal rationality or justice, that these terms only make sense in an historical context, in a tradition of thought. Thus individuals never exist on their own, apart from a tradition of rationality.

2. Narrative Unity

From MacIntyre's perspective, the ethical community needs to be entered to appreciate its rationality, for the way of life and ethical practices of the community are what make it possible to make sense of the behavior of those within a given society. Each moral thought at each stage of its development provides rational justification for its central thesis in its own terms, employing the concepts and standards by which it defines itself. This process is known as the narrative unity. It is the "systemic clashing of the questions (for example about values in the society) and the attempt to answer in deed as well as in word which provides the moral life with its unity." [144]

According to MacIntyre, the Enlightenment project in ethics, for example, began with the idea of the disengaged self, the self that used reason to formulate norms of behavior. MacIntyre however asserts that sources of ethics can be found in narrative. "Narrative history of a certain kind turns out to be the basic and essential genre for the characterization of human actions.[145] " This is an opposition to the idea that the human action is at the center. With the narrative a human action can never be intelligible in isolation, it always has a context in time and place.

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[142] *Ibid.*

[143] A. MACINTYRE, WHOSE JUSTICE? WHICH RATIONALITY? 120 (1988), hereinafter, MACINTYRE II.

[144] MACINTYRE, *op. cit. supra*, note 130 at 15.

[145] *Ibid.*

Thus human action can only be intelligible as narrative. He writes that "[t]o identify an occurrence as an action is in the paradigmatic instances to identify it under a type of description which enables us to see that occurrence as flowing intelligibly from a human agent's intentions, motives, passions and purposes."[146]

As an illustration of MacIntyre's formulation, a murderer, for example may be seen as simply someone who has killed another person or we may see him in the context of his life narrative. In the former case the person disappears under an ethical rule, in the latter he is present as a person who has perhaps a history of abuse and violence, of neglect and moral malformation. It is the narrative that gives us the truth about the person and that makes his action intelligible. It is to be considered though that for MacIntyre *telos* is part of the intelligibility of the narrative. He writes: "We live out our lives, both individually and in our relationships with each other, in the light of certain conceptions of a shared future, a future in which certain possibilities beckon us forward and others repel us. There is no present which is not informed by some image of some future and an image of the future which always presents itself in the form of a *telos* -- or of a variety of ends or goals... man is in his actions and practices, as well as in his fictions, essentially a story-telling animal. He is not essentially, but becomes through his history, a teller of stories that aspire to truth. But the key question for men is not about their own authorship; I can only answer the question "What am I to do?" if I can answer the prior question "Of what story or stories do I find myself a part?"[147] Invariably, in Enlightenment thought, it was seen to be necessary to free men and women from the traditions that stopped them from achieving their full potential as rational beings. The disengaged self was to stand apart not only from his own desires and passions but also from the narratives that formed his community. This is the only way, according to MacIntyre, that truth could be revealed. Thus in answer to the question: "In what does the unity of an individual life consist?" MacIntyre answers in "the unity of a narrative embodied in a single life."[148] MacIntyre continues that "[t]o ask 'what is the good for me?' is to ask how best I might live out that unity and bring it to completion. To ask 'What is the good for man?' is to ask what all answers to the former question have in common. But now it is important to emphasize that it is the systematic asking of these two questions and the attempt to answer them in deed as well as in word that provide the moral life with its unity. The unity of a human life is the unity of a narrative quest."[149]

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[146] *Id.* at 68.
[147] *Id.* at 102.
[148] *Ibid*
[149] *Ibid*

3. Tradition

The purpose of tradition, according to MacIntyre, is to provide continuity to human pursuits. This is to oppose the idea that to be free we have to relinquish any tradition that makes claims upon us of allegiance. True enough, in the individualist mode of thinking the past is not a rich source of wisdom but a burden to be shaken off. He admonishes: "We are apt to be misled here by the ideological uses to which the concept of tradition has been put by conservative political theorists. Characteristically such theorists have followed Burke in contrasting tradition with reason and the stability of tradition with conflict. Both contrasts obfuscate. For all reasoning takes place within the context of some traditional mode of thought, transcending through criticism and invention the limitations of what had hitherto been reasoned in that tradition; this is true of modern physics as of medieval logic."[150] MacIntyre observes that modernity thinks it brave and rational for anyone to relinquish tradition. However, as MacIntyre points out, there is escaping the continuity of thought in any area of life. He writes:

> A living tradition then is an historically extended, socially embodied argument, and an argument precisely in part about the goods which constitute that tradition. Within a tradition the pursuit of goods extends through generations, sometimes through many generations. Hence the individual's search for his or her good is generally and characteristically conducted within a context defined by those traditions of which the individual's life is a part, and this is true both of those goods which are internal to practices and of the goods of a single life. Once again the narrative phenomenon of embedding is crucial; the history of a practice in our time is generally and characteristically embedded in and made intelligible in terms of the larger and longer history of the tradition through which the practice in its present form was conveyed to us; the history of each of our own livs is generally and characteristically embedded in and made intelligible in terms of the larger and longer histories of a number of traditions.[151]

G. Articulating a New Jurisprudence on Free Speech

Legal theorizing on free speech, to borrow from Matthew Bunker, "is under assault."[152] This is because any argument for free speech operates on either libertarian or egalitarian principles. Always, free speech jurisprudence is

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[150] *Id.* at 80

[151] *Id.* at 72

[152] MATTHEW BUNKER, CRITIQUING FREE SPEECH: FIRST AMENDMENT THEORY AND THE CHALLENGE OF INTERDISCIPLINARITY 1 (2001).

hermetically sealed from non-libertarian and non-egalitarian arguments. Neither have the positivist and the formal approaches to the First Amendment deviated from the hermetical libertarian-egalitarian dichotomy. Bunker argues that "the insights of disciplines... to bear upon First Amendment jurisprudence ... would be a defense of either a positivist or a formalist approach to the First Amendment".[153]

Too, the legal approaches for free speech which Bunker finds prominent in the United States Supreme Court legal scholarship--e.g., marketplace theory, self-government theory, checking value theory, individual autonomy theory, and dissent theory -- are neither free from the hermetical dichotomy.

The above scenario reaffirms Thomas Emerson's statement made more than 30 years ago: "The (US) Supreme Court has never developed any comprehensive theory of what the constitutional guarantee means and how it should be applied in concrete cases.[154]" There is thus an open polemic for a formulation of, which in the words of Emerson, "a general theory of the First Amendment."[155] But more recently, as this essay has shown in the preceding discussion, theorizing on free speech has involved disciplines other than law. The effect of which involvement is broadening the range of available legal theories and rupturing the libertarian--egalitarian dichotomy.

While the theorists discussed thus far are able to provide an alternative theoretical landscape for the free speech debate, they, however, have not escaped criticisms. The criticisms revolve on the ability of the theories to obliterate the traditions which preserve the virtues in the society. The theories are said to have weakened the virtues or neglected their maintenance; they advocate for a "lack of justice, lack of truthfulness, lack of courage, and lack of relevant intellectual virtues," all of which corrupt traditions.

MacIntyre's *Communitarianism* by formulation proposes to keep the *traditions* that preserve the virtues in the society like *truth, justice, wisdom ,freedom, and courage.* With communitarianism, there exists a collective consciousness defining the historical narrative of truth. It provides, for example, "a grasp of future possibilities which the past has made available to the present."[156] Moreover, it maintains that obligations of membership are not just duties (natural or universal) to persons as persons or incurred by consent. These obligations of

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[153] *Id.* at 94.
[154] *Id.* at 1.
[155] *Ibid.*
[156] MACINTYRE, *op. cit. supra* note 130 at 54.

membership "are morally important obligations and cannot be condemnable prejudices or unjustifiable predispositions."[157] In summary, *communitarianism* holds that "our identities are determined by membership in groups, by the stories of our lives, by the things we care about and the goals we strive for." How compelling, then, is communitarianism to free speech jurisprudence?

In the case of *National Association for the Advancement of Colored People v. State of Alabama*,[158] the NAACP was outlawed from doing business in the State of Alabama, the US Supreme Court, recognizing the historical rootedness in the American Society of the African-Americans, reversed the decision and allowed NAACP to do business in protecting the African-Americans in the State of Alabama. In this 1958 case, the petitioner is a non-profit corporation organized in New York laws as an organization advancing the welfare of blacks. It operated through chartered affiliates which are independent unincorporated associations, with membership equivalent to membership in the NAACP. It had local affiliates in Alabama, and opened an office of its own there without complying with an Alabama statute which, with some exceptions, required a foreign corporation to qualify before doing business in the State by filing its corporate charter and designating a place of business and an agent to receive service of process. Alleging that petitioner's activities were causing irreparable injury to the citizens of the State for which criminal prosecution and civil actions at law afforded no adequate relief, the State brought an equity suit in a state court to enjoin petitioner from conducting further activities in, and to oust it from, the State. The court issued an *ex parte* order restraining petitioner, *pendente lite,* from engaging in further activities in the State and from taking any steps to qualify to do business there. Petitioner moved to dissolve the restraining order, and the court, on the State's motion, ordered the production of many of petitioner's records, including its membership lists. After some delay, petitioner produced substantially all the data called for except its membership lists. It was adjudged in contempt, and fined $100,000 for failure to produce the lists. The State Supreme Court denied certiorari to review the contempt judgment, but the US Supreme Court granted certiorari. Here, the Court ruled that the NAACP had the right to assert on behalf of its members a claim that they are entitled under the Constitution to be protected from being compelled by the State of Alabama to disclose their affiliation with the association. [159]

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[157] *Ibid.*

[158] 357 US 449 (1958).

[159] *Id.* at 450-468

Moreover, in *Rosenbloom v. Metromedia, Inc.*, the United States Supreme Court in upholding the communitarian ideal of "historic function of a society" maintains that:

> Self-governance in the United States presupposes far more than knowledge and debate about the strictly official activities of various levels of government..."Freedom of discussion, if it would fulfill its historic function in this nation in this nation, must embrace all issues about which information is needed or appropriate to enable he members of society to cope with the exigencies of their period. [160] [underscoring supplied].

But in *Gertz v. Robert Welch, Inc.*, however, the United States Supreme Court illustrates "the degree to which the law of defamation has been 'constitutionalized' and therefore 'nationalized'.[161] Archibald Cox has this analysis of the *ponencia*:

> Justice Powell follows the technique of a common law jurist balancing opposing interests without precedent to control him. He found the interests to be the circulation of information and debate upon matters of public significance, on the other side, and the individual's private personality--his dignity and worth-- on the other. In the case of a public figure, the Justice concluded, the imposition of liability anything less than an intentional or reckless falsehood carries too much risk of censorship resulting in the suppression of truth, but the balance is to be struck more favorably for a private person, unlike a public official or public figure, does not voluntary expose himself to risk of falsehood and lacks opportunity to command attention for his reply.
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> ...The enthusiasm that often characterized the majority opinions of the Warren Court has yielded to cautious analysis. The decision continues the trend in "constitutionalizing " and thus "nationalizing bodies of law previously left to the states by requiring proof of fault and restricting the damages recoverable."[162]

III. PHILIPPINE EXPERIENCE

In the previous section we discussed the contemporary debates on free speech in the United States in a time scholars of various disciplines have called the "postmodern era." Two main schools of thought have been locked in the running

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[160] Rosenbloom V. Metromedia, Inc., 403 US 29, 41 (1971); quoting Thornhill v. Alabama, 310 US 88, 102 (1940)

[161] 418 US 323.

