

# Freedom of Expression: Positive or Negative Freedom? Helping Understanding the Boundaries of a Cherished Right

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Freedom of expression is a key value of a liberal democracy. In the Netherlands, like other democracies, freedom of expression has become a hot topic. Events such as the assassinations of Pim Fortuyn (2002) and Theo van Gogh (2004), the Danish cartoons affaire (2005) and the Paris *Charlie Hebdo* shooting (2015) have ignited debates concerning the scope and limits of the right to freedom of expression. There are roughly speaking two prevalent opinions in the current heated debate about freedom of expression: either free speech<sup>1</sup> is under attack or there is simply too much of it. This brings me to the following main question of the article: what are the justifications to curtail freedom of expression in a liberal democracy?

I will show in this article that Isaiah Berlin's ideas of freedom are extremely useful in exploring the boundaries of free speech. After presenting a case dealing with the boundaries of freedom of expression, I will explain the two concepts of liberty as designed by Isaiah Berlin. I will demonstrate that, generally speaking, we value freedom, when it becomes practically meaningful, when it is a condition in which people have the opportunity to become or do something else. I will analyze Berlin's preference for negative freedom and discuss his criticism of positive freedom. Next, I will analyze whether freedom of expression is a positive or negative freedom. This outcome helps to better understand appropriate boundaries on freedom of expression.

## Féret v. Belgium: The Boundaries of Freedom of Expression

In recent years, there has been a broad debate about freedom of expression. Roughly speaking, there are two positions. The first position is

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<sup>1</sup> Throughout this article the term freedom of expression is used synonymously with freedom of speech and free speech. I agree here with Larry Alexander who writes that freedom of speech covers more than spoken language. Everybody agrees that freedom of speech or free speech covers written language as well. Furthermore, it is difficult to perceive how it is separated from pictographs, sign language, films, images, plays, etc. In liberal democracies, freedom of speech is legally protected and extends to media of communication and expression, as well as to musical performances and abstract artistic. Therefore, freedom of speech refers to freedom of communication and freedom of expression. See Alexander, *Is There a Right of Freedom of Expression?*, pp. 7-8.

the majority position, which supposes that peaceful societies set boundaries on freedom of expression. The second position presumes that freedom of expression is absolute and the individual will go to great lengths. In order to explore the boundaries of freedom of expression in liberal democracies it is useful to study the case of *Féret v. Belgium*, since this case was not only brought to the domestic court, but also to the European Court of Human Rights. Furthermore, as far as I know, *Féret v. Belgium* is the most principled judgment regarding inciting discrimination and intolerance.<sup>2</sup> This case is also highly controversial due to the dissenting opinion of three judges of the European Court.

Daniel Féret is a Belgium physician who was president and member of the political party *Front National* in Belgium. He was editor-in-chief of leaflets, posters and owner of the website of the *Front National*. During the election campaigns, Féret and his party distributed leaflets and posters between July 1999 and October 2001, which evoked numerous of complaints of both individuals and civil associations, which were filed against Féret. The distributed leaflets and posters called *inter alia* for precedence of Belgians and Europeans, and pleaded against the Islamization of Belgium. Immigrants were being labeled as a criminogenic environment and as profiteers of the Belgian government services such as benefits, and should be repatriated in order to convert their vacant homes in shelters for homeless Belgians.

The Centre for Equal Opportunities and the Fight against Racism filed a complaint due to a leaflet entitled 'National Front Program'. The mentioned program advocated a repatriation of immigrants and said it wanted to 'oppose the Islamization of Belgium', 'stop the pseudo-integration policy', 'return non-European unemployed,' 'reserve for Belgians and Europeans priority welfare', 'stop fertilizing socio-cultural associations help to the integration of immigrants,' 'reserve the right to asylum (...) to people of European descent who are actually prosecuted for political reasons' and 'understand the expulsion of illegal immigrants as a simple application of the law.'<sup>3</sup> In addition, the program advocated a stricter regulation of homeownership in Belgium, prevention of sustainable implementation of extra-European families and ethnic ghettos in the territory and aimed to 'save our people from the risk posed by the conquering Islam.'<sup>4</sup> In October 2001, a new complaint was filed about a poster with the title 'This is the couscous clan', depicting a veiled woman and a man wearing a turban, holding this pair on a placard, which included the inscription: 'the Quran says:

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<sup>2</sup> See, for example, Nieuwenhuis, *Over de grens van de vrijheid van meningsuiting*, p. 333.

<sup>3</sup> ECHR 16 July 2009, *Affaire Féret c. Belgique* (Requête no 15615/07).

<sup>4</sup> Ibid.

Kill the infidels to the point of making great slaughter.’ Underneath was written in red letters ‘FN says NO!’<sup>5</sup>

On 19 February 2002 Féret was interviewed by the police about these complaints. After joining all the complaints pertaining the various leaflets and the National Front party program, the parliamentary immunity of Féret was lifted on the request of the Principal Public Prosecutor at the Brussels Court of Appeal.

On 14 November 2002, the prosecution summoned Féret, his assistant and the non-profit organization National Front to appear before the Brussels Criminal Court to answer several charges, which are connected with the content of the distributed leaflets, posters and the website of *Front National*. On 4 June 2003 the Brussels Criminal Court refused to suspend the proceedings while a filed rehabilitation application by Féret was still pending. Later on, in June 2003, the Brussels Criminal Court declared an appeal by Féret pertaining the jurisdiction as inadmissible and on 10 March 2004 the Court of Cassation dismissed his appeal against the judgment of the Court of Appeal. On 29 June 2004 Féret was sworn in the Council of the Brussels-Capital Region, providing him with a new political immunity, while on 23 June 2004 the Public Prosecutor reactivated the lawsuit by filing its written submissions. After holding a complete trial on 20 February 2006 at the Brussels Court of Appeal, the same court, in a judgment of 18 April 2006, sentenced Féret to 250 hours of community service in the integration of people of foreign nationality sector, and subsidiary imprisonment for ten months. Furthermore, he would not be eligible for a period of ten years and was ordered to pay EUR 1 to each of the plaintiffs.

Although the Brussels Court of Appeal stated that ‘In determining the penalty to be applied (...), the court takes account of the circumstances it did not discover incitement to actual violence in the documents provided by the prejudices (...), that incitement and use of discrimination, segregation and hatred constitute no less serious violations of democratic values that must be punished firmly (...).’<sup>6</sup> In others words, although the court admits that Féret did not actually incite violence, it deems that Féret had sown the seeds of discord and that his views are incongruous with constitutional values such as tolerance, social placidity and non-discrimination. The sentence is indeed severe but the court was in line with the relevant sections of the Act of 30 July 1981 to suppress certain acts motivated by racism and xenophobia.

Before the European Court of Human Rights Féret complained that the sentence imposed by the Belgian State had infringed on his right of freedom of expression, arguing that the Court of Appeal made an excessive application of the restrictions permitted by paragraph 2 of Article 10 which guarantees the right to freedom of expression and which provides:

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<sup>5</sup> Ibid.

<sup>6</sup> Ibid.

‘1. Everyone has the right to freedom of expression. This right includes freedom to hold opinions and freedom to receive and impart information and ideas without interference by public authority and regardless of frontiers. (...)

2. The exercise of these freedoms carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law which are necessary in a democratic society (...) defense order (...) [and] the protection of the reputation or rights of others (...).’

In order to assess whether the Belgian State ruled correctly, the European Court of Human Rights set out that freedom of expression constitutes one of the essential foundations of a democratic society. Only for imperative reasons of overriding public interest is it appropriate to interfere on the right of freedom of expression. Examples of imperative reasons to intervene are discrimination, intolerance, segregation or hatred against a group, and racism.

In several reports, the European Commission against Racism and Intolerance (ECRI) noted that Belgium authorities have made significant progress in combating racial hatred. However, ECRI strongly recommended Belgium authorities be vigilant regarding racism, anti-Semitism and xenophobia.

