DISCOURSE ETHICS AND FREE SPEECH JURISPRUDENCE

DISCOURSE ETHICS AND FREE SPEECH JURISPRUDENCE

BY:

COLIN PATRICK FARRELLY, B.A.

A Thesis

Submitted to the School of Graduate Studies

in Partial Fulfilment of the Requirements

for the Degree

Master of Arts

McMaster University

MASTER OF ARTS (1996) McMaster University
(Philosophy) Hamilton, Ontario

TITLE: Discourse Ethics and Free Speech Jurisprudence

AUTHOR: COLIN PATRICK FARRELLY, B.A.(McMaster University)

SUPERVISOR: Professor W.J. Waluchow

NUMBER OF PAGES: vii, 78

CONTENTS

ABSTRACT

This thesis is an essay in normative jurisprudence. As such, it shares many of the concerns of moral and political philosophy. My approach to law is not a 'descriptive' endeavour, as is typical of the approach taken by legal positivists. Following Professor John Finnis, my aim is to "assist the practical reflections of those concerned to act, whether as judges, or as statesman, or as citizens". The natural law tradition is concerned primarily with the moral obligation aspect of law. That is, law in the 'binding of conscience' sense. Thus, a theme that dominates most natural law theories is reason. Rationality is a criterion for law ('law' in this sense). I argue that laws *ought* to be moral. This means that I must determine what is 'moral'. To accomplish this, I turn to the pragmatics of conversation (Jurgen Habermas). The practice of discourse has, by its very nature, a moral element. Or, to put it another way, discourse embraces a 'rationality'. This 'rationality' can shed light on what is 'moral'. If I had to summarise my argument in one sentence it would be as follows: **one can infer rules for some just laws from the rules of discourse.**

One of the primary goals of this paper is to refute 'ethical relativism' or 'subjectivism'. Some human rights, I argue, are not the mere personal preference of Western liberal-democracies, but are the implicit presuppositions of discourse. In attempting to show that a theory of natural law can find answers to difficult questions, I try to show that the ethics of discourse can guide us in considering the issue of freedom of expression. Should hate speech and pornography be censored? In assessing what the "common good" of a human community is, I argue that Canada's anti-hate speech legislation and anti-obscenity laws could undermine the democratic commitment.

PREFACE

Man, born in a family, is compelled to maintain society, from necessity, from natural inclination, and from habit. The same creature, in his farther progress, is engaged to establish political society, in order to administer justice, without which there can be no peace among them, nor safety, nor mutual intercourse. We are, therefore, to look upon all the apparatus of our government, as having ultimately no other object or purpose but the distribution of justice...

David Hume- ***On the First Principles of Government, 1741***

Jurisprudence is the theory of the rules by which civil governments ought to be directed. It attempts to shew the foundation of the different systems of government in different countries and to shew how far they are founded in reason.

Adam Smith - ***Lectures on Jurisprudence*, 1762**

If one accepts Adam Smith's definition of jurisprudence then the following project is an essay in jurisprudence. It could just as easily be labelled a work in moral or political philosophy. What it is, I believe, is a development of contemporary theories of natural law. In *Natural Law and Justice,* Lloyd Weinreb criticises contemporary theories of natural law, like those put forth by John Finnis and David Richards. Weinreb argues that "such theories fail on their own terms because the principles on which they rely, however widely accepted (in Western societies -?), do not meet the test of objective validity. Their 'objectivity' breaks down as soon as they are applied to a problem for which there is not a generally accepted solution..."[1]

This work is an attempt to challenge Weinreb's claim. I will suggest how a contemporary theory of natural law might attempt to find solutions to difficult issues, like free speech. Using the pragmatics of conversation as my basis, I shall argue that a theory of natural law could incorporate part of Habermas' moral philosophy in an attempt to assess free speech jurisprudence. This project is divided up into two parts. The first can be read by itself as an attempt to make some contribution to natural law theory with the help of Habermas' discourse ethics. Chapter One deals with the type of 'approaches' legal philosophers take to answer the question 'Is X law?'. Chapter Two deals with Habermas' discourse ethics and it is in this chapter that I attempt to forge some new ground in natural law by premising reason on the pragmatics of conversation. My aim is not to provide an account of a whole theory of natural law based on discourse ethics, but on how one might incoporate discourse ethics into a natural law theory.

One of the benefits of living in a liberal-democracy is that it enables one the freedom to challenge and criticise the wisdom of those in power. Part II of this work is such a critique. What I critique is the recent trend in Canadian free speech jurisprudence that appears to move away from the idea of democracy as a spontaneous order. In Chapter

---

[1]*Natural Law and Justice,* p.122

Three I articulate a conception of the 'democratic commitment' which is founded on the idea that a democracy must allow an indefinite and unpredictable number of positions to compete for public support. Chapter Four is a critique of the court's decisions in *Keegstra*[2], and *Butler*[3]. What I hope my analysis of the free speech issue accomplishes is that it shows how a supporter of natural law might attempt to find answers to issues that do not have an easy solution.

During my six years at McMaster I have had the pleasure of getting to know a number of people with whom I am greatly indebted for their guidance and advice in developing this project. Wil Waluchow, my thesis supervisor, first introduced me to legal philosophy and was instrumental in both the founding of this project and its completion. Evan Simpson, my second reader, helped with the tremendous task of trying to understand Habermas' moral philosophy. Anyone who has read Habermas will appreciate how difficult this task can be. I would also like to thank my third reader Gary Madison. Gary's commitment to human rights served as a constant source of inspiration and he took much time and effort to help me develop my ideas. I am also very grateful to David Dyzenhaus (University of Toronto) and Rhoda Howard (Director of McMaster's Theme School on International Justice and Human Rights) who read drafts of chapter two and provided useful insights. Chapter two is part of a revised paper I presented to the multi-disciplinary Graduate Student Conference on "Confronting ethnic Conflict in the Modern Nation State" at the University of Waterloo.[4] I am grateful to the organisers of the conference

---

[2]This case deals with hate speech. Again, my contention will be that the courts decision to uphold anti-hate legislation is problematic because such speech does not present a "clear and present" danger.

[3]This case deals with sexual expression. I will rely, in part, on Nadine Strossen's (*Defending Pornography*...(1995)) argument against Catherine MacKinnon's position. Strossen puts forth a convincing argument that shows that censorship that is supposed to "protect women" actually does more harm to women's rights.

[4]This paper, entitled "Discourse Ethics and Human Rights", will soon be published in a volume of the proceedings of the conference.

and to those who participated in it for allowing me to test my argument in the 'free market of ideas'. I would also like to thank my parents for their support over the years. And finally to my wife Lori, who not only keeps me on my toes by constantly challenging my capacity for debate, but also provided the faith and love that saw me through many stressful nights.

CHAPTER ONE

ON THE DIFFERENT METHODOLOGIES OF SOCIAL INQUIRY

It is often supposed that an evaluation of law as a type of social institution, if it is to be undertaken at all, must be preceded by a value-free description and analysis of that institution as it exists in fact. But the development of modern jurisprudence suggests, and reflection on the methodology of any social science confirms, that a theorist cannot give a theoretical description and analysis of social facts unless he also participates in the work of evaluation, of understanding what is really good for human persons, and what is really required by practical reasonableness.

John Finnis, ***Natural Law and Natural Rights***.

INTRODUCTION

One might think it peculiar to begin a comprehensive excursion into legal philosophy with a whole chapter entitled "On the Different Methodologies of Social Inquiry". But one does not have to delve deeply into the literature of legal philosophers to realise that the issue of 'method' is momentous and perhaps partly to blame for some of the confusion that surrounds various 'competing' legal philosophies. This chapter is an attempt to outline the various ways philosophers have approached law, and at the same time provide the reader with a clear idea of the direction that this project will take.

As mentioned above, many legal philosophers (legal positivists and natural lawyers alike) stress the type of method or approach they take to the philosophy of law. In the preface to *The Concept of Law*, H.L.A. Hart describes his project as an "essay in descriptive sociology"[1]. Ronald Dworkin argues that "a conception of law is a general, abstract interpretation of legal practice as a whole. It offers to show that practice in its best light, to deploy some argument why law on that conception provides an adequate justification for coercion."[2] John Finnis, who, in *Natural Law and Natural Rights*, sets aside a whole chapter to the issue of "Evaluation and Description of Law" remarks:

> A social science, such as analytical or sociological jurisprudence, seeks to describe, analyse, and explain some object or subject-matter. This object is constituted by human actions, practices, habits, dispositions, and by human discourse. The actions, practices, etc., are certainly influenced by the 'natural' causes properly investigated by the methods of the natural sciences, including a part of the science of psychology. But the actions, practices, etc., can be fully understood only by understanding their point, that is to say their objective, their value, their significance or importance, as conceived by the people who performed them, engaged in them, etc.[3]

---

1 *The Concept of Law*, p.v

2 *Law's Empire*, p.139

3 *Natural Law and Natural Rights*, p.3

In order to provide some clarity and comprehension to the issue of 'how do we approach the philosophy of law?' I shall briefly outline three approaches. I do not offer a critique of these three approaches. Each approach has its own advantages and disadvantages. I only mention them to show how my approach to law is different from that of others, so as to help the reader see the perspective from which I will be functioning. The first approach is that of legal positivism, perhaps best represented by Hart. This approach is that of descriptive sociology. The second approach is what one might loosely call an 'interpretive' approach. This approach is characterised by Dworkin. And the third approach, which this project will take, is Finnis' approach- "primarily to assist the practical reflections of those concerned to act, whether as judges or as statesman or as citizens."[4] I will now explain how these three approaches to law are distinct.

DESCRIPTIVE SOCIOLOGY

The first two of these approaches, as represented by Hart and Dworkin, depict a deeper philosophical difference that is much wider than the scope of philosophy of law. It is really a difference in the philosophy of social science. Without going too deeply into Hart's account of legal positivism, one could summarise his perspective as "that of an external observer out to describe and analyse a particular kind of social system, and the concepts in terms of which we conceive of it, in a philosophically illuminating way."[5] Seeking to provide a descriptive-explanatory account of law, Hart argues that it is "in no sense a necessary truth that laws reproduce or satisfy certain demands of morality, though in fact they have often done so."[6] The following rather lengthy quotation from Weinreb's

---

[4] *Natural Law and Natural Rights*, p.18

[5] *Inclusive Legal Positivism*, p.5

[6] *The Concept of Law*, p.142

Natural Law and Justice effectively articulates an explanation of the separation thesis[7], which is usually taken to be the central thesis of legal positivism:

> Legal positivists agree that positive law is an appropriate subject for moral inquiry and that a law inconsistent with overriding moral principles does not, simply because it is the law, obligate one to comply. On the contrary, one may have a moral obligation not to comply. For that reason, legal obligation and moral obligation have to be distinguished. Nevertheless, they assert, there is no more basis for saying that an immoral positive law is not a law than there is for saying that a causal law of nature is not a law unless it respects considerations of justice. If a rule is enforced and effective and is part of the complex body of rules that compose a legal system, then surely it is law. The questions whether it is good law and whether one is obligated to comply are of the greatest importance; but they do not arise until one has determined what the law is. To assert otherwise grossly confuses what is the case with what (one believes) ought to be the case and transforms a serious and substantial moral issue into a trivial and misleading controversy about the use of a word.[8]

Unlike evaluative accounts of law, descriptive-explanatory accounts do not take as their primary concern the moral desirability of law in a specific legal system. Instead they are concerned with such questions as: What counts as 'valid law' in a legal system? What counts as a legal system? Thus, when attempting to provide a descriptive-explanatory theory of law, legal positivists distance themselves from their own evaluative concerns about law. Wil Waluchow explains this point in the following passage from *Inclusive Legal Positivism*:

> Often a bit of 'distance' allows one to see things for what they really are, as opposed to what one's ingrained beliefs, assumptions, and biases lead one to think that they are. In the everyday sense of the term, distance sometimes provides a bit more 'objectivity'.[9]

---

[7] John Austin's assertion that 'the existence of law is one thing, its merit or demerit is another.'

[8] *Natural Law and Justice*, p.99

[9] *Inclusive Legal Positivism*, p.29

THE INTERPRETIVE TURN

Ronald Dworkin's 'interpretive' approach to legal philosophy is not as easy to characterise as Hart's descriptive-explanatory approach. Part of this reason is due to the fact that Dworkin's interpretive approach to law is part of a recent trend that has occurred in other disciplines in the social and natural sciences. Rainbow and Sullivan, in *Interpretive Social Sciences*, have labelled this trend the 'interpretive turn'. The 'interpretive turn' is a recent phenomenon (1970's) that "inspires practitioners and students of social inquiry to violate the positivist taboo against joining evaluative concerns with descriptions of fact."[10] Jurgen Habermas, in *Moral Consciousness and Communicative Action*, explains part of the reason for the 'interpretive turn':

> It became evident that the conventional social sciences were unable to make good their theoretical and practical promises. For example, sociological inquiry failed to live up to the standards set by Parson's comprehensive theory, Keynessian economics proved ineffective at the level of practical policy, and in psychology, the claim of learning theory to provide a universal explanatory model came to nought- and it had been hailed as a text book example of an exact behavioural science. These failures opened the door for alternative approaches, the later Wittgenstein, philosophical hermeneutics, critical theory etc. What these approaches had to recommend then was not that their superiority had been established but that they offered alternatives to the prevailing objectivism.[11]

The 'interpretive turn' can be seen in the approaches theorists have taken in disciplines like political science, psychology, history, the natural sciences and, of course, legal theory. Charles Taylor, in "Interpretation and the Sciences of Man", develops and promotes a 'interpretive' approach to the human sciences. It is an approach that is distinguished from the 'rationalist' and empiricist' schools of thought. The main departure

---

[10] *Interpretive Social Science*, p.1

[11] *Moral Consciousness and Communicative Action*, p. 23

from these schools of thought is Taylor's claim that meanings "are not just in the minds of actors but are out there in the practices themselves; practices which cannot be conceived as a set of individual actions, but which are essentially modes of social relations, or mutual action."[12] Meanings, for Taylor, are intersubjective (as opposed to subjective or objective).

If the social sciences are premised on the empiricist tradition, and thus attempt to construct social reality as consisting of 'brute data' (data received from the 'outside'), then intersubjective and common meanings are excluded, argues Taylor. He stresses the practical benefits of abandoning the "verification model". This point is illustrated by showing that this new approach to disciplines like political science open "fruitful avenues" and help us understand problems of our day. Traditional political science, when it analyses something like voting, neglects the fact that the "practice of voting has to do in part with the vocabulary established in a society as appropriate for engaging in it or describing it."[13] Thus, points out Taylor, intersubjective meanings (that is, "ways of experiencing action in society which are expressed in the language and descriptions constitutive of institutions and practices"[14]) are neglected in mainstream political science.