[162] COX, *supra* note 51, at 16.

debate over the place of free speech in political life: the classical libertarian and the egalitarian. And yet, the various transformations that have taken place over the last few decades in human ways of life have also put to question the very premises upon which both points of view stand in relation to the world. Dissatisfaction with the state of things has led to the emergence of a new jurisprudence, one built upon the ideas of the philosopher Alasdair McIntyre, whose works stress upon the importance of community. In this section, we attempt to trace the main philosophical thread that runs through much of Philippine jurisprudence on free speech – one that is decidedly classical liberal in orientation, and one that, when understood in its proper historical context, pushes Philippine constitutional history back to the Malolos Constitution. In the succeeding paragraphs, we argue that a common philosophical root, though coming from different sources, obtains for both the American and the Philippine Bill of Rights.

Finally, we also examine an emerging thread in Philippine jurisprudence on free speech, one that is egalitarian in character and which we consider to be a "theoretical break" worthy of note. This has become manifest in Philippine jurisprudence on political advertising, a subject that has come to the fore in the reconfiguration of the Philippine political landscape of the post-Marcos years.

A. MALOLOS CONSTITUTION: AN (IGNORED) HISTORY OF LIBERAL IDEAS

The main view in Philippine constitutional history today is that constitutionalism, and its key feature – the libertarian *Bill of Rights* – was brought to Philippine shores by American colonizers who assumed sovereignty over the country after Spain sold it to them for US$20 million by way of the 1898 Treaty of Paris.[163] Vicente Sinco, a noted constitutional scholar of an earlier era, has made the same claim, saying that under the three hundred year-reign of the Spaniards,

> The notion of a constitution as an instrument that limits governmental authority and establishes a rule of law for all, the governor and the subject, the public official and the private official, was not comprehended in theory and in practice. The legal milestone that marked its beginnings was the Treaty of Paris which terminated the war between the United States and Spain.[164]

This view is rather unfortunate for being narrow, ignoring the long struggle

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[163]JOAQUIN BERNAS, A HISTORICAL AND JURIDICAL STUDY OF THE PHILIPPINE BILL OF RIGHTS (1971).

[164]V. SINCO, PHILIPPINE POLITICAL LAW (1962).

for freedom of the Philippines from the oppressive Spanish regime. Dr. Cesar Adib Majul's classic treatise on the constitutional and political ideas of the Philippine Revolution presents a comprehensive and highly insightful analysis of the major liberal ideals around which *Ilustrados* like Rizal, Jacinto, Mabini and Calderon rallied in their pursuit of freedom from Spanish yoke. Majul's work is particularly useful because in it, he discussed the efforts of the revolutionaries to draft a constitution, from the Biak-na-Bato pact to the Malolos Congress.[165]

He saw that the Malolos Constitution, drafted on September 15, 1898, as "the most elaborate document which expressed some of the deepest aspirations of the Filipino people." Majul argues that its *Bill of Rights*, which included guarantees for the freedom of speech, communication and association,[166] was taken seriously by the revolutionary leaders.[167] This was because the revolutionaries believed that the goal of the Revolution is to secure and preserve certain rights believed to be prior to all government or law.[168] The Malolos Constitution, a brainchild of Felipe Calderon, had provided for a strong executive, owing to the difficult situation of the times. It made Aguinaldo a supreme military chief; yet, it also laid down a *Bill of Rights* that provided protection against abuses of the Chief Executive. Mabini also noted that Aguinaldo need not be compared to a horse without a rein because in his case, the reins "are public opinion which is manifested in the press, in the public assemblies, and in the literary works of critics—all censuring such a power if decreed an unjust law."[169] Clearly then, Mabini, one of the pillars of the Philippine Revolution, acknowledged the importance of the opinion of the governed in governance, which had to be protected.

The revolutionary government and the constitution it had created were short-lived but the Bill of Rights it contained, in Majul's view, "actually made explicit some 'rights' already exercised during the days of the Revolutionary government."[170] Indeed, the press during the Revolution was, in his assessment, "relatively free."[171] In fact, the government established an official organ on July 4, 1898 and even encouraged the people to contribute articles to it, aiming to raise the level of political education of the Filipino people. The government also encouraged privately-owned newspapers. Majul notes that there was only one case, when

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[165] C.A. MAJUL, THE POLITICAL AND CONSTITUTIONAL IDEAS OF THE PHILIPPINE REVOLUTION (1967; reprinted 1996).

[166] *Id.* at 198.

[167] *Id.* at 201.

[168] *Ibid.*

[169] *Id.* at 185.

[170] *Id.* at 200.

[171] *Ibid.*

Aguinaldo actually asked the editor of *La Independencia*, a revolutionary paper, not to print articles that were prejudicial to the government.[172]

For Majul, the Malolos Congress was composed of people who envisioned republican and constitutional programs; they were products of the liberal ideas that had already spread in Europe by the end of the nineteenth century.[173] At the very least, the constitutional ideas were by-products of the *Ilustrados'* exposure to European Liberalism, which stressed a belief in natural law and natural rights.[174] Yes, it may have been copied from a variety of sources – France, Belgium, Mexico, Brazil, Nicaragua, Costa Rica and Guatemala -- [175]but these sources, ultimately, draw from the same river, the Enlightenment. Hence, in the conclusion to his book, Majul noted that:

> The political thinkers of the Philippine Revolution were voicing demands and ideas that were current in the minds of the contemporary Spanish liberals. These in turn, were the ideas of the eighteenth century Enlightenment: belief in natural law and natural rights. Another common element between the thinkers of the Enlightenment and the propagandists and leaders of the *Katipunan* was the desire to construct a new way of life and build a new society. The individuality of a person was emphasized, even though it was maintained that he had a definite position in society and that it was a duty for him to work for the welfare of all. Consent and not force was believed to be the basis of authority, hence, the "compact theory" was utilized by the Filipino thinkers. Nowhere is the influence of the Enlightenment more evident than in the belief that man had great intellectual and moral potentialities. These were held to be conducive to progress.[176]

B. FROM MALOLOS TO EDSA

A recent reexamination of the contributions of the Malolos Congrss to Philippine constitutional history posits that its provision for a *Bill of Rights* is significant because such an act "indicates that the same philosophical underpinnings motivated the formulation of the Malolos Constitution and succeeding Philippine Constitutions.[177] Indeed, while the US Constitution – largely the basis for the 1935,

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[172] *Ibid.;* On July 31, 1899, on account of officials who did not like some of the views Mabini had articulated in his article, "Something for Congress."

[173] *Id.* at 203.

[174] *Id.* at 207.

[175] MAXIMO M. KALAW, THE DEVELOPMENT OF PHILIPPINE POLITICS 126 (1926; reprinted 1986).

[176] MAJUL, *op. cit. supra* note 164 at 209.

[177] Mona Francesca Katigbak, *Historical Transcendence: The Significance of the Bill of Rights of the Malolos Constitution*, 73 PHIL. L.J. 2 (1998).

and by extension, the 1973 and the 1987 Constitutions – did not directly influence the Malolos Constitution, both documents grew from the same philosophical roots; that they share a common philosophical heritage is indicated by the marked similarities among them.[178]

For our purposes, a look at the provisions on free speech found in the four documents is necessary. Article 20 of the Malolos constitution provided the freedom of speech, freedom of the press, and the right to petition the government for a redress of grievances. The Malolos constitution provided that citizens may not be deprived of the right to freely express their ideas or opinions, orally or in writing, through the use of the press or other similar means; the right of association for the purposes of human life, not contrary to public morals; the right to send petitions to the authorities for the redress of grievances, whether individually or collectively, so long as armed force was not used; but the same charter provided that these rights are subject to general regulations and crimes committed on the occasion of their exercise would be prosecuted according to law.[179]

The same freedoms were guaranteed by the organic acts promulgated by the United States government in the Philippines, quoting almost verbatim the first amendment to the United States Constitution. President McKinley's instructions to the Second Philippine Commission on April 7, 1900, laid down the rule "that no law shall be passed abridging the freedom of speech or of the press or the rights of the people to peaceably assemble and petition the Government for redress of grievances." Section 5 of the Philippine Bill of 1902 carried a similar provision, as did the Philippine Autonomy Act of 1916.[180]

The 1935 Constitution carried an identical provision on the three freedoms.[181] Indeed, one delegate even referred to the Malolos Constitution as a direct source of inspiration for the same provision. And, as has been forcefully and beautifully argued:

> Delegate Laurel, proponent of this new provision, admitted that its source was the Malolos Constitution. The addition of this new provision is thus hardly the "inconsequential occurrence" that Bernas calls it. It is important because it reveals a clear link between the 1935 Constitution and the Malolos bill of rights. Even if the right to form association[s] was already recognized by

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[178] *Id.* at 335.

[179] *Id.* at 345.

[180] BERNAS, *op. cit. supra* note 162.

[181] CONST.(1935), art.. III, Sec. 1, par. (8) provided: "No law shall be passed abridging the freedom of speech, or of the press, or of the right of the people peaceably to assemble and petition the Government for redress of grievances."

> Philippine jurisprudence, the predecessor of the actual constitutional provision was the Malolos constitution. The 1973 and 1987 Constitutions also make explicit recognition of the separate right to form associations. Thus, the Malolos provision survives – in tangible form – to this day.[182]

C. PHILIPPINE FREE SPEECH JURISPRUDENCE IN FOCUS

The Philippine Supreme Court has acknowledged the *Bill of Rights*' debt to the Enlightenment idea of reason as a mode of discovering the truth in its different facets. Perhaps, one of the most eloquent and explicit declaration about the purpose of the protections it accords to the citizen has been made by constitutional scholar Joaquin Bernas, S.J. who, in explaining the intent of the provisions found in the Bill of Rights of the 1987 Charter, said:

> First, the general reflections. The protection of fundamental liberties in the essence of constitutional democracy. Protection against whom? Protection against the state. The *Bill of Rights* governs the relationship between the individual and the state. Its concern is not the relation between individuals, between a private individual and other individuals. What the *Bill of Rights* does is to declare some forbidden zones in the private sphere inaccessible to any power holder.[183] *[italic ours]*

The pertinent portion of the Bernas sponsorship speech was later on quoted in a 1991 case, which though criminal in nature, and involving an issue of an unreasonable search and seizure, affirms the liberal idea that the protections found in the *Bill of Rights* are meant to limit the reach of the state and prevent it from abusing such powers.[184]

In the case of *Reyes v Bagatsing*,[185] the Philippine Supreme Court differentiated between an "utterance" in the context of violence and one in the

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[182] Katigbak *op. cit. supra* note 175 at 346.