Besides freedom of expression, the European Court emphasizes that ‘tolerance and respect for the equal dignity of all human beings constitute the foundations of a democratic and pluralistic society. It follows that in principle it may be considered necessary in democratic societies to sanction or even prevent all forms of expression which spread, incite, promote or justify hatred based on intolerance (including religious intolerance), if it is ensured that the ‘formalities’, ‘conditions’, ‘restrictions’ or ‘penalties’ imposed are proportionate to the legitimate aim pursued (regarding hate speech and advocating violence see, *mutatis mutandis*, *Sürek v. Turkey* (No. 1) [GC], No. 26682/95, § 62, ECHR 1999 IV, and especially *Gündüz v. Turkey*, No. 35071/97, § 40, ECHR 2003 XI ).’

The distributed leaflets and posters of *Front National* contained elements that clearly incited to segregation, discrimination or hatred against a group, community or their members because of race, color, descent or national or ethnic origin. It even incited implicitly to violence. The European Court concurred with the Belgium competent courts in relying on the Act of 30 July 1981 in order to suppress certain acts motivated by xenophobia or racism. Therefore, the inference on the free speech of Ferét by the Belgium State was justified, protected the rights and reputation of others and maintained the public order.

## Freedom: what is it?

Anyone who wishes to understand the course of freedom of expression and its boundaries, will soon discover that it is closely linked with freedom. Indeed, the origin of freedom of expression is closely connected with

the emergence of political freedom and more precisely the nascency of the concept of freedom.<sup>7</sup> In the annals of humanity, it seems that most men love and aspire to freedom, but at the same time freedom is perceived quite differently making it impossible to reach a consensus on it. Hannah Arendt notes that ‘to raise the question, what is freedom? seems to be a hopeless enterprise.’<sup>8</sup> In his renowned work *Two Concepts of Liberty*, the British liberal philosopher Isaiah Berlin (1909 – 1997) discerns two major concepts of freedom. In this section I will explain the two concepts of freedom<sup>9</sup> and point out their possible aberrations. I shall then point out that freedom of expression fits best in the concept of positive freedom, but it also need the protective elements of negative freedom.

### Negative Freedom

The first sense of political freedom is what Berlin calls the negative sense. The notion of negative freedom refers according to Berlin to ‘...the question: ‘What is the area within which the subject — a person or group of persons — is or should be left to do or be what he is able to do or be, without interference by other persons?’<sup>10</sup> Thus, negative freedom implies the non-interference of others, being left alone. In the context of negative freedom, Berlin notes that absolute freedom does not exist, because humans have different activities and purposes which do not always harmonize with each other. Since every human being should be able to develop his personal faculties in order to pursue various goals in life, a certain minimum extent of personal freedom must exist which by no means may be violated.<sup>11</sup> Although ‘It follows that a

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<sup>7</sup> Dommering, *Het verschil van mening*, p. 57; See also Bury, *A history of Freedom of Thought*. Bury argues that freedom of speech is a part of freedom of thought. Although nowadays, freedom of expression is taken for granted and considered as a natural right, it has always been problematic in human societies. This can be readily seen in ancient Greece, where Socrates was ordered by the authorities to withhold to express his thoughts.

<sup>8</sup> Arendt, *Between Past and Future. Six Exercises in Political Thought*. p. 143.

<sup>9</sup> For a critique on Berlin’s two concepts of liberty, the interested reader may refer to ‘*Negative and Positive Freedom*’ (1976) by Gerald C. MacCallum Jr. Briefly, for MacCallum freedom is always to be regarded as a triadic relation taking the format ‘x is (is not) free from y to do (not do, become, not become) z,’ x ranges over agents, y ranges over such ‘preventing conditions’ as constraints, restrictions, interferences, and barriers, and z ranges over actions or conditions of character or circumstance. The reason that the concept of freedom is not always obvious is due to the context of the discussion in which freedom takes part. See also Goodin, *Reasons for Welfare*, p. 307-308. On a similar note, Goodin argues that there is only one fundamental concept of freedom and that the discussion between the proponents of negative and positive freedom is merely a discussion about the proper emphasis on the elements of the triadic relation of freedom. Positive freedom emphasizes the relationship between x and z, negative freedom that between x and y. The two notions of freedom are not absolute contradictory, but ‘only incomplete references to the same underlying conception of freedom.’

<sup>10</sup> Berlin, *Liberty, Incorporating Four Essays on Liberty*, p. 169.

<sup>11</sup> *Ibid.*, p. 170-1.

frontier must be drawn between the area of private life and that of public authority', Berlin states that people are largely interdependent and therefore 'the liberty of some must depend on the restraint of others.'<sup>12</sup> It is not possible to remain free. In order to preserve freedom as much as possible, we must give up some of it. It is not clear upon which principles this should be done, yet a minimum of our personal freedom must be preserved.<sup>13</sup> There must always be an area of non-interference, delimited by a recognizable demarcation, which betokens negative freedom and implies in this context freedom *from*. For some philosophers such as John Stuart Mill (1806-1873), negative freedom is particularly at the level of individual freedom; being free *from* the interference of the state.<sup>14</sup> From this, it can be inferred that a person who conceives freedom simply as to be left alone by the state and happens to live in a monarchy or a dictatorship, feels more free compared to living in a fully-fledged democracy accompanied with stifling bureaucratic rules.

### Positive Freedom

The second sense of freedom discussed by Berlin is the positive freedom or freedom *to*. It is the liberty in which a person is a subject and not an object, in which people can formulate and shape their lives and achieve their ideals and goals, without being thwarted or coerced by others (internal or external pressures). This implies that a human is a rational, active and willing being who bears responsibility for his choices. At first glance, these concepts of freedom do not differ much from each other, but, as Berlin notes, these two concepts have developed in divergent directions. It is the positive freedom to which Berlin adopts a critical stand, for it can result in totalitarian regimes such as Nazi-Germany.<sup>15</sup>

### The Aberrations of Negative Freedom and Positive Freedom

According to Berlin, both concepts of freedom can be perverted. Negative freedom can degenerate into a justification for the law of the jungle where whoever has the superior firepower wins, positive freedom can be perverted into a totalitarian theory<sup>16</sup>, or as Berlin calls it 'the apotheosis of authority'.<sup>17</sup> In the twentieth century, there has been sufficient emphasis upon

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<sup>12</sup> Ibid., p. 171.

<sup>13</sup> Ibid.

<sup>14</sup> Ibid., p. 173-4.

<sup>15</sup> Ibid., p. 178-9.

<sup>16</sup> Blokland, *Freedom and Culture in Western Society*, p. 34.

<sup>17</sup> Berlin, *Liberty*, p. 40.

the more disastrous implications of negative freedom.<sup>18</sup> However, according to Berlin, the aberrations of positive freedom have not adequately been demonstrated, and therefore he has decided that ‘hence the greater the need, it seems to me, to expose the aberrations of positive liberty than those of its negative brother.’<sup>19</sup>

According to Berlin, positive freedom, dressed in sheep's clothing as a promise of more freedom also remains in this day and age a threat to individual freedom. This fact, then, is the underlying reason for Berlin to concentrate especially on the excesses of positive freedom.<sup>20</sup> However, having said this, as long as the private area, in which people can operate unhindered by others, is guaranteed, and they can freely set out their own life goals, Berlin considers positive freedom or autonomy as a legitimate and honorable value,<sup>21</sup> as he states: ‘Positive’ liberty, conceived as the answer to the question, ‘By whom am I to be governed?’, is a valid universal goal. I don’t know why I should have been held to doubt this, or, for that matter, the further proposition, that democratic self-government is a fundamental human need, something valuable in itself, whether or not it clashes with the claims of negative liberty or of any other goal; valuable intrinsically and not only for the reasons advanced in its favor by, for example, Constant – that without it negative liberty may be too easily crushed; or by Mill, who thinks it an indispensable means – but still only a means – to the attainment of happiness.<sup>22</sup> Towards the end of his essay, Berlin makes it unequivocally clear that he is in favor of pluralism of values combined with the negative concept of freedom due to the fact that there are so many human goals which are not only incongruous but are also in constant rivalry with each other.<sup>23</sup>

### The Aberrations of Freedom of Expression in the light of Negative and Positive Freedom

Although I shall elaborate on the justifications and boundaries of freedom of expression later in this article, I would like to make a few comments about its possible aberrations. If we consider freedom of expression as

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<sup>18</sup> Berlin, *Liberty*, p. 40; Blokland, *Freedom and Culture in Western Society*, p. 34.