I remarked earlier that Dworkin's approach to the philosophy of law marked the 'interpretive turn' in the philosophy of law. So let us now turn to his account of law, as expounded in *Law's Empire*. For Dworkin, law is an "interpretive" enterprise. More specifically, legal practice is an instance of constructive interpretation: "Roughly, constructive interpretation is a matter of imposing purpose on an object or practice in order to make it the best possible example of the form or genre to which it is taken to

---

12 *Interpretive Social Sciences*, p.7
13 *ISS*, p.56

14 *ISS*, p.59

belong."[15] Thus, for Dworkin, his 'interpretive' approach to the philosophy of law seeks to put the legal practice in its best 'moral' light. He remarks:

> I offer this general and very abstract characterisation of interpretation: it aims to make the object the best it can be. So an interpretation of *Hamlet* tries to make of the text the best play it can be...[16]

This means that, unlike the descriptive-explanatory theory of Hart, that attempts to explain what law is, Dworkin's account is evaluative. A conception of law then, he argues, "must explain how what it takes to be law provides a general justification for the exercise of coercive power by the state, a justification that holds except in special cases when some competing argument is specially powerful."[17]

Dworkin's theory of law, or justification for the use of force, is law as integrity. I shall now attempt to summarise the basic tenants of law as integrity. But before I do that, one should be aware of another major difference between Hart's and Dworkin's theory of law. Hart's "descriptive" approach makes a distinction between a theory of law, "which seeks to describe and explain the nature of law and its various relationships with morality, custom, the use of force and so on,"[18] and adjudication (a theory about how judges actually decide or ought to decide cases). Dworkin makes no such distinction:

> For Dworkin, a legal theorist's job is not unlike that of a judge who sets out to interpret a statue or a line of precedents. Both must attempt to make their objects of study the best they can be, to find in them as much moral value, i.e. moral justification, as they can. Both the judge and the legal theorist are trying to find something that licenses state coercion. The judge wants to know what justifies coercion in this particular case before him; the legal theorist wants to know what, in general, licenses coercion in all (or most) cases coming before the courts of a particular legal system. So according to Dworkin legal theory is not

---

[15] *Law's Empire*, p.52
[16] *Law's Empire*, p.77
[17] *Law's Empire*, p.190
[18] *Inclusive Legal Positivism*, p.40

> essentially different from adjudication: it is just that the former is more general and encompasses more material than the latter.[19]

Now let us turn to Dworkin's law as integrity. He argues that law as integrity is different from conventionalism, (the position that statements of law are backwards-looking, factual reports), and different from legal pragmatism (the position that legal statements are forward looking and instrumental). Law as integrity is the view that "legal claims are interpretive judgements and therefore combine backward and forward looking elements; they interpret contemporary legal practice seen as an unfolding political narrative.[20] Dworkin compares a judge's task to that of an author in a chain novel. The judge's decision, like the author's continuation of the chain novel, must be "drawn from an interpretation that both fits and justifies what has gone before, as far as possible."[21] The interplay between fit and justification is complex in Dworkin's theory, but he attempts to illuminate this relationship by creating an imaginary super-judge called Hercules. When deciding cases, Judge Hercules will consider the various candidates for the *best* interpretation of the law. In deciding which interpretation puts the legal practice in its best "moral" light, Judge Hercules is guided by the principles of law as integrity:

> Law as integrity asks judges to assume, so far as this is possible, that the law is structured by a coherent set of principles about justice and fairness and procedural due process, and it asks them to enforce these in the fresh cases that come before them, so that each person's situation is fair and just according to the same standards. That style of adjudication respects the ambition integrity assumes, the ambition to be a community of principle.[22]

---

19 *Inclusive Legal Positivism*, p.24

20 Dworkin's reference to narrative is on of the reasons why I feel his theory is part of the 'interpretive turn'. Narrative is major theme that 'interpretive' theorists often stress.

21 *Law's Empire*, p.238

22 *Law's Empire*, p.243

Hercules is the model judge whom human judges strive to emulate, as far as is humanly possible. In deciding cases, law as integrity requires a judge to be both backward and forward looking. "A successful interpretation must not only fit [the institutional history] but also justify the practice it interprets".[23] A critic might object and argue that the complex relationship of fit and justification might be explored by a judge when faced with a difficult case, but surely "no judge needs to consider questions of fit and political morality to decide whether someone must pay his telephone bill".[24] Thus this critic might argue that perhaps a judge has two methods, one for simple cases, maybe something like conventionalism, so that in a simple case the judge does not have to engage in Dworkin's search for the "best" interpretation. In such a case they judge simply looks backwards on past decisions and decides that "yes, people must pay their telephone bill." The second method, Dworkin's more complex interpretive method, could thus be saved and used sparingly for hard cases. But Dworkin does not accept this prospect:

> Hercules does not need one method for hard cases and another for easy ones. His method is equally at work in easy cases, but since the answers to the questions it puts are then obvious, or at least seem to be so, we are not aware that any theory is at work at all. [25]

THE MORAL EVALUATIVE APPROACH

In the preface to *Natural law and Natural Rights* Finnis notes his indebtedness to the classical thinkers Plato, Aristotle and Aquinas. As such, I think it would be useful to begin an exposition of Finnis' theory of natural law by briefly mentioning some of the

---

[23] *Law's Empire*, p.285
[24] *Law's Empire*, p.354
[25] *Law's Empire*, p.354

classical authors' comments on law. This might be beneficial because many of the themes of their works re-emerge in Finnis' theory. But I will limit my discussion here to some preliminary words on Aquinas' theory of natural law.

AQUINAS

Aquinas' approach to law is firmly established in the teachings of Christianity. One must comprehend the role of God in Aquinas' thought if one wants to understand his philosophy of law. Let us begin with the three criteria Aquinas puts forth for X to be considered a law:

(1) It must be in accordance with reason.
(2) It must be for the common good.
(3) It must be promulgated by him who has care for the community.[26]

It is obvious, from these criteria, that the one dominant aspect of natural law theories is the relationship they posit between law and morality. Aquinas' whole conception of law is premised on the believe that there exists an "objective law", i.e. law according to God's plan, which human law must 'reflect' if it is to bear the title of law. Aquinas refers to God's plan as the Eternal law. Thus, he remarks, "the natural law is nothing else than the rational creature's participation of the eternal law."[27]

The important issue that I think warrants extra consideration here is Aquinas' view of human law. How are we, as mere mortals, to grasp these 'objective' laws? By reason, remarks the Aristotelian disciple. For example: "One must not kill may be derived as a conclusion from the principle that one should do harm to no man."[28] But Aquinas does acknowledge the fact that not all human laws are derived by strict deduction. In cases such as deciding when the deadline for filling income tax returns without suffering

---

[26] *Philosophy of Law*, (excerpts from *Summa Theologica*) p.14
[27] *Philosophy of Law*, p.16
[28] *Philosophy of Law*, p.22

sanctions must be, there is no one answer demanded by God, but it is the responsibility of the legislator to make **a** decision. And in so doing, his decision must be for the common good and promulgated to the community.

The fact that Aquinas' conception of law is premised on a belief in God, and an eternal law that humans must obey, I think that it is fair to label it an 'objectivistic' conception of law. That is, Aquinas believes that there are absolute truths that human laws ought to (and typically do) mirror. It is not up to the people of the community to arbitrarily decide whether a certain act really is good or bad, for such a situation would be 'subjectivistic'. What is 'just' and 'unjust' is determined by eternal law and is revealed to us by reason. The legitimacy of law then, on this view, has to do with the moral value of the specific law under question. "Laws formed by men are either just or unjust. If they be just, they have the power of binding in conscience from the eternal law whence they are derived, according to Prov. viii. 15: By Me kings reign, and lawgivers decree just things."[29]

PRACTICAL REASONABLENESS

Finnis begins his theory of natural law by listing the three principles of natural law. The first principle is "there is a set of basic practical principles with indicate the basic forms of human flourishing as goods to be pursued and realised, and which are in one way or another used by everyone who considers what to do, however unsound his conclusions."[30] Finnis' second principle of natural law is "there is a set of basic methodological requirements of practical reasonableness (itself one of the basic forms of human flourishing) which distinguish sound from unsound practical thinking and which ...provide the criteria for distinguishing between acts that are reasonable-all-things

---

[29] *Philosophy of Law*, p.23
[30] *Natural Law and Natural Rights*, p.23

considered and acts that are unreasonable-all-things considered"[31]. Thus one is able to formulate the third principle of natural law which is a set of general moral standards.

An important point that Finnis stresses about his natural law theory is that he does not arrive at answers to what is good by induction,[32] but by reason.

> When discussing what is good, to be pursued, intelligence is operating in a different way, yielding a different logic, from when it is discerning what is the case (historically, scientifically, or metaphysically);... By a simple act of non-inferential understanding one grasps that the object of the inclination which one experiences is an instance of a general form of good, for oneself (and others like one).[33]

While Finnis echoes much of what Aquinas argued for in his theory of natural law, Finnis' theory does not depend on the existence of God. Instead, Finnis basis his conception of natural law on 'practical reasonableness'. And this is a theme that runs through the Aristotelian tradition, as Finnis notes- "Someone who lives up to the requirements of practical reasonableness is thus Aristotle's *phronimos*; he has Aquinas' *prudentia*; they are requirements of reasonableness or practical wisdom, and to fail to live up to them is irrational."[34] Finnis provides a rather lengthy list of "The Basic Requirements of Practical Reasonableness":

1. The first requirement is what John Rawls calls a rational plan for life.
2. There must be no leaving out of account, or arbitrary discounting or exaggeration of, any of the basic human values.
3. The basic goods are human goods*, and can in principle be pursued, realised, and participated in by any human being

---

31 *Natural Law and Natural Rights*, p.23

32 "They are not inferred from facts", p.33

33 *Natural Law and Natural Rights*, p.34

34 *Natural Law and Natural Rights*, p.102

* The basic goods are life, knowledge, play, aesthetic experience, sociability (friendship), practical reasonableness and religion. p.86

4. One must have a certain detachment from all the specific and limited projects which one undertakes.
5. One must establish a balance between fanaticism and dropping out.
6. One brings about good in the world (in one's own life and the lives of others) by actions that are efficient for their (reasonable) purposes.
7. One should not choose to do any act which *of itself does nothing but* damage or impede a realisation or participation of any one or more of the basic forms of human good.
8. One should favour and foster the common good of one's communities.
9. One should not do what one judges or thinks of 'feels'-all-in-all should not be done. That is to say one must act 'in accordance with one's conscience'.[36]

JUSTICE

As for justice, Finnis argues that it has three elements. The first element is **other-directedness**. "Justice has to do with one's relations and dealings with other persons, it is 'inter-subjective', or inter-personal. There is a question of justice and injustice only where there is a plurality of individuals and some practical question concerning their situation and/ or interactions vis-à-vis each other."[37] This element is important to note because it is also given primacy in later chapters when I discuss the reciprocity inherent among participants of discourse. Finnis' second element of justice is **duty**. Duty is: "what is owed or due to another and correspondingly of what that other person has a right to."[38] **Equality** (or proportionality, or balance) is the third element of Finnis' conception of justice. These three requirements of justice- other-directedness, duty and equality- are, for Finnis, the "concrete implications of the basic requirements of practical reasonableness that one is to favour and foster the common good of one's communities."[39]

---

36 *Natural Law and Natural Rights*, Ch.V
37 *Natural Law and Natural Rights*, p.161
38 *Natural Law and Natural Rights*, p.162
39 *Natural Law and Natural Rights*, p.164

OBLIGATION

Obligation is an important theme that must be carefully examined in order to understand the fundamental difference between a natural lawyer's discussion of a law as obligatory and a positivist's usage of the term. When a natural lawyer says that an unjust law is no law at all, it might sound as though he is making a contradiction. But one must distinguish when one is discussing law in the positivist sense or in the 'binding of conscience' sense. Ronald Dworkin notes, in *Law's Empire*, that legal language is flexible.[40] Weinreb captures the sense of 'law' that natural lawyers usually mean when discussing law in this distinct way:

> Sharing the concerns of political philosophy generally but approaching it from the side of law, natural law's subject is the moral analysis of the positive law. True to their origin, the principle element of all theories, which leads to their association with natural law, is that the idea of law has moral content. One way or another, explicitly or not, they assert that a rule of positive law that fails to conform to overriding, fully general moral principles, and is for that reason not obligatory, is not truly *law* at all. Law is different from threats or commands; the difference is of the essence of law and is manifest in its obligatory character.[41]

Finnis, in his chapter on "Unjust Laws", posits four senses of 'obligation to obey the law'.

> (i) empirical liability to be subjected to sanction in event of non-compliance.
> (ii) legal obligation in the intra-systemic sense ('legal obligation in the legal sense') in which the practical premise that conformity to law is socially necessary is a framework principle insulated from the rest of practical reasoning.
> (iii) legal obligation in the moral sense (i.e. legal obligation that presumptively is entailed by legal obligation in the intra-systemic or legal sense.)
> (iv) moral obligation deriving not from the legality of the stipulation-of-obligation but from some 'collateral' source.[42]

---

[40] *Law's Empire*, p.104-105
[41] *Natural Law and Justice*, p.99

For the natural lawyer it is the sense of 'moral obligation' that is of primary concern. For it is only those positive laws that are in accordance with 'practical reasonableness' that create a moral obligation on us. The one possible exception to this is, as Finnis notes, when there is a moral obligation to conform to some unjust laws in order to uphold respect for the legal system as a whole.

RULE OF LAW

Anyone who has an interest in political philosophy is bound to come across the term 'rule of law'. What exactly does this term mean? Finnis says that the 'rule of law' is the name commonly given to the state of affairs in which a legal system is legally in good shape. Finnis considers a legal system to be in good shape if its rules are prospective, not retroactive. The rules must also be possible to comply with. They must be promulgated, clear, coherent and stable enough to allow people to be guided by their knowledge of the content of the rules. Decrees and orders that apply to relatively limited situations must also be promulgated, clear, stable, and coherent. And finally, the 'rule of law' requires that those in authority are accountable for their compliance with rules applicable to their performance and administer the law consistently and in accordance with its tenor.[43]

HOW FINNIS' APPROACH IS NOT AT ODDS WITH THE SEPARATION THESIS

Finnis' approach to natural law does share some similarities with both Hart's 'descriptive' and Dworkin's 'interpretive' approaches. As I pointed out earlier, Finnis' approach is not like Hart's "descriptive sociology"; but is intended "primarily to assist the practical reflection of those concerned to act." And so while Finnis and Hart may have different points of emphasis, (i.e. for Finnis, what counts as a 'moral' law, for Hart, what

---

42 *Natural Law and Natural Rights*, p.354
43 *Natural Law and Natural Rights*, p.270

counts as a 'valid' law) their theories are not opposed. Finnis points out that his "undertaking cannot proceed without a knowledge of the whole range of human possibilities and opportunities, inclinations and capacities, a knowledge that requires the assistance of descriptive and analytical social science."[44] Furthermore, Finnis' theory of natural law does not conflict with the main tenet of legal positivism, that is, the separation thesis. This is just one of the appeals of Finnis' approach. This is why legal positivists, like Neil MacCormick, find Finnis' theory of natural law attractive:

> Finnis' theory of natural law... does not deny the thesis of the separation of positive law from morality... For Finnis, the classical doctrine is not that there is a simple and universal all-or-nothing moral criterion for the validity of every law in every legal system, transcendentally superadded to whatever may be each system's explicit internal criteria of validity of law... In being defective law, an unjust enactment is, in a practical moral perspective, at best defectively obligatory, whether or not in the perspective of legal analysis it is a valid imposition of legal obligation.[45]

Finnis' approach to law shares some similarities with Dworkin's 'interpretive' approach (i.e. both theories are evaluative). Both theorists are concerned with the moral content of law. Like Dworkin's attempt to "justify coercion", Finnis remarks:

> In relation to law, the most important things for the theorist to know and describe are the things which, in the judgement of the theorist, make it important from a *practical* viewpoint to have law- the things which it is, therefore, important in practice to 'see to' when ordering human affairs.[46]

But there are some important differences that separate Finnis' approach to natural law from Dworkin's. Finnis' evaluative theory is premised on his moral philosophy of

---

[44] *Natural Law and Natural Rights*, p. 18-19

[45] "Natural Law and the Separation of Law and Morals", p.108. (from Robert George's *Natural Law Theory*.)

