



# Freedom of Expression: what lessons should we learn from US experience?

LIBERDADE DE EXPRESSÃO: QUE LIÇÕES DEVEMOS APRENDER  
DA EXPERIÊNCIA AMERICANA?

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## Abstract

Freedom of Expression is becoming a theme of growing importance and visibility in Brazil. Newspapers report daily legal suits against “hate speech” concerning race and religious discrimination. Many courts are also imposing high compensation damages that are challenging the “right to ridicule” in comedy shows and newspapers cartoons. The Brazilian public opinion in general tends to be sympathetic to more restrictive rules that may threaten freedom of expression in Brazil. There is nowadays in Brazil an unexpected agreement among the right wing, religious groups, and many human rights movements that support a European model of free speech. In many ways, the “Brazilian Model” based on balancing doctrine and a vague conceptualization of Human Dignity gives a lot of discretion for courts to decide the limits of freedom of expression. Court decisions based on balancing rhetoric is becoming dominant in Brazilian Constitutional court and usually try to avoid some epistemological issues concerning objectivity and moral justification. This article advocates that Brazilian interpretation of freedom expression has a lot to learn from the US model and doctrine. The US more strict and conceptual jurisprudence on this issue offers a powerful and democratic alternative to the balancing model and represents a rich conceptual analysis still unknown by Brazilian courts.

## Keywords

Freedom of Expression; hate speech; balancing doctrine; Brazilian interpretation; US model.

## Resumo

*Liberdade de expressão está se tornando um tema de grande importância e visibilidade no Brasil. Diariamente os jornais noticiam questões acerca do que é chamado de “discurso de ódio” em relação à discriminação racial e/ou religiosa. Além disso, muitos tribunais impõem compensações altas a esses danos desafiando o “direito de ridicularizar” dos shows de comédia e das charges. A opinião pública brasileira tende, normalmente, a simpatizar com regras mais restritivas, que podem ameaçar a liberdade de expressão no país. Há atualmente no Brasil um inesperado acordo entre a ala direita, os grupos religiosos e os vários movimentos de direitos humanos que apoiam o modelo europeu da liberdade de expressão. De várias formas, o “modelo brasileiro” baseado na doutrina da ponderação e na vaga conceptualização da dignidade humana dá aos tribunais discricionariedade para decidir os limites da liberdade de expressão. Decisões judiciais fundamentadas na retórica da ponderação estão se tornando dominantes no Supremo Tribunal Federal e, geralmente, elas evitam aspectos epistemológicos relativos a objetividade e justificação moral. O artigo defende que a interpretação brasileira da liberdade de expressão tem muito a aprender com o modelo e a doutrina norte-americanos. A jurisprudência norte-americana mais rígida e conceitual nesse assunto oferece uma alternativa poderosa e democrática ao modelo de ponderação e representa uma análise rica e conceitual ainda desconhecida pelos tribunais brasileiros.*

**Palavras-chave**

*Liberdade de expressão; discurso de ódio; doutrina da ponderação; modelo brasileiro; modelo norte-americano.*

**INTRODUCTION**

Freedom of Expression is becoming a theme of growing importance and visibility in Brazil. Newspapers report daily legal suits against “hate speech” concerning race and religious discrimination. Many courts are also imposing high compensation damages that are challenging the “right to ridicule” in comedy shows and newspapers cartoons. The Brazilian public opinion in general tends to be sympathetic to more restrictive rules that may threaten freedom of expression in Brazil.

There is now in Brazil an unexpected agreement among the right wing, religious groups, and many human rights movements that support a European model of free speech. In many ways, the “Brazilian Model” based on balancing doctrine and a vague conceptualization of Human Dignity gives a lot of discretion for courts to decide the limits of freedom of expression. Court decisions based on balancing rhetoric are becoming dominant in the Brazilian Constitutional court, which usually tries to avoid epistemological issues concerning objectivity and moral justification.

It is common sense to say that the issues related to freedom of expression are very complex and involve many different dimensions and distinction concerning the context of communication. Discussing all possible dimensions of it is clearly out of the reach and intentions of this article. Our basic purpose is to pinpoint some general aspects of the current Brazilian debate on freedom of speech and ask how the American theory and practice might offer useful lessons. Some recent cases can offer a preliminary portrait of how free speech is being enforced and debated in Brazil.

**PART I****1.1 SOME REPRESENTATIVE BRAZILIAN CASES****1.1.1 PROHIBITION OF *MEIN KAMPF* (2016)**

On February 2<sup>nd</sup> 2016, a Brazilian criminal judge published a preliminary injunction forbidding

the selling and distribution of Adolf Hitler's book *Mein Kampf* in the city of Rio de Janeiro. The decision was grounded on the article 20 of Statute 7.716/89 that sanctions with up to three years of imprisonment those who "practice, induce or incites discrimination or prejudice based on race, color, ethnicity, religion or national origin". The censorship was clearly based on the racist content of the book.

The judge stated that the publication of *Mein Kampf*:

[...] has the intention to violate the criminal law since it *foster the ominous practice of intolerance to a determinate group of human persons*. [...] It is well known that the Nazi Leader preached and incited the practice of hate against Jews, blacks, homosexuals, gypsies, etc. In face of manifest conflict between the foundations and objectives of the Brazilian Federal Republic (BFR), more precisely, the defense of human person, *it is evident that any manifestation of thought apt to proportionate and foster any kind of discrimination to human person is contrary to the most basic legal and human values protected by BFR*. It is to be noticed that the relevant question to be analyzed by this judge is *the protection of human rights of those who could be victims of Nazism, as well as the memory of those already victimized*. [...]

Furthermore, *today the hermeneutics of post-positivism solves the question by the harmonization (balancing) of the fundamental rights apparently in conflict*. In this concrete case, there is no real conflict to be solved, since a right to information does not protect the publication of the Bible of Nazis. *On the contrary, this work has the power to foment the horrible practice that history has proved to be responsible for the death of millions of innocent people* [...] *Therefore, it is contrary to human rights*. Even if this is not the adopted understanding, there is no doubt that in case of conflict among legal interest linked to information and the protection of human rights, the latter should always prevail, either by the technique of the preponderance of interests (human rights) or by balancing. *This conclusion follows from the prevalence of human rights over any other that could conflict with them*. (RIO DE JANEIRO, 2016, emphasis added).

The legal justification of the case is a good example not only of the naturalized acceptance of balancing as "the method" of constitutional interpretation, but also an interesting case of the poor analysis of the concept of incitement, resulting in a conviction based on "a kind of bad tendency" justification.

1.1.II PROHIBITION OF BIBLICAL BILLBOARD QUOTATIONS DURING THE GAY PARADE (2011)  
In August 2011, a local judge forbade an evangelist church (Casa de Oracão de Ribeirão Preto) to publish billboards with homophobic biblical citations in the city of Ribeirão Preto, São Paulo, in the eve of the seventh Gay Parade in the city. Some of the Biblical citations were:

So God created mankind in his own image, in the image of God he created them; male and female he created them (Genesis 1:27);

If a man also lie with mankind, as he lies with a woman, both of them have committed an abomination: they shall surely be put to death; their blood shall be upon them. (Leviticus 20:13);

Because of this, God gave them over to shameful lusts. Even their women exchanged natural sexual relations for unnatural ones. 27 In the same way the men also abandoned natural relations with women and were inflamed with lust for one another. Men committed shameful acts with other men, and received in themselves the due penalty for their error. (Romans 1:26-27).

