HATE SPEECHES IN WELL-ORDERED SOCIETIES AND REAL SOCIETIES

Discursos de ódio em sociedades bem-ordenadas e sociedades reais

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ABSTRACT

This article aims to address the subject of free speech; in particular, we will work on the issue of hate speech. To achieve this purpose, we will use the work of the political philosopher John Rawls as a theoretical framework. Specifically, we will analyze, in a more in-depth way, the considerations made by Jeremy Waldron in the book The Harm in Hate Speech about the Rawlsian concept of well-ordered societies aiming to justify regulations on freedom of expression. Regulations propose to restrict this kind of discourse, thereby ensuring a more substantive democracy.

Keywords: Free speech; Hate speech; Well-ordered Society; Ideal and Non-ideal Theories of Justice; Democracy.

RESUMO

Este artigo tem como objetivo abordar o tema da liberdade de expressão, em particular trabalharemos a questão do discurso de ódio. Para alcançar esse propósito, usaremos como marco teórico o trabalho do filósofo político John Rawls, especificamente iremos analisar, de forma mais pormenorizada, as considerações feitas por Jeremy Waldron, no livro *The Harm in Hate Speech*, sobre o conceito rawlsiano de sociedades bem-ordenadas com o objetivo de justificar regulamentações à liberdade de expressão. Regulamentos que têm a proposta de restringir esse tipo de discurso e, assim, garantir uma democracia mais substantiva.

Palavras -chave: Liberdade de expressão; Discurso de ódio; Sociedade bem-ordenada; Teorias ideais e não ideais da justiça; Democracia.

INTRODUCTION

In his book *The Harm in Hate Speech* (2012), Jeremy Waldron dialogues with several influential authors about Hate Speech's regulations (Anthony Lewis, C. Edwin Baker, Ronald Dworkin, among others); however, in that book, what has caught more our attention is an indirect dialogue he has with John Rawls in the fourth chapter of his work where he - Waldron - uses some Rawlsian concepts to substantiate his position. In particular, he develops some interesting considerations about the subject, which has the Rawlsian idea of a well-ordered society as a background. That concept was, for Waldron, an important argumentative source. Therefore, through this present work, we will deepen this argument developed by Waldron, trying to verify the compatibility of Waldron's propositions with the Rawlsian theory.

With this purpose in mind, in chapter one, we will show the differences between the so-called ideal and non-ideal theories of justice, which is a crucial distinction among Rawlsian theory of justice scholars. In chapter two, we will explain Jeremy Waldron's proposition about hate speech based on the Rawlsian concept of a well-ordered society, dealing with the issue of the appearance of hate and the appearance of a well-ordered society. Chapter three will be divided into two parts. In the first one, we will explain Robert Taylor's (2012) argument that denies the possibility of justifying restrictions on hate speech based on a liberal political theory. According to Taylor, "liberals of all stripes either are or should be civil libertarians with respect to speech, including hate speech" (2012, p. 355). In the second part, we will elaborate a partial answer to the arguments proposed by Taylor, making some clarifications about the Rawlsian theory (which is a liberal political theory) and explaining how it would be possible to justify regulations/restrictions to the so-called hate speech having this theoretical proposal as a background. Finally, in chapter four, we will present in detail the damage that this kind of speech generates in society regarding assurance and political liberty, trying to make very clear how these speeches can be extremely harmful to any democratic society.

The methodological procedure that was applied to the research that preceded the production of this work was the theoretical one (that is, it was not an empirical research), which prioritizes "the construction of specific conceptual schemes" and uses "the various discursive and argumentative processes to convince about the validity of the proposed schemes" (GUSTIN; DIAS, 2013, p. 92 - our translation[1]). For that, we used the content analysis method, considering that "whenever a

[1] In the original language: "a construção de esquemas conceituais específicos", "dos vários processos discursivos e argumentativos para o convencimento sobre a validade dos esquemas propostos".

theoretical research is developed, the content analysis procedure becomes essential" (GUSTIN; DIAS, 2013, p. 91- our translation[2]).

Within the scope of the work, the generic type of investigation that we carried out was the juridical-comprehensive or juridical-interpretative, which "uses the analytical procedure of decomposing a problem in its various aspects, relationships and levels", and "is characteristic of comprehensive and not just descriptive research", as it is intended, since we are investigating "objects of greater complexity and with greater depth" (GUSTIN; DIAS, 2013. p. 28-29 - our translation[3]).

1. IDEAL AND NON-IDEAL THEORIES OF JUSTICE

There is a big difference between discussing hate speech in a well-ordered society, under the terms proposed by Rawls, and debating this same kind of speech in a real society. That difference will reflect the existing differences between the so-called ideal (or transcendent) and non-ideal theories of justice. Therefore, before beginning our discussion about the regulation of hate speech in real and well-ordered societies, we will briefly explain the existing differences (and their respective consequences) between ideal and non-ideal theories of justice. It is important to clarify that we do not aim in these short explanations to bring up all the possible issues pertaining to this dichotomy, but only to reflect about some points that may be necessary for a better analysis of our object of study.

An ideal theory of justice asks what principles of justice would regulate a perfectly (or almost perfectly) just society. While a non-ideal theory of justice would be concerned with which principles to adopt under *less happy conditions* (RAWLS, 1999, p. 216 and STEMPLOWSKA; SWIFT, 2014, p. 112).

According to Zofia Stemplowska and Adam Swift (2014), Rawls' ideal theory deals with three idealizing premises. Firstly, Rawls (2001, p. 13) starts from the assumption of acquiescence, strict compliance, that is, for Rawls almost all citizens of a well-ordered society acquiesce with their principles of justice. Under this assumption, citizens share the same conception of justice and are motivated to do it. Secondly, another idealization made by Rawls concerns what we can call favorable circumstances (RAWLS, 1999, p. 216 and RAWLS, 2001, p. 101). In other words, they

[2] In the original language: "todas as vezes que se desenvolve uma pesquisa teórica, o procedimento de análise de conteúdo torna-se imprescindível".
[3] In the original language: "utiliza-se do procedimento analítico de decomposição de um problema em seus diversos aspectos, relações e níveis", "é próprio das pesquisas compreensivas e não somente descritivas", "objetos de maior complexidade e com maior aprofundamento".

are conditions (economic, technological and educational) that, with political will, would make a constitutional regime possible[4]. That is, here, he is not analyzing the political will, which is certainly necessary for any democratic regime, but only historical, economic and social conditions. Lastly, the latest idealization made by Rawls concerns contingencies derived from natural or accidental limitations of human life, such as, for example, the lack of full capacities from either age or originated by some mental disability. This third idealization is strongly criticized by Zofia Stemplowska and Adam Swift, considering that even ideally perfect societies would probably fail to not have children or people with some kind of disability[5].

Another point that we must highlight from Rawls' ideal proposal is the fact that, despite all his idealizations, he still aims at what could be called a realistic utopia (RAWLS, 1999B, p. 11 and SIMMONS, 2010, p. 7). He aims for something more feasible in practical terms, as opposed to Cohen (2008), for example, who, as Hamlin and Stemplowska (2012) clarify, would aim to discuss justice in a more "pure"[6] way, and may, therefore, reach some very extreme limits. Thus, the question for Rawls is what could arise as a result of our choices, given the limits set by our moral and psychological nature and on issues pertaining to the limits of social institutions and how human beings can live under them. Therefore, the Rawlsian ideal theory examines the limits of practicable political possibility. Obviously, to some extent, we will have to rely on conjecture and speculation, on our determination of what is actually possible in practical terms, and what is considered possible can be in certain aspects historically relative. However, at least hypothetically, Rawls' goal is to make only realistic assumptions on his ideal theory.

[4] By way of illustration, he claims that Germany from 1870 to 1945 would have these conditions, lacking only political will.