[46] *Natural Law and Natural Rights*, p.16

practical reasonableness. He is primarily concerned with the *moral obligation* of law, and what laws *ought* to accomplish. Dworkin's 'interpretive' theory is a theory of legal adjudication. Legal positivists have characterised Dworkin's theory as that of 'the lawyer's perspective'.[47] This is quite different from Finnis' perspective, which could be called that of 'the moral philosopher's perspective'.

This concludes this chapter and our overview of the "Different Methodologies of Social Inquiry". The three approaches examined here are in no way an exhaustive list, but they do represent three different ways a theorist can approach a discipline like law (or other areas of social inquiry). The third of these approaches, -Finnis' moral evaluative approach- is the one that the present work shall focus on. This is the reason why Finnis' account is the theory I have spent the majority of time discussing. In the next chapter I will attempt to strengthen a Finnisian approach to natural law by exploring the possibilities of incorporating Habermas' "discourse ethics" into a theory of natural law. Then we will be prepared to meet the arduous task of tackling the "free speech" debate.

---

[47] See Raz, "The Problem About the Nature of Law" (in *University of Western Ontario Law Review*, 1983) and Waluchow- *Inclusive Legal Positivism*, p.32

CHAPTER TWO

DISCOURSE ETHICS AND HUMAN RIGHTS

Were we to reflect on this fundamental fact about human existence, [man's ability to engage in the art of discourse], we would, perhaps, be able to discover the ultimate principles of a properly human existence, the ultimate values which should regulate human affairs. The following overall tactic thus recommends itself. We shall argue that the various values defended by liberalism are not arbitrary, a matter of mere personal preference, nor do they derive from some natural law existing independently of the reasoning (communicative) process, such that they would be discernible only by metaphysical insight into the "nature of things". Rather, they are nothing less and nothing more than what could be called the operative presuppositions or intrinsic features and demands of communicative rationality itself.

G.B. Madison, ***The Logic of Liberty***

The aim of this chapter is to develop a conception of morality which can function as a guide to what some laws *ought* to accomplish. To do this, I shall rely, in part, on the moral philosophy put forth by Jurgen Habermas in *Moral Consciousness and Communicative Action*. This chapter consists of two parts. In the first part I shall outline the main tenets of Habermas' argument, as found in *Moral Consciousness and Communicative Action*. I shall suggest how one might incorporate Habermas' 'discourse ethics' into a substantial natural law theory. (That is, a theory which is concerned with the proper ends to be sought through legal rules). This will involve explaining and expanding on Lon Fuller's position (*The Morality of Law*), in an attempt to base some part of the "external morality of law" on the ethics of discourse. Thus, if I am successful, I hope to persuasively show that some human rights are not just the 'personal preference' of Western liberal democracies, but are the implicit presuppositions of discourse.

HABERMAS AND 'DISCOURSE ETHICS'

Let us now begin by turning to Habermas' argument, as presented in *Moral Consciousness and Communicative Action*. Perhaps the most important distinction a reader of Habermas must be aware of is that between cognitivism and non-cognitivism. In David Richards' *The Moral Criticism of Law*, the following definitions are given to these two positions:

> Cognitivism: That position in moral philosophy which holds that sentences using ethical terms (such as "morally right" and "morally good") express propositions or beliefs which can be truly or falsely asserted of actions, people, institutions and the like.
>
> Noncognitivism: That position in moral philosophy which holds that sentences using ethical terms (for example "morally right" and "morally good") do not express propositions or beliefs at all, and accordingly cannot be assessed in terms of truth or falsity.[1]

---

[1] *The Moral Criticism of Law*, (Glossary) p.268-269

Habermas' approach to moral philosophy is a cognitivist approach. Unlike emotivists like C.L. Stevenson, who argue that "ethical judgements are used not to indicate facts but to create an influence"[2], Habermas holds the view that "normative rightness must be regarded as a claim to validity that is analogous to a truth claim"[3]. He attempts to refute 'subjectivism' by showing that his moral principle is "not just a reflection of the prejudices of adult, white, well-educated, Western males of today."[4]

One of the main tasks that faces cognitivist ethics is to answer the question, how do we justify normative statements? Immanuel Kant, for example, attempted to accomplish this with his Categorical Imperative: "Act as though the maxim of your action were by your will to become a universal law of nature."[5] According to McCarthy, Habermas reformulates Kant's ethics by grounding moral norms in communication:

> Habermas' idea of a "discourse ethics" can be viewed as a reconstruction of Kant's idea of practical reason in terms of communicative reason. Roughly speaking, it involves a procedural reformulation of the Categorical Imperative: rather than ascribing to others as valid those maxims I can will to be universal laws, I must submit them to others for purposes of discursively testing their claim to universal validity.[6]

Language is an important theme that dominates much of Habermas' work. As Thomas McCarthy notes: "As early as 1965, in his inaugural lecture at Frankfurt

---

2 "The Emotive Meaning of Ethical Terms", p.16

3 *Moral Consciousness and Communicative Action*, p.197 Habermas' stipulation that normative righteousness must be regarded as a claim to validity that is analogous to a truth claim makes his cognitive approach less strict than that defined by Richards.

4 *Moral Consciousness and Communicative Action*, p.197

5 *Foundations of the Metaphysics of Morals*, (ed. by Lewis White Beck) p.268

6 "Kantian Constructionism and Reconstructionism: Rawls and Habermas in Dialogue", p.45

University, Habermas had proclaimed that human interest in autonomy and responsibility were not mere fancy, for it could be apprehended a priori. What raises us out of nature is the only thing whose nature we can know: *language*."[7] Interactions are communicative, argues Habermas, when "the participants co-ordinate their plans of action consensually, with the agreement in terms of the intersubjective recognition of validity claims."[8] Habermas' theory of value puts high priority on the 'search for truth'. Argumentation, he maintains, "insures that all concerned in principle take part, freely and equally, in a co-operative search for the truth, where nothing coerces anyone except the force of the better argument."[9]

Consensual speech actions rest on a background consensus formed from reciprocal raising and mutual recognition of four types of validity claims:

> The speaker has to select a *comprehensible* expression in order that the speaker and hearer can *understand one another*; the speaker has to have the intention of communicating a *true* prepositional content in order that the hearer can *share the knowledge* of the speaker; the speaker has to want to express his intentions *truthfully* in order that the hearer can believe in the speaker's utterance (can trust him); finally, the speaker has to select an utterance that is *right* in the light of existing norms and values in order that the hearer can accept the utterance, so that both speaker and hearer can *agree with one another* in the utterance concerning a recognised normative background.[10]

The above mentioned comments serve only as preliminary notes to familiarise those who are not familiar with Habermas' moral philosophy. The real issue that I want to now focus on is Habermas' discourse ethics. What is discourse ethics and what moral intuitions does it conceptualise? Habermas says that discourse ethics stands or falls with the following two assumptions:

---

7 *The Critical Theory of Jurgen Habermas*, p.287
8 *Moral Consciousness and Communicative Action*, p.58
9 *Moral Consciousness and Communicative Action*, p.198.
10 *The Critical Theory of Jurgen Habermas*, p.288

(a) normative claims to validity have cognitive meaning and can be treated *like* claims to truth.

(b) the justification of norms and commands requires that a real discourse be carried out and thus cannot occur in a strictly monological form, i.e., in the form of a hypothetical process of argumentation occurring in the individual mind.[11]

The very practice of discourse, which can only take place in a 'social' context (i.e. where there is at least two participants), has procedural conditions that amount to implicitly acknowledging normative presuppositions. But what kind of normative presuppositions does practical discourse embrace? Habermas outlines the three types of rules R. Alexy[12] describes. First there are the logical-semantic rules of argumentation:

(1.1) No speaker may contradict himself.

(1.2) Every speaker who applies predicate F to object A must be prepared to apply F to all other objects resembling A in all relevant aspects.

(1.3) Different speakers may not use the same expression with different meanings.[13]

Habermas notes that the presuppositions of argumentation at this level have no ethical content. The rules at the second level have some ethical content. These are rules of jurisdiction and relevance. They regulate things like themes of discussion and what is to count as a contribution to the argument. These rules are:

(2.1) Every speaker may assert only what he really believes.

(2.2) A person who disputes a proposition or norm not under discussion must provide a reason for wanting to do so.[14]

---

11 *Moral Consciousness and Communicative Action*, p68

12 R. Alexy, "Eine Theorie des praktischen Diskurses", in W. Oelmuler, ed., *Normendegrundung, Normendurchsetzung* (Panderborn, 1978)

13 *Moral Consciousness and Communicative Action*, p.87

14 *Moral Consciousness and Communicative Action*, p.88

The third level of rules put forth by Alexy are:

(3.1) Every subject with the competence to speak and act is allowed to take part in a discourse.

(3.2) a. Everyone is allowed to question any assertion whatever.
b. Everyone is allowed to introduce any assertion whatever into the discourse.
c. Everyone is allowed to express his attitudes, desires, and needs.

(3.3) No speaker may be prevented, by internal or external coercion, from exercising his rights as laid down in (3.1) and (3.2)[15]

Habermas realises that using Alexy's rules of discourse might promote the misconception that all actual discourses conform to these rules. To avoid this misconception, Habermas stresses the point that rules of discourse are not constitutive of discourse in the sense in which chess rules determine the playing of actual chess games:

> Whereas chess rules *determine* the playing of actual chess games, discourse rules are merely the *form* in which we present the implicitly adopted and intuitively known pragmatic presuppositions of a special type speech, presuppositions that are adopted implicitly and known intuitively.[16]

SOME HUMAN RIGHTS AS THE 'MORAL INTUITIONS' OF DISCOURSE

Morality, argues Habermas, is a type of safety net, a safety net that compensates "for a vulnerability built into the sociocultural form of life."[17] Habermas' approach to moral philosophy is premised on his theory of social interaction. This theory builds upon a particular conception of human nature. Humans are *rational* creatures. That is, humans are unique in that they possess the capacity for language. Unlike other creatures, whose

---

15 *Moral Consciousness and Communicative Action*, p.88
16 *Moral Consciousness and Communicative Action*, p.91
17 *Moral Consciousness and Communicative Action*, p.199

interactions are dominated by instinct and coercion, humans can converse[18] with each other and thus many normative presuppositions follow from this. It is because of man's social relations, argues Habermas, that our personal identity is from the start interwoven with relations of mutual recognition. This means that rational beings recognise that they are vulnerable. They seek, to some extent, collaboration with those in their community. This leads Habermas to derive a moral principle (U) that every valid norm must fulfil:

> (U) *All* affected can accept the consequences and the side effects its *general* observance can be anticipated to have for the satisfaction of *everyone's* interests (and these consequences are preferred to those of known alternative possibilities for regulation).[19]

Using the rules of argumentation, Habermas formulates the principle of discourse ethics (D) which stipulates:

> Only those norms can claim to be valid that meet (or could meet) with the approval of all affected in their capacity *as participants in a practical discourse*.

This principle makes reference to a procedure for rational co-existence. A procedure that rational creatures implicitly affirm in their communicative interactions. A.J. Watt characterises this approach to moral philosophy:

> The strategy of this form of argument is to accept the sceptical conclusion that these principles are not open to any proof, being presuppositions of reasoning rather than conclusions from it, but to go on to argue that commitment to them is rationally inescapable because they must, logically, be assumed if one is to engage in a mode of thought essential to any rational human life. The claim is not exactly that the principles are true, but that their adoption is not a result of mere social convention or free personal decision: that a mistake is involved in repudiating them while continuing to use the form of thought and discourse in question.[20]

---

[18] This is not to suggest that force and coercion do not still dominate much of human affairs, only that we have a choice to peacefully work out our differences.

[19] *Moral Consciousness and Communicative Action*, p.65

[20] cited by Habermas, *Moral Consciousness and Communicative Action*, p.83 (from A.J. Watt, "Transcendental Arguments and Moral Principles", *Philosophical Quarterly*, 1975)

Due to the individual's vulnerability in society, morality functions as a guarantee of mutual consideration. Thus, argues Habermas, moralities must solve two tasks at once:

(1) Justice: refers to the subjective freedom of inalienable individuality.

(2) Solidarity: refers to the well-being of associated members of a community that share the same lifeworld.[21]

Keeping these two criteria of morality in mind, I would now like to attempt to incorporate some of Habermas' ideas about discourse ethics into a theory of natural law. First I would like to make it clear that the 'ideal speech situation', to which Habermas' theory of discourse regularly refers, need not be the only way for us to discover the moral presuppositions of discourse. Instead, let us look at the most obvious demands of discourse (i.e. the minimum moral presuppositions). We begin by stating that an actual discourse is not the ideal "co-operative search for truth" that Habermas discusses. An actual discourse involves at least two participants who attempt to reach agreement *by means of argumentation*. Unlike 'ideal speech situations'[22], actual discourses do not always yield consensus. But there are procedural conditions in the actual practice of discourse and these amount to implicitly acknowledging normative presuppositions. This includes moral presuppositions of the following type: security of person[23] and freedom of

---

21 *Moral Consciousness and Communicative Action*, p.200

22 In this article "Rawls' Political Liberalism" (*The Journal of Philosophy*, March 1995) Habermas states "discourse ethics views the moral point of view as embodied in an intersubjective practice of argumentation and enjoins those involved to an idealisation *enlargement* of their interpretive perspectives." (p.117) Why must discourse ethics enjoin those involved to an idealisation enlargement of their interpretive perspectives? This is the main difference between my position and Habermas'. It seems much more practical to base a theory of morality on the *actual* way rational beings operate; not on some 'ideal' situation that seldom, if ever, occurs.

23 I will take the scope of this moral norm to mean more than just a rejection of violence. It represents the rejection of all of those things that force an *end* to discourse. For example, coercion, which is different from violence, but also represents an "enemy of

expression. When participants attempt to settle disagreements by argument they are rejecting the use of violence. This point is articulated by Paul Ricoeur in the following passage:

> If we... ask the philosopher why he cannot undertake the apologia of violence, seeing that he recognises its indelible mark on political history, if we ask him whether violence is always wrong, even when it is a lesser evil as in the case of wars of liberation or legitimate popular revolts, his answer is not in doubt: violence is the opposite of discourse. If we were not convinced of this violence would not be a problem ... Violence and discourse are the two opposite poles of human existence...Violence is always the interruption of discourse: discourse is always the interruption of violence... It is because we, as men, have chosen discourse- that is discussion, some agreement by means of verbal confrontation- that the defence of violence for violence sake is forever forbidden us.[24]

Freedom of expression is another moral presupposition of discourse. The rules of discourse require that each participant be free to express his views, even when others disagree with his position.[25] This is essential because one usually engages in a discourse to settle disagreements. If everyone agreed with one another, we would have little use for argumentation.

I hope that it has now become apparent to the reader where I am going. The basic point I am trying to get across is that some human rights are the moral presuppositions of

---

reason" or the termination of inquiry. As Ricoeur points out in the quotation to follow, discourse and violence are the opposite poles of human existence. I would place coercion at the same pole as violence.