In December 10<sup>th</sup>, 2015, the São Paulo State Higher Court of Justice upheld the decision. According to the opinion, publishing these biblical citations

[...] is not a simple expression of religiosity, something that could perfectly happen in the interior of a temple, in the presence of the church goers, and thus respecting the freedom of religious faith and cult. However, the church intended to make lobby for its religious convictions and this practice confronts the sexual orientation of others and should not prevail. The self-determination of a person gives her the right to opt and eventually to practice her own sexuality the way she wants. The State and no religion cannot publicly confront such a liberty. In the democratic rule of law, the human dignity must prevail. For this reason the inadequate behavior of the appealing church must be abolished, since it is not admissible any incentive to prejudice. Furthermore, the religious support of the condemned practice affects those who do not comply with the religious dogmas. Besides, a free society requires that all of his members exercise their individual freedom without limitations and the billboards don't follow such requirements and should be taken away since they do not take into consideration the human dignity which also includes the sexuality. (RIBEIRÃO PRETO, 2015).

### 1.1.III MARIJUANA MARCH (CRIME ADVOCACY) (2011)

On June 15, 2011, the Brazilian Federal Supreme Court ruled in favor of public demonstrations that defend the legalization of drug use, like the Marijuana March (*Marcha da Maconha*). The case at hand was filed in 2009 by the Federal Prosecutor's Office (Ministério Público Federal), which asked for an interpretation of article 287 of the Penal Code according to the Constitution. Article 287 prescribes a punishment of three to six months in prison and a fine for whoever publicly justifies, defends, or praises criminal acts or the perpetrator of a crime.

The Court expressed the opinion that the constitutional rights of freedom of assembly and freedom of expression must be respected. The Court also opined that the marches should

not be considered crimes, because they do not foster or defend the use of drugs, but rather are designed to bring about a review of public policies. The decision overturns various lower-court decisions that had banned them as “apology for drug use and crime” and “support of drug trafficking.” The court held that the marches must be allowed if authorities were to respect the rights of freedom of expression and the right to assemble. The marches are a way for citizens to exercise their rights: “Nothing proves more harmful and dangerous than the desire of the State to repress freedom of expression, especially of ideas that the majority repudiate. Thought should always be free.” (Justice Celso de Mello).

#### 1.1.IV LEVY FIDELIX CASE (HOMOPHOBIA) (2014)

Levy Fidelix former candidate for presidential election in 2014 and president of the little Political Party PRTB delivered a homophobic speech during a debate in TV in September 28, 2014. He was therefore sentenced to pay a fine of one million reais in damages in a civil action for damages brought by Gay, Bisexual, Transsexual and Transgender movements (LGBT) and Defensoria Pública (Public Attorney) of City of São Paulo. São Paulo Court of Justice reversed the sentence (SÃO PAULO, 2017).

During a debate on TV with other presidential candidates, Fidelix was asked a why many of those who defend traditional family values refuse to recognize the right of couples of the same sex to civil marriage. He responded with a vulgar statement about gay sex not leading to reproduction. “Those people who have those problems should receive psychological help. And very far away from us, because here it is not acceptable.” He claimed to be against homo affective union because “they can’t have children”: “Put a hundred people of the same sex on an island and go back in a hundred years. They’ll be all dead.” He concluded saying that he doesn’t see any problem if homosexuals act “in private”. However, exhibitionism, according to Fidelix, is unacceptable, gay “can’t confront. Showing genitalia, kissing in public.” He continued saying that “Excretory organs can’t reproduce [...] How can a father, a grandfather stay here anchored because he is afraid of losing votes? I’d rather not have those votes to be silent. [...]. Let’s end this story”, he said, suggesting that he should be courageous and face the intimidation produced by the politically correct view that favors gay community interests. “I saw now the Holy Father, Pope cleaned the pedophile in Vatican, he did very well. That’s right! We treat all life with religiosity to our children can really find a good family way”, he said at the time. The candidate also stated that the most important is that the LGBT population is attended psychological and affective level, but “far from us.” The polemic statements of Levy Fidelix during the debate caused strong reactions and international repercussions.

The São Paulo Higher Court of Justice considered the statements of the presidential candidate had “exceeded the limits of freedom of expression, focusing on hate speech”. “We cannot prohibit the candidate to express his opinions. However, he used extremely rude, hostile, and unfortunate words that offend persons who are human beings and deserve

respect from society. The equality principle should be followed.” Besides, the offenses made to GLS population propagate the false sentiment of political legitimation of discriminatory behavior, strengthening acts of exclusion and violence against this minority. “Thus, this kind of discourse is “a disservice to democratic society” and “denies dignity to GLS population” (SÃO PAULO, 2017).

#### I.I.V ELLWANGER CASE – SUPREME COURT – RACISM AND HOLOCAUST DENIAL (2003)

A petition for a writ of *habeas corpus* was filed before the Federal Supreme Court (FSC) (BRASIL, 2004), on behalf of Siegfried Ellwanger, a writer and publisher who was convicted, at the appellate level, of the crime of anti-Semitism for publishing, selling and distributing anti-Semitic material. The Constitution (Article 5.42) determines that “the practice of racism constitutes a crime neither subject to bail nor to the statute of limitations”. Arguing that Jews are not a race, the petitioner alleged that the crime of anti-Semitic discrimination, for which he was condemned, does not have the racial connotation necessary for barring the statute of limitations, as disposed by Article 5.42 of the Constitution, which should be confined to the crime of racism.

The Plenary of the Court, based upon the premise that there are no biological subdivisions of the human species, found that the division of human beings in races results from a process whose content is merely social political. This process gives birth to racism, which in turn generates discrimination and segregationist prejudice.

It was argued that the discrimination against Jews, which results from the core of the National-Socialist thought that Jews and Arians form distinct races, is irreconcilable with the ethical and moral standards defined in the Constitution and in the contemporary world, on which the Democratic Rule of Law arises and harmonizes itself. Hence, the crime of racism is verified by the simple use of these stigmas, which constitutes an assault against the principles upon which human society is built and organized, such as the respectability and dignity of the human being and his peaceful coexistence in the social environment.

It was therefore recognized that the editing and publishing of written works conveying anti-Semitic ideas – which seek to revive and lend credibility to the racial conception defined by the Nazi regime, denying and subverting incontrovertible historical facts as the Holocaust, predicated on the supposed inferiority and disqualification of the Jewish people – *amount to inciting discrimination* with a heightened racist content, made even more serious in light of the historical consequences of the acts upon which they are based.

The Justices understood that, in this case, the conduct of the petitioner in publishing books with anti-Semitic content was explicit, revealing a manifest intention to deceive, as he based himself on the wrong premise that the Jews are not only a race, but more than that, a fundamentally and genetically lesser and pernicious racial segment. In this way, the discrimination he committed, deliberately and aimed specifically against Jews constitutes the illicit act of practicing racism, with the grievous consequences that accompany it.