[5] "This leaves the most problematic assumption: the absence of natural limitations and accidents of life. It is hardest to accept that this fits into the idea of a realistic utopia. After all, any normal society that continues over time must involve children. But as we suggested above, the role of the assumption might have been simplification of the ideal theory of justice rather than specification of something without which the theory cannot be ideal. Rawls's attempt to offer a realistic vision is a further reason to see this assumption as no more than simplifying. Simplifications won't secure realism, of course, but they may still be necessary, at least initially, if without them the problem is too complex for us to solve" (STEMPLOWSKA; SWIFT, 2014, p. 116).

[6] "Indeed, notice that even if we accept, as most political theorists probably do, that the value of justice is constrained by what is feasible – so that a truly unfeasible requirement cannot be a requirement of justice (Miller, 2008) – it would still not follow that in specifying the ideal of justice we must not venture beyond what is feasible. This is because to understand the ideal of justice fully it may be important to ask what justice would require in the absence of the relevant feasibility constraint (Cohen, 2008, pp. 252–4; Mason, 2004). It matters, that is, to our understanding of justice whether some requirement is not a requirement of justice merely because satisfying it is not feasible, or because it would not be required by justice anyway. For example, it may well not be feasible for all parents to give up their children happily. But we do not understand parental justice fully unless we ask whether justice would require this of parents if it became feasible" (HAMLIN; STEMPLOWSKA 2012, p. 55).

Let us now turn to non-ideal theories. They, in denial of what we said above about ideal theories, are those theories that deal with only partial compliance, or simply noncompliance[7], in relation to the principles of justice and to enjoy a society in circumstances that are not always so favorable. So, for example, what to do if a large group of intolerant people appears in the midst of an initially well-ordered society, a group that does not share the same ideals of justice[8]; or what to do when a society's institutions enact an unjust law? How do we deal with injustices? It is essential to realize that, in the first case (intolerant people), the partial compliance comes from citizens and, in the second one (unfair law), the basic structure of society that does not seem to be in accordance with the established by the principles of justice.

In order to better understand all these possible situations to be faced by the non-ideal theories of justice, given that Rawls is not very systematized when dealing with the subject, we believe that a chart prepared by Simmons is very enlightening and noteworthy (2010, p. 17) where he lists all possible non-ideal situations, their causes and possible solutions:

Ideal Theory	Nonideal Theory
1. Basic Structures	a) Deliberate noncompliance (institutional injustice): civil disobedience, etcetera.
	b) Unfortunate noncompliance (poverty, culture): the general conception.
2. Individuals	a) Deliberate noncompliance (wrongs, crimes): punishment/reparation.
	b) Unfortunate noncompliance (insanity, immaturity): paternalism.
3. Nations	a) Deliberate noncompliance (outlaw states): just war, intervention.
	b) Unfortunate noncompliance (burdened societies): international assistance.

Excluding the issue of nations that refers to the justice of peoples, since it is very out of our analysis object, Simmons, in an interesting way, divides the non-idealities into two groups, those

[7] In The *Law of Peoples*, instead of partial compliance, Rawls simply says noncompliance. (RAWLS, 1999B, p. 90 and SIMMONS, 2010, p. 12).

[8] "Several of the preceding examples involve a less extensive liberty: the regulation of liberty of conscience and freedom of thought in ways consistent with public order, and the limitation on the scope of majority rule belong to this category (§§34, 37). These constraints arise from the permanent conditions of human life and therefore these cases belong to that part of nonideal theory which deals with natural limitations. **The two examples of curbing the liberties of the intolerant and of restraining the violence of contending sects, since they involve injustice, belong to the partial compliance part of nonideal theory.** In each of these four cases, however, the argument proceeds from the viewpoint of the representative citizen. Following the idea of the lexical ordering, the limitations upon the extent of liberty are for the sake of liberty itself and result in a lesser but still equal freedom" (RAWLS, 1999, p. 217- Emphasis added).

from the basic structure and those from the individuals and, within each of these groups, he realizes that noncompliance may or may not be deliberate/intentional[9]. Thus, regarding the first group, that is, regarding the basic structure, if the noncompliance is deliberate (for example, an unfair law or an unfair conduct of a public official), such act, according to Simmons, could justify a civil disobedience or some other form of civil resistance against this determination contrary to the principles of justice. If the noncompliance is not deliberate, that is, it comes, for example, from social poverty or cultural obstacles to justice[10], the proposed solution would be a momentary application of the General Conception of Justice[11], where priority rules can be temporarily

[9] As for Simmons chart, he also clarifies: "There is a final complication, never directly addressed by Rawls. To precisely which agents, we might ask, are the various rules of nonideal theory addressed? Rawls's comments on nonideal theory might be taken to suggest that the classes of agents who are directed by nonideal theory to respond in certain ways to unjust noncompliance divide as neatly as do the agents responsible for the injustice. Thus, we might take Rawls to be suggesting that where domestic institutions (or the officials occupying institutional positions) are unjust, the required response is from the citizens of that society. Where private individuals act unjustly, it is their domestic institutions that should respond according to the applicable nonideal principles. Where nations are unjust, it is other nations that should respond. But that picture is plainly too simple and just as plainly cannot be what Rawls intends. For some kinds of domestic injustice—for instance, serious human rights violations—seem to call for action both by the citizens of the offending society (in the form of disobedience, say) and by other nations (in the form of intervention, say). Indeed, the nonideal theory governing such a case would presumably include as well special rules for the conduct of public officials in the unjust society, and possibly even rules for the conduct of foreign private citizens. So while we have identified six kinds of noncompliance and six corresponding branches of nonideal theory, each of those branches may contain complex sets of principles separately governing the actions of a variety of different classes of agents, including private citizens (and their voluntary associations), public officials, and nations" (SIMMONS, 2010, p. 17-18).

[10] Let us think, for example, of that case in which the basic structure of society fails to provide its citizens with their most basic needs, as put forward by Rawls in the following excerpt from Political Liberalism: "Finally, as one might expect, important aspects of the principles are left out in the brief statement as given. In particular, the first principle covering the equal basic rights and liberties may easily be preceded by a lexically prior principle requiring that citizens' basic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties. Certainly any such principle must be assumed in applying the first principle. But I do not pursue these and other matters here" (RAWLS, 1993, p. 7).

[11] "**The general conception does not give priority to the basic liberties over the fair distribution of other primary social goods**. The primary social goods, once again, are the resources which Rawls's principle of justice are designed to distribute: rights and liberties, powers and opportunities, income and wealth, and the bases of self-respect (TJ, 62/54 rev.). Rawls in Theory describes these as all-purpose social means that any rational person should want whatever else he or she wants (TJ, 92/79 rev.), and of which it is rational to prefer more rather than less (TJ, 397/349 rev.). Their derivation will be discussed later. The general conception of justice regards all the primary goods as of equal significance and distributes them to benefit everyone equally, allowing for an inequality only if it is to the greater benefit of those who end up with the least. **The general conception applies to the non-ideal case in conditions unfavorable to liberalism and democracy; once a society is able to sustain a liberal constitution the "special conception of justice" applies, giving priority to the equality of basic liberties over other social values, and equality of fair opportunity over the difference principle.** Each society has a duty to seek to establish conditions in which the special conception of justice applies. As Rawls says, "The equal liberties can be denied only when it is necessary to change the quality of civilization so that in due course everyone can enjoy these freedoms" (TJ, 475 rev.). Rawls also thinks that giving priority (or primacy) to the basic equal liberties does not presuppose a high level of income and wealth in society (JF, 47n.). Relatively poor countries, such as India and Costa Rica, can sustain successful democratic governments and societies" (FREEMAN, 2007, p. 65 – Emphasis added).

abdicated[12]. In the second group, that is, in the individual conducts of noncompliance, the hypotheses are as follows. In the case of deliberate noncompliance, as occurs, for example, with the criminal conduct or other unlawful acts[13], the solution would be to apply punishments and to repair the damage. And, if the noncompliance occurs for reasons beyond the full conscious will of the individual, as it can happen, for example, with people during their childhood and adolescence, since at these ages they do not have their capacities fully developed, the solution presented would be the creation of a paternalistic structure where their capacity or the possibility to govern their acts is restricted; and the same occurs with other people who, for some other reason, transient or permanent, have their capacities reduced.