[183] 1 RECORD OF CONSTITUTIONAL COMMISSION p. 674, July 17, 1987.

[184] People v. Marti G.R. 81561, January 18, 1991, 193 SCRA 57 [1991]. In this case, the accused sent four packages to his friend in Zurich, Switzerland through the Manila Packing and Export Forwarders. Before sending the packages, the proprietor, following standard procedure, opened the packages for final inspection, only to discover dried marijuana leaves inside the packages. Subsequently, the proprietor reported the matter to the National Bureau of Investigation (NBI). The NBI in due time prosecuted the accused, using the marijuana found in the packages as evidence against him. The accused sought to exclude the evidence, saying it violates the constitutional guarantees to his right as a citizen against unreasonable searches and seizure and to his rights to privacy of communication. Finding for the state, the Court, after quoting Bernas, was emphatic in stating that '(t)he constitutional proscription against unlawful searches and seizures therefore applies as a restraint directed only against government and its agencies tasked with the enforcement of law. Thus, it could be only be invoked against the State to whom the restraint against arbitrary and unreasonable exercise of power is imposed."

[185] G.R. No. L-65366 November 9, 1983, 125 SCRA 553 [1983]

context of peaceful advocacy. The decision in this case, penned by Justice Fernando, granted an action for mandamus to compel the Manila City Mayor to issue a permit for a march to and a picket before the US Embassy in Manila. It should be noted that this case was decided just as the opposition to the Marcos regime from the middle class was picking up in the wake of the assassination of former Sen. Benigno Aquino Jr. Justice Fernando, one of the most prominent constitutional theorists of his time, held that where there is no "clear and present danger of a substantive evil that the State has a right to prevent,"[186] such utterance or speech must pass the test of constitutionality. Thus, in interpreting the free speech clause of the 1973 Constitution, he noted that the *Bill of Rights*, which we owe to the Anglo-American tradition, "was the child of the enlightenment"[187] and was reared in the high idea that the guaranty for free speech "lay faith in the power of an appeal to reason by all the peaceful means for gaining access to the mind."[188] "It was in order to avert force and explosions due to restrictions upon rational modes of communication that the guaranty of free speech was given a generous scope,"[189] the Supreme Court said. As it were, jurisprudence was concerned *not so much with what is being said* in the speech as with *how the speech was made*; that is, whether it was said with "fighting words"[190] or with "the general advocacy of ideas."[191]

1. Not Absolute but Preferred

Still, recent Philippine jurisprudence on free speech is liberal modernist in orientation, in that the Court, while stressing the protections accorded the citizen against the State's abuse of power, it does not consider such protections as absolute, as the classical liberal theorists would have put it.

In the case of *Philippine Blooming Mills Employees Organization v. Philippine Blooming Mills*, the Court, recognized that the right of the people to free expression is *preferred* over the interests of private property.[192] The idea that the right to free speech is a preferred one, of course, is borrowed from American jurisprudence. The idea of the "preferred position" approach, according to one Philippine constitutional law scholar,[193] was first broached in a well-known footnote by Justice

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[186] *Ibid.*
[187] *Ibid.*
[188] *Ibid.*
[189] *Ibid.*
[190] *Ibid.*
[191] *Ibid.*
[192] G.R. No. L-31195, June 5, 1975.
[193] Miriam Defensor Santiago, *The Supreme Court Applies "Clear and Present Danger": But Which One?* 60 PHIL. L.J. 57

Stone in the case of *United States v. Carolene Products Co.*[194] "[t]here may be narrower a scope for operation of the presumption of the constitutionality when legislation appears on its face to be within a specific prohibition of the Constitution, such as those of the first ten amendments..." The American Supreme Court later on fully expressed this in the 1943 case of *Murdock v. Pennsylvania*:[195] "Freedom of press, freedom of speech, and freedom of religion are in a preferred position."

Thus Defensor-Santiago notes that in the United States, the notion that free speech occupied a preferred position appears to be an established judicial dogma, although it is not without its share of critics. One of them has warned that such a doctrine may imply that "any law touching communication is infected with invalidity."[196] But in a more recent case in the Philippines, the Court, speaking through Justice Feliciano made an emphatic pronouncement that "(b)ecause of the preferred character of the constitutional rights of freedom of speech and of expression, a weighty presumption of invalidity vitiates measures of prior restraint upon the exercise of such freedoms."[197]

2. Content-Neutrality and Political Discourse

In *Reyes v. Bagatsing*[198] cited above, Justice Fernando adapted the 1960s American doctrine first expressed in the case of *Brandenburg v. Ohio*.[199] In this case, the appellant a Ku Klux Klan leader, was charged in court for criminal syndicalism, having allegedly sought political reform through violence and joined a group that espoused criminal syndicalism. Brandenburg had contacted a television news crew to film a Klan gathering – which allegedly included him -- as members discussed the group's plan to march to Congress. The American High Court acquitted him, ruling that mere teaching of abstract doctrines is not equivalent to leading the group in a violent march. It said that the questioned statute must be able to distinguish between advocacy of a theory and an advocacy of action; if it fails, it must be struck down as unconstitutional.[200] Here is the doctrine of *content-neutrality* transplanted to the soil of Philippine jurisprudence – it is not the content, but how the content is conveyed, that makes the world of a difference. The communication of content must be done in a reasoned or rational way to be considered as falling within the constitutional protection for free speech or free expression. These rights are

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[194] 304 U.S. 144, 152 (1938)
[195] DEFENSOR-SANTIAGO *op. cit. supra* note 192 at 59.
[196] *Ibid.*
[197] Ayer Productions vs. Capulong, G.R. No. L-82398. April 29, 1988.
[198] G.R. No. L-65366, November 9, 1983, 125 SCRA 553 [1983]
[199] 395 U.S. 444 (1969)
[200] *Id.* at 477.

premised on the primacy of rational debate over the raging issues of the day. Liberal democracy, as a political arrangement, is supposedly built upon free and equal citizens who, in the words of philosopher Tom Bridges, "are ruled in their own name: they rule themselves."[201] Yet in a "developmental sense", they are not free and equal first; they are produced through the influence of a particular kind of culture – one that is shaped by a public education that encourages and produces forms of culture able to sustain identities consistent with citizenship.[202] One such avenue of public education is the rational dialogue that ensues between and among citizens in the public sphere, the *res publica*. The theory is that without the rights of free speech and expression, the rational dialogue in the public sphere is constricted and consequently, the development of citizens who know what they can do as citizens for and on behalf of the polity is stunted. Hence, rational dialogue is a continuing theme in liberal democratic discourse. The "clear and present danger" rule, according to a more recent study, "has become an acceptable constitutional standard."[203] Yet it is also advanced that "political speech" is now increasingly viewed as well within the ambit of constitutional protection, or even "well-nigh absolute"[204] as a protected right. This class of speech encompasses electoral process and activities of government, as well as expression on political issues or speech that contributes to the understanding of political issues. It also includes speech on government behavior, policy or personnel, whether the governmental unit involved is executive, legislative, judicial or administrative, speech about how citizens are governed, including a wide range evaluation, criticism, electioneering and propaganda.[205] These have been categorized as: (1) expression intended to contribute to the resolution of issues through political processes; (2) expression bearing on important public issues; or (3) speech that participates in and serves to make the political process work.[206]

3. Election Law and Political Speech

Over the years, the idea of political speech as a protected right has taken on a more complicated aspect to it. This is readily discernible in the development of law and jurisprudence on the regulation of election expending,[207] the manner of soliciting or undertaking campaign propaganda, freedom to sell and/or to give free

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[201] BRIDGES, *op. cit. supra* note 7.

[202] *Ibid.*

[203] Alma F. Fernandez, Eric F. Mallonga, Sulyman Lagmay, *The Clear and Present Danger Rule as A Limitation on Freedom of Speech in the Philippines*, 60 PHIL. L. J. 185

[204] *Ibid.*

[205] *Ibid.*

[206] *Ibid.*

[207] Rep. Act No. 7166 (1991).

of charge air time to candidates.

In *Gonzales v. Commission on Elections*,[208] election law prohibited except during the prescribed election period, "the solicitation or undertaking of any campaign or propaganda, whether directly or indirectly, by an individual, the making of speeches, announcements or commentaries or holding of interviews for or against the election of any party or candidate for public office, or the publication or distribution of campaign literature or material." This provision was sustained although only four Justices supported it, as the other seven who opposed were one vote short of the two-thirds majority then needed to annul it. The court held that the inordinate preoccupation of the people with politics tended toward the neglect of the other serious needs of the nation and the pollution of its suffrage. In a strange twist, however, the case of *Santiago vs. Far East Broadcasting*,[209] where a petition for mandamus to compel the respondent to allow the campaign manager of the opposition party to deliver a speech over the radio without first submitting a copy thereof for purposes of censorship by the Radio Board as required by a law, made the following remarks in denying the petition on statutory grounds:

> (The petitioner) impliedly admits—and correctly, we think—that a speech that may endanger public safety may be censored and disapproved for broadcasting. How would the censor verify the petitioner's claim that the speeches he intended to broadcast offered no danger to public safety or public morality, if the petitioner refused to submit the manuscript or even the gist thereof?[210]

The respondent Commission, in the case of *Mutuc v. Commission on Elections*,[211] prohibited the use of taped jingles in the mobile units used by the petitioner in his election campaign. Petitioner protested claiming infringement of his freedom of expression. He was sustained by the Supreme Court, thus: "What respondent Commission did, in effect, was to impose censorship on petitioner, an evil against which this constitutional right is directed. Nor could respondent Commission justify its action by the assertion that petitioner, if he would not resort to taped jingles, would be free, either by himself or through others, to use his mobile loudspeakers. Precisely, the constitutional guarantee is not to be emasculated by confining it to a speaker having his say, but not perpetuating what is uttered by him through tape or other mechanical contrivances. If this Court were to sustain respondent Commission, then the effect would hardly be distinguishable from

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[208] G.R. No. L-27833, April 18, 1969, 27 SCRA 835 [1969]
[209] G.R. No. 48683, November 8, 1941, 73 Phil. 408 [1941]
[210] *Ibid.*
[211] G.R. No. L-32717, November 26, 1970, 36 SCRA 228 [1970]

previous restraint. That cannot be validly done. It would negate indirectly what the Constitution in express terms assures."[212]

Further, in justifying its decision, the Court held that the prohibition was actually content-based and thus for that reason constituted a prior restraint on speech as it inhibits the candidate himself to use the loudspeaker. In another case, decided along libertarian lines, a ban against newspaper columnists expressing opinion on an issue in a plebiscite amounts to a content-based restriction which, unless justified by a compelling reason, is unconstitutional.[213]

But two years later, in *National Press Club vs. Commission on Elections*,[214] the validity of section 11 of Republic Act No. 6646, prohibiting: "b)...any newspaper, radio broadcasting or television station, other mass media to sell or to give free of charge print space or air time for campaign or other political purposes except to the Commission as provided under sections 90 and 92 of Batas Pambansa Blg. 881. Any mass media columnist, commentator, announcer or personality who is a candidate for any effective public office shall take a leave of absence from his work as such during the campaign period," was put into issue.