It was decided, at last, that as any individual right, the constitutional guarantee to freedom of expression is not absolute, as it may be retracted when it oversteps its moral and juridical limits, as in the case of immoral manifestations that amount to penal violations. For this reason, in the concrete case, the guarantee of freedom of expression was retracted in the name of the principles of dignity of the human person and of judicial equality.

## I.II THE CHARACTER OF THE BRAZILIAN DEBATE

The choice of cases is somehow arbitrary. Many other cases concerning commercial speech, privacy, Internet communication, corporate donation for electoral campaigns, religious speech, fighting words could have been added. However, they fit the purpose of showing that the debate on the limits and the very concept of freedom of expression is becoming more complex and intense every day. This phenomenon has triggered a very interesting, although sometimes conceptually poor, debate about the limits of free speech and the proper mechanisms and models of interpretation that should be used in specific settings.

The Brazilian Constitution of 1988 considered freedom of expression a fundamental right. Its content does not differ deeply from the usual way other Latin American constitutions protect this right.<sup>1</sup>

The Brazilian Constitution is the result of the democratization process that followed the end of the authoritarian regime. For this reason, its main political rationale is based on the liberal idea that free speech is a central instrument for the protection of the *democratic regime*. Justice Barroso's words mentioned above illustrate this. According to this view, the free political criticism is necessary for the transparency and accountability of the exercise of

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<sup>1</sup> According to it:

“Article 5. All persons are equal before the law, without any distinction whatsoever, Brazilians and foreigners residing in the country being ensured of inviolability of the right to life, to liberty, to equality, to security and to property, on the following terms: (ca no. 45, 2004)

IV – the expression of thought is free, and anonymity is forbidden;

IX – the expression of intellectual, artistic, scientific, and communications activities is free, independently of censorship or license;

XIV – access to information is ensured to everyone and the confidentiality of the source shall be safeguarded, whenever necessary to the professional activity;

Article 220. The manifestation of thought, the creation, the expression and the information, in any form, process or medium shall not be subject to any restriction, with due regard to the provisions of this constitution.

Paragraph 1. No law shall contain any provision which may represent a hindrance to full freedom of press in any medium of social communication, with due regard to the provisions of article 5, IV, V, X, XIII and XIV.

Paragraph 2. Any and all censorship of a political, ideological and artistic nature is forbidden.”

the political power and to grant voice to minority groups and political ideologies that were silenced during dictatorship. Most of Brazilian legal doctrine on free speech is based on these justifications that correspond to the dominant political expectations of the Brazilians in 1988. This is not surprising since many artists, politicians and intellectuals, political parties, and journalists were censured and persecuted by the military regime.

Generally speaking, these rationales are quite similar to John Stuart Mill's justification for free speech. It is also possible to identify in the mentioned cases and the traditional doctrine the idea that free speech is a powerful instrument to grant the "Market of Ideas" in which the best arguments could prevail. This kind of argument is quite similar to what in the US is often called a Meiklejonian conception of free speech.<sup>2</sup>

Some of the cases above mentioned represented a challenge to the Brazilian traditional kind of justification of free speech. On one hand, it is very interesting to notice that intellectuals, ordinary people and jurists were divided about the prohibition of selling Hitler's *Mein Kampf* and Levy Fidelix civil conviction to pay one million reais as moral collective harm for his words during the 2014 Presidential debate. In both cases, the judicial arguments attracted human rights left wing and conservative supporters that in the past approved the constitutional protection of free speech. On the other hand, progressive groups that also supported the prohibition of billboards with homophobic biblical citations during the Gay Pride Parade also applauded "Marijuana March" decision. Conservative members of the evangelic community repudiated both decisions.

The most salient feature to be stressed is the lack of a more deep and refined reflection that could reveal some theoretical coherence that could lie behind these cases. It is hard to avoid the impression that the different standards adopted in these decisions are, in the end of the day, a mere expression of the ideological biases that guided the judge's preferences. In other words, it is difficult to find legal arguments that could match the requirement of integrity. On reading the cases one could easily conclude that the decisions were *ad hoc*, even though some quotes of the balancing theory, appeals to principle of human dignity, and fashionable doctrines could serve as a disguise for mere strong discretion.

It is worth noticing that the same feeling of lack of clear standards and tension among different conceptualizations of free speech are also found in the Ellwanger case, often treated as a leading case on the matter. It is particularly revealing that Justices Marco Aurelio Mello and Gilmar Mendes Ferreira invoked Alexy's doctrine of balancing but arrived at contrary opinions! It is quite surprising how both justices after making a summary of the proportionality test simply jumped to a conclusion without further justification. Besides, whoever reads the Marijuana's March case easily notices the tension between the prevailing

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<sup>2</sup> See Post (2011, 2000).



justification there adopted and the justification and method used in the Ellwanger case. This is particularly clear when justices discuss the limits of crime advocacy. In the Ellwanger case, the preexistence of a federal law considering racism a crime was one of the bases of the decision on holocaust denial. The prevailing interpretation considered the expression of such ideas equivalent to the practice of racism. However, in the Marijuana's March case the advocacy of crime argument received a much more flexible and loose interpretation. There is an evident lack of a more refined conceptualization of ideas such as incitement and sometimes a non-explicit acceptance of offensiveness as a sound rationale for limiting free speech. Furthermore, Judiciary gives no clear attention to the fact that some speeches are made on the public debate whereas others are not. Democracy (usually loosely defined) is often invoked as the exclusive rationale for freedom of speech.

### I.III THE IMPLICIT METHOD OF INTERPRETATION

The decisions that Brazilian Judiciary made on freedom of speech are clear symptoms of two different *intellectual diseases*. On one hand, they can be seen as a mistaken technical use of the doctrine of balancing.<sup>3</sup> Since the influence of German balancing doctrine is still a novelty in Brazil and the rise of the principles based rhetoric in legal experience is not yet well understood paradigm by Brazilian jurists, one could be possibly hopeful that in the future a better legal dogmatic could provide a method to avoid the sense of discretion that are now pervasive. Better legal education training could also be thought to be a good medicine to fight such a disease. In our view, there are reasons to be skeptic about the naïve optimism. However, discussing them would require us more than we can say in this article.

On the other hand, we believe that the *use of balancing techniques has been naturalized* in Brazilian doctrine and practice. In this sense, applying balancing method in free speech cases is hardly challenged by jurists who most often disagree about how to balance or about the evaluation of the rights, and decide on a case-by-case basis. Jurists hardly ever challenge the very option for this method in free speech cases. Balancing has been trivialized and naturalized in Brazil.

#### I.III.I HUMAN DIGNITY AND THE NEED FOR BALANCING

This view of the nature of constitutional values besides assuming that clash of principles is inevitable and always requires balancing, also gives a special prominence to the principle of human dignity. Again, a good paradigm of such position is found in Barroso's ideas. For him,

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<sup>3</sup> See Silva (2002).

In Brazil, Mr. Ellwanger wanted to publish books denying the existence of the Holocaust. [...] Each of these scenarios represents real cases decided by high courts throughout the world and share one common trait: the meaning and scope of the idea of human dignity. (BARROSO, 2012, p. 347).