Still regarding the differentiations between ideal and non-ideal theories of justice, another point that deserves to be highlighted and better understood is the existing dichotomy between what might be called end-state theories and transitional theories. From this perspective, the ideal theory would be one with a long-term goal, while the non-ideal theory would inquire how that long-term goal could be achieved through gradual steps. According to Rawlsian argumentation, the ideal theory is essential since, without a north (a point of orientation), we would not know which way to go.

> Nonideal theory asks how this long-term goal might be achieved, or worked toward, usually in gradual steps. It looks for policies and courses of action that are morally permissible and politically possible as well as likely to be effective. So conceived, nonideal theory presupposes that ideal theory is already on hand. For until the ideal is identified, at least in outline — and that is all we should expect — nonideal theory lacks an objective, an aim, by reference to which its queries can be answered (RAWLS, 1999B, p. 89-90).

[12] In the Simmons words: "So nonideal theory for the basic structure will deal both with deliberate or avoidable institutional injustice (including unjust conduct by public officials in their application of institutional rules) and with unfortunate noncompliance (due to societal poverty or cultural obstacles to justice), recommending civil disobedience and conscientious refusal (and, in more extreme cases, violent resistance) in the former case and temporary institutional adjustments guided by the general conception of justice in the latter" (SIMMONS, 2010, 16-17).

[13] It is necessary to clarify that with the affirmation we do not mean that in an ideal society there are no crimes, it is absolutely not that, even because, as we have already explained, Rawls aims a realistic utopia. Therefore, even if crimes are probably very low (perhaps even non-existent for some periods), coercive laws are needed, laws that, in a well-ordered society, may sometimes only fulfill a symbolic role maintaining social stability. However, in a non-ideal society, due to the existence of people who do not share the principles of justice, the number of crimes may be quantitatively and qualitatively more significant. As Rawls points out: "By enforcing a public system of penalties government removes the grounds for thinking that others are not complying with the rules. For this reason alone, a coercive sovereign is presumably always necessary, even though in a well-ordered society sanctions are not severe and may never need to be imposed. Rather, the existence of effective penal machinery serves as men's security to one another. This proposition and the reasoning behind it we may think of as Hobbes's thesis" (RAWLS, 1999, p. 211).

Amartya Sen (2006) makes some interesting considerations about this issue. Sen understands that an end-state theory (which he calls transcendental) would not be a condition either necessary or sufficient for a transitional theory[14].

Regarding sufficiency, which, as Zanitelli (2016) clarifies, would be the least controversial point, a transcendental theory by itself would lack a criterion for measuring how ideal or not a state of affairs is. How can we measure how close a situation is to an ideality or not (?), and this issue is not trivial. Let us imagine, for example, the situation of qualitatively different distances of ideality, that is, how to compare two non-ideal situations that are in this way for various reasons. Imagine, for example, two societies: one in which wealth is poorly distributed, and another, in which an ethnic minority is victim of discrimination. How can we compare these situations? Which one would be closer to the ideal? Another issue pointed out by Zanitelli is the path dependence. Here, the heart of the matter is a different one. The focus of the problem here is on which of the possible paths towards the ideal to choose given issues pertaining to the path probability:

> For example, imagine that state A is closer to the ideal than state B. B, however, increases the subsequent probability of a state of affairs C, which is even closer to the ideal than A. When comparing A and B according to the proximity criterion, should I consider B's propensity to give way to C? If so, what weight should I give to this characteristic of B? (ZANITELLI, 2016, p. 373 – Our translation[15]).

[14] It is interesting to note, in regarding Sen's statements, that some people, such as Laura Valentini, see them as something necessarily at odds with Rawls's argument: "Let me now turn to the third and last understanding of the distinction between ideal and non-ideal theory. This understanding too can be found in the works of John Rawls, and corresponds to the dichotomy between what one might call 'end-state' and 'transitional' theory. On this account, ideal theory sets out a long-term goal for institutional reform. Non-ideal theory, on the other hand, 'asks how this long-term goal might be achieved, or worked toward, usually in gradual steps' (Rawls 1999b: 89). Rawls is also keen to emphasize that non-ideal theory so conceived presupposes ideal theory, 'for until the ideal is identified, at least in outline …non-ideal theory lacks an objective, an aim, by reference to which its queries can be answered' (Rawls 1999b: 90). This normative and logical priority of 'end-state' theorizing over transitional considerations **has been recently put into question**, most famously by Amartya Sen (2006 and 2009; see also Phillips 1985 and Wiens 2012). Sen has argued that, if the aim of theorizing about justice is to help us understand how to make the world more just, we should not invest much energy in scrutinizing what would make the world fully just. In other words, for Sen, end-state theory (what he calls 'transcendental theorizing') is neither necessary, nor sufficient for transitional theory (Sen 2006 and 2009)" (VALENTINI, 2012, p. 660-661 – Emphasis added). While others, like Leandro Zanitelli, do an important reservation to this possible contradiction between Rawls and Sen: "**Note that Sen's claim is that there is no need for an end-state theory for the comparison of imperfect states of affairs. This is completely different from defining ideal theory as an end-state theory and non-ideal theory as a theory about how the final state should or can be achieved** (RAWLS, 1999b, p. 89). Understood in this way (that is, as a transitional theory), it is evident that there can be no non-ideal theory that does not have an ideal theory as a starting point" (ZANITELLI, 2016, p. 374 – Our translation and emphasis added). In the original language: "Note que a afirmação de Sen é quanto à desnecessidade de uma teoria de estado final para a comparação de estados de coisas imperfeitos. Isso é complemente diferente de definir teoria ideal como teoria de estado final e teoria não ideal como teoria sobre como o estado final deve ou pode ser alcançado (RAWLS, 1999b, p. 89). Entendida dessa maneira (isto é, como teoria transicional), é evidente que não pode haver teoria não ideal que não tenha uma teoria ideal como ponto de partida".

[15] In the original language: "para exemplificar, imagine que um estado A esteja mais próximo do ideal do que um estado B. B, no entanto, aumenta a probabilidade subsequente de um estado de coisas C, que está ainda mais

Still concerning the problem of sufficiency, we need to talk about the matter of defensibility. Would this ideal really help in anything if we were, for example, facing situations that are very far from this ideal? The argument here is linked to the idea that the further away a situation is from the ideal, the more complex the comparison will be. An extreme situation may occur when the distance is so great that knowing how to regulate an ideal situation has little influence on how to deal with a real situation.

Therefore:

> The two problems just examined confirm the view that an end-state theory is not enough to make comparisons. At a minimum, it is necessary to add to this theory a proximity criterion with sufficient precision to support comparisons, as well as an argument in defense of that criterion […]. **None of these requirements is met by a theory of end-state as such since, in dealing exclusively with the description of a perfectly fair state of affairs, such theory is freed from the matter of how to measure the proximity of imperfect worlds in relation to perfect one or the defense of the proximity criterion as a basis for comparisons** (ZANITELLI, 2016, p. 373 - Our translation[16] and emphasis added).

With the issue of sufficiency closed, let us now turn to the issue of necessity: would an ideal theory be necessary to work justice in non-ideal situations?

For Amartya Sen (2006), the answer would be no, and his argument is quite simple; he says, by analogy, that it is not necessary to know which is the largest mountain in the world to be able to conclude which between two smaller mountains, is the biggest. So, bringing this analogy to our object of study, it would not be necessary to know what justice is in a perfect situation so that we may evaluate justice in imperfect conditions. Compared to the issue of sufficiency, this Sen's statement was much more controversial in the academic world and, because of that, we will now analyze the consistency of some of the counter-arguments that arose from it.

With regard to the matter of the necessity, Zanitelli analyzes the arguments made by Martijn Boot (2012) and by Zofia Stemplowska (2008).