24 Paul Ricoeur, *Main Trends in Philosophy* (New York: Holmes and Meier Publishers Inc., 1979) p.226-7.

25 Or, as I shall argue later on in section two, even when one's views offend the other. "Restriction on speech is justified only when coercion is necessary to prevent actual or imminent harm to an interest of 'compelling' importance, such as violence or injury to others. This is often summarised as the 'clear and present danger' requirements." (Strossen, p. 42) If one's expression does satisfy the 'clear and present danger' requirement, then the ethics of discourse have been violated.

communicative rationality. Those who engage in discourse are implicitly affirming some of those values embodied in documents like the *Universal Declaration of Human Rights*[26]. For example, the ethics of discourse are affirmed in the following articles of the *Universal Declaration of Human Rights*:

> ARTICLE 1: All human beings are born free and equal in dignity and rights. They are endowed with reason and conscience and should act towards one another in a spirit of brotherhood.
>
> ARTICLE 2: Everyone is entitled to all the rights and freedoms set forth in this Declaration, without distinction of any kind, such as race, colour, sex, etc...
>
> ARTICLE 3: Everyone has the right to life, liberty, and the security of person.
>
> .
> .
> .
>
> ARTICLE 19: Everyone has the right to freedom of opinion and expression; this right includes freedom to hold opinions without interference and to seek, receive and impart information and ideas through any media and regardless

---

[26] The connection between the ethics of discourse and the human rights I point out (e.g. freedom of expression, security of person, etc.) is the principle of reciprocity. Those who engage in discourse are affirming relations of mutual recognition. This mutual recognition, I would like to suggest, amounts to an affirmation of the procedural criteria of liberal-democracy. To deny them would be to deny the rules of discourse. Thus, if one is committed to discourse, then they are committed to these human rights. But I limit my discussion of human rights to the general moral presuppositions of the right to security of person, and freedom of expression. (e.g. 'core' values of liberal-democracy). I am not suggesting that one can derive **all** human rights like Article 14 (1) of the *Universal Declaration of Human Rights* which states that "Everyone has the right to seek and to enjoy in other countries asylum from persecution" from the ethics of discourse. What I am suggesting is that the reasoning process itself, i.e. discourse, is committed to some of the values embodied in human rights declarations.

of frontiers.[27]

Once the moral presuppositions of discourse are made more explicit, as I have done here, it becomes apparent that the ethics of discourse achieve Habermas' two criteria for morality. Human rights, such as those stated above, do attempt to compensate for the "vulnerability built into the sociocultural life". They fulfil Habermas' call for justice and solidarity.

What I would now like to do is strengthen the connection I am making between the 'rules of discourse' and rules for some 'just laws'[28]. I will do this by incorporating Lon Fuller's theory of natural law, as expounded in *The Morality of Law*. What I hope I have accomplished, thus far, is to suggest that human rights are not the mere 'personal preference' of Western liberal democracies, but the implicit presuppositions of discourse. Now I will build on the analogy between the moral obligation involved in discourse with the moral obligation of law. What both share, I believe, is a commitment to, and respect for, human rights. Reason is evident in both the 'rules of discourse', and the rules for 'just laws'. Let us now turn to Fuller's account.

FULLER

I agree with Finnis when he characterises Fuller's account as 'descriptive'.[29] But, as we noted earlier, Finnis believes that a natural law theory that aims at assisting the 'practical reflections of those concerned to act' requires the assistance of 'descriptive and analytical social science.' Thus, my theory of natural law relies, in part, on Fuller's 'descriptive' analysis of the 'inner morality of law.' In order to understand Fuller's theory

---

27 *International Handbook of Human Rights*, p.460-2.

28 Among the criteria for some just laws are the ethics of discourse. In other words, I am suggesting that the rules of discourse embody a necessary condition for some just laws.

29 *Natural Law and Justice*, p.9

of the 'internal morality of law', some time must be spent explaining his discussion of the following issues: (1) the distinction between morality of aspiration and the morality of duty, (2) the moral scale, and (3) the eight ways to fail to make a law.

Fuller begins *The Morality of Law* by making a distinction between the 'morality of aspiration' and the 'morality of duty'. The former is the morality of the Good Life. "Rules which critics lay down for the attainment of what is sublime and elegant in composition."[30] The 'morality of duty' is more like the rules of grammar. That is, the 'morality of duty' starts at the bottom. "It lays down the basic rules without which an ordered society is impossible."[31]

Fuller argues that there is a kinship between the 'morality of duty' and law, and a similar kinship between the 'morality of aspiration' and aesthetics. He puts forth his conception of a moral scale to show this relationship. This scale goes something like this:

[EXCELLENCE
[
[
[
[
[
[
[
[
[INDICATOR OF MORAL OBLIGATION
[**********
[
[**MOST OBVIOUS DEMANDS OF SOCIAL LIVING**
[

(Diagram 1.0)

---

30 *The Morality of Law*, p.4
31 *The Morality of Law*, p.4

Diagram 1.0 illustrates Fuller's moral scale. The line designated by *** represents the dividing line where duty leaves off and the challenge of excellence begins. The crucial issue is, where is the locator? Fuller points out:

> If the morality of duty reaches upward beyond its proper sphere the iron hand of imposed obligation may stifle experiment, inspiration, and spontaneity. If the morality of aspiration invades the province of duty, men may begin to weigh and qualify their obligations by standards of their own and we may end with the poet tossing his wife into the river in the belief- perhaps quite justified- that he will be able to write better poetry in her absence.[32]

I shall, later on in this chapter, explain where I believe the locator should be. But let us now turn to Fuller's hypothetical tale of the bumbling ruler Rex. It is in this tale that Fuller effectively articulates what he means by the 'inner morality of law'. In the section entitled "Eight Ways to Make a law Fail" Fuller summarises the eight ways a legal system can fail to be a legal system 'properly so-called'. These eight ways are (notice the similarity to Finnis' conception to the 'rule of law'): (1) a failure to achieve rules at all, (2) a failure to publicise the rules, (3) the abuse of retroactive legislation, (4) a failure to make rules understandable, (5) the enactment of contradictory rules or (6) rules that require conduct beyond the powers of the affected party, (7) introducing such frequent changes in the rules that the subject cannot orient his action by them, and, finally (8) a failure of congruence between the rules as announced and their actual administration.[33]

Despite the fact that these eight ways to fail a law represent the 'inner morality of law', they are neutral with respect to the actual moral worth of a law. This concern (the concern for the actual moral worth of law) is what Fuller calls the 'external morality of law'. It is quite conceivable that an evil ruler who, having some knowledge of how to

---

32 *The Morality of Law*, p.27-28
33 *The Morality of Law*, p.39

make effective laws, could set up an effective legal system that had many evil laws. But it is important to note, as Fuller does, that 'a law is a precondition to a good law'. So, if we accept Fuller's claims about procedural[34] natural law, can we can build upon it by adding some 'intuitive' claims about the pragmatics of conversation that go beyond the 'internal morality of law'? That is, can we develop a substantive[35] theory of natural law that also uses communication as its basis? I believe we can. As stated earlier, my task, like Finnis', is a moral evaluative analysis of law (not a descriptive one). As such, I will build on Fuller's 'inner morality of law' so that we can shed some light on the **moral obligation** of law. I propose we begin with Fuller's basic requirements for law, and raise the locator on the moral scale to include those things 'reason' illuminates. How shall I accomplish this?, one might ask. By incorporating Habermas' account of the pragmatics of conversation into a theory of natural law. Thus, if I am successful, I hope to argue persuasively for the following moral scale:

[**EXCELLENCE**
[
[
[
[**********
[MOST OBVIOUS DEMANDS OF SOME 'JUST LAWS'
[*(1) DISCOURSE ETHICS*
[- JUSTICE } or quite
[- SOLIDARITY } simply: **THE 'CORE' RIGHTS OF LIBERAL-**
[**DEMOCRACY**
[*(2) FULLER'S 'INNER MORALITY OF LAW'*

DIAGRAM 1.1

---

34 Fuller makes a distinction between procedural and substantive natural law. The former is "concerned with ways in which a system of rules governing human conduct must be constructed and administered if it is to be effectious and at the same time remain what it purports to do". p.97

35 Fuller describes substantive natural law as a theory that deals with the proper ends to be sought through legal rules.

Let us begin by returning to R. Alexy's rules of communication at the logical-semantic level. We can construct the following diagram that captures the 'inner-morality of communication'.

[EXCELLENCE
[
[
[
[INDICATOR OF MORAL OBLIGATION
[**********
[MOST OBVIOUS DEMANDS OF COMMUNICATION (rules of grammar)
[- Speaker cannot contradict himself
[- If speaker applies predicate **F** to object **A** he must be prepared to
[apply **F** to all other objects resembling **A** in all relevant aspects.
[- Different speakers may not use the same expression with different
[meanings.
[----------

DIAGRAM 1.3

From the semantics of communication, Fuller comes up with the following scheme for the 'inner-morality' of law.

[EXCELLENCE
[
[
[
[**********
[MOST OBVIOUS DEMANDS OF LAW
[*THE 'INNER MORALITY OF LAW'*
[- of a reasonable degree of generality and clarity, promulgated, prospective
[in effect, reasonable constancy, possible to comply with, the conduct of
[officials should be substantially congruent with the announced rules.
[----------

DIAGRAM 1.4

The two preceding diagrams that outline the basic requirements for communication and law, which represent the 'inner-morality of communication' and the 'inner-morality of law' are neutral. That is, they do not fulfil what Fuller calls the 'morality of aspiration'. The 'morality of aspiration' is the morality of the Good life. So the rules of grammar and

the procedural theory of law are ethically neutral about the substantive aims of communication and law. More is needed to ensure that discourse can occur, and just laws can occur. For example, the 'inner-morality' of communication can be fulfilled where one participant is threatening the other participant. And likewise, all of Fuller's conditions for the 'inner-morality' of law' could be met by an intelligent, self-promoting tyrant. For us to get to a substantial theory of law (i.e. rules for just laws), which is premised on the rules of discourse, perhaps we should provide a diagram for the rules of discourse, or what we could call the 'external morality of discourse'.

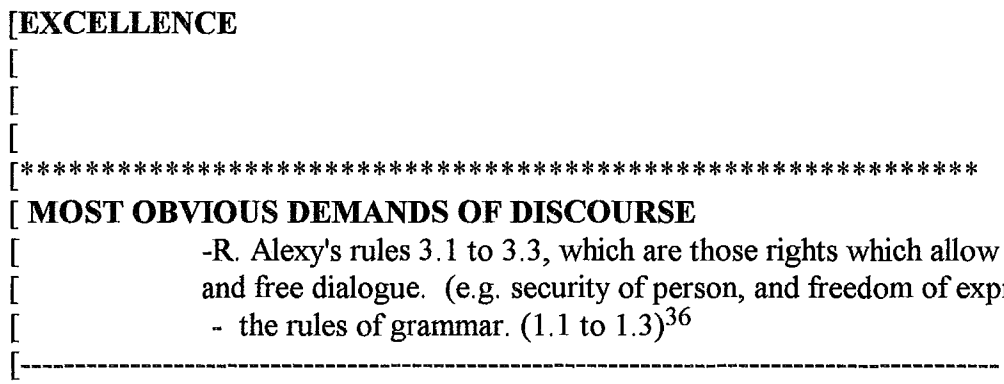

DIAGRAM 1.5

Thus, using the pragmatics of conversation as a basis for some moral principles, a substantial theory of law can be intuited from the above stated diagram about the 'external morality of discourse'. This is diagram 1.1 that I set out to demonstrate earlier. Thus, I hope I have made it clear how a theory of natural law might assess whether or not a law is 'just' if the law is in accordance with the pragmatics of conversation. That is, if a legal system implements laws that guarantee those human rights previously specified, and if these laws are effective (that is, they follow Fuller's 'inner-morality of law') the laws of this

---

36 I have purposively left out Alexy's rules of jurisdiction and relevance. (2.1 and 2.2) As I indicated earlier, I am interested in actual discourse not Habermas' "ideal speech situations". The rules of jurisdiction and relevance do not seem to be *necessary* for an actual discourse to occur.

system would be in accordance with the ethics of discourse. But do the pragmatics of discourse provide us with a conception of morality to assess all laws? To answer affirmative to this question is to speculate beyond the confines I wish to explore in this paper. While I think it would be worthwhile for one to explore the possibilities of how far the ethics of discourse could take us in developing a legal theory, I wish to limit myself primarily to free speech jurisprudence. And this is the direction that I shall take in the next two chapters.

Perhaps we should conclude this chapter by returning to Fuller's concern about where duty leaves off and the challenge of excellence begins. As I have argued, duty ends with those moral presuppositions of discourse, which I have suggested are some of those rights outlined in human rights documents. Thus, by having the indicator placed at those values held dearly by liberal-democracies, Fuller's concern about the "iron hand of obligation stifling experiment, inspiration and spontaneity" are relieved because it is only in societies that respect human rights that the freedom to pursue such endeavours is realised. And likewise, Fuller's concern about the morality of aspiration invading the province of duty is also silenced, because respect for human rights means respect and protection of human dignity and freedom, and thus we do not have to worry about the poet tossing his wife into the river in the belief that he will be able to write better poetry in her absence.

IS MY ARGUMENT JUST A THEORY OF MORALITY?

In *Natural Law and Justice*, Weinreb criticises Finnis' account of natural law: Weinreb remarks:

> One expects the centre of the theory to be about the nature of law; but all of its weight rests off to the side, on the claim that the moral principles in question are objectively valid. So long as we know what he has in mind, Finnis can call his theory "natural law" if he prefers. But both his and Richard's theories appear really to be theories of morality, which their particular interests lead them to apply to matters of law but which apply with equal force to any context in which moral

issues arise.[37]

I think that Weinreb's criticism is an interesting one, and is one I feel warrants consideration because my position is subject to the same criticism. But having said this, if one labels my position a theory of morality and not a theory of law, I am not that disturbed because my primary concern is to give guidance to judges, citizens etc., and if this is accomplished, regardless of how my position is characterised, than I have achieved my goal.

But Weinreb's comments do bring up an important issue that should be addressed- What sense of 'law' am I (and Finnis) referring to? One of the significant contributions of legal positivism has been their emphasis on the fact that laws are a *human* construct. I do not want to challenge this 'common sense' tenet of legal positivism.[38] But if there are many senses in which we can use the term 'law', as most legal philosophers acknowledge there are, then I would like to summarise my use of it.