Furthermore,

The other major role played by the principle of human dignity is *interpretive*. Human dignity is part of the core content of fundamental rights, such as equality, freedom, or privacy. Therefore, it necessarily informs the interpretation of such constitutional rights, helping to define their meaning in particular cases. (BARROSO, 2012, p. 347, emphasis added) .

The possible impression that a Dworkinian interpretive approach would be the ground for the decisions, however, is soon dismissed when *balancing* is recognized as the natural consequence of this observation. The naturalization of balancing is stated clearly as the conclusion of the argument, in spite of the fact that is clearly rejected by Dworkin views. Barroso continues:

It would be contradictory to make human dignity a right in its own, however, because it is regarded as the foundation for all truly fundamental rights and the source of at least part of their core content. Furthermore, *if human dignity were to be considered a constitutional right in itself, it would need to be balanced against other constitutional rights*, placing it in a weaker position than if it were to be used as an external parameter for permissible solutions when rights clash. *As a constitutional principle, however, human dignity may need to be balanced against other principles or collective*. (BARROSO, 2012, p. 359, emphasis added).

To sum up, the dominant legal doctrine on free speech combines three basic features: a Millian-Meiklejonian justification of freedom of speech, the unavoidable need of balancing conflicting constitutional values as the exclusive and unique methodology of constitutional interpretation and the acknowledgment of human dignity as a central and foundational value. This structure comes together with a vague conceptualization of human dignity and a defense of a case-by-case decision process.

## PART II

### II SOME LESSONS FROM THE US EXPERIENCE

Many Free Speech scholars have already acknowledged that the richness of the American

experience in dealing with free speech is hardly comparable.<sup>4</sup> Brazilian jurisprudence on free speech has also a lot to learn. In the following section, we want to summarize some of the most important ones in this vast area of study that we believe justify this statement.

We believe we can compare US and Brazilian traditions. In order to do so, we will separate the main features of First Amendment jurisprudence in three main points: (I) foundational critiques to the very concept of freedom of expression (its main rationales); (II) the development of a rich conceptual apparatus; (III) methodological innovations (the alternative to *ad hoc* balancing). Geoffrey Stone (2009) has made a compelling argument about the ten most important aspects that we will take as a starting point for our analysis.

## II.I FOUNDATIONAL CRITIQUES TO THE VERY CONCEPT OF FREEDOM OF EXPRESSION (ITS MAIN RATIONALES)

There is a necessary connection between freedom of speech and its philosophical foundations. Political philosophy is clearly rooted in American free speech scholarship. This is not the case in Brazil where a philosophical treatment of the subject – especially in terms of the presupposed theory of justice embedded in it – is usually absent in most of legal practice and constitutional doctrine (legal dogmatism). Brazilian mainstream doctrine tends to accept as an almost sufficient (and sometimes exclusive) starting point the unavoidable and irreconcilable conflicting positive rights and values stated in the constitution.

In our opinion, First Amendment doctrine has taken the philosophical foundations of freedom of speech more seriously and this fact caused a big impact in the kind of conceptual analysis developed by American courts and jurisprudence. This is quite evident when the definition of the purposes of freedom of speech is associated with different concepts and values of democracy, autonomy, self-determinacy, and dignity.

### II.I.I THE CONCEPT OF FREE SPEECH REQUIRES A POLITICAL CONCEPTUALIZATION

American legal experience has shown that any legal analysis of free speech should start with a theory of what this expression should mean. Although this statement may sound obvious, very few countries have taken this task as seriously as US. The short provision of the First Amendment probably helped to make clear that this is a necessary step. According to Stone:

Justice Oliver Wendell Holmes decisively put this apparent meaning to rest in *Schenck v. United States* (1919)<sup>5</sup> with his famous example of a false cry of fire in a crowded

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<sup>4</sup> See Schauer (2005, p. 12-14).

<sup>5</sup> *Schenck v. United States*, 249 U.S. 47 (1919).

theatre. From that moment on, we (Americans) have acknowledged that although the government may not “abridge” the freedom of speech, we must define what we mean by the “freedom of speech” that the government may not abridge. That freedom, in other words, is not self-defining and, indeed, nothing in the text of the First Amendment helps us to decide what it means. (STONE, 2009, p. 274).

In other words, the necessary first step in analyzing free speech requires some conceptual investigation that is linked to some concept of justice and therefore its meaning is also connected to a web of moral and political beliefs concepts.

American scholarship has produced a particularly rich and deep thought on the basic rationales for free speech. The most obvious and direct influences are classical liberalism and utilitarianism. One way of analyzing these philosophical issues is through the identification of the basic rationales that underlie the First Amendment doctrine. They are much more clearly and acutely stated both in the Supreme Court leading cases as in US scholarship than in Brazilian case law and doctrine.

## II.1.II SOME RATIONALES OF FREE SPEECH

### II.1.II.1 *Self-government*

The American Constitution and the First Amendment are products of the Enlightenment. The self-governance rationale is rooted in the Declaration of Independence, which states, “Governments are instituted among Men, deriving their just powers from the consent of the governed” (UNITED STATES, 1776, § 2). For this reason, citizens are to engage in self-government by using reason and practical judgment. Accordingly, one rationale of freedom of speech is that it is indispensable to self-government and to allow participation in the democratic process.

This rationale is often identified with the work of Alexander Meiklejohn but Justice Brandeis in *Whitney v. California* articulated it much earlier.<sup>6</sup> Under this rationale, political speech ranks at the top of the freedom of speech hierarchy. Furthermore, it offers a strong rationale only to protect speech that can reasonably be said to contribute to the civic education of citizens – so-called “political speech”.<sup>7</sup> However, political self-governance rationale extends political protection only to some kinds of expression while others (like pornography, for example) would fall outside these parameters.

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<sup>6</sup> *Whitney v. California*, 274 U.S. 357 (1927). For a critical historical description of these ideas, see Post (2011; 2000).

<sup>7</sup> See Meiklejohn (1948). For a commentary of this process see Post (2000).

Self-government rationale clearly connects freedom of speech justification to democratic theories and justification. American scholarship has produced a vast and insightful debate about how various theories of justice would generate different impacts in free speech jurisprudence. Among the most important contributions are Rawls' and post-Rawlsian political philosophy.

#### II.1.II.II *The fourth state rationale*

There is also the so-called fourth-state rationale. According to Stone

It holds that, as a practical matter, citizens do not have the time or resources necessary to inform themselves adequately about the actions of their government or the changes in the world around them. Therefore, there must be a group within society whose primary professional purpose are the gathering, organizing, and broad distribution of information about these actions and events. In our society, this group is, of course, the institutional media, sometimes referred to as the "fourth estate". (SCORDATO, 2002, p. 198).

The rationale for this kind of special protection has been stated in the famous *New York v. Sullivan*.<sup>8</sup> Many scholars, such as Owen Fiss, have made some criticisms on the absolutism of this principle and calling the attention to problems related to the imbalance of power in free press and media, this especially important dominion of public debate. We will return to this point later in this article.<sup>9</sup>

#### II.1.II.III *The marketplace of ideas*

The marketplace of ideas rationale in American constitutional theory is usually identified with Supreme Court Justice Oliver Wendell Holmes in his dissent in *Abrams v. United States* (1919). He wrote:

When men have realized 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.<sup>10</sup>

8 *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964).