<sup>19</sup> *Ibid.*

<sup>20</sup> Blokland, *Freedom and Culture in Western Society*, p. 34; see also Ramin Jahanbegloo, *Conversations with Isaiah Berlin*, p. 41-2, where Berlin states: ‘Certainly the weak must be protected against the strong, and liberty to that extent be curtailed. Negative liberty must be curtailed if positive liberty is to be sufficiently realized; there must be a balance between the two, about which no clear principles can be enunciated. Positive and negative liberty are both perfectly valid concepts, but it seems to me that historically more damage has been done by pseudo-positive than by pseudo-negative liberty in the modern world. That, of course, may be disputed.’

<sup>21</sup> Blokland, *Freedom and Culture in Western Society*, p. 34.

<sup>22</sup> Berlin, *Liberty*, p. 39.

<sup>23</sup> Berlin, *Liberty*, p. 216.

a pure absolute negative freedom, then all kinds of expressions and opinions are protected. This also means that calling for violence which might result in loss of life is fully protected and the state cannot intervene. If, on the other hand, we regard freedom of expression solely as a positive freedom, then there is a risk that the state will be given too much power and ultimately all undesirable expressions and opinions will be curtailed. Positive freedom then results in a collective whole and dissenting opinions are no longer tolerated. And this is exactly what Berlin is warning about. In the previous section, we have seen that there is a certain overlap between negative and positive freedom and that the distinction between them is not absolute. However, I will argue later in this article that it is more appropriate to regard freedom of expression above all as a positive freedom. I have two reasons for this. First, most literature indicates that there are various justifications for freedom of expression that are ultimately in the interest of the democratic constitutional state. In other words, freedom of expression is not only a right of the individual, but also serves a purpose on a collective level. For the political philosopher John Stuart Mill, the ultimate goal of free speech is the discovery of the truth. Consequently, the society as a whole will benefit from free speech. Secondly, all liberal democracies set certain boundaries for freedom of expression. The purpose of setting boundaries is to protect the democratic legal order. I think this is in line with Berlin's concept of negative freedom in which political intervention is justified in certain circumstances.

As Blokland explains, Berlin certainly doesn't plead for *laissez-faire* since it is obvious to him that such a kind of social-economic system in the nineteenth century wasn't able to create the minimum conditions in order to actual make use of the obtained negative liberties. Therefore, Berlin, who favors the concept of negative freedom, considers state intervention to be justifiable in order to safeguard these conditions:<sup>24</sup>

'Legal liberties are compatible with extremes of exploitation, brutality, and injustice. The case for intervention, by the state or other effective agencies, to secure conditions for both positive, and at least a minimum degree of negative, liberty for individuals, is overwhelmingly strong. Liberals like Tocqueville and J.S. Mill, and even Benjamin Constant (who prized negative liberty beyond any modern writer), were not unaware of this.'<sup>25</sup>

However, in a liberal democracy restricting the constitutionally protected right of freedom of expression must be done with great care. Only when an act of speech is harmful and / or dangerous can a judge decide to restrict it.

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<sup>24</sup> Blokland, *Freedom and Culture in Western Society*, p. 33.

<sup>25</sup> Berlin, *Introduction*, in: *Liberty*, p. 38.

Therefore, in order to protect the individual right of freedom of speech from the infringement of the state, the correction of negative freedom on its positive counterpart is always necessary.

### Berlin's objection towards positive freedom, a critique

In my opinion, Berlin's criticism of positive freedom is not only flawed, but is also a caricature of positive freedom. I also strongly believe that in his critique of positive freedom, the time in which he was living played a significant role. As a young boy at the age of eight, Berlin – who was born in Riga – witnessed the Russian Revolution in Petrograd. After coming back to Riga, at the age of ten, he left Latvia with his parents for England. We should not forget that Berlin wrote his essay in 1958, thus only a little of a decade after the Second World War ended and the Cold war was going on. At that time the Soviet Union and its allies were considered as totalitarian regimes and posed a great danger to – as Samuel Huntington calls it – the 'free world' or the Western world.

In his exposition on positive freedom, Berlin fails to establish a clear cause and effect relationship that explains why autonomy inevitably leads to totalitarianism. Berlin's fear is that people who adhere to self-rule and share certain views about how a state should function, will impose their collective will on others who hold diverging opinions. Furthermore, Berlin neglects that 'positive freedom is a cluster of concepts, at the heart of which is the notion that self-rule or self-determination is valuable in itself.'<sup>26</sup> The idea of the autonomous individual is not something that is the prerogative of would-be totalitarians<sup>27</sup>, but is the core value of liberalism.<sup>28</sup> This involves matters like the right to self-determination, privacy and autonomy and modern individualism. Modern individualism is increasingly identified with liberalism.<sup>29</sup> Berlin's claim that positive freedom inevitably leads to totalitarianism, imposition and coercion, can only hold if self-rule or autonomy in itself is a false ambition of positive freedom.<sup>30</sup> This is, of course, absurd, not only since we have just seen that self-rule is a core value of liberalism, but we also observed that autonomy in itself is in value to negative freedom. Adherents of negative freedom consider human beings capable of taking rational and autonomous actions and therefore they value self-rule.<sup>31</sup> It seems to me, that Berlin's fear for how freedom leads to totalitarianism, should be sought in two fundamental elements: (1) the lack of

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<sup>26</sup> Ramsay, *What's Wrong with Liberalism?*, p. 57.

<sup>27</sup> Ibid.

<sup>28</sup> Snel, *Recht van spreken*, p. 85.

<sup>29</sup> Ibid.

<sup>30</sup> Ramsay, *What's Wrong with Liberalism?*, p. 57.

<sup>31</sup> Ibid.

plurality of values and (2) a sovereign will of the majority. All this is, for a large extent, interconnected with the *Rechtsstaat*<sup>32</sup> or rule of law, which prevents the arising of a totalitarian regime by *inter alia* protecting minorities against a tyrannical majority. Surprisingly, Berlin doesn't discuss the *Rechtsstaat*, a concept so inextricably bound up with a liberal democracy. Nor does he explain how both concepts of freedom relate to fundamental rights of the *Rechtsstaat* such as freedom of expression, freedom of religion or the non-discrimination principle. Thus, Berlin's main objection to positive freedom – that it inevitably leads to totalitarianism – doesn't hold in a democratic state where the rule of law prevails.