As I noted in the beginning of this paper, I am concerned with law in the 'binding of conscience sense'. I would agree with those who claim that there are no 'laws' that exist independent of human creation. Nonetheless, what I am concerned with is the question, -

---

37 *Natural Law and Justice*, p.124

38 I must make it clear that all I have argued for thus far is that some human rights are the moral presuppositions of discourse and that some laws ought to embody the values of discourse. It does not follow from this that human rights have always had historical reality or that they have historical reality everywhere in the world. Michael Novak explains how human rights can be brought into existence in historical reality: "Human rights assume historical reality only when certain specific ideas about human dignity have become embodied in the habits of peoples, when such peoples may associate together freely to build institutions that embody these ideas in routine and regular practice, and when free associations of concerned citizens see to it that these institutions function as they ought. When institutions are staffed by persons who are corrupt, or by persons who turn such institutions to personal or partisan abuse, they become hollow shells."(*Human Rights and the New Realism*, New York: Freedom House, 1986. p.42 ff.3)

when can a law be considered morally obligatory? My argument is that some laws create a moral obligation on rational beings only when they are in accordance with the ethics of discourse. If a law violates the ethics of discourse, then I would label this a 'defective' law. It is better understood as a command, not a law in the 'proper sense'. Even legal positivists acknowledge the possibility of characterising positive laws in this sense. Wil Waluchow, in *Inclusive Legal Positivism*, claims that "immoral laws could, for the natural lawyer, easily be conceived as 'laws not properly so called' and studied on that basis."[39] This is what I have attempted to do in this paper. My discussion of natural law coincides with Finnis' analysis of authority and obligation:

> ... the ruler has, very strictly speaking, no right to be obeyed; but he has the authority to give directions and make laws that are morally obligatory and that he has the responsibility of enforcing. He has the authority for the sake of the common good (the needs of which can also, however, make authoritative the opinions- as in custom- or stipulations of men who have no authority). Therefore, if he uses his authority to make stipulations against the common good, or against any of the basic principles of practical reasonableness, those stipulations altogether lack the authority they would otherwise have by virtue of being his. More precisely, stipulations made for partisan advantage, or (without emergency justification) in excess of legally defined authority, or imposing inequitable burdens on their subjects, or directing the doings of things that should never be done, simply fail, of themselves, to create any moral obligation whatever.[40]

---

39 *Inclusive Legal Positivism*, p.102
40 *Natural Law and Natural Rights*, p.359

CONCLUSION TO PART ONE

This concludes the first part of this thesis. I have attempted to make some contribution to the tradition of natural law by looking at the connection between the ethics of discourse and law. The presuppositions of discourse, I have tried to show, are those that reason demands. And as such, some laws (e.g. those governing free speech) *ought* to be in accordance with the ethics of discourse. From the work of Habermas and Alexy I have tried to make more explicit the moral presuppositions of discourse. These presuppositions amount to an affirmation of some human rights, thus challenging the skeptic who argues that no such 'objective' moral principles exist.

To return briefly to Finnis, how does my argument about the "external morality" of law fit with his three elements of justice? I believe that the three elements- other-directedness, duty, and equality- are embodied in the practice of discourse. First, because discourse can only take place in a 'social' context, it is, by its very nature, other-directed. As Habermas notes in his discussion of solidarity, a morality must promote the well-being of associated members of a community that share in the same lifeworld. And if some human rights are the implicit presuppositions of discourse, then it fulfills this first element of justice.

Duty is the second element of justice, argues Finnis. As we have already seen, discourse involves a moral obligation. A participant of discourse has a duty to obey the rules articulated by Alexy. And similarly, equality is also a presupposition of discourse. By agreeing to settle disputes by argumentation, participants acknowledge each other as equals and thus respect each other's rights to take part in the discourse, and to express each other's attitudes, desires and beliefs. The conception of equality that is embodied in discourse is that conception most commonly associated with liberalism. Namely, "equality of opportunity"[1].

---

[1] The equality implicit in discourse is formal or procedural equality. All participants are

The theory of natural law argued for in this paper is a deontological approach to natural law. Habermas explains what is meant by deontological ethics:

> In short, the basic phenomenon that moral philosophy must explain is the normative validity (*Sollgeltung*) of commands and norms of action. This is what is meant by saying that a moral philosophy is deontological. A deontological ethics conceives of the rightness of norms and commands on analogy with the truth of an assertoric statement.[2]

Lloyd Weinreb, in *Natural Law and Justice*, criticizes contemporary natural law theories. In particular, the positions defended by John Finnis and David Richards. Weinreb's critique of contemporary natural law theories is captured in the following passage:

> If Finnis' claim is to be supported at all, his principles of practicable reasonableness must indicate in a not inconsiderable number of cases what the law ought to be, with certainty. Finnis believes they do. He says: "The central principle of the law of murder, of theft, of marriage, of contract...may be a straight-forward application of universally valid requirements of reasonableness," although their full integration into a legal system requires "countless elaborations" that are not all obvious or determinate. He writes as if there were "central" principles of law, ascertainable with certainty by his method, that determine a core of basic legal obligations, while other, less basic obligations are indeterminate matters of detail... The law, however, does not contain central principles of that kind. The

---

equal in the sense that all are free to participate in the discourse and all are free to express whatever they want. But it does not follow that everything a participant says will be of equal worth in a discourse, nor does it mean that participants have a "right to be heard". A right "not to be silenced" must not be equated with a right "to be heard". For example, if a racist is granted the right to express his views, it does not follow from this that we *must* listen to him. Part of the communicative rationality is that participants must have the option to 'walk away' when they want to. This reinforces the metaphor of the 'free market of ideas'. While all ideas are allowed to compete for acceptance, some will be convincing but others will not be, and thus will be rejected. But as long as everyone is allowed to expresss whatever they want, then the ethics of discourse do fulfill this third element of justice.

2 *Moral Consciousness and Communicative Action*, p.196

> only principles that might plausibly be said to arise from reason (let alone reason unaided by evidence or inference) are so general and abstract that they leave even the most basic legal obligations for further determination.[3]

Are the principles that arise from reason so general and abstract that they leave even the most basic legal obligations for further obligation? To this question I give a negative response. (But I will rely on reason being aided by evidence and inference). In order to back up my claim, I intend to tackle the contentious issue of freedom of expression. Using the argument outlined so far about discourse ethics, I hope to show that reason, as embodied in the practice of discourse, can guide us in getting answers to the issue of freedom of expression. (i.e. when is censorship of expression justified?). In fact, I would like to suggest that this principle is embodied in the First Amendment and is at the heart of the U.S. Supreme Court's free speech jurisprudence. Unfortunately, the same can not be said of Canada's stance on free expression. The next part of this thesis is an attempt to show that Canada's anti-hate laws and censorship of sexual expression violate the ethics of discourse. From what we have already seen about the moral presuppositions of discourse I hope it has become apparent that peace is embodied in the practice of discourse. But this conception of peace makes an important distinction between violence and hate propaganda. The former violates the ethics of discourse while the latter does not.[4] As I

---

3 *Natural Law and Justice*, p.113

4 Provided hate propaganda is not communicated in a violent manner. There is nothing inherent in hate speech that violates the rules of discourse. But the actual act of hate crimes (that is, violence) does violate the communicative rationality. As Donald Down points out, "the First Amendment permits restriction of racist speech in three major contexts: (1) when such speach is an integral part of illegal action, as in conspiracy, solicitation, or direct incitement to imminent illegal action; (2) when such speech occurs in nonpublic domains and jeopardizes privacy or other interests, such as voting, employment relations, or trials; (3) when racist speech is targeted at discrete individuals outside of the contexts just memtioned and is sufficiently threatening, harassing or intimidating. In each of these situations, racist speech either constitutes the perpetuation of a substanial direct herm or is part and parcel of illegal action ("performative"). As long as governments consientiously tailor laws to these

noted earlier, discourse is a rejection of violence. Thus, laws that aim at being 'just' must oppose violence.

But speech that is not communicated in a violent manner, such as some hate speech, does not warrent censorship. As Gary Madison makes clear in "Philosophy and the Pursuit of World Peace":

> Respecting the human person means in fact respecting his right to his *own* opinions. Genuine peace, be it between individuals or nations, does not mean the absence of differences, or even conflicts, of opinion (whether of a political, social, cultural, or religious nature.) It is only realistic to assume that, where there is freedom, there will always be conflict or competition in ideas among people as to what truly constitutes the good life or the good society. The important thing is, accordingly, to ask if there is a way of instituting a world order which would allow for the peaceful competition of such ideas and opinions.[5]

The conception of law argued for in this paper can, I believe, assist us in instituting a world order which would allow for the peaceful competition of ideas and opinions. What I intend to accomplish in the second part of this paper is to show that the harm principle is derived from the pragmatics of conversation. Reason, as embodied in the ethics of discourse, can guide us in determining when state coercion is justified and when it is not.

---

conditions, and do so in a viewpoint-neutral fashion (R.A.V.), the laws will pass constitutional muster.("Incitement Law and Policy in the United States", *Under the Shadow of Weimar*, p.128)

[5] "Philosophy and the Pursuit of World Peace", p. 34

CHAPTER THREE

DEMOCRACY AND THE COMMON GOOD

...the theory of freedom of expression involves more than a technique for arriving at better social judgements through democratic procedures. It comprehends a vision of society, a faith and a whole way of life. The theory grew out of an age that was awakened and invigorated by the idea of a new society in which man's mind was free, his fate determined by his own powers of reason, and his prospects of creating a rational and enlightened civilisation virtually unlimited. It is put forward as a prescription for attaining a creative, progressive, exciting and intellectually robust community. It contemplates a mode of life that, through encouraging toleration, scepticism, reason and initiative, will allow man to realise his full potentialities. It spurns the alternative society that is tyrannical, conformist, irrational and stagnant.

Thomas Emerson, "Toward a General Theory of the First Amendment". (1963)

INTRODUCTION

Having developed a revised Habermasian line of argument as to the "objective" validity of normative judgements (i.e. what one *ought* to do), I would like to shift the focus back to Finnis and his discussion of the common good. By showing that security of person and freedom of expression are two of the moral presuppositions of discourse, we are now in a position to address the more general question- what vision of society embodies the values of discourse ethics? "The norms and values of communicative understanding (dialogue)... are those having to do with respect for the freedom and dignity of one's conversational partners: tolerance, reasonableness, the attempt to work out mutual agreements and to come to mutual understanding by means of *discourse* (dialogue or conversation) rather than by means of force."[1] As such, the argument sketched in this chapter is an attempt to show that democracy embodies the "rationality" of discourse[2]. A democracy is, in a sense, the institutionalisation of a "public discourse". Why this is and what it entails are questions I hope to answer in this chapter.

In order to understand how society *ought* to be organised one must attempt to grasp what a community is. Finnis argues that we should not think of community as an 'entity' which 'exists' and 'acts', "but as an ongoing state of affairs, a sharing of life or of action or of interests, an associating or coming-together. Community in this sense is a matter of relationship and interaction."[3] Finnis' account of human community is that of a complex unifying relationship among human beings. This relationship involves four types of

---

1 G.B. Madison, "Hermeneutical Liberalism".

2 In his new book *Between Facts and Norms: Contributions to a Discourse Theory of Law and Democracy*, Habermas actually develops a theory of democracy. Unfortunately, at the time of my writing this paper the English translation of this text was not yet available. The reader should bear this fact in mind and not subscribe my theory of democracy to Habermas.

3 *Natural Law and Natural Rights*, p.134

orders. The first order is that which is studied by the natural sciences. He gives the example of the unifying relationship between a lecturer and a listener when the listener *hears the sounds* made by the lecturer's vocal chords. Sound waves, eardrums etc. are subjects for natural scientific study. Thus, part of our unity in human community is physical and biological.

The second type of order is that unity which we can bring into our understanding itself. Logic, epistemology, and methodology are the disciplines that study this order. This relationship is illustrated by Finnis' previous example of lecturer and listener. When the listener *hears expositions, arguments and explanations* he brings his understanding into line with the lecturers. Thus, in addition to our physical and biological similarities, we are united by our capacity of intelligence.

Finnis' third order of human community is the unity we impose upon whatever matter is subject to our powers. This order is the subject of study in the arts, the applied sciences and studies of human symbol making. An example of this relationship is the relationship between lecturer and listener when the listener *hears the English language* and a pedagogical technique. For example, when the lecturer and listener share in the making and decoding of certain gestures and smiles that have been taught to express certain meanings. Language, common technology, and common technique are part of our unity in human community.

Fourth, there is the unity we bring into our actions and dispositions by intelligently deliberating and choosing. This is the order of study in psychology, history, ethics, political philosophy etc. Finnis describes the following situation as an example of this unity:

> This relationship exists between lecturer and listener when the listener *hears the lecturer*, as a person and a teacher; the listener shares with the lecturer in making a self-constituting decision; the lecturer's decision is to devote part of his life to trying to communicate knowledge to another

> person (perhaps for the sake of truth and a kind of friendship, perhaps only to earn a living), while the listener's is to commit part of his life to trying to acquire knowledge from another person (perhaps for the sake of truth, perhaps only to gain a qualification which in turn will enable him to...). Part of our unity in human community, then, is the unity of common action.[4]

This fourth order, the unity of common action, is the primary unity that Finnis emphasises. While the other three are needed to pursue a common good, it is the co-ordination of action that receives the primary attention in Finnis' account of practical reasonableness. Having thus outlined his theory of unity in human community, I would now like to turn to his conception of the common good, a conception that I think can also be derived from the pragmatics of conversation.

As with his discussion of unity in the human community, Finnis' discussion of the common good focuses on relationships between individuals. He considers the case where two students, A and B, both want to learn about 'natural law" (naturally!) from tutor X. But tutor X will only give tutorials to pairs of students. This example is important because it is a case where two individuals (i.e. A and B) can only obtain their objectives (learning about 'natural law' from tutor X) by co-ordinating with each other. A and B must collaborate, even if it is just minimally, in order to achieve their objectives. This co-ordination does not mean that A and B are polite and charitable individuals, eager to see each other achieve their objectives. Each may be indifferent to the other's success in pursuing his objective, argues Finnis. But each has an interest in the maintenance of the ensemble of conditions required for each to meet their objectives. (e.g. quiet, fresh air, holding the tutor's attention to the subject, etc.) Finnis claims that this ensemble of conditions can be said to be the common good of A and B.

---

4 *Natural Law and Natural Rights*, p. 138

I think that we could apply Finnis' analysis to the practice of discourse and thus arrive at a common good among participants of a discourse. Let us imagine two participants of an argument. Their common objective is to express their own beliefs, desires etc., perhaps in the hopes of *persuading* the other over to their side or simply to validate one's own views and opinions[5]. Let us imagine the debate is about the existence of God. Participant Y is a dedicated Christian and feels an obligation to share with non-believers the virtues and rewards of religious faith. Participant Z is an atheist and sceptical of any belief that is not grounded on firm, empirical evidence. He feels an obligation to challenge beliefs that are held dogmatically.

Our two participants share a common interest if the objective of each is to express their own beliefs and desires. First, there are considerations that are necessary for Y and Z to *understand* each other. Some examples of these requirements would be a common language, speaking loud enough and clear enough so that the other can hear one's argument, not contradicting oneself and thus confusing the other as to one's true beliefs etc.

But there are also considerations that go beyond being able to comprehend the other that are essential to engaging in argumentation. There is also an interest in being allowed to question the others' position, freedom to express your own beliefs and desires, freedom from coercion etc. Thus, the common good of participants of a discourse are the procedural rules which we discussed in the previous chapter. The ethics of discourse are a common good. Participants have an interest in ensuring that relations between participants are such that they can freely express themselves. This requires a certain degree of tolerance and respect for other participants in the discourse. These conditions

---

[5]For an overview of this point see Joseph Raz's discussion of 'validation' in "Free Expression and Personal Identification."

would allow each participant to pursue his own particular objectives, be it promoting religious faith or promoting atheism.

The common good of the political community, argues Finnis, is the "set of conditions which enables the members of a community to attain for themselves reasonable objectives, or to realise reasonably for themselves the value(s), for the sake of which they have reason to collaborate with each other (positively and /or negatively) in a community."[6] But what are the set of conditions which all members of community require to attain their own objectives? If I am successful in building up the analogy between discourse and democracy, then my answer shall be the procedural criteria of democracy. (i.e. right to vote, free speech, etc.)