9 Fiss (1986, p. 366, 372). See also, Fiss (1998).

10 *Dissent Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

Nevertheless, its roots go back to John Stuart Mill ideas in the pamphlet *On Liberty* (2014). This rationale posits that freedom of speech is important because, in a marketplace of ideas, the better ideas eventually prevail through competition. The basic insight of the ideas parallels both on laissez faire in the economic realm and on scientific experimentation of XVIII century.

This rationale grounds the idea that freedom of speech creates a social climate “in which accepted ideas and conventional orthodoxy can be vigorously challenged, and this constant competitive interplay of ideas moves society more quickly toward a truthful understanding of the world” (SCORDATO, 2000, p. 193-194). It is important to notice that it focuses on potential benefits to the whole of society rather than on asserted benefits to individuals in the society. It stresses that freedom of speech is an important tool for generating good consequences for good government and truth.

Under this rationale, there is no hierarchy of speech. The value of different kinds of speech depends solely on the marketplace’s assessment. Nevertheless, the relevance of truth varies according to different kinds of truth. Arguments based on this rationale are stronger for protection of statements that carry some capacity for being either true or false as compared to expressions that do not. This is important since the many kinds of arguments are not linked to any truth-value such as art and even less to obscenity and pornography.<sup>11</sup> It is noticeable that many Brazilian court decisions invoke this rationale uncritically in adjudicating cases about free speech concerning arts, religion, and advertising.

Besides, on one hand it is sometimes argued that

[...] some expressive communities are better-suited in practice to the behavioral model implicitly assumed by the marketplace of ideas theory. That is, some communities of speakers and their audience operate in such a way that greater amounts of speech and communication in expression typically do result in the production of greater truth. (SCORDATO, 2002, p. 193).

On the other hand, it is not necessarily true that any kind of vigorous competition of ideas would promote truth. The speech dominion has always been a place for sophists and demagogues. For this reason, “free speech interpreted through a marketplace of ideas rationale would inevitably generate different levels of constitutional speech protection to different expressive communities and to different speakers” (SCORDATO, 2002, p. 193).

Finally, it is important to notice that although freedom of speech is usually referred to a negative freedom of speech, an absence of coercive government constraints on our expressive

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11 See Dworkin (1981, p. 177-212).

activity, some critics have called the attention to its positive dimension, i.e., its connection to positive freedom. One limit of this kind of justification resembles the criticism commonly made against market failure and the need of antitrust regulation in commercial markets. Some level of market regulation may prove to be more efficient whenever power imbalance could threaten the entry of diversity of voices in a fair competition.

Many scholars such as Owen Fiss have also called the attention to the structural imbalance of power that often affects the dominion of public speech controlled by big media corporations. For him,

For the most part, the Free Speech Tradition can be understood as a protection of the street corner speaker. An individual mounts a soapbox on a corner in some large city, starts to criticize governmental policy, and then is arrested for breach of the peace. In this setting the first amendment is conceived of as a shield, as a means of protecting the individual speaker from being silenced by the state. (FISS, 1986, p. 1.408).

Fiss notices the tension between the traditional free speech dominant rationales and the need for a new conceptualization caused by egalitarian demands that grew during the Warren court. Besides,

*The purpose of free speech is not individual self-actualization, but rather the preservation of democracy, and the right of a people, as a people, to decide what kind of life it wishes to live. Autonomy is protected not because of its intrinsic value, as a Kantian might insist, but rather as a means or instrument of collective self-determination.* (FISS, 1986, p. 1.411, emphasis added).

This criticism emphasizes the instrumental and consequentialist approach that is vivid and strong among American Free speech scholars (FISS, 1986, p. 1414).

#### *II.1.II.IV Self-fulfillment and individual autonomy*

Contrary to Fiss, many jurists and case law insisted on the idea that freedom of speech is valuable because it promotes and allows every individual's self-fulfillment and autonomy. This argument directly connects protection of free speech to liberty theories, or the individual self-fulfillment rationale.<sup>12</sup> First Amendment theories identify this rationale with the stated in the Declaration of Independence that "all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these are Life, Liberty, and the pursuit of Happiness" (UNITED STATES, 1776, § 2). Thus, freedom of individual

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<sup>12</sup> Chafee Jr. (2001).

expression is an important component of a happy, fulfilled life. Besides, government has a responsibility in creating the circumstances in which individuals can freely make their own choices about their life (*good life*) and pursue their individual self-fulfillment.

On one hand, this kind of rationale is particularly strong for the protection of non-political speech such as artistic expression and pornography. On the other hand, freedom of speech is not the only means and value that serves the purpose of promoting self-fulfillment and autonomy. Equality as a value and antidiscrimination laws, among others, concur with the same objective. For this reason the relative importance of this rationale requires a more comprehensive theory of justice in which the place of freedom of speech and its “priority”<sup>13</sup> can be evaluated. Besides, once it may be claimed that other elements of human existence may contribute as much, or more, to basic individual self-fulfillment and autonomy than does the opportunity to freely express oneself, it is a controversial issue whether their relative importance should be evaluated under some kind of balancing test.

Jeremy Waldron has recently written on this topic arguing that the “social sense of assurance” of not being rejected or excluded from a community is such an important dimension of his *dignity* (interpreted as equality in rank) that should require regulation banning hate speech.<sup>14</sup> Interestingly and also revealing of his theoretical commitments, for him the balancing method is unavoidably required to deal with clash of values in free speech decisions.<sup>15</sup>

Ronald Dworkin has confronted the argument in a recent and particularly interesting debate.<sup>16</sup> It showed the relevance not only of the basic assumptions of conflicting values (*sense of assurance* versus *autonomy of expression*; *dignity as rank* versus *freedom as a requirement of dignity*) but also of the methodology appropriated to decide cases involving hate speech (i.e. balancing *versus* conceptual analysis of the very concept of dignity). According to Dworkin, dignity is an *interpretive concept* and according to Waldron, dignity as rank could be interpreted as a *criteria or sociological concept*; *legitimacy as a normative interpretive concept* versus *legitimacy as a sociological, criterial concept*. It is not the scope of this article to analyze the merits of the arguments. Our goal in mentioning it is limited to pointing the unavoidable philosophical dimension of the debate and its consequences. This dimension is hardly acknowledged in Brazilian jurisprudence and case law.

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13 See Rawls (2005).

14 Waldron (2012).

15 Waldron (2012, p. 140, 145-146, 171-172).

16 Herz and Molnar (2012). An interesting debate between Waldron and Dworkin happened during a conference, under the title ‘Challenges to Multiculturalism’, organized by New York Review of Book Foundation and the Norwegian Foundation Fritt Ord on 25-26 June 2012 in Oslo is available at <<https://youtu.be/DoSbp8pdbM8>>.



It is also important to notice that interests and values promoted by the marketplace of ideas rationale and those embraced by the individual self-fulfillment rationale may differ considerably, depending on how one defines them. On one hand, the marketplace of ideas rationale would support a more vigorous freedom of expression so long as society advances, even if the conditions that created that advancement were detrimental to the autonomy of some individuals. On the other hand and conversely, it could be said that<sup>17</sup> the individual self-fulfillment and autonomy rationale would support an expansive freedom of expression so long as some individuals were benefiting, even if it were clear that the result was detrimental to society as a whole. However, the statement would not be correct if one considers that the best societal goal is precisely guaranteeing the conditions for individual development and autonomy. The difference depends on whether we take into consideration only a consequentialist approach or whether we take a non-consequentialist approach on this issue.