The argument developed by Boot is based on the idea of covering value. Through this idea, the author argues that in order to compare two things it is necessary to have a criterion or value in

próximo do ideal do que A. Ao comparar A e B segundo o critério da proximidade, devo considerar a propensão de B a dar lugar a C? Se sim, que peso devo atribuir a essa característica de B?".

[16] In the original language: "Os dois problemas recém-examinados confirmam a opinião de que uma teoria de estado final não é suficiente para a realização de comparações. No mínimo, é preciso adicionar a essa teoria um critério de proximidade com precisão suficiente para embasar comparações, bem como um argumento em defesa desse critério [...]. Nenhum desses requisitos é atendido por uma teoria de estado final como tal, já que, ao se ocupar exclusivamente com a descrição de um estado de coisas perfeitamente justo, tal teoria se vê liberada da questão acerca de como mensurar a proximidade de mundos imperfeitos em relação a si ou da defesa do critério da proximidade como base para comparações".

relation to which to compare them. Thus, to compare two situations in terms of justice, it is necessary to clarify the value of justice. Justice, however, is a complex value that, for it to be structured, may involve the application of one or more principles, and, in the case of a plurality of principles, "an accurate description of the covering value involves not just the principles by themselves, but also the relations between them" (ZANITELLI, 2016, p. 375 - Our translation[17]).

However, it is fallacious to conclude, from the need for a covering value and from the complexity of the ideal of justice, that an end-state theory is imperative to compare two non-ideal situations. In other words, yes, it is necessary to have a criterion, and yes, the criterion of justice is probably a complex one, but from it does not follow that this criterion needs to be one built in an ideal situation. Theoretically, it is perfectly possible to think about the structuring of a complex justice criterion to regulate non-ideal situations without an ideal situation in mind and, based on this criterion, to compare non-ideal situations.

The criticism developed by Stemplowska, on the other hand, claims that they are reckless comparisons that ignore an ideal state of affairs and, to understand this idea better, imagine the following situation. Think that we have to compare two non-ideal situations of justice: situation "A" and situation "B". In this comparison, it could happen that, although "B" can be considered a more just situation in non-ideal terms, "A" could be preferred if it is concluded that, by following a path that leads to "A", we would find ourselves in a more favorable situation than if you get to the ideal situation[18].

However, as Zanitelli realizes:

> There is a difference, however, between stating that an end-state theory is a necessary condition for the comparison between the imperfect societies A and B and stating that this comparison, once carried out without being based on an end-state theory, will be a doubtful source for counseling for social reforms (ZANITELLI, 2016, p. 376 - Our translation[19]).

[17] In the original language: "uma descrição acurada do valor de cobertura envolve não apenas os princípios em si, mas também as relações entre eles".

[18] "There are two reasons why we must sometimes make the assumption nonetheless. First, unless we know what is desirable when there is full compliance, we could adopt a direction of reform for nonideal circumstances that unnecessarily moves us away from the ultimate aim of full compliance. For example, even if we think it is often justified for parents to send their children to private schools when other parents do so, it should make a big difference to the education policies we advocate if we also establish that in circumstances of full compliance there should be no private education. Working out what is ideal under the assumption of full compliance forces us to inquire if we could innovate in order to come closer to what such a theory recommends and if we really must depart from the ideal when such departures are on the table. Assuming full compliance therefore has its straightforwardly practical role" (STEMPLOWSKA, 2008, p. 332).

[19] In the original language: "há uma diferença, entretanto, entre afirmar que uma teoria de estado final é condição necessária para a comparação entre as sociedades imperfeitas A e B e afirmar que essa comparação, uma vez realizada sem ter como base uma teoria de estado final, será uma fonte duvidosa de aconselhamento para reformas sociais".

In other words, one thing is the question about which of these two situations is more just against a background of a non-ideal situation of justice, and the other is which of these two paths is the best to arrive at an ideal situation of justice. These are two separate issues, and they should not be confused.

Notwithstanding, Zanitelli emphasizes the fact that the exchange between short-term justice and long-term justice can be quite uncertain. In other words, would long-term justice compensate the degree of uncertainty that a long-term action would require (?), given that:

> In the circumstances of imperfect societies, it can be challenging to say with a high safety margin which of the two measures is more likely to lead to a situation of perfect justice in the future. It is possible, therefore, that besides the comparisons not being necessary in terms of justice, an end-state theory has little weight in the deliberations on what to do in imperfect circumstances due to the uncertainty about the most remote effects of the speculated measures (ZANITELLI, 2016, p. 377 - Our translation[20]).

Thus, in summary, we can say that we agree with Zanitelli in concluding that Sen is right in saying that an end-state theory is neither sufficient nor necessary for comparisons among imperfect states of affairs.

However, and this may seem a little contradictory, we also agree with him when he says that although transcendental theories are neither sufficient nor necessary, they can be useful for evaluating reform proposals, and now we will better explain this idea.

Firstly, an end-state theory can be useful in allowing "to say whether (and, if not, why) the society under analysis is perfectly fair" (ZANITELLI, 2016 p. 377 – Our translation[21]). That is, through it we can affirm whether the society under analysis, as it stands, is fair or not and, if it is not, such fact, in itself, would already be an argument against the *status quo* maintaining.

Secondly, an end-state theory can be useful for comparison purposes:

> [...] as long as the principles of justice valid for a perfectly fair state of affairs are also valid for the non-ideal conditions under which comparisons take place, or if the valid principles for such comparisons can be at least in part deduced from the principles valid for the ideal situation (ZANITELLI, 2016 p. 377 – Our translation[22]).

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[20] In the original language: "nas circunstâncias de sociedades imperfeitas, pode ser difícil afirmar com muita margem de segurança qual de duas medidas é a mais propensa a conduzir a uma situação de perfeita justiça no futuro. É possível, pois, que, além de não ser necessária às comparações em termos de justiça, uma teoria de estado final tenha pouco peso nas deliberações sobre o que fazer em circunstâncias imperfeitas, em razão da incerteza sobre os efeitos mais remotos das medidas cogitadas".

[21] In the original language: "dizer se (e, se não, por que) a sociedade em questão é perfeitamente justa".

[22] In the original language: "[...] à medida que os princípios de justiça válidos para um estado de coisas perfeitamente justo também sejam válidos para as condições não ideais sob as quais as comparações têm lugar, ou se os princípios válidos para essas comparações podem ser ao menos em parte deduzidos dos princípios válidos para a situação ideal".

In other words, if the principles that govern a society in a non-ideal situation are not necessarily the same as those that govern it in an ideal situation, this fact by itself does not constitute an equally sufficient reason to dismiss them as an object of reflection. That is, there is nothing to prevent that the principles established from an ideal situation may be used, for example, as an initial framework of analysis that should be adapted, as far as possible, to non-ideal situations.

> One strategy would be to take as a starting point the characteristic principles of perfectly just societies and then try to determine whether, and with what necessary modifications, these principles continue to be valid in injustice conditions. In another possible scenario, the meaning of the investigation may be inverted, that is, it starts from the principles valid in non-ideal conditions and then asks which ones would remain valid under ideal conditions. There is, at first glance, no methodological reason to reject both, whether the "top to bottom" movement (that is, from the ideal to the non-ideal), or the opposite, although the predilection for end-state theories in contemporary philosophy facilitates following the first option. The important thing, in any case, is that the fact that end-state theories are neither necessary nor sufficient for the comparison of imperfect states of affairs is not, by itself, a reason for these theories to be considered irrelevant for the judgment of reform proposals in non-ideal circumstances (ZANITELLI, 2016 p. 378 – Our translation[23]).

2. THE APPEARANCE OF HATE AND THE WELL-ORDERED SOCIETY

As it was said in the previous topic, the first use of an end-state theory would be to evaluate the status quo; that is, if there is no difference between the ideal and the real situation, it can be concluded that no change would be necessary. Thus, in this topic, firstly, we will try to verify *what does a well-ordered society look like* (WALDRON, 2012, p. 65-69) having as a background the so-called hate speeches, and for that, we will use some statements made by Jeremy Waldron about the issue.