DEMOCRACY AS A SPONTANEOUS ORDER

The analogy between discourse and democracy is a useful way to illustrate the virtues of the democratic ideal. Like the commitment inherent in the ethics of discourse (i.e. to maintain an "openness" that facilitates free and open discussion), the democratic commitment is a similar commitment to "openness". A democracy, like a discourse, is a spontaneous order. The argument that develops between our theist (Y) and atheist (Z) is spontaneous in the sense that what issues will arise and be challenged or accepted is not determined by some authority beforehand. The participants are free to explore an indefinite number of issues from the value of religious belief to challenges on the authenticity of the bible. Likewise, a democracy is a spontaneous order. Just as a discourse allows for a plurality of different ideas, arguments and beliefs, a democracy allows (ought to allow) for a plurality of avenues of human development. Citizens may choose the life they wish to pursue, be it that of a Christian , Muslim, atheist or lesbian. Both discourse and democracy involve reciprocity; that is, participants of a discourse and

---

6 *Natural Law and Natural Rights*, p. 155

citizens of a democracy must, to some extent, respect the dignity of others. This mutual respect is needed for any individual to pursue their own particular objectives.

Taking this analogy one step further, the common good of participants in a discourse were the procedural criteria which were essential to maintain the dialogue. The common good of citizens in a democracy are those procedural criteria that are essential for allowing citizens to develop the life they have chosen for themselves. Gus DiZerega, in "Democracy as a Spontaneous Order", explains what these criteria are and how, like the procedural criteria of discourse, they do not favour any particular viewpoint or interest beyond that of the common good.

> Political democracies are minimally constituted by certain abstract procedural criteria. In a pure democracy all adult citizens posses equal votes in choosing representatives or policies. They also enjoy freedom of speech, the press, and assembly in order to discuss, advocate, and choose public policies. These criteria are silent on how each citizen will employ his or her political rights. As with the rules governing market transactions, the rules governing political democracy are purely procedural and abstract. The criteria for democratic citizenship and participation are divorced completely from citizen's substantive views and values. They do not favour particular people or purposes other than by maintaining the political framework itself... A democracy is not established to pursue any particular purpose at all. Democracy allows an indefinite and unpredictable number of positions to compete for public support. [7]

The key part to note from DiZerega's passage is that a democracy *is not* established to pursue any particular purpose at all. What distinguishes a democracy from totalitarianism is that the latter is 'instrumental' as opposed to 'spontaneous'. In a democracy, different positions compete for public support in the 'market place of ideas'. In an instrumental organisation the state *determines* which ideas will and will not be

---

[7] Gus DiZerega, "Democracy as a Spontaneous Order". *Critical Review*, vo3, no.2, Spring 1989, pg.206- 40

permitted. This makes the issue of censorship perhaps the most fundamental difference between a spontaneous order and an instrumental order. In a democracy censorship (for the most part) is incompatible with the idea that the 'marketplace of ideas' allows for an indefinite and unpredictable number of positions to compete. By contrast, censorship is the *tool* by which instrumental organisations can coerce adherence to specific "party policies". Unlike the "openness" inherent in a democracy, instrumental organisations violate the procedural criteria of its citizens- freedom of speech, the press, and assembly etc...[8]

DiZerega claims that the "relationship of democracy to liberalism is a good deal more intimate than many classical liberals admit."[9] Liberals (unlike socialists) stress the importance of individual liberty. Thus, because a democracy does not pursue any particular purpose at all, individual liberty is maximised in a democracy where there is (or ought to be) a tolerance for a "plurality of truths". This contrasts with instrumental organisations. In this latter type of society conformity is demanded. One must share the values of those in power or else suffer the price of dissension. The last century has

---

8 The democratic commitment means a commitment to a clear, limited role for the state (some state intervention is needed to protect rights). Those who are committed to the values of democracy are, by their very nature, suspicious of the state. As Goldwin Smith, perhaps the classic Victorian liberal, stated: "Socialism...aims at making the government the sole capitalist. How a government fit for that trust is to be created and its perfect wisdom and integrity are to be secured, we have yet, I believe, to be told". (*Personal Papers*, reel #16, Jan. 4th, 1906) When one reflects on the historical development of the democratic commitment it is not surprising to see that there is an inherent distrust of the state. Historically, it has been the state that has limited individual liberty and the free market of ideas. Unlike the democratic commitment, proponents of the instrumental organisation believe the state can bring about some "new and improved" society. Usually this mentality seeks a 'quick fix' to perceived social problems.

9 "Democracy as a Spontaneous Order", p.209

witnessed various types of totalitarian regimes- Stalin's Soviet Union, Hitler's Nazis Germany and Mao's Communist China are obvious examples.

THE LIMITED STATE IS THE BEST STATE

The common good of citizens of a democracy could simply be stated as those measures necessary to allow us to pursue our own reasonable objectives. Thus, some collaboration among citizens of a community is needed in order for everyone to have the freedoms required for this development. This is achieved through the various institutions of society. (e.g. army, police, judiciary, etc.) But does the common good extend to the whole physical and moral well-being of the nation? The answer to this is no. The benevolent paternalistic state actually hinders the freedom of individuals to pursue their own objectives and is thus contrary to the common good. Wilhelm von Humboldt, in *The Limits of State Action*, explains the negative implications of the welfare state:

> A spirit of governing predominates in every institution of this kind; and however wise and salutary such a spirit may be, it invariably produces national uniformity, and a constrained and unnatural manner of acting. Instead of men grouping themselves into communities in order to discipline and develop their powers, even though, to secure these benefits, they may forgo a part of their exclusive possessions and enjoyments, they actually sacrifice their powers to their possessions. The very variety arising from the union of numbers of individuals is the highest good which social life can confer, and this variety is undoubtedly lost in proportion to the degree of State interference. Under such a system, we have not so much the individual members of a nation living united in the bonds of civil compact; but isolated subjects living in a relation to the State, or rather to the spirit which prevails in its government- a relation in which the undue preponderance of the State already tends to fetter the free play of individual energies.[10]

The welfare state also weakens the vitality of a nation, argues Humboldt:

---

10 *The Limits of State Action*, p. 18

> The man who is often led easily becomes disposed willingly to sacrifice what remains of his capacity for spontaneous action. He fancies himself released from an anxiety which he sees transferred to other hands, and seems to himself to do enough when he looks to their leadership and follows it. Thus, his notions of merit and guilt become unsettled. The idea of the first no longer inspires him; and the painful consciousness of the last assails him less frequently and forcibly, since he can more easily ascribe his shortcomings to his peculiar position, and leave them to the responsibility of those who have made it what it is.[11]

The welfare state threatens the common good because it threatens the spontaneity of active beings. As such, it challenges the very concept of human dignity that is inherent in the democratic commitment. That is, the dignity of treating individuals not as children but as subjects free to develop their potentialities by learning from the consequences of their own actions. Humboldt's following principle captures the role of the State in protecting and promoting the common good:

> *The State is to abstain from all solicitude for the positive welfare of the citizens, and not to proceed a step further than is necessary for their mutual security and protection against foreign enemies; for with no other object should it impose restrictions on freedom.*[12]

REFORM AMONG SPONTANEOUS ENTITIES

Our discussion of democracy as a spontaneous order that promotes the potential for the development of human beings also prescribes a method for reform. A democracy is not a static society. It is a coming-together of spontaneous active beings, it is an on-going state of affairs. Thus, reform within a democratic society must not come from above (i.e. dictated by the state) but from within. The challenge to old beliefs and ideals must come via the free market of ideas. As Humboldt argues: "In order to bring about the transition

---

11 *The Limits of State Action*, p.20
12 *The Limits of State Action*, p.33

from present circumstances to those which have been planned, every reform should be allowed to proceed as much as possible from men's minds and thoughts."[13]

When we consider how the process of reformation occurs within the human community of spontaneous entities, democracy begins to look like a public discourse. Various conceptions of the good compete and clash with each other in the realm of ideas. While reform may take longer going through this democratic process, this approach to reform is much more lasting in practice. The twentieth century has witnessed the demise of many totalitarian regimes that tried to *force* reform on its citizens. The record of democracy is much more impressive. Over the last two centuries democratic societies have witnessed the abolition of slavery, the extension of the vote to women and the civil rights movement. These important developments are evidence that the spontaneous order can bring about effective change.

FREEDOM OF EXPRESSION

> Freedom of expression is mainly a negative liberty or right. In other words, it confers an immunity in Berlin's terms, on individuals or on what the law recognises as persons, so that they may express themselves and speak without the interference of the State. It creates a domain of spontaneous discourse that is not subject to legal regulation or administration. The basic meaning of the right of free expression, then, is that it is a negative liberty, possessed by individuals, which prevents the State from interfering with the spontaneous discourse that marks scientific, cultural, and political life.
>
> G. Stuart Adam[14]

As noted earlier, censorship is, for the most part, incompatible with the commitment to democracy (i.e. the common good of human community). This does not mean that no censorship at all is justified under the democratic commitment. On the contrary, the

---

13 *The Limits of State Action*, p.142
14 "Truth, the State, and Democracy"

democratic commitment requires that certain expressions be censored because they would result in harm or injury. As Ricouer stated: "discourse and violence are the opposite poles of human existence". Discourse ethics is the fundamental moral commitment of a democracy. Because the democratic commitment means a commitment to *persuasion* of opinions, force is usually not be tolerated in a democracy and when force is used it is as a last resort. Coercion is not a legitimate form of persuasion under the democratic commitment. It undermines the very idea of the 'market place of ideas'. In the 'market place of ideas', participants put forward *reasons*, rather than *threats*, for people to accept what they believe to be true. The harm principle is championed by liberals as the principle to guide us on the issue of when state censorship is justified. The harm principle embodies the commitment to the democratic ideal.

The democratic commitment is represented in the two cardinal principles of free speech jurisprudence in the United States. Nadine Strossen[15], in *Defending Pornography, Free Speech, Sex, and the Fight for Women's Rights*, explains these two principles. The first principle is the "bedrock principle". This principle requires "content neutrality" or "viewpoint neutrality". "A government may never limit speech just because the listener- or even, indeed, the majority of the community- disagrees with or is offended by its content or the viewpoint it conveys"[16]. The idea behind this principle is that the proper response to speech one disagrees with is more speech. Persuasion, not censorship, is the solution. Obviously this remedy is not the "quick-fix" that censorship is, but it is the only remedy that is consistent with the ideas of a spontaneous order. Holmes, in his classic defence of the democratic commitment in *Abrams v United States* (1919) articulates why censorship of offensive speech is inconsistent with the Constitution:

---

15 President of the American Civil Liberties Union
16 *Defending Pornography*, p.40

> Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. ...But when men have realised that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While the experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law than an immediate check is required to save the country...[17]

The second principle of U.S. free speech jurisprudence is the "clear and present danger" requirement. The "clear and present danger" requirement specifies that conditions that must be met before censorship is justified. First, that the expression will cause direct, imminent harm to a very important interest. And second, that restriction is *necessary* to avert such harm. Strossen points out that "restricted speech must pose an imminent danger, not an alleged "bad tendency". Allowing speech to be curtailed on the speculative basis that it might indirectly lead to possible harm would inevitably unravel free speech protection. *All* speech might lead to potential danger at some future point"[18] The second requirement means that the "least restrictive alternative" must be taken by the government. Censorship is justified only if it is *necessary* to avert the harm or injury.

---

17 cited by Strossen p. 46-47, (*Abrams v. United States*, 250 U.S. 616, 630-31 (1919) (dissenting)

18 *Defending Pornography*, p.42

The rationality behind the United States free speech jurisprudence is not the 'mere personal preference' of the United States, but is, I would like to suggest, part of the implicit morality of discourse and the commitment to the ideals of democracy. That is, censorship is justified when the ethics of discourse have been violated (as in the case of threats to the security of person). But why must the standard be the 'clear and present danger' requirement? Why not a less stringent test? In the next chapter I will attempt to argue that a weaker test would undermine the ethics of discourse. This issue will arise when I consider Canada's anti-hate and anti-obscentiy laws.

CHAPTER FOUR

HARM AND CENSORSHIP

No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and when needful, by the active interference of mankind.

John Stuart Mill, *On Liberty*, 1859

Mill's passage from *On Liberty* reminds us that protection of the common good does sometimes require restriction of certain expressions (i.e. those expressions that pose a real danger to others). This chapter will explore the various rationales for restricting certain types of expressions. Joel Feinberg, in "Limits to the Free Expression of Opinion", explains when speech warrants restriction and when it does not. I would like to highlight the main parts of his argument so that we can see that some restriction is justifiable in the interest of the common good. But is restriction of hate speech and pornography justifiable in a democratic society of spontaneous entities? I will consider the arguments for and against restricting hate speech and pornography. In so doing, I would like to suggest that Canada's anti-hate speech legislation and anti-obscenity legislation threaten to undermine the ethics of discourse and thus could be contrary to the common good of human community. While the ethics of discourse do not provide us with concrete answers to moral questions, I would like to pursue the point sketched out in the previous chapter. That is, that the ethics of discourse can guide us in free speech jurisprudence. But to what extent? My contention is that expressions that cause direct harm to assignable persons violate the ethics of discourse. Such expressions are closer to that pole of human existence represented by coercion and violence than that of discourse and tolerance. But what about expressions that do not pose a 'clear and present danger'? I shall argue that restriction of these expressions undermine the ethics of discourse because if such a standard were consistently applied to all speech it would threaten much of the diversity of the human community and do more harm to society than good. Moreover, such expressions leave open the possibility of a less restrictive remedy such as counter-speech. This is not a possibility for expressions that pose a 'clear and present danger'. Finally, if one accepts the position that hate speech and pornography do not pose a 'clear and present danger', which is itself a contentious issue, then restriction of such expressions are contrary to the rules of discourse.

The Harm Principle

Feinberg argues that certain expressions are excluded by the harm principle. These are (i) defamation and malicious truth (ii) invasions of privacy (iii) expressions that cause others to do harm (those that cause panics, provoke retaliatory violence or incite others to crime or insurrection). He explains the first of these instances:

> Defamatory statements are those that damage a person's reputation by their expression to third parties in a manner that 'tends to diminish the esteem in which the plaintiff is held, or to excite adverse feelings or opinions against him'.[1]

There are of course two defences in the case of defamation and "malicious truth"- when the defendant's utterance or publication is "privileged" (that is, he has been granted absolute immunity from liability of defamation) or if the his utterance or publication is true. The reason that truth is a plausible defence against limiting defamatory or "malicious truth" expressions is that truth "serves some kind of overriding pubic interest."[2] But, as Feinberg points out, it is not so valuable that it is a bargain at *any* cost. The defamatory statement "must be published with good motives, or is necessary for some reasonable public purpose, or (in some cases) both."[3]

Now I would like to turn to invasions of privacy. Feinberg notes that the legal 'right to privacy' embraces a miscellany of things, protecting the right-holder not only from 'physical intrusions upon his solitude' and 'publicity given to this name or likeness or to

---

1 Joel Feinberg, "Limits to the Free Expression of Opinion". (*Philosophy of Law*, Belmont, California: Wadsworth Publishing Company, 1991, p.295-311) p.297

2 "Limits to the Free Expression of Opinion", p. 298

3 "Limits to the Free Expression of Opinion", p.299

private information about him' without his permission, but also from being placed 'in a false light in the public eye' and from 'commercial appropriation of elements of his personality."[4] The issue of invasions of privacy focuses on statements that are true and nondefamatory but are of an intimate and private kind, "gathered and published without the plaintiff's consent, it often leads to his 'shame and mortification'."[5] But it is not these types of harmful effects that warrant restriction of expressions that violate privacy, but because the right to privacy is a fundamental right in a free and democratic society. Respect for privacy is an essential part of the democratic commitment.[6] Rhoda Howard explains the importance of privacy in a free society:

> The value of personal privacy implies the individual's right, within the law, to do what he considers in his best interest, even if these interests conflict with those of larger social entities of which he may be a member. Such an individual is entitled to have a domain of personality and interest separate from that of kin and community. He is entitled to autonomy in his personal, social, and political relations to others... The notion of privacy thus contributed to a new type of legal system that assumed anything not specifically forbidden was permitted, not only in the economic and political spheres, but gradually also in the social sphere. This in turn broadened the scope for creativity- in thought or the arts as much as in means of production and social arrangements...[7]

The third kind of expression that warrants restriction by the harm principle are those expressions that cause harm not through defamation or invasion of privacy, but through causing panic, provoking retaliatory violence, or incitement to crime. The classic example

---

4 "Limits to the Free Expression of Opinion", p.299

5 "Limits to the Free Expression of Opinion", p.299

6 One problem that might seem to arise for this line of argument is the case of famous people. But, as Feinberg points out, American courts have taken the position that one who intentionally puts themselves in the public eye has no right to complain of any publicity which reasonably bears on their activity.