The provision was sustained by the Supreme Court through Justice Feliciano. It declared, thus:

> Section 11 (b) does of course, limit the right of free speech and of access to mass media of the candidates themselves. The limitation, however, bears a clear and reasonable connection with the constitutional objective set out in Article IX (C) (4) and Article II (26) of the Constitution. For it is precisely in the unlimited purchase of print space and radio and television time that the resources of the financially affluent candidates are likely to make a crucial difference. Here lies the core problem of equalization of the situations of the candidates with deep pockets and the candidates with shallow or empty pockets that Article IX (C) (4) of the Constitution and section 11 (b) seek to address. That the statutory mechanism which section 11 (b) brings into operation is designed and may be expected to bring about or promote equal opportunity, and equal time and space, for political candidates to inform all and sundry about themselves, cannot be gainsaid.
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> The paid political advertisements interjected into the electronic media and repeated with mind-deadening frequency, are commonly intended and

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[212] *Ibid.*

[213] Sanidad vs. COMELEC G.R. No. 90878, January 29, 1990, 181 SCRA 529 [1990]

[214] G.R. No. 102925, March 5, 1992, 207 SCRA 1 [1992]

> crafted, not so much to inform and educate as to condition and manipulate, not so much to provoke rational and objective appraisal of candidates' qualifications or programs as to appeal to the non-intellective faculties of the captive and passive audience. The right of the general listening and viewing public to be free from such intrusions and their subliminal effects is at least as important as the right of candidates to advertise themselves through modern electronic media and the right of media enterprises to maximize their revenues from the marketing of 'packaged candidates.[215]

4. A Theoretical Break: the Case of Osmena v. Comelec

A reexamination of the court's decision upholding the validity of section 11 (b) of Republic Act No. 6646 was sought in *Osmeña v. Comelec.*[216] The petitioners contend that events after the ruling in *NPC vs. Comelec* have called into question the validity of the very premises of the said decision. Still, here, the Court ruled out repeated objections to regulation by saying that the main purpose of the law is the promotion of "equality of opportunities in the use of mass media for political advertising."[217]

The court refused to grant a reexamination of the validity of the law, contending that no empirical data have been presented by petitioners to back up their claim that the situation has significantly changed since the passage of the regulatory measure into law. Nevertheless, the Court looked into the substantive issue of the case and reiterated its decision in *NPC vs. Comelec.*

In not upholding the claim of the petitioner that section 11 (b) of Republic Act No. 6646 is a restriction on the freedom of speech, the Court ruled that the main purpose of the provision is regulatory. Any restriction on speech is only incidental, and it is no more than necessary to achieve its purpose of promoting equality of opportunity in the use of mass media for political advertising. As pointed out in *NPC v. Comelec*, the restriction on speech is limited as to time and space.

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[215] 395 U.S. 444 (1969)

[216] G.R. No. 132231, March 31, 1998, 288 SCRA 447 [1998]. Before the NPC ruling, the validity of the Comelec's take-over of advertising page of newspapers and the commercial time of radio and TV stations for allocation to the candidates under provisions of the same law was upheld in the case of *Philippine Press Institute v. Comelec* (G.R. No. 119694, May 22, 1995, 244 SCRA 272 [1995]), where the Court held that space acquired in the newspapers by the Commission must be paid a just compensation. At the time of the writing of the decision in Osmena, the issue of whether the same can be said about broadcast time was still pending in the case of *Telecommunications and Broadcast Attorneys of the Philippines v. Comelec*, G.R. No. 132922, April 21, 1998.

[217] Osmeña vs COMELEC *supra* at 470.

Further, according to the Court, the premise of the argument that section 11(b) imposes a ban on media political advertising misses the point that the prohibition against paid or sponsored political advertising is only half of the regulatory framework, the other half being the mandate of the Comelec to procure print space and air time so that these can be allocated free of charge to the candidates.

This case is novel because other than stressing the regulatory duties of government, it also recognizes the points raised against the limitations of the libertarian approach to free speech. Critiquing the ruling in the American case of *Buckey v. Valeo*[218] in which the US Supreme Court invalidated a law regulating political campaign expenditures.

Justice Mendoza, *ponente* in this case, has this to say:

> The notion that the government may restrict the speech of some in order to enhance the relative voice of others may be foreign to the American Constitution. It is not to the Philippine Constitution, being in fact an animating principle in the document. Indeed, Art. IX-C [Sec. 4] is not the only provision in the Constitution mandating political equality. Art. XIII, [Sec. 1] requires Congress to give the 'highest' priority to the enactment of measures designed to reduce political inequalities, while Art II, [Sec. 26] declares as a fundamental principle of our government 'equal access to opportunities for public service.' Access to public office will be denied to poor candidates if they cannot even have access to mass media in order to reach the electorate. What fortress principle trumps or overrides these provisions for political equality?[219]

A closer analysis of the law in question reveals that there is no total ban on political advertising, nor a restriction on the content of speech, according to the *ponente*. The regulation is but in consonance with the constitutional provision on the regulatory power of the Comelec. Considering that print space and air time can be controlled or dominated by rich candidates to the disadvantage of poor

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[218]424 U.S. 1, 16-19 (1976); The case resolved a challenge to the Federal Election Campaign Act, which sought to put limits to campaign expenditures and required detailed reportage of campaign spending. The law was passed because of concerns that large campaign contributions have had a negative effect on the political life of citizens. But here, the American Supreme Court struck down the law as unconstitutional, saying that political expenditures are protected by the First Amendment: [T]his Court has never suggested that the dependence of a communication on the expenditure of money operates itself to introduce a non-speech element or to reduce the exacting scrutiny required by the First Amendment...A restriction on the amount of money a person or group can spend on political communication during a campaign necessarily reduces the quantity of expression by restricting the number of issues discussed, the depth of their exploration, and the size of the audience reached."

[219] *supra* at 473. *See* CONST. IX-C sec. 4; *see also* CONST. art. XIII; *see also* CONST. Art. II Sec. 26.

candidates, there is then a substantial or legitimate governmental interest justifying exercise of the regulatory power.

This case represents a radical break from traditional libertarian approaches in Philippine jurisprudence on free speech issues because here we see how the case sought to interpret the task of the law within a broader context of constitutional prerogatives beyond the conventional equality provision found in section 1 of Art III of the 1987 Constitution.[220] Indeed, it comes close to Fiss's conception of free speech along the lines of equal protection. But it too, shows the nuances of political culture that goes against blanket application of a legal principle lifted from one culture to that of another.

For while Fiss insists that *content-neutral* interpretations of the law is inadequate to account for such an issue as political campaign contribution,[221] the Philippine Court, in *Osmena v. Comelec,* actually argued that the law is valid precisely because it meets the requirements demanded of a *content-neutral* piece of legislation. For Fiss, campaign contributions by themselves are a form of speech that distorts the political landscape with messages that are a monopoly of the moneyed. Political advertising is in fact a function of the availability of campaign funds; the more funds a candidate has in his hands, the more access he has to political advertising. In this sense, those who have the money flood the political landscape with messages that may in fact, distort the democratic ideal.

In *Osmeña,* however the court belabors the point that *content-neutral* laws are about standards and the law in question, meets the standards. The test---drawn from the *O'Brien* case[222]--says a government regulation is sufficiently justified if it furthers the substantial interests of government.

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[220] CONST. art. III, sec. 1

[221] FISS, *op. cit. supra* note 15 at 18.

[222] 391 U.S. 367 (1968); In this case, O'Brien burned his Selective Service registration certificate before a sizable crowd, supposedly, to influence others to adopt his antiwar beliefs. He was indicted, tried, and convicted for violating the Universal Military Training and Service Act, which, under a 1965 amendment, applies to any person "who forges, alters, knowingly destroys, knowingly mutilates, or in any manner changes any such certificate . . ." The District Court rejected O'Brien's argument that the amendment was unconstitutional because it was enacted to abridge free speech and served no legitimate legislative purpose. But the Court of Appeals held the clause unconstitutional under the First Amendment as singling out for special treatment persons engaged in protests, on the ground that conduct under the 1965 Amendment was already punishable since a Selective Service System regulation required registrants to keep their registration certificates in their "personal possession at all times.' The Supreme Court, however, upheld O'Brien's conviction. The Court held that a governmental regulation is sufficiently justified if it is within the constitutional power of the Government and furthers an important or substantial governmental interest unrelated to the suppression of free expression, and if the incidental restriction on alleged First Amendment freedom is no greater than is essential to that interest. The 1965 Amendment meets all these requirements,

Incidentally, Justice Mendoza quotes from the Yale professor's book.[223] The ruling in *Osmeña* demonstrates that affinity with the Yale scholar's concept of free speech does not necessarily mean the overturn of existing precedents---at least, with respect to Philippine-bound standards of *content-neutrality* vis-a-vis the equality clause. His ruling seems to suggest that we can advance the democratic conception of free speech according to our concrete historical and cultural conditions.

As Justice Mendoza asserts, the government here is not regulating based on the content of the speech at issue; that is, political advertising. Responding to Justice Panganiban's dissent which cited that the law in question prohibits messages that in fact, do not violate the "clear and present danger" test, he argues that such a test was originally applied in criminal law and does not apply to laws as the one in question whichn merely address the "incidents" of political ads and not their "contents":

> The reason for this difference in the level of justification for the restriction of free speech is that content-based restrictions distort public debate, have improper motivation, and are usually imposed because of fear of how people will react to a particular speech. No such reasons underlie content-neutral regulations....[the law in question] is a valid exercise of the power of the State to regulate media of communication or information for the purpose pf ensuring equal opportunity, time and space for political campaigns; that the regulation is unrelated to the suppression of free speech; that any restriction on freedom of expression is only incidental and no more than necessary to achieve the purpose of promoting equality.[224]

Interestingly however, in his lengthy dissent, Justice Romero harkens to the libertarian tradition in Philippine constitutionalism beginning with the free speech clause in the Malolos Constitution. He notes:

> This right, held sancrosanct by the Filipino people and won at the cost of their lives found its way ultimately in the Constitutions of a later day, reinforced as they were, by the profound thoughts transplanted on fertile soil by libertarian ideologies. Why emasculate the freedom of expression now to accord a governmental agency a power exercisable for a limited period of time for the

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said the Court. From this decision, a four-fold test was developed. A government regulation is justified if, (1) it is within the constitutional power of government; (2) if it furthers an important or substantial government interest; (3) if the govt. interest is unrelated to the suppression of the free expression; and (4) if the incidental restriction on the alleged First Amendment freedom is no greater than essential to the furtherance of that interest.