### The justifications of Freedom of Expression

Although nowadays freedom of expression is considered as a core value within a liberal democratic society, it seems that many have neglected or are ignorant of the possible goals of freedom of expression. Freedom of expression is simply deemed as a good-in-itself. As stated earlier, all liberal democracies are cognizant of fundamental rights and freedom of expression is just simply one of them. In no single liberal democracy has the legislature preferred freedom of expression over other fundamental rights. Conversely, freedom of expression should be treated in conjunction with other fundamental rights like the non-discrimination principle, freedom of religion and the right of privacy. In most literature, the following justifications of freedom of expression are mentioned: discovery of truth, self-fulfillment, human progress, citizen participation in a democracy, and the much-needed control of government.<sup>33</sup> Furthermore, as Raphael Cohen-Almagor argues, 'free speech is important because it allows us to communicate with others. People are social beings. We do not like to be solitary beings. We need to connect with others, speak to others, and live

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<sup>32</sup> See Caenegem, *An Historical Introduction to Western Constitutional Law*, p. 16: According to Van Caenegem, the word *Rechtsstaat* is relatively new considering that it appeared in the beginning of the nineteenth century in Germany. He mentions two works by which it became widespread: *Die Polizeiwissenschaft nach den Grundsätzen des Rechtsstaates* (Tübingen, 1832-4) by Robert von Mohl and *Der Rechtsstaat. Eine publizistische Skizze* (1864) by Otto Bähr. This German word was adopted in the Dutch language. In 1870 it appeared for the first time in a text concerning Johan Rudolph Thorbecke (1798-1872), the founder of the Dutch Constitution of 1848. *Etat de droit* is the phrase which is used in France, where it is quite recent. Rule of law is the English equivalent and Van Caenegem gives different descriptions for the *Rechtsstaat*: 'the state where the rule of law prevails', 'the state under law' or 'the law-based state'.

<sup>33</sup> Barendt, *Freedom of Speech*, pp. 6-23; Cohen-Almagor, *Between Speech and Terror: The Charlie Hebdo Affair*, p. 2; Dahl, *On Democracy*, pp. 96-97; Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech*, pp. 3-6; Hawoth, *Free Speech*, pp. 17, 27, 177; Nieuwenhuis, *Over de grens van de vrijheid van meningsuiting*, p. 22; Stokkom, *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen*, pp. 49-54; Fish, *There's No Such Thing as Free Speech And It's a Good Thing*, p. 123.

in the company of others.<sup>34</sup> Free communication also serves social integration and stability. Freedom of expression makes it possible in a society characterized by diversity, for opinions from all groups to get out into the open and be recognized as part of the social debate. Thus, it makes adequate decisions more likely. Shutting off certain groups endangers the stability in mutual relationships.<sup>35</sup>

Dignity as a justification for freedom of expression is generally overlooked. As I will point out later, the limitation of free speech is often warranted when it offends human dignity. However, a person who is denied freedom of speech cannot address their problems, injustice or issues to the state in which he happens to live, and is thus automatically been deprived of human dignity. Therefore, it is submitted that free speech is not only a condition for human dignity but, as Steven Heyman correctly writes, ‘both of these values are essential to a liberal democratic society.’<sup>36</sup>

Let us return one more time to Berlin’s two concepts of freedom. Negative freedom or freedom *from* refers to non-interference by others like Berlin expounds ‘By being free in this sense I mean not being interfered with by others. The wider the area of non-interference the wider my freedom.’<sup>37</sup> Classical liberal philosophers and politicians such as John Stuart Mill mainly refer to the non-interference of government towards its citizens. Many of the fundamental rights in liberal democracies are negative rights and fit in the framework of negative freedom, although the scope of negative rights, of course, varies from state to state. For example, the right to own firearms is a negative right in the United States, which may not be infringed by the state, while in most European countries it is unlawful to keep and bear arms. From this perspective, freedom of creed, religion and speech equates to negative rights; society should not interfere with the individual who utilizes these rights, unless he or she is harmful to others. Freedom of speech is then conceived to me the individual who decides on the purpose of free speech.

Positive freedom or freedom *to* is about the liberty to shape life, how people can achieve their goals and ideals. Since people have different ideas, different interests, different goals and different ideals, positive freedom is far more complex than its counterpart. Values such as democracy, individualism and self-determination pertain to the framework of positive freedom and are championed in name of freedom and for many people form a real expression of freedom. Positive freedoms are about autonomy, controlling one’s own life,

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<sup>34</sup> Cohen-Almagor, *Between Speech and Terror: The Charlie Hebdo Affair*, p. 2.

<sup>35</sup> Dijk van, *Dit kan niet en dit mag niet*, p. 201; Greenawalt, *Fighting Words: Individuals, Communities, and Liberties of Speech*, p. 5.

<sup>36</sup> Heyman, *Free Speech and Human Dignity*, p. 1.

<sup>37</sup> Berlin, *Isaiah, Liberty, Incorporating Four Essays on Liberty*, Edited by Henry Hardy, Oxford: Oxford University Press, 2002, p. 170.

unused opportunities, a way to infuse people's own lives and society with content and meaning. This presupposes ideals and values which can clash and lead to conflicts.<sup>38</sup>

Although negative freedom is preferred in classical liberalism and is also favored by Berlin, in our day and age, it is incumbent upon the government to provide a minimum set of resources in order to achieve these ideals. In order to make good use of free speech, the government should provide resources such as education, which allow for the use of free speech.

Citizens should also be entitled to a certain right to information in the public sphere for the same reason; there's no point in freedom of expression without informed citizens.<sup>39</sup> However, could it be that free speech is both a negative and a positive freedom? This question can perhaps be answered in the affirmative by looking at the arguments of John Stuart Mill for freedom of speech. In his renowned book *On Liberty* (published in 1859) in Chapter two, Mill endeavors to connect individual freedom with social progress. Freedom of opinion and freedom of expression (Mill mentions these two concepts separately) are necessary for the society as a whole. For discovery of the truth, which is Mill's ultimate goal, he mentions four reasons why free speech should be tolerated. First, even the most different opinion can be true and should be expressed because nobody is infallible. This is closely connected with Mill's second argument, that a general rejected opinion still may hold a part of the truth which is absent in the general or prevailing opinion. Third, contesting a prevailing opinion which is the absolute truth, will lead to a better understanding for the adherents of this opinion. Finally, not challenging the general meaning, will result in taking the doctrine for granted, it becomes attenuated or even in danger.<sup>40</sup>

Snel, a Dutch historian, rightfully observes that for Mill, negative freedom in the meaning of unfettered expression is the best guarantee for truth. In his view, the positive opportunity to discover useful knowledge and insights depends on the maximum negative freedom of seeking the truth. In Mill's optimistic idea maximum individual freedom and maximum freedom of speech will lead to the best insights. Due to this individual freedom, the society as a whole will benefit the most. Finding the truth can only be achieved in a process of trial and error. According to Mill, the maximum degree of freedom of expression of the individual is the best guarantee to achieve maximum freedom for the society as a whole.<sup>41</sup>

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<sup>38</sup> Snel, *Recht van spreken*, pp. 58-9.

<sup>39</sup> Dijk van, *Dit kan niet en dit mag niet. Belemmering van de uitingsvrijheid in Nederland*, p. 214.

<sup>40</sup> Mill, *On Liberty*, pp. 101-2; Gray, *Mill on Liberty: A defence*, p. 104; Ten Cate, 'Speech, Truth and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses,' *Yale Journal of Law & the Humanities*, vol. 22 (2010), p. 38.

<sup>41</sup> Snel, *Recht van spreken*, p. 60.

For Mill, all kinds of opinions and expressions are welcome and the only restriction is when harm is done to other individuals, known as Mill's 'harm principle'. As an example, he gives the now famous speech related to the corn dealers:

'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 unfavorable sentiments, and, when needful, by the active interference of mankind.'<sup>42</sup>

In the next section, I will point out that Mill's harm principle being the only test in restricting free speech is not only flawed, but also dangerous for sustaining a liberal democracy which preserves tolerance and the protection of minorities. Furthermore, as Raphael Cohen-Almagor points out, Mill's work should be analyzed in the context of its time. The 19<sup>th</sup> Century England in which Mill lived was significantly different from the current England. Freedom of expression was a privilege for the elite, and not for the poor. And certainly not for the poor strata that wanted to express their opinions in their own words, let alone expressions that were considered offensive or blasphemous to the elite. Against this background, Mill had a clear agenda: the need to endorse the broadest feasible scope to freedom of speech and press.<sup>43</sup>

I now want to turn to the second justification of freedom of expression: self-fulfillment.<sup>44</sup> At the outset, freedom in general is associated with self-fulfillment. As we have seen before, freedom is only useful when it serves a purpose, when it offers the possibility to do or become something else. If freedom doesn't serve a purpose it becomes an end in itself. The same applies for freedom of expression; the ends are being confused with the means. When freedom of expression becomes an end in itself, we can say anything that comes to mind. This includes the right to offend others.<sup>45</sup> A champion and exponent of this opinion is Ayaan Hirsi Ali who proclaimed in a lecture in 2006 for the international press in Berlin that she has the right to offend (especially when it comes

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<sup>42</sup> Mill, *On Liberty*, pp. 107-8.