Thus, what does a well-ordered society look like? How does it seem in its visual[24], sound, in short, in its perceptible aspects?

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[23] In the original language: "Uma estratégia seria tomarmos como ponto de partida os princípios característicos de sociedades perfeitamente justas para então tentar determinar se, e com que modificações necessárias, esses princípios seguem tendo validade em condições de injustiça. Em outro possível cenário, o sentido da investigação se inverte, isto é, parte-se dos princípios válidos para condições não ideais para então indagar quais deles permaneceriam válidos em condições ideais. Não há, à primeira vista, razão de ordem metodológica para rejeitar seja o movimento "de cima para baixo" (isto é, do ideal para o não ideal), seja o contrário, embora a predileção por teorias de estado final na filosofia contemporânea facilite seguir a primeira opção. O importante, em todo o caso, é que o fato de teorias de estado final não serem nem necessárias nem suficientes para a comparação de estados de coisas imperfeitos não é, por si só, razão para que essas teorias sejam consideradas irrelevantes para o julgamento de propostas de reforma em circunstâncias não ideais".

[24] "I take will focus on the visual aspect of a society contaminated by posters or publications that deprecate the dignity and basic citizenship of a certain class of people in society. I want to contrast the ugly visual reality of a society defaced by racist or homophobic or Islamophobic slogans with what we would hope to see in a society that was open to the lives, opportunities, and expectations of members of every group" (WALDRON, 2014, p. 65).

> That's the position I want to test in this chapter, by focusing on this issue of appearances. The question I have asked - what does a well-ordered society look like? - is not a coy way of asking what makes a society well-ordered, or what a well-ordered society is like. I am interested in how things literally look; I'm interested in the visible environment. How important is the look of things in a well-ordered society? (WALDRON, 2012, p. 68).

It is important to realize that a society that allows this kind of publication can look like very different from another in which it is not allowed. Its streets, for example, they can keep posters extolling white supremacy; or there may still be claims that members of a particular minority are criminals, perverts or terrorists; or pamphlets saying that followers of a specific religion are a threat to decent people and should be deported. Imagine a billboard, at the entrance of any neighborhood, with a swastika symbol in the background, and the following message: niggers are not welcome. "That is what a society may look like when group defamation is permitted". In view of this, Waldron wonders: "Is that what a well-ordered society would look like?" (WALDRON, 2012, p. 66).

He justifies the importance of this questioning, since many liberal constitutionalists, mainly in the United States, which is considered a free society (and a well-ordered society should be considered as such), advocate the idea that laws prohibiting this kind of speech would go against the freedom of expression, which, in the United States, is protected by the first amendment of the constitution[25]. They recognize that the social environment resulting from tolerance of hate speech is unpleasant. They do not like the appearance that these messages can generate, but claim that precisely because a society allows this type of racist expression, because it allows any and all kind of expression, that it must be considered well-ordered, celebrating the diversity of ideas and speeches in the great market of ideas of this society. They think that it would be a hallmark of a well-ordered society, although a vulnerable part of that society can be labeled with some degrading labels and might have, because of that, and being euphemistic, at least difficulty in agreeing with this point of view.

It is important to realize that Waldron's interest, at least initially, is not what makes a society well-ordered or what it is like. He is interested in how things look in their visible environment.

"We might ask with equal sense: What should a well-ordered society sound like?" (WALDRON, 2012, p. 71). Would the sound of a well-ordered society be:

> […] the marching feet and the chants of neo-Nazis in Skokie, a Grand Wizard's speech at a Ku Klux Klan rally, or the incessant anti-Tutsi radio broadcasts - "You

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

> are cock-roaches! We will kill you!" - of Radio Télévision Libre des Mille Collines (RTLM) in Rwanda in 1994 (WALDRON, 2012, p. 71).

Therefore, the swastika is much more than just any geometric design; it carries a meaning that goes beyond. So, in case you don't belong to some of the groups that I will quote, let's try to do an empathy exercise and imagine, for a moment, how, for example, a Jewish family would feel if they woke up with the wall of their home graphitized with a big swastika; or imagine how a family of black people would feel if they woke up with a burning cross in their backyard? Do you really believe that these families, after these events, would feel comfortable walking around the neighborhood at night? The feeling of insecurity that that would generate is precisely the reason why Waldron wonders how the State should position itself in the face of some of these events. Thus:

> But think about the appearance of masked men in white sheets and pointy hats in Georgia or Mississippi, and the effect that has on the lives and the security of members of the African American community in that state. The Georgia Criminal Code makes it an offense to wear in public "a mask, hood, or device by which any portion of the face is so hidden, concealed, or covered as to conceal the identity of the wearer," and several other American states do as well. Free-speech advocates sometimes criticize such laws as attacks on free expression. The expressive aspect of wearing Klan hoods and robes is undeniable. But as with the more articulate hate speech that I am concerned with, the question is whether the law should be indifferent to its impact on what our society looks like and what it is for the members of certain groups to have to try and make a life in a society that looks like that (WALDRON, 2012, p. 77).

In the same sense, Waldron also realizes that some symbols, depending on the context, can have a much deeper meaning than the apparent. In view of this, Waldron is interested in knowing if the regulations of this type of discourse would harmonize with Rawls's idea of a well-ordered society with respect to a particular element of this conception. In a well-ordered society, Rawls determines that everyone accepts and knows that others also accept the same principles of justice. This is an attractive idea for Waldron, that is, the idea of a society that carries its values with itself, making clear all the fundamental principles and freedoms that it embraces, it is something that catches Waldron's attention. It is precisely at this point that he wants to focus, i.e., on ensuring a general commitment about the foundations of justice and dignity that a well-ordered society must provide for all its citizens as part of its public culture. It is important to measure the strength of this assurance when considering, for example, how comfortable we should be with public and semi-permanent manifestations of racial and ethnic hatred as visible aspects of the social environment.

Thus, how should we interpret the Rawlsian claim that a well-ordered society must necessarily be governed by a democratic system and that an important characteristic of any democracy is

pluralism? Since, as we have just seen, this same pluralism is used, by some people, as a justification for a "broader" discourse, where the expression of hatred and prejudice in general would be allowed.

To better understand this issue, let us turn again to Rawls's proposal and how he structures his idea for a well-ordered society. People in the contemporary world live immersed in a great sea of ideologies and values, in a large marketplace of ideas where the most diverse religious, philosophical or moral doctrines compete in order to try to give meaning that fills their lives. Thus, for Rawls, a well-ordered society must surely be one with cultural, religious, moral diversity etc.. In this context, to be able to guarantee at least an overlapping consensus over this whole ocean of values and ideals, and knowing that many of them are completely incompatible with each other, Rawls constructs the idea of reasonable pluralism. In other words, he knows that "many doctrines are **plainly incompatible with the values of democracy**" (RAWLS, 2001, p. 37 - Emphasis added), however, from that, among those comprehensive conceptions of life that are minimally reasonable and compatible with democratic values, he will try to structure a political conception that overlaps them all, guaranteeing, at least, a consensus on some essential issues. It is worth noting that this conception should not be understood simply as a middle ground among all these doctrines because such middle ground would be a political conception in the pejorative sense of the expression, and Rawls, on the contrary, craves legitimacy; he aims for a public justification of his conception. In short, Rawls's goal is a conception of justice that may be defensible by itself and that, at the same time, given the assumption of reasonable pluralism, may be endorsed, even if from different grounds, by the supporters of the most diverse reasonable moral comprehensive doctrines.