[223]NPC v. COMELEC *supra* at 479.

[224] *Id.* at 478.

> dubious purpose of 'equalizing' the chances of wealthy and less affluent candidates.[225]

5. New Law

Subsequently, the passage of Republic Act No. 9006 known as the Fair Elections Act (FEA) in the year 2001 expressly repealed section 11 (b) of Republic Act No. 6646. Does this now mean to say that Comelec's power to regulate print space and air time has no more leg to stand on?

On the contrary, the FEA retains Comelec's regulatory power. The law merely repeals the prior prohibition against any newspaper, radio broadcasting or television station, and other mass media selling or giving free of charge print space or air time for campaign or other political purposes outside the Commission as provided under sections 90 and 92 of Batas Pambansa Blg. 881. However, it does not remove the regulatory power of the Comelec "to supervise the use and employment of press, radio and television facilities in so far as the placement of political advertisements is concerned to ensure that candidates are given equal opportunities under equal circumstances to make known to make their qualifications and their stand on public issues within the limits set forth in the Omnibus Election Code and Republic Act No. 7166 on election spending."[226]

Further, even without a law expressly granting Comelec the power to regulate political advertising, the Constitutional provision which expressly grants it such power remains. And all reasonable regulations pursuant to this power can always withstand constitutional scrutiny so long as it conforms to the standards set by the constitution that the regulation shall equalize opportunities under equal circumstances to all candidates.

6. Libertarian Strain Remains Strong

Yet, the libertarian impulse remains strong in Philippine jurisprudence. In the year 2000, the Supreme Court in *ABS-CBN v. Comelec*, held that exit polls are a form of expression and are entitled to constitutional protection.[227] Here, the Court ruled that, the Comelec cannot totally prohibit the holding of exit polls and the

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[225] *Id.* at 522.

[226] Rep. Act No. 9006, Section 6.4 par. 2. (2001).

[227] ABS-CBN v. COMELEC, GR No. 133486, January 28, 2000.

dissemination of their results through the mass media in the guise of protecting the sanctity of elections and the secrecy of the ballot.[228]

This Court ruling was further strengthened in the case of *Social Weather Stations vs. Comelec*[229] when it invalidated section 5.4 of RA 9006, or the FFA, which provides:

> Surveys affecting national candidates shall not be published fifteen (15) days before an election and surveys affecting local candidates shall not be published seven (7) days before an election.

Speaking again through Justice Mendoza, the Court held that section 5.4 constitutes an unconstitutional abridgement of freedom of speech, expression and the press for the following reasons:

> 1. It lays a prior restraint on freedom of speech, expression and the press by prohibiting the publication of election survey results;
> 2. The grant of power to COMELEC is limited to ensuring "equal opportunity, time, space, and the right to reply" as well as to prescribing uniform and reasonable rates of charges for the use of such media facilities for "public information campaigns and forums among candidates";
> 3. Pursuant to the O'Brien[230] test, the most influential test for distinguishing content-based from content-neutral regulations is as follows: "[A] government regulation is sufficiently justified if (1) it is within the constitutional power of the Government; (2) if it furthers an important or substantial governmental interest; and (3) if the government interest is unrelated to the suppression of free expression; and (4) if the incidental restriction on alleged First Amendment freedoms [of speech, expression and the press] is no greater than is essential to the furtherance of that interest.[231]

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[228] *Ibid.*

[229] Social Weather Stations v. Comelec, GR No. 147571, May 5, 2001. see A.V. Panganiban, *An Emerging Paradigm of Free Expression*, 77 PHIL. L. J. 1,2 (2003). Justice Artemio V. Panganiban calls this an "emerging paradigm of free expression," in the sense of "a unique mode of free expression with a growing role in nurturing and strengthening Philippine democracy." In our view however, a "mode", or manner, of free expression is not the equivalent of a "paradigm", strictly speaking. The libertarian approach is a paradigm, or model, of jurisprudence and the opinion poll may be said to be merely an expansion of the same paradigm. The emergence of a new paradigm, in the sense of a "paradigm shift" articulated by philosopher Thomas Kuhn, is epistemological. But see also T. KUHN, THE STRUCTURE OF SCIENTIFIC REVOLUTIONS (ed. 1960). see H.C.M. ALFONSO, SOCIALLY-SHARED INQUIRY: A SELF-REFLEXIVE, EMANCIPATORY, COMMUNICATION APPROACH TO SOCIAL RESEARCH, 195 (2001); quoting B. P. KEENEY, THE AESTHETICS OF CHANGE 7 (1983). Hence, as Bradford P. Keeney put it, "The deepest order or change that human beings are capable of demonstrating is epistemological change. A change in epistemology means transforming one's way of experiencing the world."

[230] U.S. v. O'Brien, 391 US 367 (1968)

[231] Social Weather Stations v. COMELEC, GR No. 147571, May 5, 2001

Here, Justice Mendoza said that applying the *O'Brien* test, two considerations on section 5.4 should be made:

> *First*, Section 5.4 fails to meet criterion [3] of the *O'Brien* test because the causal connection of expression to the asserted governmental interest makes such interest 'not related to the suppression to the suppression of free expression.' "By prohibiting the publication of election survey results because of the possibility that such publication may undermine the integrity of the election, section 5.4 actually suppresses a whole class of expression, while allowing the expression of opinion concerning the same subject matter by newspaper columnists, radio and TV commentators, armchair theorists, and other opinion makers. In effect section 5.4 shows a bias for a particular subject matter, if not viewpoint, by preferring personal opinion to statistical results. The constitutional guarantee of freedom of expression means that the government has no power to restrict expression because of its message, its ideas, its subject matter, or its content."
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> This sufficiently distinguishes section 5.4 from Republic Act No. 6646, section 11 (b), which this Court found to be valid in National Press Club v. COMELEC[232] and Osmeña vs. COMELEC.[233] For the ban imposed by Republic Act No. 6646, section 11 (b) is not only authorized by a specific constitutional provision, but it also provides an alternative so that, as this Court pointed out in Osmeña, there was actually no ban but only a substitution of media advertisements by the COMELEC space and COMELEC hour."
>
> *Second*, the section 5.4 fails to meet criiiterion [4] the *O'Brien* test that the restriction be not greater than is necessary to further the governmental interest even if the governmental interest sought to be promoted is unrelated to the suppression of speech and the resulting restriction of free speech is only incidental. The section aims to prevent last minute pressure on the voters, the creation of bandwagon effect, 'junking' weak or 'losing' candidates, and resort to the form of election cheating called 'dagdag-bawas'. "Praiseworthy as these aims of the regulation might be, they cannot be attained at the sacrifice of the fundamental right of expression, when such aim can be more narrowly pursued by punishing unlawful acts, rather than speech because of apprehension that such speech creates the danger of such evils." [234] *[italics in the original]*

7. Pornography

In a country where the Catholic Church remains a political force to reckon with, pornography remains a thorny issue. The Philippine Supreme Court had its

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[232] NPC v. COMELEC, G.R. 102925, March 5, 1992, 207 SCRA 1 [1992]
[233] Osmeña v. Comelec, G.R. No. 132231, March 31, 1998, 288 SCRA 447 [1998]
[234] Social Weather Stations v. COMELEC, GR No. 147571, May 5, 2001

first opportunity to rule on obscenity in case of *People v. Kottinger*.[235] The Court here applied the *Hicklin* test borrowed from American jurisprudence at the time[236] and acquitted the accused in the criminal case. The doctrine took root fast and held sway for a long time. In fact, it took six decades before the Philippine Court had another opportunity to discuss the issue yet again, when, in 1985, it handed down a decision on the case *Gonzalez v. Kalaw-Katigbak*.[237] At issue in the case was the alleged grave abuse of discretion of the Board of Review for Motion Pictures and Television under Executive Order 876, in classifying the film Kapit sa Patalim under the "For Adults Only" viewing classification albeit without any deletion or cuts. The Court found there was abuse of discretion but there was no sufficient votes to consider it grave. Nevertheless the Court ruled that the provisions of EO 876 calling for the application of "contemporary Filipino cultural values" must be construed according to accepted constitutional protections for free speech.

The case adopted the following test: "whether, to the average person, applying contemporary standards, the dominant theme of the material taken as a whole appeals to the prurient interest." This so-called *Roth test*[238] borrowed from a 1957 American case is essentially the current test on obscenity in Philippine jurisprudence. Yet this is a marked departure from the *Kottinger* ruling because it measured obscenity in terms of the "dominant theme" of the work rather than passages taken in isolation.

8. Finer Distinctions

And yet *Gonzalez v. Kalaw-Katigbak* laid down a further qualification. The liberality of the rule removing a speech or material outside the protection of the free speech clause only if its parts, when taken as a whole, appeal to prurient interests, is to be observed with respect to motion pictures. The Court ruled that "where television is concerned, a less liberal approach calls for observance." And why? "This is so because unlike motion pictures where the patrons have to pay their way, television reaches every home where there is a set." Thus, the movie may be shown in the theatres without cuts and "For Adults Only" but it cannot be aired on television without the deletion of scene not suitable for children.

9. Determination of Obscenity: A Chiefly Judicial Function

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[235] 45 Phil. 352 [1923]

[236] The test provided: "where the tendency of the matter charged as obscene is to deprave and corrupt those whose minds are open to such immoral influences, and into whose hands a publication of this sort may fall." The 1868 case from which this test was lifted was the Regina v. Hicklin LR 3 QB 360 (1868)

[237] G.R. No. L-69500, July 22, 1985.

[238] Roth v. United States, 354 U.S. 476 (1957).

Moreover, *Gonzalez v. Kalaw-Katigbak* enshrined the process of determining obscenity in the hands of the courts, very unlike the situation in *Kottinger*, where police authorities had a wider discretion. *Kottinger* had provided that a material is obscene if it had the tendency "to deprave or corrupt those whose minds are open to such immoral influences and into whose hands a publication or other article charged as obscene may fall." While it may not be a full guarantee of objectivity, it reduces the possibility of abuse.

Four years later, the Philippine Supreme Court had the opportunity to pass upon the issue of obscenity or pornography. But the case of *Pita v. Court of Appeals* [239] while making mention of the American-made *Miller v. California* [240]test---the latest in standards for judicial determination of whether a material is obscene or not in the United States----did not apply it in the instant dispute because ultimately, it was decided upon the principle of due process. The dispute revolved around the seizure of allegedly pornographic materials, including the petitioner's Pinoy Playboy, during an anti-smut campaign launched by Manila Mayor Ramon Bagatsing in December 1 and 3, 1983. The campaign was undertaken pursuant to Art. 201 of the Revised Penal Code, which outlines our laws on obscenity, prohibiting and penalizing obscene publications and exhibitions. [241]

Miller v. California had established basic guidelines in the determination of pornography: 1) whether to the average person, applying contemporary community standards, the work, taken as a whole, appeals to prurient interest; 2) whether the work depicts or describes, in a patently offensive way, sexual conduct specifically defined by applicable state law; and 3) whether the work, taken as a whole, lacks serious literary, artistic, political or scientific value.[242] Unfortunately, *Pita v. Gonzales*, discussed in detail the various tests in American jurisprudence but did not say what applied to the Philippines.