<sup>43</sup> Cohen-Almagor, Raphael, 'J.S. Mill's *Boundaries of Freedom of Expression*', p. 563, 595.

<sup>44</sup> Although it is a somewhat hard to precisely define self-fulfillment, and it is often equated with self-realization and self-actualization, the following description is suitable: '...self-fulfillment consists in carrying to fruition one's deepest desires or one's worthiest capacities. It is a bringing of oneself to flourishing completion, an unfolding of what is strongest or best in oneself, so that it represents the successful culmination of one's aspirations or potentialities. In this way self-fulfillment betokens a life well lived, a life that is deeply satisfying, fruitful, and worthwhile.' See Gewirth, *Self-fulfillment*, p. 3.

<sup>45</sup> Dommering, *Het verschil van mening*, p. 359-60.

to Islam and Muslims). Insulting fellow citizens under the pretext of free speech doesn't help to improve social cohesion and doesn't benefit a state in any way. Rather, it constitutes an act of indecency, as Bas van Stokkom puts it. And it absolves one of dealing with freedom in a responsible way. Decency is broader than being polite: it also allows one's opponents to offer a rebuttal.<sup>46</sup>

However, free speech in terms of self-fulfillment can, as Dommering argues, cultivate independent, argumentative citizens.<sup>47</sup> Dommering draws upon the classical case *Whitney v. California* (1927) in which Justice Louis Brandeis gave his opinion regarding the purpose and boundaries of free speech:

'Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears. To justify suppression of free speech, there must be reasonable ground to fear that serious evil will result if free speech is practiced. There must be reasonable ground to believe that the danger apprehended is imminent. There must be reasonable ground to believe that the evil to be prevented is a serious one.'

We see here that the exposure to evil, in this example the burning of women, creates a judgment and contributes to the discovery of the truth. Freedom of speech, or rather in my opinion freedom *to* speech, cultivates the necessary civil courage, which should help a state in fighting evil. Consequently, self-fulfillment is tantamount to democratic virtues in which free speech cultivates tolerant and argumentative citizens.<sup>48</sup>

## **Justifying the Boundaries of Freedom of expression: Hate Speech and Offense**

Free speech is a fundamental right which can only be restricted by a liberal state when there are compelling reasons to do so.<sup>49</sup> This is in line

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<sup>46</sup> Stokkom, *Mondig tegen elke prijs*, p. 12.

<sup>47</sup> Dommering, *Het verschil van mening*, p. 360.

<sup>48</sup> *Ibid.*, p. 360.

<sup>49</sup> It should be noted that the extent to which free speech is protected, varies from one state to the other. For example, when comparing the United States, the United Kingdom and Australia, Katharine Gelber states that 'Of the three countries being considered, Australia possesses the weakest free speech protections. Australia lacks an explicit free speech protection at the federal level in either constitutional or statutory form. Two subnational jurisdictions (one state and one self-governing territory) have enacted charters of rights that protect human rights, including freedom of speech. In language similar to that used in permitting restrictions on freedom of expression in Article 10(2) of the European Convention on Human Rights, both these statutes acknowledge that freedom of speech has attached to it special duties and responsibilities, and that lawful, reasonable restrictions on that right may be applied.' See Gelber, *Free Speech after 9/11*, p. 23-4.

with Berlin's concept of negative freedom or freedom *from*. Freedom of speech of citizens is protected from state interference in private spheres. Thus, limiting free speech in a liberal democracy is something that is subjected to several conditions. A liberal democracy distinguishes itself from a dictatorship in which there is usually no room for free speech, free press and critique of the government is severely punished. Freedom of expression also involves responsibility and this aligns with Berlin's concept of positive freedom: a human is a rational, active and willing being who bears responsibility for his or her choices. In this section I will discuss the justification of the boundaries of freedom of expression in light of Berlin's two concepts of freedom by focusing on two subjects: hate speech and offense. The reason for this choice is that both hate speech and offense are frequently associated with the boundaries of freedom of speech. In the beginning of this article, we discussed a case of hate speech, viz., *Féret v. Belgium*. In the following part of this article, I shall discuss other cases of hate speech and offensive speech. I claim that Mill's harm principle – freedom of speech being protected boundlessly with the exception for inciting violence – is insufficient in a liberal democracy.

### Hate Speech

Here I shall discuss how liberal states often address hate speech and ask questions such as: is allowing this kind of speech laudable and beneficial? Should it be defended at any cost? Should it be regulated? In answering these questions, I will *inter alia* argue that Mill's harm principle – which as we have already discussed before is when free speech leads to physical harm – is untenable. With the exception of the US, all liberal democracies prohibit and penalize hate speech. It remains somewhat unclear why the US differs from European countries in protecting hate speech.

### Definition and scope

It is somewhat difficult to give a specific definition of hate speech. Some scholars like Susan Brison limit the definition of hate speech to a face-to face or direct level. Brison argues that the kind of pornography which is extremely violent and degrading does qualify as hate speech against women and subsequently gives the following definition of hate speech: '...it constitutes face-to-face vilification, creates a hostile and intimidating environment, or is a kind of group libel.'<sup>50</sup> Others like David van Mill expand this definition by including indirect speech, because he believes that hate speech can also be experienced indirectly. I agree with Mill because although some speech is formulated

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<sup>50</sup> Brison, *The Autonomy Defense of Free Speech*, p. 314.

generally or veiled, it can have an impact on a person or a group. A statement like 'disabled people are the parasitizes of our societies unless they are willing to work and they should not be receiving social benefits from the state' is an example of indirect hate speech. It contains a clause that not all disabled people are bad, but they should meet certain criteria: they should work and refrain from receiving social security. All forms of speech promoting hatred against a person or a group of persons fall under hate speech.<sup>51</sup> Usually this kind of speech is aimed at persons who share in forms of identity such as religion, race, gender sexuality, or ethnicity.<sup>52</sup> Hate speech goes sometimes together with fighting words, expressions which are addressed personally and are so poisonous that an immediate response is inevitable. In a manner of speaking, the only option is a violent reaction.<sup>53</sup> According to Joel Feinberg, the doctrine of fighting words finds its provenance in the US Supreme Court case of *Chaplinsky v. New Hampshire* (1942). The Jehovah's Witness Walter Chaplinsky had been arrested for distributing literature on the streets of Rochester, New Hampshire. The contents of this literature caused a public disturbance. On the way to the police station for booking, he uttered in great anger the following words to the City Marshall: 'You are a goddamned racketeer' and 'a damned Fascist, and the whole government of Rochester are Fascists or agents of Fascists.'<sup>54</sup> Chaplinsky was convicted on the basis of violating the law<sup>55</sup> that 'No person shall address any offensive, derisive or annoying word to any other person who is lawfully in any street or other public place, nor call him by any offensive or derisive name, nor make any noise or exclamation in his presence and hearing with intent to deride, offend or annoy him, or to prevent him from pursuing his lawful business or occupation.'<sup>56</sup> The conviction was upheld all the way to the highest court because the used fighting words<sup>57</sup> are not protected by the US constitution. We see here that fighting words are unprotected because they are not an 'essential part of any exposition of ideas.'<sup>58</sup>

The purport of hate speech can go further than merely creating a hostile environment or intimidation and discrimination, it can lead to inciting violence,

<sup>51</sup> Van Mill, *Free Speech and the State*, p. 81.

<sup>52</sup> Ibid.