In this tuning fork, it is enlightening some points approached by Habermas in the paper *Religious Tolerance*: the pacemaker for cultural rights (2004). In this paper, Habermas puts it:

> Tolerance can only come to bear if there are legitimate justifications for the rejection of competing validity claims: '**If someone rejects people whose skin is black we should not call on him to be "tolerant toward people who look different" [...]. For then we would accept his prejudice as an ethical judgment similar to the rejection of a different religion. A racist should not be tolerant, he should quite simply overcome his racism.**' In this and similar cases, we consider a critique of the prejudices and the struggle against discrimination to be the appropriate response — and not 'more tolerance'. **The issue of tolerance only arises after those prejudices have been eliminated** that led to discrimination in the first place (HABERMAS, 2004, p. 10 - Emphasis added).

In this excerpt, Habermas realizes that there is a big qualitative difference between someone saying, for example, that he prefers Buddhist precepts over Catholics and someone saying that white people are morally superior to black people; and it is exactly this difference that we are trying to highlight here.

Another point that needs to be remembered is that, for Rawls, the people, the citizens of a democracy, must be treated as free and equal. In other words, it is based on the assumption that people, in this life in society, in this coordinated activity, and in the midst of all this pluralism in which they live, they are able to decide, by themselves, what meaning they want to give to their lives, which path they should take, they are free to do so. The State must not interfere or direct these choices, providing not only the freedom to choose, but also a minimum of substrate for that each one can effectively walk these paths. What makes us question how the State should act when the meaning of a citizen's life directly and completely interferes with the meaning of another one's life? Could we then say that some of these meanings are unreasonable? In a pluralistic universe, we believe that this will inevitably happen and, in situations like that, the State will have to take a position by choosing which of these conflicting options best suits its justice proposal. And, in these situations, there is no neutrality, and even the omission (not taking action) is, by itself, a position, the one that will validate the group that has the greatest power in fact to impose what it thinks.

Thus, if we weigh all these issues raised, that is, if we consider that a well-ordered society is a society where all its citizens recognize the same public conception of justice, guaranteeing that everyone should be treated as a free and equal person and that they should have their basic liberties protected, and, among them, Rawls expressly places the guarantee of personal integrity, we believe that the appearance of a well-ordered society is not one where there are public messages of hatred and discrimination against minority groups of this society. A society where this kind of message exists, for us, seems to conflict with the assumptions of a well-ordered society, as described by Rawls, especially with regard to the idea of reasonable pluralism[26]. But this idea will become even clearer ahead when we detail more about the damage that this type of speech can cause, the balance of basic liberties, as well as the situations where (and why) the right/just must prevail over the good (RAWLS, 1993, p. 173-211).

> The idea of a well-ordered society is the idea of a society being fully and effectively governed by a conception of justice. In technical terms, it is full-compliance theory rather than partial-compliance theory. On this account, discussion of a society with sufficient rancor and division to generate hate speech cannot be discussion of a well-ordered society (in John Rawls's sense), since both the hatred this speech expresses and the hatred it is calculated to drum up are incompatible with the attitudes whose prevalence among the citizenry — indeed, whose universal adoption — is supposedly definitive of a well-ordered society. We don't call a society "well-ordered" unless these attitudes have died out and been replaced by sentiments of justice (WALDRON, 2012, p. 78).

[26] As reasonable, in Rawls' conception, you should understand that will not be contrary to the substantive normative consequences of adopting their principles of justice and their balance of basic liberties, since, for him, regarding the minimum democratic assumptions established from this, the right must prevail over the good.

Therefore, in terms of the end-state, a well-ordered society, despite being colorful, that is, despite being pluralistic, could present itself, at least initially, as only a "colorful moderate" that worries about the situation of some minority groups and managing conflicts or frictions that exist among its citizens. We put the expression in quotation marks because we believe that this "colorful" initially taken by moderate, due to the possibility of the existence of some borders for manifestations of intolerance, will be, in the medium and long term, much more colorful, much more plural, than those present in liberal societies who choose not to carry out this kind of regulation. We believe that this regulation will create a fertile ground in society for those minority diversities to grow up more vigorously and, thereby, guarantee a genuinely plural environment.

In this sense, Rawls expressly states, for example, that religions with intolerant doctrines will either cease to exist or will remain in relatively small segments of society[27]

> No society can include within itself all forms of life. We may indeed lament the limited space, as it were, of social worlds, and of ours in particular; and we may regret some of the inevitable effects of our culture and social structure. As Berlin has long maintained (it is one of his fundamental themes), there is no social world without loss: that is, no social world that does not exclude some ways of life that realize in special ways certain fundamental values (RAWLS, 1993, p. 197).

Overcome the issue of the appearance (in a stricter sense) of a well-ordered society, another point arises: what makes a society well-ordered in the form that we propose? Would it be naturally in this way or would some punitive normativity be necessary; would the laws regulating free speech be necessary in a so-called well-ordered society? And in our real society (?), (Or, using a Waldron expression, our *much less-than-well-ordered society*), should we establish coercive laws or should we just expect the hate speech to naturally disappear, that is, not because of the laws, but through a natural change in mentality? And it is important to note that we are dealing with two distinct issues: one within the scope of an ideal theory of justice and the other within the scope of a non-ideal theory of justice. Regarding the ideal theory, the point is whether a well-ordered society would naturally be like that or if punitive laws were needed. In the non-ideal context, the point would be which is the best way to reach this ideality, simply through the educational path or would some punishment be necessary. And, at least in part, due to the relations existing between ideal and not ideal theories, the answer to one of these questions may interfere in the other. As we said above, end-state theories,

[27] "Suppose that a particular religion, and the conception of the good belonging to it, can survive only if it controls the machinery of state and is able to practice effective intolerance. This religion **will cease to exist** in the well-ordered society of political liberalism. Let us assume there are such cases; and that some other comprehensive doctrines **may endure but always among relatively small segments of society**" (RAWLS, 1993, p. 196-197 – Emphasis added).

although not being a necessary condition for comparisons about justice in non-ideal contexts, they can be useful for evaluating proposals for reform of non-ideal situations.

They can be useful, for example, to evaluate the *status quo* (and in this regard, we have already concluded that a society visually and sonically polluted with hatred does not fit in a well-ordered society in Rawlsian terms); and also, they can be useful for comparison purposes, like a starting point for reflection. In this way, the researcher must ask himself which factual differences between these two societies would justify a different treatment, that is, what should we have to adapt? So, it seems reasonable, as a starting point for argumentation, that we start with the a fortiori argument, that is, if for an ideal society it is necessary to regulate speech (perhaps in a punitive way), so, even more this kind of regulation would be necessary for a non-ideal society. However, this is just an initial argument, later we will detail in a more robust way the justification for both situations, showing the relationship between them.

Having made these clarifications and turning now to the ideal situation, how would Rawls imagine his well-ordered society? Would this society need, for example, a criminal law?

Waldron argues that anyone who claims that well-ordered societies are already immune to so-called hate speech has not fully understood the role of law in a well-ordered society. In this pitch, it is necessary to clarify that Rawls, in his book *A Theory of Justice* (1999), expressly places the need for a Rule of Law with coercive action to guarantee the maintenance of stability and social cooperation:

> By enforcing a public system of penalties **government removes the grounds for thinking that others are not complying with the rules. For this reason alone, a coercive sovereign is presumably always necessary, even though in a well-ordered society sanctions are not severe and may never need to be imposed**. Rather, the existence of effective penal machinery serves as men's security to one another. **This proposition and the reasoning behind it we may think of as Hobbes's thesis** (RAWLS, 1999, p. 211 - Emphasis added).

Given this, Waldron expressly states that we should not think of a well-ordered society as being a utopian fantasy in which laws are no longer necessary because all the attitudes of its members are absolutely just. Nobody supposes that punitive laws can be eliminated from the basic structure of a well-ordered society and that laws on homicide or theft can cease to exist because, by definition, no one in a fair society would ever be motivated to become involved in these crimes. Rawls' society is not utopian in this fanciful sense. As we said earlier, Rawls proposes a realistic utopia, that is, he intends to build one feasible proposition.