10. Effect v. Representation

Nevertheless, let it be said that our jurisprudence on obscenity has always looked at how the particulars of a given material of an allegedly sexual nature are displayed, configured, arranged and made available to the public, and never about

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[239] G.R. no. L-80806, October 5, 1989.
[240] 413 U.S. 15 (1973).
[241] *see* note 238 *supra*
[242] 413 U.S. 15 (1973).

the subject matter of the material itself, which is the abuse of women or their representation as sexual objects.

Often invoked side by side with the free speech clause,[243] in disputes over allegedly pornographic materials in the Philippine experience are the due process clause in the Constitution,[244] which involves both procedural and substantive standards, and the right against unreasonable searches and seizures. [245]

Thus, the line of judicial decisions available elaborates a development of standards to determine whether a material --- print or otherwise --- falls within the sphere of obscenity; that is, whether or not it portrays the sexual act in an obscene or an offensive way according to certain classes of people or individuals. *It is content-based in this sense.* There are standards that must be met, otherwise the material is declared as smut, in which case it falls outside the sphere of protection. But it is *content-neutral* in the sense that it is not responsive in the way feminists, or even scholars like Fiss, would like to address the issue of pornography.

We do not find in the jurisprudence a declaration on the ideology of pornography or that the patently negative representation of women in such cultural products is by itself, a cause for regulation.[246] Instead, what we see are notes of concern over the perceived effect of pornography to certain susceptible members of the public contained in such abstract terms as "society" or "community." This is no different from what Fiss, finds in the American experience, where judicial attention had, for a long time, been focused on the alleged power of sexually explicit films and publications to awaken sexual drives and lead to sexual crimes. He says, in particular, of the 1960s, when, other than debates on mass media effects, there was little attention given to: "the effect that their perceived risk of rape might have on the day-to-day behavior of women, and to the impact of pornography might have on the way women are viewed in society."[247] Fiss however, objects to suggestions to get pornography out of the protection of free speech by

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[243] CONST. art. III, sec. 4

[244] CONST. art. III, sec.1

[245] CONST. art. III, sec. 2

[246] Feminist writers argue that the women themselves should be allowed to speak for themselves. "If blacks are in a position to say what is demeaning to them, why shouldn't women's voices be heard on the pornography issue? Not because they are truly "disinterested" parties and therefore qualified authorities....but that there are no disinterested authorities, no 'objective' representatives of the moral community." It is also argued that the reason why women are particularly qualified to speak up on the issue is that since pornography is against them, it puts them in a morally authoritative position to express their view on the matter, just as blacks are in such a position in regard to racial insults and Jews in regard to anti-Semitic humiliations. Elizabeth Wolgast, *Pornography and the Tyranny of the Majority*, in FEMINIST JURISPRUDENCE 437 (Patricia Smith, ed., 1993).

[247] FISS, *op. cit. supra* note 15 at 100.

considering it an act. He believes that one need not resort to what he considers as contrived categories to get the message across. He invites the state's direct intervention as a "friend of freedom" to stop pornographic discourses in the interest of the marginalized sector of women. In any case, he says that the better alternative is to weigh the issue form either side of the divide. In the "judicial calculus", the activist must utilize whatever ammunition is available for use. Thus, on the matter of pornography, we may look at it, on the one hand, from a view of the free speech clause -- how pornography violates the equal right to free speech of the disadvantaged groups; on the other hand, the first consideration should not preclude the second; that is, to the Fourteenth Amendment ramifications of those two forms of speech."[248]

IV. PROLOGOMENON: FREE SPEECH AND THE TASK OF ACHIEVING COMMUNITY

> *Such matters really are battlegrounds where the means do not exist for determinations that shall be good for all time, and where the decision can do no more than embody the preference of a given body in a given time and place.* We do not realize how large a part of *our law is open to reconsideration upon a slight change in the habit of the public mind.* –
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> - Justice Oliver Wendell Holmes, Jr.[249]

As a prologomenon, this section attempts to outline how a communitarian perspective may inform Philippine jurisprudence on free speech. Here, we present contemporary Philippine concerns that cannot be adequately addressed by the reigning libertarian model of jurisprudence on free speech. In the attempt to address the inadequacies of libertarianism, the task of building a political community, and consequently, a nation, has become a tall order. As a work of jurisprudence, the paper reconfigures our putative understanding of the tensions between the two values – liberty and equality – and sets the debate within the framework of community as informed by the work of Mcintyre and other scholars. This is not only about free speech but fundamentally, about why there is a need for citizens in the postmodern age to take into account other narratives in their common duty to the democratic vision of things. It attempts to show that our

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[248] *Id.* at 120.

[249] O.W. Holmes, *Path of the Law*,10 HARV. L REV. 457 (1897) <http://ibiblio.org/gutenberg/etext00/pthlw10.txt.>

received conceptions of freedom and equality are historically determined and hence, contingent; And here therefore lies the task of legal scholars to re-interpret cherished values in the light of contemporary experience.

A. EQUALITY AS AN EVER GROWING CONCERN

In the postmodern era, where traditional lines separating distinct social and cultural categories disintegrate in the rapid transformations brought into human ways of life by technological advances, the state will increasingly be plagued by conflicts and clashes of values and concepts of the social good. In the United States, the conflict has become markedly intense because of multi-cultural influences, although to a large degree, the libertarian influence on free speech remains a dominant theme. Still, the issues raised by the egalitarian perspective against the failures of the libertarian approaches to the problem cannot be ignored.

Another compelling view has been advanced by communitarians, who have many questions to raise against both the classical liberals and the modern liberals. This essay has principally focused on the ideas of Alisdair MacIntyre, a leading communitarian, as a viable source of jurisprudential influence on free speech. What these variant readings of the same text – that is – the free speech clause – seem to suggest is that free speech is not an absolute right but a concept that is a creature of specific times and conditions. Indeed, as the Filipino Marxist thinker Epifanio San Juan, Jr. has argued, freedom in the legal and political sense, is not an absolute and neutral value; rather, it is historically determined and is contingent.[250]

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[250] E. San Juan, Jr, *Culture and Freedom in Late Capitalism*, 49 DILIMAN REVIEW 59-5. (2001) We too, are reminded by Herbert Marcuse's comment on the development of Hegel's conception of freedom in the philosophical sense from the Lutheran ideal of freedom as an inner value. He claims that the German Reformation, by way of Luther, "had established Christian liberty as an internal value to be realized independently of any and all external conditions." Hence, it nurtured a tendency in German idealism to be "reconciled" to social reality no matter how "miserable" it could be. "Ultimately," Marcuse writes, "the ideal that the critical aspects set forth a rational political and social reorganization of the world, becomes frustrated and is transformed into a spiritual value." Hegel of course, started out as a theology student until he left the study of ministry after having come to the conclusion [not necessarily correct, we say] that Christianity was ultimately inadequate to explain social and political questions. Marcuse writes thus: "At first, Hegel's answer was that of a student of theology. He interpreted Christianity as having a basic function in world history, that of giving a new ' absolute' center to man, a final goal in life. Hegel could also see however, that the revealed truth of the Gospel appealed essentially to the individual as an individual detached from his social and political nexus; its essential aim was to save the individual and not society or the state. It was therefore not religion that could solve the problem or theology that could set forth principles to restore freedom and unity. As a result, Hegel's interest slowly shifted from theological to philosophical concepts." See H. MARCUSE, REASON AND REVOLUTION, HEGEL AND THE RISE OF SOCIAL THEORY 13-14, 35 (ed. 1970). Interestingly, the noted Protestant theologian Paul Tillich (like Hegel, another Lutheran at that) seems to confirm this dim view of Lutheran social ethics: "the Lutheran doctrine of man, in the naturalistic form it takes in vitalism, negates all

Given its constitutional traditions, the free speech clause in the Philippine *Bill of Rights* has been interpreted largely along libertarian lines. We have examined the broader concerns of political speech, pornography and election laws in Philippine jurisprudence. We have shown that for the most part, the Philippine Supreme Court has upheld the liberal, or at least, the libertarian influence - the doctrine of *content-neutrality*, in other words - on the *Bill of Rights* especially in regard to the domain of political speech. Recent Philippine historical experience under Martial Law has often been cited as a concrete argument against any attempt to regulate free speech.[251]

Meanwhile, pornography, following American precedents, is generally considered outside the protection of the right to free speech. More than that, the Court has looked at the issue not as a question of equality but fundamentally, of *effects* on the community or vulnerable segments of such community. Pornography has been viewed not as a case of the marginalization of women, as one influential section of feminists would put it, but as an issue that concerns a community's sense of decency or even, morality, although the Court does not say so in explicit terms.

Yet, the dominance of libertarian thought notwithstanding, in the context of a growing complexity of political, social, economic and cultural realities, Philippine jurisprudence has seen a "theoretical break" from the reigning libertarian doctrine, at least, on the matter of political advertising. In this area, the Supreme Court has acknowledged for the first time the role of the State in equalizing access to political power as well as to venues of free expression and most important of all, such role's constitutional justifications. In a word: *a doctrinal pronouncement on the need to balance, or harmonize, the concerns of liberty with equality.* Moreover, such a pronouncement, decidedly liberal modernist in orientation, still hews with concrete Philippine realities for it is an explication that upholds the idea of *content-neutrality*, at least, with respect to the issue of political advertising.

But already, there are on-going projects along egalitarian lines that re-examine contemporary societal values, as for example in a study of stereotypes of women perpetuated in the Philippine justice system,[252] or in proposed measures to

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Utopianism. Sin, cupidity, the will to power, the unconscious urge, or any other word used to describe the human situation, is so bound up with the existence of man and nature (not of course with their essence or creaturely endowment) that establishing the Kingdom of justice and peace within the realm of strange reality is impossible." P. TILLICH, ON THE BOUNDARY, 76-77 (1966).

[251] See ROSALINDA PINEDA-OFRENEO, THE MANIPULATED PRESS, A HISTORY OF PHILIPPINE JOURNALISM SINCE 1945 (1984). See also Luis V. Teodoro, *Re-Examining the Fundamentals*, 9 PHIL. JOURN. REV. 22-26 (1998).