<sup>53</sup> Russell-Brown & Davis, *Criminal Law*, p. 37; Van Stokkom, *Godslastering, discriminerende uitingen wegens godsdienst en haatuitingen*, p. 172.

<sup>54</sup> Ibid., p. 228.

<sup>55</sup> Ibid., p. 229.

<sup>56</sup> <http://caselaw.findlaw.com/us-supreme-court/315/568.html>

<sup>57</sup> [https://www.law.cornell.edu/wex/fighting\\_words](https://www.law.cornell.edu/wex/fighting_words): Fighting words are, as first defined by the Supreme Court (SCOTUS) in *Chaplinsky v New Hampshire*, 315 U.S. 568 (1942), words which 'by their very utterance, inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.'

<sup>58</sup> Nieuwenhuis, *Over de grens van vrijheid van meningsuiting*, p. 129.

both verbal and non-verbal. For example, a Ku Klux Klan's burning cross in the garden of an African-American entails an immediate threat of harm, 'but it also brings with it an association, full of historical narratives, that violence against African-Americans is justified.'<sup>59</sup>

### Jeremy Waldron: The Harm in Hate Speech

One of the most comprehensive and significant works on hate speech is Jeremy Waldron's *The Harm in Hate Speech* (2012). Although Waldron primarily addresses the US for not restricting hate speech and argues why hate speech is suppressed in European countries, his argumentation helps to understand the boundaries of free speech in a liberal democracy. Waldron concentrates primarily on dignity, since hate speech attacks and undermines dignity and simultaneously the public good. To start with the latter, inclusiveness is an important value of a liberal democracy. Our modern society sponsors and fosters inclusiveness and recognizes our diversity in race, ethnicity, appearance, and religion. Living and working together despite of our differences, is a great challenge.<sup>60</sup> According to Waldron this means that: 'Each group must accept that the society is not just for them; but it is for them too, along with all of the others.'<sup>61</sup> In his plea why hate speech should be acknowledged, Waldron borrows the term 'well-ordered society' from John Rawls. For many liberal constitutionalists, a well-ordered society is first of all a free society that protects free speech, even when it may disturb, shock, or offend a section of the population. In addition, it is a well-ordered society based on assurance, dignity, security, and consequently, 'they live their lives and go about their business.'<sup>62</sup> For Waldron, dignity should not be confused with honor or (self-) esteem, but should be understood in the sense of a person's fundamental right to be considered as a member of the society in good standing, belonging to a minority group does not prevent from interacting socially.<sup>63</sup>

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<sup>59</sup> Van Mill, *Free Speech and the State*, p. 82. In the same book, on p. 51 van Mill explains that cross burning is considered as fighting words: 'In *R.A.V. v. City of St. Paul* the Court struck down a ban on cross burning because it was deemed to single out a particular form of fighting words, and hence violated content neutrality. It was decided that notions of racial superiority and the expression of racial hatred are as valid in the protected realm of public discourse as arguments about what the tax rate should be. *Virginia v. Black* weakened the *R.A.V.* ruling somewhat, but affirmed the view that racist hate speech in public discourse is fully protected. It was ruled acceptable to prohibit some cross burning (on the lawn of an African-American family) because of its extreme form of intimidation (i.e. for its consequences) but in other instances, (at a KKK rally, for example) it is classified as 'core political speech' and is fully protected.'

<sup>60</sup> Waldron, *The Harm in Hate Speech*, p. 4.

<sup>61</sup> *Ibid.*

<sup>62</sup> *Ibid.*, p. 16.

<sup>63</sup> *Ibid.*, p. 105.

A well-ordered society provides dignity and justice to its citizens and assures a commitment to these fundamental principles. According to Waldron, these fundamentals are: ‘that all are equally human, and have the dignity of humanity, that all have an elementary entitlement to justice, and that all deserve protection from the most egregious forms of violence, exclusion, indignity, and subordination.’<sup>64</sup>

A well-ordered society cannot do without the law in upholding these principles, ‘But just because assurance is a low-key background thing, the prime responsibility for its provision that falls upon the ordinary citizen is to refrain from doing anything to undermine it or to make the furnishing of this assurance more laborious or more difficult. *And this is the obligation that hate speech laws or group defamation laws are enforcing.*’<sup>65</sup>

Hate speech or group defamation implies the explicit denial of these fundamentals for some group in society.<sup>66</sup> In a well-ordered society, everyone matters, every person is entitled to a certain level of assurance to carry out normal day-to-day activities, either at work or outside work. Citizens feel secured against being humiliated, discriminated or terrorized. They don’t have to worry that their dignity and proper pride are affected. It goes without saying that a person is assured of some basic kind of dignity and can focus on what is important to them in social interactions: its opportunities and pleasures.<sup>67</sup> But, ‘when a society is defaced with anti-Semitic signage, burning crosses, and defamatory racial leaflets, that sort of assurance evaporates.’<sup>68</sup>

Hate speech specially targets this implicit social sense of assurance, especially the vulnerable minorities who rely on it. Hate speech is more than just autonomous self-expression, its bigotry aims at excluding certain people. In order to reinforce their message to undermine this assurance, they defile it with visible utterances of hatred, contempt and exclusion.<sup>69</sup> The result is: ‘what was implicitly assured is now visibly challenged, so that there is a whole new set of calculations for a minority member to engage in as he sets out to do business or take a walk in public with his family.’<sup>70</sup>

Moreover, hate speech seeks more than to undermine the public good of implicit assurance; it endeavors to establish *a rival public good*. People who publish hate speech (be it in words, symbols, leaflets) want to express to others that they are not alone; they want to coordinate and proliferate their message.<sup>71</sup>

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<sup>64</sup> Ibid., p. 82-3.

<sup>65</sup> Ibid., p. 93-94.

<sup>66</sup> Ibid., p. 83.

<sup>67</sup> Ibid., p. 84-8.

<sup>68</sup> Ibid., p. 85.

<sup>69</sup> Ibid., p. 88.

<sup>70</sup> Ibid., p. 88-9.

<sup>71</sup> Ibid., p. 94-5.

Waldron gives a clear example of this: he refers to Frank Collin, the leader of the Nazis who, in 1977, attempted to demonstrate through Skokie (a suburb of Chicago and known for its large Jewish population) and who stated: ‘We want to reach the good people—get the fierce anti-Semites who have to live among the Jews to come out of the woodwork and stand up for themselves.’<sup>72</sup>

Admittedly, hate speech law will drive the loathing underground, but at the same time that is precisely the object: to make clear that hate-mongers are isolated, embittered individuals. By these laws they are unable ‘...to contact and coordinate with one another in the enterprise of undermining the assurance that is provided in the name of society’s most fundamental principles. True, there is a cost to this: such laws may drive racist sentiment out of the marketplace of ideas into spaces where it cannot easily be engaged. But the notion that what we most need for expression and publication of this kind is a great debate in which Nazis and liberals can engage one another honestly and with respect for each other’s points of view is a curious one.’<sup>73</sup>

Waldron’s argument for restricting hate speech is fully in line with verdicts of European judges. In *Féret v. Belgium*, the European Court also addressed the issue of hate speech. It considered that hate speech does not essentially demand the actual call to a criminal act or an act of violence. The Court regards that any act of ridiculing, insulting or defaming parts of the population and specific groups are sufficient for a state to underline the combat against racist statements in order to safeguard the dignity or safety of these parts or groups of the population. There is no room for political speeches that incite hatred based on cultural, ethnic or religious prejudice and pose a threat to political stability and social peace in democratic states. The fact that Féret is a politician does not exonerate him from his responsibility to use freedom of expression in a responsible matter. On the contrary, the European Court argues that politicians in their public speeches – in which they have the right to defend their views and which may disturb, shock, or offend a section of the population (cf. *Handyside v. United Kingdom*, 7 December 1976, § 49, series A No. 24) – are required to avoid comments that might foster intolerance. Since politicians share the same power outlet as their ultimate goal, they should be particularly cautious regarding the protection of democracy and its principles. The European Court found that the incitement of foreclosure of foreigners constitutes a fundamental infringement of the rights of people and should therefore justify special care of everyone, including politicians. It follows that in this case, the content of the distributed leaflets promotes segregation, hatred, intolerance and xenophobia, all which are incongruous with the principles of a pluralistic democracy. In following

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<sup>72</sup> Ibid., p. 95.