In this sense, Robert Taylor (2012) also stands:

> The unstated assumption in this argument, of course, is that strict compliance is just that: strict, meaning no illegal behavior, whether in the form of civil or criminal wrongs. This cannot be right, however. **Strict compliance must be consistent with some level of illegal behavior (like illicit discrimination); otherwise, ideal theory would be utopian, as some crime is an unavoidable feature of human societies.** As Rawls notes, "…we need an account of penal sanctions, however limited, even for ideal theory. Given the normal conditions of human life such arrangements are necessary" (TAYLOR, 2012, 358 - Emphasis added).

Therefore, in short, Rawls does not deny the need for a state, despite its well-ordered society being an ideal society, it is not a utopian society, and even though the crime rate is probably very low (perhaps even non-existent for some periods), coercive laws are needed. Laws that, in a well-ordered society, can sometimes fulfill only a symbolic role in maintaining social stability. Moreover, when mentioning the need for a state with sanctions, Rawls quotes Hobbes, it being possible in this mention to clearly perceive that he - Rawls - knows that due to human weaknesses, the absence of the state, the full freedom, would not be a real freedom, but the dominance of the strongest over the weakest, the domain of the one with the largest army, the greatest political or financial strength etc. Which will justify the need of a State to regulate and establish the domain of reason and fairness over the force. Regulation that, according to Rawls, should establish the fair terms of social cooperation.

3. A JUSTIFICATION FOR RESTRICTIONS ON HATE SPEECH

3.1 ROBERT TAYLOR'S ARGUMENTS

We will start the present topic detailing the arguments developed by Robert Taylor that "liberals of all stripes either are or should be civil libertarians with respect to speech, including hate speech" (TAYLOR, 2012, p. 355); and that liberal egalitarians who use an argument based on non-ideal theories to justify the regulation of hate speech would not be really breaking the dilemma between liberty and equality, but giving priority to the second over the first, because, according to him, anyone who is in fact committed to the priority of basic liberties, as Rawls establishes, could not consent with such regulations[28].

[28] "Over the remainder of this paper, I will explore three variations on the nonideal-theory strategy for escaping the dilemma, each of which builds upon and strengthens the previous one. I hope to show that none of them is successful and that liberal egalitarians are therefore genuinely trapped in a dilemma, forced in effect to choose between their liberalism and their egalitarianism, between liberty and equality. More controversially, I will also suggest that the nonideal-theory strategy could only be attractive to those already predisposed to sacrifice their liberalism to their egalitarianism; in fact, by the time we reach the third and final variant of this strategy, we will see that it implicitly affirms an illiberal form of egalitarianism. I conclude the paper with a brief examination of

Thus, Taylor lists three strategies, based on non-ideal theories, which try to escape from the dilemma between liberty and equality.

The first strategy starts from the following syllogism: 1) speakers advocate bigoted doctrines; 2) listeners are motivated by them to discriminate (consciously or unconsciously) historically oppressed groups; 3) and the implementation of fair equality of opportunity would therefore be very compromised[29]. And, in view of that, violating the priority of liberty could promote the fair equality of opportunity, which, ideally, could not occur since Rawls establishes that the liberty principle takes precedence over that which establishes the fair equality of opportunity. However, to remove this impediment, supporters of this strategy argue that non-ideal circumstances of partial compliance would justify access to the general conception of justice, in which trade-offs between the liberties of the first principle and the opportunities of the second would be justified (if this is good for promoting everyone's interest).

Taylor counter-argues this statement by clarifying, as we have already said, that it is a mistake to say that strict compliance presupposes the absence of illegal behavior: "strict compliance must be consistent with some level of illegal behavior […]; otherwise, ideal theory would be utopian, as some crime is an unavoidable feature of human societies" (TAYLOR 2012, p. 358).

Thus, Taylor concludes that, under the circumstance that crimes (or other kinds of illegal behaviors) remain at the tolerance rate of strict compliance, the dilemma would not be overcome and it would be a mistake to defend trade-offs between fair equality of opportunity and basic liberties.

The second strategy, in turn, encompasses the criticism that the ideal theory must be consistent with some level of criminality, but denies, however, "that the illicit discrimination encouraged by hate speech remains within the bounds of ideal-theory criminality given the context within which it operates" (TAYLOR, 2012, p. 359). Then, aiming to explain this idea better, he quotes Diana Meyers when she states that they would be "entrenched, cross-cutting systems of domination and subordination that enforce group-based social and economic exclusion" (MEYERS, 1995, p. 203).

According to Taylor, academics who advocate this claim often make two additional, interconnected claims. First, they claim that in a world free of this structural oppression, hate speech would lose all (or almost all) of its power, and restrictions on it would become idle. Second, such a

its implications for other policy areas, including the possibility of markets in both human organs and women's reproductive services" (TAYLOR, 2012, p. 358).

[29] "speakers advocate bigoted doctrines; listeners are motivated by them to discriminate (consciously or subconsciously) against historically-oppressed groups; and FEO-implementation is thereby hampered, perhaps severely" (TAYLOR, 2012, p. 358).

statement presupposes that such world would be possible and that, once such ideal state is reached, restrictions on hate speech would no longer be necessary.

Taylor's answer to this second strategy is as follows. Firstly, he clarifies that his answer to this question will not be as conceptual as the first one, and that, therefore, he will have to use some controversial empirical statements. Thus, he brings to the fore the fact that even Nordic countries (Denmark, Finland, Iceland, Norway, Sweden), which would be the societies with the greatest gender equality in the world in terms of participation and economic opportunity, educational achievement, political empowerment, health and survival, would have a considerable legacy of sexism with long-term effects on the relations between men and women. Legacy that, according to the author's argument, could influence and be influenced by the so-called hate speeches. And, assuming that these considerations are true, he concludes that all existing societies would be in non-ideal conditions and, therefore, the liberty priority could not be in force anywhere on Earth.

As a counter-argument to this strategy, Taylor clarifies that such distinction between the ideal and the non-ideal would not be exactly the distinction that was built by Rawls, given that, according to Rawls, such structural conditions would be present, for example, in current American society[30]. In saying this, Rawls seems to conclude that such conditions would be present in developed countries in general terms. Thus, although this ideal world built by the supporters of this second argumentative strategy cannot be considered entirely impossible, it is far from being similar to the Rawlsian ideal world (which would be much more tangible). Therefore, just like he does with the first argumentative strategy, Taylor suggests that a well-ordered society, even here, should be open to some crime rates, that is, even an ideal society should also include some level of discriminatory crimes conditioned to the existence of continued structural oppression based on groups and their symbolic appurtenances, because otherwise, it would not be a genuine commitment with liberalism [31].

[30] "The last point about the priority of liberty is that this priority is not required under all conditions. For our purposes here, however I assume that it is required under what I shall call "reasonably favorable conditions," that is, under social circumstances which, provided the political will exists, permit the effective establishment and the full exercise of these liberties. These conditions are determined by a society's culture, its traditions and acquired skills in running institutions, and its level of economic advance (which need not be especially high), and no doubt by other things as well. I assume as sufficiently evident for our purposes, that in our country today reasonably favorable conditions do obtain, so that for us the priority of the basic liberties is required. Of course, whether the political will exists is a different question entirely. While this will exists by definition in a well ordered society, in our society part of the political task is to help fashion it (RAWLS, 1993, p. 297).

[31] "I am suggesting that it is not enough for supporters of hate-speech restrictions simply to point out the ongoing existence of group-based structural oppressions and their symbolic appurtenances, as they must admit that these would exist to some degree even under ideal conditions; denial of this point would make them vulnerable to charges of utopianism, as argued above. They must instead indicate how much abatement of group-based structural oppression would be sufficient to bring about ideal conditions and thereby trigger priority for the basic liberties,

Finally, the third argumentation strategy tries to break with the binarism present in the popular ideal/non-ideal dichotomy and transform it into a continuum where the ideal would be just a north, a guiding point, which would never be fully achieved. As a direct consequence of that, equally, the lexical priority of basic liberties would never be fully achieved, it would also be an untouchable north. That is, as the world became closer to the ideal, more weight should be put on the liberties.