Ronald Dworkin (1981) has acutely criticized this point in his article “Do we have a right to pornography?”. There he claimed:

We should consider two rather different strategies that might be thought to justify a permissive attitude. The first argues that even if the publication and consumption of pornography is bad for the community as a whole, just considered in itself, the consequences of trying to censor or otherwise suppress pornography would be, in the long run, even worse. I shall call this the ‘goal-based’ strategy. The second argues that even if pornography makes the community worse off, even in the very long run, it is nevertheless wrong to censor or restrict it because this violates the individual moral or political rights of citizens who resent the censorship. I shall call this the ‘rights-based’ strategy. (DWORKIN, 1981, p. 177).

The second strategy is based on the well-known Dworkinian argument that moral fundamental rights should be considered as *trumps*. These two strategies points to the next argument about the view of balancing as a necessary and unique interpretation method to be applied in conflicts involving freedom of expression. It is worth noticing that none of these rationales captures either the complexity of free speech issues or the actual free speech jurisprudence of the Supreme Court. Thus, deciding which rationale is applicable and what ground best fits in specific cases usually demands more than mere balancing from judges. They are required, more or less self-consciously, to organize the grammar of freedom of

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17 Scordato (2002, p. 195).

expression according to some philosophical assumptions (and underlying theory of justice) not only as a preliminary step before balancing, but sometimes to avoid balancing. This is what is going to be addressed more directly in topic III.

## II.II THE DEVELOPMENT OF A RICH CONCEPTUAL APPARATUS

### II.II.I THE NATURE OF LANGUAGE INCITEMENT AND ADVOCACY

An important lesson offered by US jurisprudence on free speech is the more refined understanding of the nature of language in different contexts of use. The clear and present danger test is often quoted in legal decisions and doctrine as an important test to analyze free speech. However, a more refined view of language was developed in American jurisprudence at least since the 1970s. As Weinstein notices,

The test announced in *Brandenburg v. Ohio* focuses on the objective meaning of the speaker's language. Thus, the key question is now not whether the speech is likely to cause harm but whether the expression in question amounts to mere advocacy of law violation, in which case it retains First Amendment protection, or whether it crosses the line to actual incitement of lawlessness, in which case it is eligible for suppression. (WEINSTEIN, 2011, p. 44).

In *Schenck v. United States*<sup>18</sup> the Court had adopted a “clear and present danger” test that *Whitney v. California* subsequently expanded to a “bad tendency” test: if speech has a “bad tendency” to cause sedition or lawlessness, it may constitutionally be prohibited. *Dennis v. United States*,<sup>19</sup> a case dealing with prosecution of alleged Communists under the Smith Act for advocating the overthrow of the government, used the clear and present danger test while still upholding the defendants' convictions for acts that could not possibly have led to a speedy overthrow of the government.

The *Brandenburg test* (also known as the imminent lawless action test), composed of three distinct elements (*intent, imminence, and likelihood*), introduced a new and more protective standard to freedom of speech. Since *Brandenburg* has been prevailing the principle that the constitutional guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such *advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce*

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<sup>18</sup> *Schenck v. United States*, 249 U.S. 47, 1919.

<sup>19</sup> *Dennis v. United States*, 341 U.S. 494, 1951.

such action. In Brazil, Levy Fidelix, *Mein Kampf* prohibition and Ellwanger cases seem to show a *pre-Brandenburg* conception of incitement, adopting the *bad tendency* kind of argument that was also voiced by influential intellectuals and human rights supporters.

#### II.II.II LESSONS FROM EXPERIENCE AND POSSIBLE CONSEQUENCES

American First Amendment doctrine rich history and the abundant data interpreting it have produced some important insights about the impact of speech in different settings. Another important and useful lesson Brazilians can get from it is that what at the time seemed like compelling reasons for suppressing speech were in retrospect recognized as inadequate.

Weinstein notes that

[...] looking back at the cases decided under the old clear-and-present danger test, Justice William O. Douglas observed (*Brandenburg v. Ohio*, 395 US 444 (1969) – concurring opinion), that the danger presented by the speech in those cases was “made serious only by judges so wedded to the status quo that analysis made them nervous”. (WEINSTEN, 2009, p. 43).

We believe that the famous *National Socialist Party of America v. Village of Skokie*, 432 U.S. 43 (1977) (also known as *Smith v. Collin*; sometimes referred to as the *Skokie Affair*) offers a quite interesting case for reflection. The outcome was that the Illinois Supreme Court allowed the National Socialist Party of America to march in Skokie (a community densely inhabited by Jewish community) using the swastika as a symbolic form of free speech entitled to First Amendment protections and determined that the swastika itself did not constitute “fighting words”. This case is usually reported as an example of the “nonsensical and extremist character of the American exceptionalism” in Free Speech doctrine. However, many historians have pointed out that the outcomes of the case, instead of threatening American democracy, served the purpose to strengthen it, provoking a significant counter reaction against Nazi public discourse and against anti-Semitism and racism in general in the US. The case stimulated the introduction of the Holocaust history in high school curriculum and the building of the Holocaust museums in US and abroad.<sup>20</sup>

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<sup>20</sup> These facts are told in many articles: BOLLINGER, Lee C.; NEIER, Aryeh. The skokie legacy: reflections on an ‘easy case’ and free speech theory. *Michigan Law Review*, v. 80, n. 4, p. 617-33, 1982. doi: 10.2307/1288226. JSTOR 1288226; SCHAUER, Frederick. The Wily Agitator and the American Free Speech Tradition. *Stanford Law Review*, v. 57, n. 6, p. 2157-70, 2005. JSTOR 40040243. Documentaries also report the episode. For example: *Skokie: Invaded But Not Conquered* (available at: <<http://video.wttw.com/video/2365163360/>>).

In contrast, the Levy Fidelix case in Brazil resulted in one million reais damages compensation in spite of the fact that Fidelix statements also provoked an overwhelming consensus among politicians in support of gay rights and fierce criticisms on his prejudiced ideas.

American First Amendment history has also shown that people are easily deterred from exercising their freedom of speech. Thus, if the individual knows that he might go to jail for speaking out, he will often forego his right to speak, showing a recognition of this “chilling effect”, and of the consequent power of government to use intimidation to silence its critics and to dominate and manipulate public debate. In Brazil, many class actions demanding moral harm compensation are possibly producing this silencing effect, specially when the target are the dominant moral values. One wise lesson before taking a consequentialist approach is to produce data and informed research about possible results. *Hunch based* consequentialism always represents a risk for freedom of expression.

A second lesson from experience might be called the “pretext effect”.<sup>21</sup> That is, we learned that government officials will often defend their restrictions of speech on grounds quite different from their real motivations for the suppression, which will often be to silence their critics and to suppress ideas they do not like. In our view, the pretext effect is quite evident in Brazilian Ellwanger, Levy Fidelix, and Biblical quotations billboard cases.