<sup>73</sup> Ibid., p. 95.

cases, the outcome is the same: the European Court concurs with the restriction imposed on freedom of expression by the national court because values such as social peace, tolerance and non-discrimination have been violated.<sup>74</sup> In *Norwood v. United Kingdom*, we see the same line of argumentation. Mark Anthony Norwood (1962) was a member of the extreme right-wing political party British National Party. After the events of 9/11, Norwood displayed in the window of his residence between November 2001 and 9 January 2002 a large poster (supplied by the BNP). The poster depicted the words 'Islam out of Britain – Protect the British People', the Twin Towers in flame and star in a prohibition sign and a symbol of a crescent. After a complaint of a member of the public, the poster was removed. The applicant refused to attend an interview at the local police station the very next day after being invited by telephone. The applicant was charged with an aggravated offence, convicted of the offense by both the Oswestry Magistrates' Court and the High Court and fined 300 GBP. Although the applicant pleaded not to be guilty because the message of the poster was aimed to Islamic extremism and argued 'that to convict him would infringe his right to freedom of expression under Article 10 of the Convention,'<sup>75</sup> Lord Justice Auld of the High Court ruled that the poster was 'a public expression of attack on all Muslims in this country, urging all who might read it that followers of the Islamic religion here should be removed from it and warning that their presence here was a threat or a danger to the British people.'<sup>76</sup>

The applicant complained before the ECHR that the criminal proceedings against him infringed his right to freedom of expression under Article 10 of the Convention. He adduces that free speech is not merely inoffensive but includes also the contentious, irritating, heretical, unwelcome, provocative, and eccentric provided that it does not incline to provoke violence. The applicant also states that 'criticism of a religion is not to be equated with an attack upon its followers.'<sup>77</sup> He lives in a rural area unknown of any religious or racial tensions and it is not proven that even a single Muslim saw the poster.

The European Court dismissed the plea of the applicant and refers to Article 17 of the Convention which states: 'Nothing in [the] Convention may be interpreted as implying for any State, group or person any right to engage in any activity or perform any act aimed at the destruction of any of the rights and freedoms set forth herein or at their limitation to a greater extent than is provided for in the Convention.' The European Court continues that 'the general purpose of Article 17 is to prevent individuals or groups with totalitarian aims

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<sup>74</sup> Cf. Nieuwenhuis, *Over de grens van de vrijheid van meningsuiting*, pp. 333-4.

<sup>75</sup> ECHR 16 November 2004, *Application no. 23131/03* by Mark Anthony Norwood v. United Kingdom, p. 2.

<sup>76</sup> *Ibid.*

<sup>77</sup> *Ibid.*, p. 4.

from exploiting in their own interests the principles enunciated by the Convention.<sup>78</sup>

The poster in question in the present case contained the words ‘Islam out of Britain – Protect the British People’, a photograph of the Twin Towers in flame, and star in a prohibition sign and a symbol of a crescent. The European Court notes and concurs with the assessment made by the domestic courts, namely that the images and words on the poster equated to a public expression of attack on all Muslims in the United Kingdom. The message of the poster – which links Muslims as a whole to a grave act of terrorism – is incompatible with the values promulgated and guaranteed by the Convention, notably social peace, tolerance, and non-discrimination. Consequently, the display of the poster constituted an act that does not enjoy the protection of Article 10 or 14, but rather falls within the meaning of Article 17. The European Court declared the application of Norwood inadmissible.

In a similar case, *Jean-Marie Le Pen v. France* (20 April 2010), there is the same reasoning for the interference of the right of freedom of expression of a politician. Jean-Marie Le Pen (1928) was the president of the French ‘National Front’ party. After interviews with the French newspaper *Le Monde* (19 April 2003) and the weekly magazine *Rivarol* (30 April 2004), Mr. Le Pen was convicted in 2005 and fined 10,000 euros for ‘incitement to discrimination, hatred and violence towards a group of people because of their origin or their membership or non-membership of a specific ethnic group, nation, race or religion’, on account of statements he had made about Muslims in France.<sup>79</sup> Mr. Le Pen made, *inter alia*, the following statements:

‘When I tell people that when we have 25 million Muslims in France, we French will have to watch our step, they often reply: ‘But Mr Le Pen, that is already the case now!’ – and they are right.’<sup>80</sup>

‘The day we will have, in France, not more than 5 million but 25 million Muslims, it is they who will command. And the French will be walking as close as possible to the walls [‘raseront les murs’], go of the sidewalks and lower their eyes. When they do not, they are told, ‘Why do you have to look at me like this?’

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<sup>78</sup> *Ibid.*; on the same page it states: ‘The Court, and previously, the European Commission of Human Rights, has found in particular that the freedom of expression guaranteed under Article 10 of the Convention may not be invoked in a sense contrary to Article 17 (see, *inter alia*, *W.P. and Others v. Poland*, (dec.), no. 42264/98, 2 September 2004; *Garaudy v. France*, (dec.), no. 65831/01, 24 June 2003; *Schimanek v. Austria*, (dec.) no. 32307/96, 1 February 2000; and also *Glimmerveen and Hagenbeek v. the Netherlands*, nos. 8348/78 and 8406/78, Commission decision of 11 October 1979, *Decisions and Reports* 18, p. 187).’

<sup>79</sup> *Le Pen v. France* (application no. 18788/09), p. 1.

<sup>80</sup> *Ibid.*

Are you looking for a fight? And you just have to go away, otherwise you get a punch'.<sup>81</sup>

Mr. Le Pen appealed against the decision, but the Paris Court of Appeal upholds the previous verdict and fines him again for 10,000 euros. The Court of Appeal argued that Mr. Le Pen's statements suggest that the security of the French people depends on rejecting the Muslim community. It held that the comments of Mr. Le Pen are an incitement to hatred, discrimination or violence toward the French Muslim community and is no justification for freedom of expression. In 2009 the Court of Cassation concurred with the Paris Court of Appeal and rejected 'an appeal lodged by Mr. Le Pen in which he argued that his statements were not an explicit call for hatred or discrimination and did not single out Muslims because of their religion, and that the reference to Islam was aimed at a political doctrine and not a religious faith'.<sup>82</sup>

The case was finally being brought to the European Court where Mr. Le Pen complained that his right of freedom of expression had been breached. The European Court stressed that it attached the utmost importance to freedom of expression in a democratic society. This applies even more in a political context, where freedom of expression does not only entail opinions, ideas or information being received favorably, but also those that offend, shock or disturb. Every politician who discusses a matter of public interest may resort to a level of provocation or exaggeration, provided they respect the right and reputation of others. Mr. Le Pen is an elected politician, who represents his voters, defends their interests and takes up their concerns and consequently the European Court holds the strictest supervision of violation of his freedom of expression. Mr. Le Pen addressed issues related to the settlement and integration of immigrants in France. This entails that the statements done by Mr. Le Pen could sometimes lead to incomprehension and misunderstanding, which makes it necessary that the State should be given a significant latitude in assessing the necessity for interference of his freedom of expression. According to the European Court there were relevant and sufficient reasons given by the domestic courts for the conviction of Mr. Le Pen. The Muslim community of France as a whole was presented by Mr. Le Pen's comments in a disturbing light plausible to give rise to feelings of hostility and rejection. By presenting the religious tenets and the rapid growth of the Muslim community as a latent threat to the security and dignity of the French people, Mr. Le Pen has set peoples against each other. The European Court found the imposed penalty by the domestic courts propor-

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<sup>81</sup> *CINQUIÈME SECTION DÉCISION SUR LA RECEVABILITÉ de la requête no 18788/09 présentée par Jean-Marie LE PEN contre la France*, p. 2.