[252] GENDER SENSITIVITY IN THE COURT SYSTEM, AN OVERVIEW 11 (Feliciano, Sobritchea, Gatmaytan, Vargas, eds., 2002). [Hereinafter, GENDER SENSIVITY]. Although preliminary in nature, the

address discrimination against the Muslim minorities. Proposed measures – House Bills 5410 and 799 – have been filed in the 12th Congress. They seek to prohibit the use of the words "Muslim" and "Christian" in print and broadcast media to describe any person suspected of or convicted of having committed criminal or unlawful acts.[253]

In the justice system, gender bias has been defined by the Judicial Council of California Advisory Committee on Gender Bias in the Courts as "behavior or decision-making of participants in the justice system that is based on or reveals (1) stereotypical attitudes about the nature and roles of women and men; (2) cultural perceptions of their relative worth; or (3) myths and misconceptions about the social and economic realities encountered by both sexes."[254]

The book outlines the following forms and manifestations of gender bias-- (1) double victimization or double jeopardy—which occurs when a female victim of sexual harassment or rape, for example, is twice victimized—"first by the abuse and then by the blame that accompanies it";[255] (2) negative attitude towards females victims as well as offenders;[256] (3) gender insensitive court procedures, examples of which are: (a) requiring the plaintiff to prove that the alleged sexual conduct was unwelcome; (b) allowing a defendant to introduce evidence of the victims' "promiscuous" appearance and behavior or past sexual experiences; (c) giving lawyers, both during pre-trial proceedings and court hearings, the license to grill victims about irrelevant details of the crime and their previous sex lives;[257] and (4)

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study has uncovered some disturbing realities that perpetuate negative stereotypes of women even in the way the courts – even the Supreme Court – interpret cases involving women, as in rape cases. Gender bias has been defined as "stereotyped thinking about the nature and roles of women and men. It refers to society's perception of what is the 'worth' of women and men by distinguishing, for example, 'women's work'. Included in such perception are myths and misconceptions about the economic and social realities of women's and men's lives encountered by both sexes.

[253] See H.B. No. 799 12th Cong. 1st Sess (2002); The first bill, introduced by Las Piñas Rep. Cynthia Villar, is entitled "An Act rohibiting the Use of the Words 'Muslim' and 'Christian' or any Word Denoting Other Religious, Racial, Cultural, Regional or Ethic Affiliation to Describe Suspected or Convicted Criminals." It imposes the penalty of *arresto mayor* or a fine ranging from one thousand pesos (P1,000) to five thousand pesos (P 5,000) or both, subject to discretion of the court. See also H.B. No. 5410 12th Cong. 2nd Sess (2002); The second bill, filed by Rep. Gerry A. Salapuddin of Basilan, is a reproduction of H.B. No. 4796 filed in the previous Congress. It is entitled "An Act Prohibiting the Disclosure by the Media of the Religious Affiliation, Whether 'Muslim' , 'Christian', or any other Religion, of any Person Suspected or Convicted of Having Committed a Criminal or Unlawful Act, and Providing Penalties for Violation Thereof." It imposes a penalty of six(6) years imprisonment on those found guilty of violating the provisions of the measure, without the benefit of the provisions of the Probation Law.

[254] GENDER SENSITIVITY, *op cit. supra* note 251, at 12.

[255] *Id.* at 17.

[256] *Ibid.*

[257] *Ibid.*

legal discrimination. The book argues that there exist various discriminatory aspects of existing laws like the Civil Code, Family Code, Code of Muslim Personal laws, the Labor Code, Civil Service Code, Revised Penal Code, Customary Law; and (5) under-representation and sexist treatment of women in courts.[258]

Measures adopted by many countries including the Philippines to reduce if not totally eradicate the incidence of gender bias include: (1) gender sensitizing judges and other court personnel involved in the handling of domestic violence;[259] (2) using gender neutral and women-friendly court language[260]; (3) creating enabling mechanisms like the establishment by the State Supreme Courts of task forces to address gender bias and take on the recommendations contained in the task force reports;[261] (4) reviewing and developing policy;[262] (5) increasing oversight functions and accountability;[263] (6) strengthening ethical guidelines for the practice of the law and law enforcement professions.[264]

The first proposed measure to regulate the representation of minorities like the Muslims argues that "it is time we give justice to our Muslim brothers by not subconsciously propagating tribal or racial biases in our media."[265] The justification presented for the second bill primarily revolves on the idea that these words refer to a person's religious belief and do not in any way refer to a person's place of origin or propensity for criminal behavior. To add, a person's religious convictions cannot be an element of a crime for which a person may be a charged with, hence associating these words with criminals is inconsistent with their true meaning.[266]

After having undergone joint deliberations before the committees on Public Information and Muslim Affairs, the Villar proposal was amended to widen

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[258] *Id.* at 27

[259] *Id.* at 57.

[260] *Id.* at 58.

[261] *Ibid.*

[262] *Ibid.*

[263] *Ibid.*

[264] *Id.* at 170; *e.g.* To address the problem of gender bias, the following measures have been recommended, among other things:

1. revise laws that have strong sexist language and contents; pass new laws that can enhance women's welfare and rights;
2. review and revise policies which address the difficulties that female complainants face in obtaining prosecution;
3. use gender neutral and women-friendly court language;

strengthen the ethical guidelines for the practice of law and law enforcement professions. *Id* at 170.

[265] H.B. No. 799 12th Cong. 1st Sess (2002).

[266] H.B. No. 5410 12th Cong. 2nd Sess (2002). The proposed measure has been referred to the Committee on Public Information upon the first reading.

the scope of the prohibition. Not only does the new version declare as unlawful the use of the words "Christian" and "Muslim" but any word denoting religious, racial, cultural, regional, or ethnic affiliation to describe suspected or convicted criminals are also proscribed. The substitute bill declares that the use of such affiliations to describe criminals in mass media is a sweeping generalization that denigrates classes of people belonging to these affiliations.[267] No doubt, libertarians would bristle at such proposed laws, which, on their face, appear to be regulations based on content, and hence, are anathema to libertarian jurisprudence.

B. ACHIEVING COMMUNITY

But in a certain sense, to build a nation is to build a community; the project of nationhood on the narrative of nationhood must be a narrative of inclusion – of a greater community where people from various ethnic backgrounds, faiths and economic classes find a common meaning in existing as a democratic polity. For how do we now achieve a nation at a time when the idea of citizenship – a crucial concept in the discourse of nationhood – has been undermined? How do we sustain a democratic polity in the on-going project of nationhood when the fundamental philosophical premises upon which such polity has been built have all come to question in the postmodern onslaught?

Perhaps, we may look at such proposed legislation as a step towards rereading, indeed, a new reading, of our narrative history as a community of various peoples and traditions. If our concepts of freedom and equality are not immutable and unchanging but are, in fact, historically conditioned, it may yet be possible to look at questions of freedom and equality essentially as concerns of community. Free speech then, must be tempered by a concern for equality, with a view to enhancing our sense of community. We think that the French philosopher Paul Ricouer has illuminated certain aspects of community proposed by MacIntyre. What Ricouer has forcefully argued for the future of a European community finally able to reckon with a bloody history may also be applied to our own quest for unity as a community of diverse cultures, traditions and religions – the need for a new narrative, for a new truth-telling ethic that encourages a creative continuity between tradition and innovation. Towards this end he proposes three models for "integration of identity and alterity according to an increasing order of spiritual density."[268]

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[267] Comm. On Public Information and Committee on Muslim Affairs Joint H. Rpt. 353 12th Cong. 1st Sess. (2002).

[268] Paul Ricoeur, *Reflections on a New Ethos for Europe* in THE HERMENEUTICS OF ACTION 3 (R. Kearney, ed. 1996).

The first model, that of translation, is about cultures being able to communicate with other cultures through the "principle of universal translatability."[269] While this model appears to be particularly suited to the European situation -- a continent of many languages, each known for its particular cultural hubris -- Ricouer's is a conviction that applies to the cacophony that is the Babel of languages across cultures and continents; that is, the need to raise the "distinctive spirit of [one's] own language to the level of that of the foreign language, particularly when it is a matter of original productions which constitute a challenge for the receiving language."[270] This is not about cultural or to be more accurate, linguistic arrogance, but a question of "living with the other in order to take that other to one's home as a guest."[271]

The narrative story of one nation's historical identity as a people, argues the philosopher, must not be viewed as eternal and unchanging. Rather, it must be imagined as possible for the "recounted story" of our identity to take into account other events, or to tell other of several points of view based on the same events--the result of what he calls "the model of the exchange of memories." [272]

"If each of us receives a certain narrative identity from the stories which are told to him or her, or from those that we tell about ourselves, this identity is mingled with that of the others in such a way as to engender second order stories which are themselves intersections between numerous stories," he writes.[273]

"The identity of a group, culture, people or nation," he says, "is not that of an immutable substance, but that, rather, of a recounted story."[274] Hence there is that possibility of revising the narrative stories of cultural identities handed down from one generation to another about the same past, the same "founding events" that exert a large influence on collective memory.[275] Sometimes, we could be so intransigent as to refuse to look at the events that began our story as a nation from any other way. What we need then, says Ricouer, is an ability to recount the founding events of national history in different ways – one that is reinforced by an exchange of cultural memories, of translating one cultural experience into the

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[269] *Id.* at 4.
[270] *Id.* at 5.
[271] *Ibid.*
[272] *Ibid.*
[273] *Id.* at 7.
[274] *Ibid.*
[275] *Ibid.*

cultural categories of another[276]. "In this exchange of memories, it is a matter not only of subjecting the founding events of both cultures to a crossed reading," he says, "but of helping one another to set free that part of life and of renew which is found captive and rigid, embalmed and dead traditions."[277] Tradition, which he defines as the transmission of things said or beliefs professed, remains living only if it remains a key ingredient of reinterpretation of the narrative story of community.[278]

It is in re-interpretation where innovation – the discerning of past promises which have not been kept – comes in. "The unfulfilled future of the past forms perhaps the richest part of tradition," Ricouer argues, adding that the "liberation" of these unfulfilled promises happen when we cross memories and exchange narratives with one another.[279]

He says that "it is principally the founding events of a historical community which should be submitted to this critical reading in order to release the burden of expectation that the subsequent course of its history carried and then betrayed. The past is a cemetery of promises which have not been kept."[280]

This eventually leads to what he terms as the model of "forgiveness" – or a specific form of revision of the past and of the specific narrative identities.[281] This revision is mutual because it acknowledges the entanglement of our life stories as members of a community, one that enables us to see the "most valuable yield of the exchange of memories."[282] This calls for an understanding of the suffering of others in the past and in the present.[283] Forgiveness, as a "poetics of moral life", consists in "shattering the law of the irreversibility of time by changing the past, not as a record of all that has happened but in terms of its meaning for us today."[284] While it does not abolish the debt, it lifts the pain of the debt – that guilt which "paralyzes the relations between individuals who are acting out and suffering their own history."[285]

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[276] *Id.* at 8.
[277] *Ibid.*
[278] *Ibid.*
[279] *Ibid.*
[280] *Ibid.*
[281] *Id.* at 9.
[282] *Ibid.*
[283] *Id* at 10.
[284] *Ibid.*
[285] *Ibid.*

We can right away imagine how we can apply the question of narrative to the issue of hate speech. It does not contribute to an inclusive narrative of community. What is freedom at the expense of hurting fellow members of the community? Hate speech is a narrative of exclusion. To form a community, we must tell and live a narrative of inclusion. Yet in the practice of community we may also uphold the cause of equality. After all, there can be no true community where some members are treated as second-class citizens. This means extending Fiss' concern for values and counter-values—from a mere question of freedom or equality, we now ask, will it lead to community?