A third lesson is about the “crisis” effect. This means not only that in times of crisis, real or imagined, citizens and government officials tend to panic, to grow desperately intolerant, and to rush headlong to suppress speech they can demonize as dangerous, subversive, disloyal, or unpatriotic, but also that the grammar of free speech varies in exceptional or extreme contexts. For this reason it is important not only to define them precisely, but also to be suspicious about the effort to judge normal cases according to exceptional hypothetical conditions. In view, Brazilian jurisprudence often uses exaggerated scenarios and the slippery slope arguments to unwisely limit free speech.

Brazil is now facing a political crisis that creates opportunity for this kind of argument. A good example is the statement made by former Minister of Education, the professor of philosophy Renato Janine Ribeiro, suggesting that protesters carrying banners supporting Military Dictatorship during the 2015 March against President Dilma Roussef’s Government should be jailed.<sup>22</sup> During the Military Regime, the same kind of argument was used to put in jail supporters of Proletariat Dictatorship and to ban the Brazilian Communist Party.

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21 On the pretext effect and improper motivation, see Kagan (1996).

22 During a lecture in São Paulo, the professor of Philosophy and former Brazilian Minister of Education supported the imprisonment of people who publicly favored totalitarian regimes and military dictatorships. “We are experiencing in Brazil a too big tolerance with non-democratic behavior that should be qualified as crimes... To advocate the return of the military regime should be a crime and should cause the imprisonment of the criminals. Many European countries criminalized Nazis advocacy. We – who

## II.II.III LESSON ABOUT CONTENT-BASED/CONTENT-NEUTRAL DISTINCTION

Freedom of speech doctrine has evolved into many different areas and problems in US and Europe and Latin America. One of the most critical steps in American doctrine that differentiates it from non-American doctrine has been the recognition of the content-based/content-neutral distinction. For Stone,

The critical step in this development was the Court's recognition of the content-based/content-neutral distinction. Until roughly 1970, the Court did not clearly see that laws regulating the content of expression posed a different First Amendment issue than laws regulating expression without regard to content. The Court first articulated this concept in an otherwise uneventful 1970 decision, *Schacht v. United States*.<sup>23</sup> (STONE, 2009, p. 278).

For him,

[...] the rationale for analyzing content-based restrictions differently from content-neutral restrictions, and for being particularly suspicious of them, is that content-based restrictions are more likely to skew public debate for or against particular ideas and are more likely to be tainted by a constitutionally impermissible motivation. (STONE, 2009, p. 279).

It is important to notice that recognizing that content-based and content-neutral regulations pose different problems does not tell us how to evaluate the constitutionality of specific laws that fall on one side of the line or the other. However the differences are significant since content regulation “is never permitted” and “regulations of speech (in the “public discourse”)<sup>24</sup> may not be based on content” and content neutral laws demand a more contextual scrutiny.

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had a military dictatorship – should criminalize the advocacy of dictatorship”. Available at: <<http://www.brasil247.com/pt/247/sp247/173287/Janine-'pregar-ditadura-deveria-ser-crime'.htm>>. Another professor of Philosophy, Wladimir Safatle made a similar statement for Globo broadcast. According to the professor of Philosophy at University of São Paulo Wladimir Safatle, those who advocate the return of military regime should be jailed for apology of crime. In: <<http://www.redebrasilatual.com.br/radio/programas/jornal-brasil-atual/2015/03/quem-defende-ditadura-militar-deveria-ser-preso-por-apologia-ao-crime-diz-safatle>>.

<sup>23</sup> *Schacht v. United States*, 398 U.S. 58, 65 (1970). In *Schacht*, the Court held unconstitutional a law prohibiting soldiers from wearing their uniforms in theatrical productions if those productions held the military in contempt.

<sup>24</sup> As conceptualized by Post (2000, p. 1367-2368).

Of course content-neutral laws can also be a threat to free speech since they may limit the opportunities for free expression and sometimes provoke content-differential effects. For example, a law restricting leafleting or public manifestations in public parks will have more of an effect on some types of speakers and on some types of messages than on others. For this reason, “Even though such laws may be content-neutral on their face, they may distort public discourse in a non-neutral manner”. In Brazil, arguments based on this kind of distinction are very rare and content-based restrictions are not considered illegal since the interests behind it should be balanced with other societal interests.

#### II.II.IV “SPECIAL CIRCUMSTANCES”

American law admits content-based regulation related to “special circumstances” that creates exception to the strong constitutional presumption against content-based regulation. The First Amendment history built a list ranging from regulations of speech by government employees, to regulations of speech on public property, to regulations of speech by students, soldiers, and prisoners, to regulations of the government’s own speech, to regulations that compel individuals to disclose information to the government. This history is based on conceptual and philosophical justifications (and rationales) that tried to justify and fix the boundaries of these circumstances.

Robert Post has written extensively on the theoretical relevance of discourse produced in public debate compared to private speech.<sup>25</sup> He also called the attention to the fact “civility rules” may also represent a way of imposing dominant culture standards to limit freedom of expression.<sup>26</sup>

In Brazil, the lack of any clear theory or philosophical justification for these special circumstances often induces judges to apply almost the same kind of justification to scrutinize the freedom of speech in public and non-public debates. This kind of non-critical merge of criteria is found in Levy Fidelix case. The judge’s arguments also suggest an a-critical understanding of Post’s argument about “civility rules”.

### II.III METHODOLOGICAL INNOVATIONS (THE ALTERNATIVE TO *AD HOC* BALANCING)

#### II.III.I THE REJECTION OF ABSOLUTISM, *AD HOC* BALANCING AND UNITARY STANDARD

American experience successfully rejected three strongly advocated approaches to interpreting the First Amendment. The first of these approaches insisted that the First Amendment is an absolute – that is, “no law” means “no law.” Justice Hugo Black is probably the

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<sup>25</sup> Post (1991, p. 279-285).

<sup>26</sup> Post (1991; 2011, p. 123-139).

most famous supporter of this position. The critique against it has shown the complex nature of relationship of constitutional values. Although this kind of absolute approach has never been popular in Brazil in part due to the complex structure of Brazilian Constitution that presents freedom of speech together with many other basic values and interests, the American critique is still useful for the constitutional theory.

The other approach rejected by American free speech jurisprudence was the notion that a single standard of review should govern all First Amendment cases. For Stone,

[...] whether that standard is set at a high level of justification, such as clear and present danger, strict scrutiny, necessary to promote a compelling government interest, or at a low level of justification, such as reasonableness or rational basis review, it became readily apparent that a “one-size fits all” standard would not do the trick. (STONE, 2009, p. 176).

For this reason, the American free speech debate proved that “any single standard would inevitably dictate implausible results, sometimes insufficiently protective of free speech, sometimes insufficiently respectful of competing government interests” (TRIBE, 2000, p. 583-584).

Not surprisingly, the only single approach that could sensibly apply to all cases was *ad hoc* balancing. However, according to mainstream US free speech scholarship,<sup>27</sup> although balancing seems sensible, in practice it turned out to be incredibly difficult to identify and assess all of the many factors that should go into this judgment on a case-by-case basis. This could cause a highly uncertain, unpredictable, and fact-dependent set of outcomes that could cause arbitrariness in favor of dominant groups and ideas.