7 *Human Rights and the Search for Community*, p.28-9

of expression that incites panic is Holmes' example of someone yelling "Fire!" in a crowded theatre. In such a situation the expression is likely to cause panic. This represents a "clear and present danger" and restriction is *necessary* to prevent this harm or injury. Perhaps the exception to this case would be when there is a real fire:

> In some circumstances a person can cause even more harm by *truthfully* shouting "Fire!" in a crowded theatre, for the flames and smoke might reinforce the tendency of his words to cause panic, and the fire itself might block exits, leading the hysterical crowds to push and trample. But we do not, and cannot fairly, hold the exited alarm sounder criminally responsible for his warning when it was in fact true and shouted with good intentions. We can hardly demand on pain of punishment that people pick their words carefully in emergencies, when emotions naturally run high and there is no time for deliberation.[8]

The next issue of expressions I would like to consider, those that provoke retaliatory violence, are a tricky example to consider. On the one hand we have to consider the situation where a person might utter words that have the effect of violence being directed at him by someone else. To punish the speaker for saying things so unpopular that they can be expected to lead to fighting is to punish the speaker "for the criminal proclivities of others."[9] But Feinberg acknowledges the possibility that some words can be considered a direct provocation to violence. This does not mean that we should excuse those who resort to violence when someone says something abusive to them. But such restrictions on speech would appear to be consistent with American Free speech jurisprudence if one notes Feinberg's qualification that "only when public speech satisfies stringent tests qualifying it as 'direct provocation to violence,' (if that is possible at all) will the harm principle justify it."[10] K. Greenwalt, in *Fighting Words*, spends a lot of time on the issue

---

8 "Limits to the Free Expression of Opinion", p.302
9 "Limits to the Free Expression of Opinion", p.303
10 "Limits to the Free Expression of Opinion", p.304

of "fighting words". He focuses on three aspects: the speaker's aims and understanding, the probability of violence, and the breadth of the circumstances against which that probability is assessed. I mention this because I will not do justice to this issue here, but I think there are circumstances when one's words are an incitement to violence. They appear to be similar to incitement to crime or insurrection except that the violence provoked is directed at the speaker himself.

This brings me to Feinberg's last example of expression that warrants restriction by the harm principle: "incitement to crime or insurrection". "In criminal law, anyone who 'counsels, commands, or encourages another to commit a crime' is himself guilty of the resultant crime as an 'accessory before the fact'.[11] But, as Feinberg points out, being an accessory before the fact means more than merely uttering certain words in the presence of others. Other criteria must be met: there must be serious (as opposed to playful) intent and some possibility at least of the words having their desired effect. He gives the following examples:

> It is not possible that these conditions can be satisfied if I tell my secretary to overthrow the United States government, or if a speaker tells an audience of bank presidents that they should practice embezzlement whenever they can.[12]

In the last part of "Limits to the Free Expression of Opinion", Feinberg makes some important points about speech that does not fall into the "clear and present danger" category. These include various modes of seditious libel. In particular, defamation of the institutions of officers of government, incitement to unlawful acts, and language that tends towards the breach of the peace "between classes". As Feinberg points out, the focus of

---

11 "Limits to the Free Expression of Opinion", p.304
12 "Limits to the Free Expression of Opinion", p.304

the disagreement over sedition laws is the status of *advocacy*- where a person uses language not to directly counsel or call for violence rather to advocate it[13]. "The issue boils down to the question of whether the normal law of words with its strict standard of immediate danger is too lax to prevent serious harms, and whether, therefore, it needs supplementing by sedition laws employing the looser standards of "bad tendency" and "presumptive intent"."[14] The former seeks to punish words long before the probability that they will break out into unlawful acts and the test of the latter is that it is necessary only that the defendant intended to publish his words, not that he intended further harm by those words.

This issue is perhaps best exemplified by the example of Marxism. Should communists have the right to advocate 'class war' or to advocate revolution? Feinberg argues that they should. The issue simply is- does expression of this type pose a "clear and present danger"? The likelihood that advocating revolution would pose any real danger, argues Feinberg, is not real.[15] Unlike advocating revolution, advocating assassination *is* a case of "clear and present danger". Assassination is much easier to achieve than revolution. As Feinberg notes: "a successful assassination requires only one good shot."[16]

---

13 Mills' example of the opinion that corn-dealers are starvers of the poor is a good example of how language could either directly counsel violence (i.e. if expressed to an excited mob assembled before the house of a corn-dealer) or simply advocate violence when the situation is not as volatile (i.e. as when circulated through the press). But those who support sedition laws will argue that allowing such speech to be circulated could eventually lead to the acts of violence and thus we should stop it before it becomes a "real" threat. Critics of sedition laws point out that almost all ideas could possibly lead to some sort of danger in the future and thus such a lax standard would infringe too strongly on freedom of expression.

14 "Limits to the Free Expression of Opinion", p.307

15 Except perhaps in "extraordinary times of great tension".

16 "Limits to the Free Expression of Opinion", p.308

HATE SPEECH AND PORNOGRAPHY

The issue of where does the democratic commitment draw the line between censoring speech that might have a 'bad tendency' and speech that represents a 'clear and present danger' is the point of contention between pro-censorship and anti-censorship feminists. In her article "If Pornography is the Theory, is Inequality the Practice?", McCormick argues:

> ...[O]n an issue as fundamental to democracy as freedom of expression, there is an obligation to demonstrate proof of harm- indeed, compelling proof- not just vague speculation about what could be, for it is easy for governments to impose constraints on dissent and very difficult for them to remove them. We have seen enough modern history to know that it is better for democracy to err on the side of too much freedom than too little.[17]

The Canadian courts, I would like to suggest, have undermined the democratic commitment in *Keegstra* and *Butler* by not requiring compelling proof that hate propaganda and pornography will cause harm. In deciding the *Keegstra* case, Justice Dickson claimed that "It is... not *inconceivable* that the active dissemination of hate propaganda can attract individuals to its cause, and in the process create serious discord between cultural groups in society."[18] Similarly in *Butler*, the courts decided that "it is sufficient...for Parliament to have a reasonable basis for concluding that harm will result and this requirement does not demand actual proof of harm."[19] What would happen to the "plurality of truths" inherent in a democracy if those that could *conceivably* lead to social discord were restricted? Strossen points out why such a lenient test would make the functioning of a democracy impossible:

---

17 McCormick, p.324 (*Philosophy of the Social Sciences*, vol. 23. Sage Publications, 1993)

18 *R V. Keegstra*, p.71

19 *Butler v. the Queen* 1 SCR 452 (199), p.505.

> Allowing speech to be curtailed on the speculative basis that it might indirectly lead to possible harm would inevitably unravel free speech protection. All speech might lead to potential danger at some future point. Justice Holmes recognised this fact in an important 1925 opinion. Holmes rejected the argument that pacifist and socialist ideas should be repressed because they might incite young men to resist the draft or to oppose the U.S. system of government- actions and views that many thought might ultimately undermine national interests. As Holmes noted, "Every idea is an incitement."[20]

What is unique about the Canadian court's decisions in *Keegstra* and *Butler* is that the restriction of speech was thought to be justified not because the speech was judged to be offensive, but because of its *conceivable* harmful effects. An important part of the Canadian approach to hate speech and pornography is the equality based arguments employed by the courts in *Keegstra* and *Butler*. Kathleen Mahoney explains what this approach entails:

> Recently, a series of decisions by the Supreme Court of Canada has articulated some alternative perspectives on freedom of expression that are more inclusive than exclusive, more communitarian than individualistic, and more aware of the actual impacts of speech on the disadvantaged members of society than have ever before been articulated in a freedom of expression case. It is an approach that redistributes speech rights between unequal groups.[21]

The equality based arguments hinge on the invoking of section 15 of the *Charter*. Section 15 guarantees equality rights:

> Every individual is equal before and under the law and has the right to the equal protection and equal benefit of the law without discrimination and, in particular, without discrimination based on race, national or ethnic origin, colour, religion, sex, age or mental or physical disability.[22]

---

20 *Defending Pornography*, p.42

21 "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography", p.78

22 *Canadian Cases in the Philosophy of Law*, p.260

Some feminists view the Canadian court's approach to inequality as an improvement to the approach taken in the United States. Criticising the 'likes should be treated alike' conception of equality invoked in American jurisprudence, Diane Majury claims that equality is meaningful only in the context of an understanding and response to inequality. She remarks:

> It is not a question of applying an abstract definition of equality, or of applying some very concrete equality formula, or even of trying to visualise what equality might look like in a perfect world. Equality, whatever that is, may be the goal, but the process of eking our way toward that idealised state is through responding to and remedying the inequalities experienced by so many members of our society. Of course, such a focus on inequality(ies) must itself be contextualized, by recognising power relations as they are manifested between subordinate and dominant groups.[23]

The Canadian courts have taken this type of approach to equality in *Keegstra* and *Butler*. In deciding the *Keegstra* case the courts declared that one of the harmful effects of hate speech is the harm it does to members of the target group. "The emotional damage caused by words", argued the court, "may be of grave psychological and social consequence."[24] In *Butler*, a similar position was taken when the court argued that obscene material posed the danger of the "physical and mental mistreatment of women by men, or what is perhaps debatable, the reverse."[25] Mahoney rejoices in the court's rejection of the 'clear and present danger test'. She argues that "the harms caused by hate propaganda are often difficult to detect, either immediately or ever."[26]

---

23 "Equality and Discrimination According to the Supreme Court of Canada", p.419
24 *Keegstra*, p.70
25 *R. v.Butler*, p.470
26 "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography", p.85

While the Canadian courts have attempted to justify restriction of speech by appealing to the possible harms that might result from such expressions, they have made it clear that actual proof of a casual connection is not required to justify restriction of speech. This raises the important question- Can the democratic commitment tolerate presumption of harmful effects as the standard for justifying state censorship? My answer to this is no. What the courts have implicitly said by accepting censorship on the presumption of the antisocial behaviour that might follow is that hate speech and pornography are not ideas, but acts. The distinction between fantasising about something (e.g. degrading explicit sex) and acting on the fantasy is disintegrated. In an attempt to avoid the "guilty act", the courts have attempted to restrict the "guilty thought". As McCormick argues:

> Thus when [procensorship feminists] collapse the distinction between dream and deed, fantasy and act, thought and behaviour, they construct a Skinnerian model of human nature, which, in turn, justifies an elaborate system of social control and the necessity of laws that regulate behaviour with threat of punishment.[27]

The American courts have reaffirmed their commitment to the ideals of democracy by rejecting similar obscenity legislation in the *Hudnut* case[28]. As the trial judge of that case, Sara Evans Barker remarked:

---

[27] "If Pornography is the Theory, is Inequality the Practice?", p.312

[28] I do not want to give the impression that the United States has perfect free speech protections. As Strossen points out, sexual expression receives second class status under First Amendment law:

> Where sexual speech his concerned, the Court simply fails, without explanation, to enforce its generally applicable, stringent preconditions for restricting expression. The Court never has demanded that the government justify restrictions on sexual speech by showing that they were necessary to avert a "clear and present danger", or to prevent the intentional incitement of imminent violence or illegal conduct, or promote another goal of compelling importance...(*Defending Pornography*, p.51)

> It ought to be remembered by...all... who would support such a legislative initiative that, in terms of altering sociological patterns, much as alteration may be necessary and desirable, free speech, rather than being the enemy, is a long-tested and worthy ally. To deny free speech in order to engineer social change in the name of accomplishing a greater good for one sector of our society erodes the freedoms of all and...threatens tyranny and injustice for those subjected to the rule of such laws.[29]

The assumption that underlies the pro-censorship position is that state censorship will benefit minorities and women. I would like to challenge this assumption. My argument against this assumption is two-fold. First, state censorship has been the historical enemy, not ally, of minorities and women. While it does not logically follow that state censorship will harm minorities in the future because it has in the past, there is much evidence to support the inference that Canada's anti-hate legislation and obscenity laws will bring similar results. My second point is that the pro-censorship tactic is disempowering to women. By relying on the state to decide what roles women should not play (i.e. the nymphomaniac in the porno), women's freedom to explore for themselves what lifestyles they want is limited. The very idea that certain roles are not "lady-like" is the kind of limitation that women's rights have sought to overcome. As the Feminists For Free Expression have remarked:

> Women are as varied as any citizens of a democracy; there is no agreement or feminist code as to what images are distasteful or even sexist. It is the right and responsibility of each woman to read, view or produce the sexual material she chooses without the intervention of the state "for her own good"...This is the great benefit of being feminists in a free society.[30]

There are many examples of state censorship that has been turned against those

---

[29] cited by Strossen, p. 80 (*American Booksellers Association v. Hudnut*, 598 F. Supp. 1316, 1317 (D. Ind. 1984))

[30] cited by Strossen, p.11 (Ad Hoc Committee of Feminists for Free Expression, letter to the members of the Senate Judiciary Committee, 14 Feb. 1992)

it "allegedly" protects. Strossen describes what occurred in England when anti-hate legislation was first introduced:

> The first individuals prosecuted under the British Race Relations Act of 1965, which criminalized the incitement of racial hatred, were black power leaders. Their overtly racist messages undoubtedly expressed legitimate anger at real discrimination, yet the statute drew no such fine lines, nor could any similar law possibly do so. Rather than curbing speech offensive to minorities, this British law instead has been regularly used to curb the speech of blacks, trade unionists, and anti-nuclear activists. Perhaps the ultimate irony of this law, intended to restrain the National Front, a neo-nazis group, is that it instead barred expression by the anti-nazi league.[31]

This example of suppressing those censorship intends to protect is already becoming a reality in Canada. Strossen points out that "within the first two and a half years after the *Butler* decision, well over a half of all Canadian feminist bookstores had had materials confiscated or detained by customs...Canadian bookstore managers [across Canada] had the same comment: *Butler* increased censorship in Canada by customs, police, lower courts, and the predominant targets have been gay, lesbian and women's literature."[32]

It is actually in the best interests of minorities and women that compelling proof of demonstrable harm be shown before censorship is justified. The reason being, the way oppressed groups can bring about change in a democracy is to use offensive speech, speech that might conceivably lead to social discord. For example, black militant groups use emotional language to foster solidarity among the black community. This language might be hateful of white corporate America. The same can apply to feminists who wish to criticise sexism or pornography. As writer Molly Ivins claims: "I need the First Amendment so that I'll be able to say to people who say things I do not agree with, 'Look

---

31 *Defending Pornography*, p.221
32 *Defending Pornography*, p.231

you yellow-bellied son of a bitch- you run on all fours, you molest children, you have the mind of an adolescent tyrant'"[33].