<sup>82</sup> *Le Pen v. France* (application no. 18788/09), p. 2.

tionate and the interference of his right of freedom of expression had been needful in a democratic society.<sup>83</sup>

### Joel Feinberg: Offense to Others

The late political and legal philosopher Joel Feinberg (1926-2004) argued that liberal societies are also in need of the Offense Principle which reaches further than the Harm Principle: 'It is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offense to persons other than the actor and would probably be an effective means to that end if enacted.'<sup>84</sup> As David van Mill points out, liberal democracies apply a kind of an Offense Principle 'where citizens are penalized for a variety of activities, including speech, that would escape prosecution under the harm principle. Wandering around the local shopping mall naked, or engaging in sexual acts in public places are two obvious examples.'<sup>85</sup>

With the exception of hate speech, most courts in liberal states do not take offense seriously in order to limit freedom of expression. This is as Raphael Cohen-Almagor argues for two reasons: (1) Offense is subjective: a person who heard, saw or read a message finds it offensive and another does not. (2) Because offense is subjective, it requires psychological evaluation and this entails that another profession decides constitutional matters, something with judges are reluctant to accept. Therefore, judges usually dismiss accusations of offense.<sup>86</sup> However, as Cohen-Almagor points out, the Charlie Hebdo affair (2015) is concerned with freedom of expression and offense.<sup>87</sup> Now the question arises what is offense and when can offense be taken seriously by the criminal law. Feinberg states that 'the word 'offense' has a general and a specifically normative sense, the former including in its reference any or all of a miscellany of disliked mental states (disgust, shame, hurt, anxiety, etc.), and the latter referring to those states only when caused by the wrongful (right-violating) conduct of others.'<sup>88</sup> Our interest is in the latter, because offense in general is subjective and often trivial. This implies that the offense principle can only come into effect when there is wrongful offense, when the rights of others are violated. For example, finding certain fashion (a man wearing a pink shirt) or haircuts (a crewcut on a woman) offensive can never be banned by the offense principle. In other words, we are dealing with *profound offense* and not with offensive

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<sup>83</sup> Ibid., p. 2.

<sup>84</sup> Feinberg, *Offense to Others*, p. xiii.

<sup>85</sup> van Mill, 'Freedom of Speech'.

<sup>86</sup> Cohen-Almagor, *Between Speech and Terror: The Charlie Hebdo Affair*, p. 2.

<sup>87</sup> Ibid.

<sup>88</sup> Feinberg, *Offense to Others*, p. 1-2.

nuisance or annoyance merely.<sup>89</sup> In order to determine the seriousness of an offense, Feinberg uses the following standards:

1. *The magnitude of the offense*, which is a function of its intensity, duration, and extent.

a. *Intensity*. The more intense a typical offense taken at the type of conduct in question, the more serious is an actual instance of such an offense.

b. *Duration*. The more durable a typical offense taken at the type of conduct in question, the more serious is an actual instance of such offense.

c. *Extent*. The more widespread the susceptibility to a given kind of offense, the more serious is a given instance of that kind of offense.

2. *The standard of reasonable avoidability*. The more difficult it is to avoid a given offense without serious inconvenience to oneself the more serious is that offense.

3. *The Volenti maxim*. Offended states that were voluntarily incurred, or the risk of which was voluntarily assumed by the person who experienced them, are not to count as ‘offenses’ at all in the application of a legislative ‘offense principle.’

4. *The discounting of abnormal susceptibilities*. (This can be thought of as a kind of corollary of 1.) Insofar as offended states occur because of a person's abnormal susceptibility to offense, their seriousness is to be discounted in the application of a legislative ‘offense principle.’<sup>90</sup>

Feinberg gives several (hypothetical) examples of offenses which he submits to the above-mentioned standards. The most compelling factor to penalize an offense is the *standard of reasonable avoidability*. Films which show the most horrible racist imagines<sup>91</sup> in order to please secret ‘black-haters’ so that they have ‘a pleasant evening’, and played in privately owned places is reasonably avoidable and ‘the Offense Principle... will not warrant legal prohibition of the films’.<sup>92</sup> But, as Feinberg continues, we acknowledge ‘that severe restrictions should be made on announcements and advertisements. A black need not suffer the direct humiliation and stinging affront to his dignity and self-respect that would come from his being forced into the audience for a ‘folk film.’ He can simply stay away, and avoid the worst of it. But if the city is blanketed with

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<sup>89</sup> Ibid., p. 51; Cohen-Almagor, *Between Speech and Terror: The Charlie Hebdo Affair*, p. 2, who states: ‘People may feel profound offence as a result of many problematic forms of expression: pornography, sexism, racism, bigotry, hateful speech, satirical cynicism, discussions on abortion, euthanasia, slavery, capital punishment, human trafficking and prostitution are a few examples.’

<sup>90</sup> Feinberg, *Offense to Others*, p. 35.

<sup>91</sup> See for example Feinberg, *Offense to Others*, p. 158: ‘The main features could be stories of uppity blacks put in their place by righteous whites, taunted and hounded, tarred and feathered, tortured and castrated, and in the climactic scenes, hung up on gallows to the general rejoicing of their betters. The aim of the films would be to provide a delicious catharsis of pent-up hatred.’

<sup>92</sup> Feinberg, *Offense to Others*, p. 159.

garish signs announcing the folk films, or worse than that, signs that dispense with euphemisms and advertise ‘shows that put niggers in their place,’ then the affronts are no longer private; the offense is no longer avoidable; and its nature no less profound. The signs will be even more deeply offensive than those inviting participation in cannibalistic banquets..., since they can be expected to inflame the blacks, who are the direct object of their insult, in the manner of fighting words, further frustrating them since violent response cannot be permitted. The offense of conspicuous advertisements, even nongraphic ones (though graphic ones are the worst), is so great that any restriction of them short of interference with the minimum basic right of communication is warranted.’<sup>93</sup>

In the concept of free speech being a positive freedom, the Offense Principle justifies prohibition of offensive speech which is intense, durable, extent and hard to avoid. This is further underpinned and ratified if the offensive speech doesn’t have any social value. That is to say, it doesn’t give a meaningful contribution to the justifications to value free speech: discovery of truth, self-fulfillment, human progress, citizen participation in a democracy, and the much-needed control of government.<sup>94</sup> Like hate speech, offensive speech will lead to sowing the seeds of discord and to views that are incongruous with constitutional values such as social peace, tolerance, and non-discrimination.

## Conclusion

The usual justifications given for free speech such as discovery of truth, self-fulfillment, human progress, citizen participation in a democracy, and the much-needed control of government indicate that freedom of expression is as Berlin calls it a positive freedom. Positive freedom or freedom *to* is about the liberty to shape life, how people can achieve their goals and ideals. Additionally, in the concept of positive freedom a person is a rational, active and willing person and bears responsibility for his choices such as enjoying his freedom of expression. Negative freedom or freedom *from* refers to non-interference and implies that speech acts of citizens are protected from state interference. A well-ordered society furnishes dignity and justice to its citizens and assures a commitment to these fundamental principles. When freedom of expression or better freedom *to* expression is valued for its contribution for a well-ordered society, then both legally and morally there is justification for limiting speech

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<sup>93</sup> Ibid., p. 162.

<sup>94</sup> Cf. Mondal, *Islam and controversy: the politics of free speech after Rushdie*, p. 4, who states: ‘...freedom of speech is not an end in itself but a means towards achieving mutual understanding, so too is dialogue only a means towards the achievement of social justice, which is a goal that lies beyond discourse even if it is nevertheless only conceivable within and through it.’

acts that aim to undermine such a society. Framing freedom of expression primarily as positive freedom, but with the correction of its negative counterpart, helps us to understand the boundaries of freedom of expression in a liberal democracy.

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