Contrary to Brazilian free speech jurisprudence, which sometimes seems to transplant uncritically some foreign European post war doctrines, First Amendment doctrine seems to be largely the product of practical experience rather than doctrinal reasoning applied to concrete cases.

#### II.III.II ALEINIKOFF’S THE CRITIQUE OF BALANCING AND FREEDOM OF SPEECH

Alexander Aleinikoff has written an influential article comparing the structure and features of the idea of balancing. Although his target was balancing in free speech cases, his main arguments certainly apply to this dominion. He stresses:

The most troubling consequence of the problem of deriving a common scale are those cases in which the Court simply does not disclose its source for the weights assigned

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27 On *ad hoc* balancing, see Bickel (1962), Tribe (2000) and Aleinikoff (1987).

to the interests. These balancing opinions are radically underwritten: interests are identified and a winner is proclaimed or a rule is announced which strikes an “appropriate” balance, but there is little discussion of the valuation standards. Some rough, intuitive scale calibrated in degrees of “importance” appears to be at work. But to a large extent, the balancing takes place inside a black box. Of course, the hidden process raises the specter of the kind of judicial decision making that the Realists warned us about and that balancing promised to overcome. (ALEIKINOFF, 1987, p. 943).

The examples mentioned in the beginning of this article confirm that the same malaise is occurring in Brazilian courts. Balancers view constitutional law as field comprised of principles discovered by weighing interests relevant to resolution of a particular constitutional problem. As Aleinikoff points,

These interests may be traceable to the Constitution itself (free speech, federal regulation of commerce) or discoverable elsewhere (clean streets, law enforcement). Some interests are accorded great weight because society generally recognizes their importance, others because they are located in the Constitution. Indeed, one may understand the Constitution, from the balancer’s point of view, as a document intended to ensure that judges (among others) treat particular interests with respect. It is an honor roll of interests. (ALEINIKOFF, 1987, p. 986).

Although this methodology may have brought a clear protocol and transparency to the adjudication process, it can also generate some adverse impacts. Ronald Dworkin has tirelessly argued that viewing constitutional rights simply as “interests” that may be overcome by other non-constitutional interests does not accord with common understandings of the meaning of a “right” (DWORKIN, 1977, p. 194-269). The strong sense of rights, moral rights, is neither reducible to interests nor is correctly translatable in instrumental terms. Rights as *trumps* involve a non-instrumentalist approach and challenge the idea that adjudication is a matter of deciding about conflicting interests.

Aleinikoff (1987, p. 987) argues that “Balancing is undermining our usual understanding of constitutional law as an interpretive enterprise. In so doing, it is transforming constitutional discourse into a general discussion of the reasonableness of governmental conduct”. This is because

Under a balancing approach, the Court searches the landscape for interests implicated by the case, identifies a few, and reaches a reasonable accommodation among them. In so doing, the Court largely ignores the usual stuff of constitutional interpretation — the investigation and manipulation of texts (such as constitutional language, prior cases, even — perhaps — our “ethical tradition”). (ALEINIKOFF, 1987, p. 988).



He is right in pointing to the risk.

The consequence of the naturalization of balancing as the unique method for adjudicating free speech cases is the risk of losing the special richness of conceptual and philosophical construction that marked its existence. Balancing is a sensible method for resolving personal, social, and legal conflicts. However, it is not true that it is always the only or the best method.<sup>28</sup>

The same conclusion is particularly true in many constitutional decisions concerning freedom of speech. In sum, we agree with Aleinikoff's conclusion that "balancing is not inevitable. To balance the interests is not simply to be candid about how our minds – and legal analysis – must work. It is to adopt a particular theory of interpretation that requires justification" (ALEINIKOFF, 1987, p. 1000).

## CONCLUSION

To sum up: the American legal experience on freedom of speech offers many important lessons to be learned by new constitutional democracies in Latin America, such as Brazil. The long and rich history of judicial reasoning and theoretical reflection upon created a very rich repertoire of conceptual analysis and empirical data both about the instrumental and non-instrumental rationales usually invoked to support freedom of speech. We believe that some of the most relevant and insightful lessons are these:

1. American doctrine has tinkered a complex and refined analytical apparatus concerning the nature of language in different contexts. This is one of the most important outcomes of cases like *Brandenburg*.

2. The American experience on empirical data about the consequences of liberal decisions supporting free speech may help to avoid fast and shallow conclusions about the possible effects and causal connections of harmful speeches and violence, discrimination and silencing. In this sense, it can show useful data that could challenge hypothetical consequentialist arguments often found in Brazilian legal debate on free speech.

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<sup>28</sup> Aleinikoff argues convincingly: "In life and law, however, we often make decisions in ways that cannot be characterized as balancing. Many decisions based on notions of right and wrong, fairness, desert, love, and passion seem to have nothing to do with balancing. It is doubtful that one helps a friend because, on balance, such conduct is more rewarding than any other activity she could undertake at the moment. Nor is one likely to oppose racial discrimination because it is inefficient, or because the social costs of prejudice are far greater than the individual benefits of being able to choose one's customers or tenants. Behind many of the most important decisions we make, the most important beliefs we hold, are judgments of principle that do not reduce to balancing. These judgments may be leaps of faith; they may be premises, not proofs. But they form the bedrock of our moral systems". (ALEINIKOFF, 1987, p. 996-997).

3. American history also shows an interesting context in which the functioning of the structural limits of free speech can be analyzed and criticized. This critique has led to special distinctions of special areas such as big media, employment contexts, academic contexts, which are rarely considered in a more refined way by Brazilian courts and doctrine.

4. The American experience has produced a rich conceptual apparatus that helped to understand and analyze free speech controversies – among them the normative or interpretive nature of concepts such as democracy, autonomy, rights (as *trumps*), public debate, insult, reckless disregard, actual malice, incitement, etc. American Law has also served as a rich legal and institutional setting in which theories such as “Bad tendency”, that is still vivid in Brazilian case law.

5. It has also created many legal mechanisms or tests such as “clear and present danger” or strict scrutiny which can serve as alternative methods to imposing clearer, less disputable and possibly more objective criteria on how to define the limits of free speech in specific contexts.

6. Besides, the American doctrine has for a long time challenged the mere harm as a sole basis for authorizing imposing limits to free speech. This conceptualization has also put new light in the criteria to be used to differentiate fighting words from offensive speech in public debate. It is clear that Brazilian case law and jurisprudence is still at risk of repeating the same mistakes American did in the past.

American exceptionalist experience in free speech debate has also created a powerful methodological antidote against naturalized balancing through proportionality test. The mantra of balancing and proportionality is pervasive in Latin American jurisprudence and Europe. Here is not the place to discuss its merits and correctness in general. I believe balancing is probably a very useful tool in many areas of law and plays an important role in free speech jurisprudence. However, it is not the exclusive and necessarily best method to decide free speech conflicts. Although the critique of balancing test is neither something restricted to free speech legal debate nor unknown outside US, it is a particularly interesting area in which it has occurred. This is an important methodological lesson that free speech scholars should keep in mind. The US more strict and conceptual jurisprudence on this issue offers a powerful and democratic alternative to the naturalized and mechanical acceptance of the balancing model and represents a rich conceptual analysis still unknown by Brazilian courts.

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