In a post-colonial society like the Philippines, the task of "reimagining the nation", to borrow from political scientist Nathan Allen Quimpo, is most urgent because of its largely disjointed history.[286] It is in fact, a history dictated upon the marginalized communities of the Moros and the Lumads by a dominant *ethnie* or ethnic community made up of Christians. Quimpo argues that we must come to grips with the multi-cultural character of the project of reimagining the nation, uprooting prejudices and misperceptions held by the dominant *ethnie* – the Christian majority[287]. We can learn from the initiative of the peace movement that has emerged in Mindanao and other parts of the country. The peace movement in Mindanao has adopted the "tri-people" approach to bring together the "peoples" of the region – the Christians, Muslims and Lumads – in an inter-cultural and inter-faith dialogue.[288]

He describes the progress made by the movement in these terms:

> In trying to fin out the roots of prejudice and conflict, the peace groups have been digging in the past, into the nation's historical memories. They have been studying, reviewing, even endeavoring to rewrite Philippine history, making it into a more inclusive one, not just the history of the dominant Christian *ethnie*, but of the Muslims and other groups as well. They have been raising profound questions related to Filipino nationhood and

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[286] Nathan Allen Quimpo, *Resolving the Mindanao Conflict and Re-imagining the Filipino Nation* 14 CONJUNCTURE 18 (2002). See also *Id.* at 20; Quimpo draws from the ideas of "modernists" like Benedict Anderson and Eric Hobsbawn and ethno-symbolists like Anthony Smith and John Huchison, to explain the problem of reimagining the nation. The former nation and nationalism as "inherently modern phenomena, the nation as an essentially modern construct and nationalism as its modern cement, both resulting from the specifically modern conditions of capitalism, industrialism, mass communications and secularism, and consciously designed by the elite to meet the requirements of modernity." The latter, meanwhile, posit the theory of the ethnic roots of nations – that "the modern nation is the modern heir of the much older and commoner ethnie (or ethnic community) and such gathers to itself all the myths, symbols and memories of premodern ethnicity in generating national attachments and forcing cultural and social networks.

[287] *Id.* at 22.

[288] *Ibid.*

> national identity and to inter-*ethnie* relations, such as: Why have the Muslims been depicted in Philippine history books as savages, bandits and *juramentados*? Why [do] Philippine media freely append the adjective Muslim but never Christian to such negative terms as kidnappers, bandits and extremists? Why is the centuries-old struggle of the Muslim people against colonialism not at all reflected in the nation's symbols? Why does the Philippines still stick to a colonial name? [289]

For the political scientist, it is quite possible therefore to "reimagine" the Filipino nation. After all, he notes that many post-colonial societies in Africa and Asia have had only 50 years or less to build themselves – that is, set up legal-political structures, provide social bonds among its citizens, create national cultures and write a national history.[290] "For a formally democratic country," he says, "it is no longer acceptable to forge national unity by mercilessly erasing cultural differences and making people 'forget' their own, different pre-national histories."[291]

Such is the "fragility" of the democratic polity, as Ricouer would put it. For the philosopher, each citizen must cease to view responsibility towards society as constitutive only of the ability to designate one's self as the author of one's acts.[292] [Such, to our mind, expresses the liberal ethic of individualism]. He argues for a more communitarian view of responsibility, which says that responsibility must be based on a "mutual recognition through which the other ceases to be an alien and is treated as my peer according to a fundamental human fellowship."[293] But an individual's sense of responsibility is no longer sufficient; "It is in the midst of others," he says, "that we become effectively responsible."[294] Indeed, citizens must adopt the conviction that for the democratic polity to survive, they must have the "will to live together."[295]

Such is the fragility of society in the postmodern era: its solidarity is constantly threatened by the explosion of various cultures, commitments and causes, which have weakened the liberal democratic vision of citizenship anchored on the idea of nation and nationalism. In the first place, we must contend with the fact that that the political society, if you will, the democratic polity, had been built

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[289] *Id.* at 23.

[290] *Id.* at 24.

[291] See Lontoc, *Randy David: Achieve Nation, Include Voiceless Communities*, UP Newsletter, February 23, 2003, at 1 and 3. See also S. JUBAIR, A NATION UNDER ENDLESS TYRANNY 187 (2nd ed. 1997)

[292] See Paul Ricoeur, *Fragility and Responsibility* in P. RICOEUR, *op. cit.* supra note 267 at 16.

[293] *Id.* at 17

[294] *Ibid.*

[295] RICOEUR, *op. cit. supra* note 277 at 20.

on conflict. "One the one hand, there is the violence of masters, who gathered lands, seized inheritances, and oppressed ethnic, cultural or religious minorities," he notes. "On the other hand, there is legal rationality. At this point of the equilibrium which characterizes the legal state, political power is defined both as force, inasmuch as it holds the legitimate violence, and as form, inasmuch as it is submitted to the constitutional rule by which the initial violence was humanized and institutionalized."[296] Ricouer remarks with a deep sense of urgency on the need of citizens to realize that the responsibility to protect the democratic polity from dissolution is not the exclusive domain of the intellectual. On the contrary, he argues that:

> It is even more important that each citizen is aware of his or her own responsibility. He or she must know that the great city is fragile, that it rests on a fiduciary bond. He or she must feel particularly responsible for then constitutive horizontal bond of the will to live together. In short, he or she must ascribe public safety to the vitality of the associate life which regenerates the will to live together.[297]

For the Christian majority belongs the task, to borrow from Bridges, to reach out in a gesture of "civic friendship"[298] to the Muslims and the Lumads, conscious of how religion has been used to subjugate others, and willing to engage in a reasoned inter-religious dialogue that promotes peace rather than discord, that advances the cause of freedom, equality, and above all, community.

Yes, reason still has a place in the dialogue for community but it is one that recognizes its own limitations, its being grounded in the experience of community itself. It is a reason cognizant that it does not have all the answers to all the questions. That it may in the end, even be proven wrong, and that truth as it is now understood, may after all, be incomplete.

C. The Judge and the New Jurisprudence

As society changes, so do its values. Over time the values of the society, which include its understanding of free speech, change, as do the interpretations of them. A problem arises in making the values retain at least their motivational depth and power to authoritatively guide humankind. Now as ever the society demands such authoritative power. The judges who act on behalf of the society make the problem even worse with their varying notions of truth, self-

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[296] *Ibid.*
[297] *Id.* at 21.
[298] BRIDGES, *supra* note 7.

realization, and pursuit of interests, let alone their willingness to be affected by different influences.

While it may not be plausible to imagine the judges to be insulated from these influences, it is at least possible to imagine them operating on some moral principles in making decisions. Judges shall not only focus their attention on ideas such as truth, pursuit of self-interest, democracy and self-realization but also on the moral justifications of these ideas. Unless this occurs, the threat to the democratic order will always come not from the the aberrant depredations of totalitarianism nor from technological dystopia but from the lack of an authoritative motivational and moral guide.

American constitutionalist Christopher L. Eisgruber says that judges are challenged to engage in "strategic judgment" – that moment when they attempt to answer "questions about what sort of institutions and devices are likely to do a good job implementing the principles that judges announce."[299] Eisgruber argues that, in the case of tradition, judges may do well to use it critically when addressing strategic issues.

For by carefully scrutinizing tradition, judges may be able to link moral principle and judicial doctrine; they may also be able to see which institutions and practices can successfully put into effect "moral constraints" on governmental power. "Some traditions may be founded upon injustice, and other traditions may have outgrown conditions that once made them useful," he writes. [300] As Justice Harlan has argued, the courts stand by the light of "the traditions from which [our country] developed as well as those traditions from which it broke,"[301] precisely because "tradition is a living thing."[302]

Dworkin, a modernist liberal, has echoed the need for judges to adjudicate on moral principles. He wanted judges "to read Kant and Rawls, think hard about moral principles, and try to integrate the reading and thinking into their decision-making."[303] Stanley Fish, a postmodernist, on the other hand, prefers judges who moralize in their decisions to judges who use abstruse legal and

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[299] C. EISGRUBER, CONSTITUTIONAL SELF-GOVERNMENT 136 (2001).
[300] *Id.* at 167.
[301] Poe v. Ullman 367 U.S. 497 (1961).
[302] *Id.* at 542.
[303] R. Dworkin, *In Praise of Theory*, 29 ARIZ. STATE L. J. 353 (1997).

political language. Fish regards the latter as academics who "*like to eat sh-t, and in a pinch, they don't care whose sh-t to eat*"[304] (Italics in the original).

The German philosopher Jurgen Habermas, coming from a discourse perspective, also stresses the inseparability of the moral from the legal. Peter Ball, discussing the Habermasian critique of the Weberian concept of the "formal rationality of law" which separates the legal from the moral imperative, has this to say:

> According to Habermas, law and morality are unbreakably linked. The formal properties of law, as described by Weber, cannot be seen as rational in a morally neutral sense, and therefore, cannot guarantee the legitimacy of law. The legality of governmental power exercised by positive law has no legitimate force of its own. What is legal is not necessarily legitimate. First, the systematization of law by professional jurists contributes to legitimacy only when it takes moral justifications into account. In positive law, social norms have lost their validity based on custom. Because of this, legal norms now need to be founded on moral principles. Second, general and abstract laws are also dependent on moral principles for their legitimate validity; for instance, treating equal cases as equal and unequal as unequal. And third, the judiciary does not apply laws blindly. In interpreting laws, moral views are involved. Decision-making in concrete cases is not only a matter of black-letter law, but (always) of normative considerations as well. Positive law should, therefore, take this inherently moral dimension into account for its legitimacy.[305]

And yet the search for the authoritative may or may not be, as Richard Rorty would put it, a "search for any universal or bindingly, objectively authoritative grounds for moral principles."[306] It must at the least be a search for that rational inheritance carried over by those who have a commitment to cultural history and to the concern of the community. While this may not involve a metaphysically-rooted moral principles, judges should not shy away from moral dialectics in judicial decision-making. Moral open-mindedness is required of them.

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[304] STANLEY FISH, THERE'S NO SUCH THING AS FREE SPEECH, AND IT'S A GOOD THING TOO, 278 (1994)

[305] Peter Bal, *Discourse Ethics and Human Rights in Criminal Procedure*, in HABERMAS, MODERNITY AND LAW 73 (Mathie Deflem, ed. 2001)

[306] R. RORTY, UTOPIA 259 (1987)