It is also in the interests of minorities and women that the *onus of proof* for harmful effects of speech fall on the state. It should not be up to citizens of a democracy to provide evidence that their expressions are not harmful. This would again undermine our right to free speech. We would have to demonstrate that all of the programs of television do not harm, that criticising government officials is not harmful, and that promoting or even practising one's own religion does not harm others. As Strossen ironically points out, "there certainly is no evidence that feminist writing in general, or MacKinnon's in particular, does no harm."[34]

The pro-censorship position's call for state intervention also undermines the ability of minorities and women to empower themselves. It fosters the stereotypes that minorities and women can not compete in the 'free market of ideas'. That, because they have been historically subordinated, "special measures" must be taken to enable them to be equal citizens in society. The arguments used by proponents of procensorship themselves help to foster such negative stereotypes. Kathleen Mahoney argues that pornography is a violent form of expression because some women are coerced into making these films. There is no dispute that some women have been coerced to perform through physical violence. Perhaps the most famous example of this is former porn star "Linda Lovelace" (Linda Marchiano) In her book *Ordeal* (1980), Marchiano describes how she was coerced into making *Deep Throat* against her will. But, as Strossen points out, the conclusions pro-censorship feminists make from these examples is unwarranted.

---

33 Molly Ivins, "Havin' Fun Fightin' For Freedom", *New York Law School Law Reviews Symposium*, 1964

34 *Defending Pornography*, p.249

> For every Linda Lovelace who was coerced to perform for a pornographic work, there is a Nina Hartley, who proclaims herself to be an exhibitionist; a Veronica Vera, who celebrates the personal growth she experienced through performing in porn films; a Candid Royalle, who proudly declares that she produces pornography "from a woman's point of view"; and countless others.[35]

The procensorship argument that pornography is a violent form of expression is itself an insult to women's ability to choose their own lifestyles for themselves. The assumption that a women who performs in a porno must have been coerced is not based on empirical evidence, but on a stereotype about what women's roles should be. Porno star is not an image that conforms to the traditionally accepted roles for women. The procensorship assumption that it is only men that enjoy pornography is another sexist assumption. As writer Sallie Tisdale shows, it is not only men who enjoy pornography, but women as well:

> I take this personally, the effort to repress material I enjoy- to tell me how wrong it is for me to enjoy it. Anti-pornography legislation is directed at me: as a user, as a writer. Catherine MacKinnon and Andrea Dworkin... are themselves prurient, scurrying after sex in every corner. They look down on me and shake a finger: *Bad girl. Mustn't touch.* That branch of feminism tells me my very thoughts are bad. Pornography tells me the opposite: that *none* of my thoughts are bad, that anything goes...The message of pornography...is that our sexual selves are real.[36]

The attempt to claim that certain expressions harm particular groups imposes a static notion of culture on society. As Howard explains:

> In liberal human rights practice culture is a matter of individual choice. Minority cultures are protected by the civil and political rights to freedom of association, press, and speech and by the rights to speak one's own language and to worship one's own god. Culture, then, is a private matter: Each individual can make a

---

35 *Defending Pornography*, p.185

36 cited by Strossen, p.161 (Sallie Tisdale's "Talk Dirty to Me: A Woman's Taste for Pornography", *Harper's*, Feb. 1992)

> private choice of what culture practices are meaningful to him. If a woman wishes to identify with a new type of culture, such as the new culture of women's groups or lesbian groups, she is free to do so. But no one can constrain her to identify herself as Christian, or as Chinese-Canadian, or as a woman, or as lesbian.[37]

The democratic commitment requires the state to remain neutral as to what constitutes the "good" life. The state can not enter into the debate between sexists and feminists, racists and anti-racists, anymore than it can enter into the debate between atheists and theists, or democrats and republicans. What the state can intervene in is the violation of its citizens' rights. Thus, restrictions on expressions that cause harm are justified under the democratic commitment. The Canadian courts have attempted to restrict hate speech and obscenity on the basis that they are harmful, not merely offensive. But one is hard pressed to see how the court's decisions are anything more than a form of legal moralism[38] when the court acknowledges that they can not *demonstrate* that hate speech and obscenity cause harm. Thus, one is left to consider how committed the Canadian courts are to the ideals of democracy if its citizens' speech can be censored on the *speculative* basis that
harm will result from these expressions.

---

[37] *Human Rights and the Search for Community*, p.218

[38] David Dyzenhaus, in "Obscenity and the *Charter*: Autonomy and Equality" (1991), defines legal moralism as the majority deciding what values should inform individual lives and then coercively imposing those values on minorities. (cited in *Butler)*

CONCLUSION

Legal rules which jurists use have been made. The legal rules that existed formerly, exist now, or will exist in the future, are the work of men... Why do men make these rules? Obviously, in order that there be justice and not in order that there be rules of law. The fact that rules of law are made in order that there be justice means that the aim pursued by the making of rules is the establishment of rights, in the provisionally very vague sense of humanity.

William Luijpen, *The Phenomenology of Natural Law*.

I conclude this paper with Luijpen's reflections on why men make laws because it was within the spirit of this question that I pursued the connection between discourse ethics and law. My belief that we make some legal rules to institutionalise the particular moral principles that we see as 'just' is premised on my Habermasian bias that, as rational beings, we cannot deny the rules of discourse without at the same time denying our own nature. I have tried to bring together some of the ideas of Anglo-American legal philosophers and Continental philosophers; my goal being to see if one could incorporate Habermas' moral philosophy into issues concerning the moral obligation of law.

I have tried to limit my discussion of natural law to laws governing freedom of expression. One can not begin to address the complexities of free speech jurisprudence without assessing it against the background of such 'core' rights as security of person. To this extent, I have tried to connect the pragmatics of conversation with a conception of the common good. By focusing primarily on Finnis' account of natural law, I have tried to explore how a conception of natural law might incorporate some of Habermas' arguments concerning the reasoning process.

Finally, I tried to apply the ethics of discourse to the contentious debate surrounding hate speech and pornography. The commitment to tolerance, which I believe is implied in the commitment to discourse, raises interesting questions concerning when we should no longer tolerate certain expressions but censor them. I have suggested that a stringent test, similar to that in American free speech jurisprudence, is compatible with the ethics of discourse. A weaker test, such as that accepted by the Canadian courts in *Keegstra* and *Butler*, is incompatible with the ethics of discourse. And I have expressed my concerns with regards to this less stringent test.

While I am sure that there are many issues that I have not done justice to in this paper, I hope my project has unearthed some themes of interest to legal philosophers. Habermas' moral philosophy seems to offer a vast amount of stimulating and insightful

contributions to the on-going debate in Anglo-American legal philosophy. And if the goal of this paper was successful, then some further progress was made in bringing these two traditions closer together.

BIBLIOGRAPHY

Adam, Stuart. "Truth, the State, and Democracy: The Scope of the Legal Right of Free Expression". *Canadian Journal of Communication*. Vol. 17. No. 3, Summer 1992.

Aquinas, Thomas. extracts from *Summa Theologica*. *Philosophy of Law*. (eds. Feinberg and Gross) Belmont, California: Wadsworth Publishing Company, 1991.

Aristotle. extracts from *Nicomachean Ethics*. *A New Aristotle Reader*. (ed. J.L. Ackrill) Princeton, New Jersey: Princeton University Press, 1987.

Bickenbach, J.E. (ed). *Canadian Cases in the Philosophy of Law*. Peterborough: Broadview Press, 1993.

DiZerega, Gus. "Democracy as a Spontaneous Order". *Critical Review*. Vol. 3, no. 2, Spring 1989, p.206-40.

Donnelly, Jack and Howard, Rhoda (eds). *International Handbook of Human Rights*. New York: Greenwood Press, 1987.

Dworkin, Ronald. *Law's Empire*. Cambridge: Harvard University Press, 1986.

Feinberg, Joel. "Limits to the Free Expression of Opinion". *Philosophy of Law*. (eds. Feinberg and Gross) Belmont, California: Wadsworth Publishing Company, 1991.

Fekete, John. *Moral Panic*. Montreal: R. Davies Publishing, 1995

Finnis, John. *Natural Law and Natural Rights*. Oxford: Clarendon Press, 1980
---------- "Natural Law and Legal Reasoning". *Natural Law Theory* (ed. Robert George) Oxford: Clarendon Press, 1992.

Fuller, Lon. *The Morality of Law*. New Haven and London: Yale University Press, 1964.

Gleditsch, Nils Petter. "Democracy and Peace: Good News for Human Rights Advocates". *Broadening the Frontiers of Human Rights*. (ed. Donna Gomien) Scandinavian University Press, 1993.

Goldsworthy, J.D. "The Self-Destruction of Legal Positivism", 10 *Oxford Journal of Legal Studies*, no.4 (1990), 449.

Greenspan, Louis and Levitt, Cyril (eds). *Under the Shadow of Weimar*. Westport,

Connecticut: Praeger Publishing, 1993.

Greenwalt, Ken. *Fighting Words: Individuals, Communities, and Liberties of Speech.* Princeton, NJ: Princeton University Press, 1995.

Habermas, Jurgen. *Moral Consciousness and Communicative Action.* (Trans. Christian Lenhardt and Shierry Weber Nicholsen). Cambridge, Mass.: MIT Press, 1990.
---------- *Justification and Application: Remarks on Discourse Ethics.* (Trans. Ciaran P. Cronin) Cambridge, Mass.: MIT Press, 1993.
---------- "Law and Morality". *The Tanner Lectures on Human Rights.* (ed. Sterling M. McMurrin) Salt Lake City: University of Utah Press, 1988.
---------- "Reconciliation through the Public Use of Reason: Remarks on John Rawl's Political Liberalism". *The Journal of Philosophy.* Vol. XCII, No. 3, March 1995.

Hart, H.L.A. *The Concept of Law.* Oxford: Clarendon Press, 1961.

Hawkins, Gordon and Zimring, Franklin. *Pornography in a Free Society.* Cambridge: Cambridge University Press, 1988.

Howard, Rhoda. *Human Rights and the Search for Community.* Colorado: Westview Press, Inc., 1995

Hume, David. *Essays: Moral, Political and Literary.* Indianapolis: Liberty Fund, 1985.

Kant, Immanuel. *Kant Selections.* (ed. Lewis White Beck) New York: Macmillan Publishing Company, 1988.

MacCormick, Neil. "Natural Law and the Separation of Law and Morals". *Natural Law Theory* (ed. Robert George) Oxford: Clarendon Press, 1992.
---------- "Smashing the Two Way Mirror". *Anti-Foundationalism and Practical Reasoning.* (ed. Evan Simpson) Edmonton: Academic Printing and Publishing, 1987.

MacKinnon, Catherine. *Only Words.* Cambridge, Mass.: Harvard University Press, 1993.

Madison, Gary. *The Logic of Liberty.* New York: Greenwood Press, 1986.
---------- "Philosophy and the Pursuit of World Peace". *Dialectics and Humanism.* Vol. XI, no. 2-3, 1984.
---------- "Hermeneutical Liberalism"
---------- "Getting Beyond Objectivism". *Economics and Hermeneutics.* (ed. Don Lavoie) London: Routledge, 1991.

Mahoney, Kathleen. "Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography". *Law and Contemporary Problems*. Vol. 55, 1992.

Majury, Diane. "Equality and Discrimination According to the Supreme Court of Canada". *Canadian Journal of Women and the Law*. Vol. 4, no. 2, 1991.

McCarthy, Thomas. *The Critical Theory of Jurgen Habmeras*. London: Hutchinson, 1978.

---------- "Kantian Constructivism and Reconstructivism: Rawls and Habermas in Dialogue". *Ethics*. Vol. 105, No. 1, October 1994.

McCormick, Thelma. "If Pornography is the Theory, is Inequality the Practice?". *Law and Contemporary Problems*. Vol. 55, 1992.

Mill, John Stuart. *On Liberty*. (ed. Stefan Collini) Cambridge: Cambridge University Press, 1989.

Novak, Michael. *Human Rights and the New Realism*. New York: Freedom House, 1986.

Outhwaite, William. *Habermas: A Critical Introduction*. Stanford, California: Stanford University Press, 1994.

Pally, Marcia. *Sex and Sensibility*. New Jersey: Ecco Press, 1994.

Rainbow, P. and Sullivan, W. (eds.). *Interpretive Social Science*. Berkeley: University of California Press, 1979.

Raz, Joseph. "Free Expression and Personal Identification". *Oxford Journal of Legal Studies*. Vol. 11, 1991.

Richards, David. *The Moral Criticism of Law*. Encino, California: Dickenson Publishing, 1977.

Ricoeur, Paul. *Main Trends in Philosophy*. New York: Holmes and Meirer Publishing, 1979.

Smith, Adam. *The Theory of Moral Sentiments*. Indianapolis: Liberty Fund, 1982.

Smith, Goldwin. *Personal Pages*. (microfilm) Ithaca, New York: Photo Service, Cornell University, 1971.

Stevenson, Charles. *Facts and Values: Studies in Ethical Analysis*. New Haven and

London: Yale University Press, 1963.

Strossen, Nadine. *Defending Pornography: Free Speech, Sex, and the Fight for Women's Rights*. New York: Scribner, 1995.

Sumner, Wayne. "Hate Propoganda and Charter Rights". *Free Expression: Essays in Law and Philosophy*. (ed. Wil Waluchow) Oxford: Clarendon Press, 1994.

Taylor, Charles. "Interpretation and the Sciences of Man". *Interpretive Social Science*. (eds. Rainbow and Sullivan) Berkeley: University of California Press, 1979.

Walker, Samuel. *Hate Speech: The History of an American Controversy*. Lincoln and London: University of Nebraska Press, 1994.

Waluchow, W.J. *Inclusive Legal Positivism*. Oxford: Clarendon Press, 1994.

Weinreb, Lloyd. *Natural Law and Justice*. Cambridge, Mass.: Harvard University Press, 1987.

White, Stephen (ed.). *The Cambridge Companion to Habermas*. Cambridge: Cambridge University Press, 1995

Von Humbodlt, Wilhelm. *The Limits of State Action*. (ed. J.W. Burrow) Indianapolis: Liberty Fund, 1993.

COURT CASES:

"Case 58: Irwin Toy Ltd. V. Quebec". Canada Law Books, Inc. (4th edition) Toronto: Canada Law Book Inc.

"Case 89: Regina V. Butler". Canada Law Books, Inc. (4th edition) Toronto: Canada Law Books Inc.

"Case 35 Regina V. Zundel". Canada Law Books Inc. (4th edition) Toronto: Canada Law Books Inc.

"R. V. Keegstra Supreme Court of Canada". (ed. Bickenbach) *Canadian Cases in the Philosophy of Law*. Peterborough, Ontario: Broadview Press, 1993.