However, as Taylor rightly argues, such a proposal clearly is not consistent with Rawls' theory, once it would attempt to transform what would be a vice of utopianism into a virtue. Since, under this perspective, the basic liberties demanded by Rawls would never receive the due priority and we would live forever under the apparatus of the General Conception of Justice, which would transform the existing hierarchy between the two principles of justice into a true illusion.

3.2 A PARTIAL REPLY TO ROBERT TAYLOR'S ARGUMENTS AND A RAWLSIAN PROPOSITION TO RESTRICT HATE SPEECH

First of all, to start a reply, it is important to say that Robert Taylor is not contrary to the regulation of so-called fighting words. He thinks that this limitation would not threaten the free exercise of public reason and could help protect other central liberties, such as physical integrity. So, let us talk a little bit about fighting words. The doctrine of fighting words was established in North American jurisprudence through Chaplinsky v. New Hampshire (1942, 315 U.S. 568) and would constitute an exception to the First Amendment, an exception still accepted by that Court. For this exception, it would not be protected by the First Amendment (mutatis mutandis would be the same as shouting “fire” in a crowded theater, as put by Holmes) to exclaim provocative words in the midst of a circumstance of great passion. In a definition given by the court itself in that case, fighting words would be exclamations that, by their own utterance, inflict harm or tend to incite an immediate breach of peace. Which, in our particular understanding, would be quite vague, something that could often be confused with hate speeches by themselves. We could try to differentiate through a specification that hate speeches would have a more general and abstract connotation; it would be something closer than what Waldron (2012) named by group libel or group defamation, but we believe that many would be the borderline cases where it could be hard to state precisely if it is one or another. This is a major difficulty faced by the North American courts themselves.

especially free speech; additionally, they must demonstrate that this degree of abatement is possible either now or in the near future for some nonempty set of societies” (TAYLOR, 2012, p. 362).

Having clarified this issue, let us now analyze the heart of the matter. There are two ways to justify a regulation of hate speech. The first way would be through a denial of liberty by itself (which would be, in fact, a real restriction on liberty), and another way would be through an adjustment, a balance, among the basic liberties (which we understand to be only a regulation of the liberties). Taylor denies the first way and calls himself as agnostic about the second, that is, he is skeptical about the possibility of justifying this kind of regulation through an adjustment among the basic liberties. He does not consider it as being an impossible situation, but he states that it would occur just in rare exceptions[32].

Concerning the first way, before we explain it better, it is necessary to remember the following chart, the chart of non-ideal situations systematized by Simmons:

Ideal Theory	Nonideal Theory
1. Basic Structures	a) Deliberate noncompliance (institutional injustice): civil disobedience, etcetera.
	b) Unfortunate noncompliance (poverty, culture): the general conception.
2. Individuals	a) Deliberate noncompliance (wrongs, crimes): punishment/reparation.
	b) Unfortunate noncompliance (insanity, immaturity): paternalism.
3. Nations	a) Deliberate noncompliance (outlaw states): just war, intervention.
	b) Unfortunate noncompliance (burdened societies): international assistance.

Note that in this chart, it is not all situations of non-ideality that would justify the application of the General Conception of Justice, with the consequent breach of the lexical priority between the two principles and the possibility of making exchanges between the liberties of the first principle and the social and economic advantages of the second. According to the chart developed by

[32] "I also want to remain agnostic here about whether hate speech as I have defined it might be reasonably regulated for reasons internal to EL. I noted earlier that "fighting words" (such as racial epithets) might be so regulated, as their limitation does not threaten the free exercise of public reason and might help protect other central liberties, such as bodily security; liberties, in short, may have to be balanced against one another, and peripheral exercises of one liberty will reasonably give way to central exercises of another, equally important one. One can imagine rare situations—such as the calm delivery of a scholarly, epithet-free disquisition on the ethical and physical inferiority of Jews to an angry mob of anti-Semites gathered near Jewish businesses—in which even hate speech on my understanding of it might be reasonably regulated. Rather than focus on such cases, though, I want to concentrate instead on those whose curbs would genuinely qualify as restrictions and violations of the priority of liberty, not only because such cases have great prominence in the philosophical and legal literatures, including case law, but also because discussion of them will serve the larger aim of my paper, viz. examining the uses (and abuses) of nonideal theory". (TAYLOR, 2012, p. 355).

Simmons, only when the non-compliance is derived from the basic structure of society and simultaneously is of an unintentional type (that is, coming, for example, from social poverty or cultural obstacles to justice) that the proposed solution would be a transitory application of the general conception of justice. Thus, in that situation listed by Taylor in the first argumentative strategy, differently from what was stated, the application of the general conception of justice and the overcoming of the priority of liberty is not justified. The hypothesis of crimes not connected with the basic structure of society represents the individual deliberate non-compliance and the solution for this case would be only punishment and repair of the damage. That is, if the situation is not linked to a basic structure, it is not necessary to apply the general concept of justice.

Thus, what could, according to Rawls, justify the breaking of liberty purely and simply, that is, the breaking of liberty without having as a foundation a balance of basic liberties? As we said above, the chart puts that the general conception of justice only should be applied when the basic structure of society does not work due to an unintentional fail, and it gives some examples of when this could happen.

The first case that we can cite is that of poverty, and to clarify this issue, the following excerpt from the book Political Liberalism is enlightening:

> In particular, the first principle covering the equal basic rights and liberties may easily be preceded by a lexically prior principle requiring that citizens' basic needs be met, at least insofar as their being met is necessary for citizens to understand and to be able fruitfully to exercise those rights and liberties. Certainly any such principle must be assumed in applying the first principle (RAWLS, 1993, p. 7).

The second case that we can cite is that of cultural obstacles to justice and, about this, we can quote the emergence of what Rawls called *a constitutional crisis of the requisite kind*. In a crisis like that, the society, its basic structure, even willing, would be unable to assert itself, which could justify a break of the liberty priority.

> Thus as a matter of constitutional doctrine the priority of liberty implies that free political speech cannot be restricted unless it can be reasonably argued from the specific nature of the present situation that there exists a constitutional crisis in which democratic institutions cannot work effectively and their procedures for dealing with emergencies cannot operate (RAWLS, 1993, p. 353-354).

And leading the discussion to our object of analysis, we will bring here a passage from the book *A Theory of Justice* in which Rawls deals with tolerance to the intolerant (RAWLS, 1999, p. 190-194). He realizes that "the question of tolerating the intolerant is directly related to that of the stability of a well-ordered society regulated by the two principles" (RAWLS, 1999, p. 192). This stability would work as a buffer in which the basic structure would naturally be able to receive some

impacts in which the balance of basic liberties would already be able to resist without breaking the Rawlsian lexical priority. Thus, in the case of the emergence of an intolerant group of people in a given society, it is necessary to verify that this group is not growing up so strongly that the capacity of the basic structure for resisting will break.

> So even if an intolerant sect should arise, provided that it is not so strong initially that it can impose its will straightway, or does not grow so rapidly that the psychological principle has no time to take hold, it will tend to lose its intolerance and accept liberty of conscience. This is the consequence of the stability of just institutions, for stability means that when tendencies to injustice arise other forces will be called into play that work to preserve the justice of the whole arrangement. Of course, the intolerant sect may be so strong initially or growing so fast that the forces making for stability cannot convert it to liberty (RAWLS, 1999, p. 192-193).

So, to finish the explanations about this first way, that is, the way that justifies the regulation of hate speech through the denial of liberty by itself (which, as we said above, would be, in fact, a real restriction on the liberty) I must say that this path must be seen with much distrust, because it is a strong and straight restriction on the liberty and can easily be used in an abusive way by not so stable democracies, justifying continued breaches on the liberty.

In the abstract, it could occur both in an ideal and non-ideal society, but we are skeptical about the possibility of a serious situation like that occurring in an ideal society. An ideal society, by nature, should have democratic institutions stable enough to withstand big problems without having to appeal to a resource that so directly breaks people's liberties.

Situations to justify this type of restriction would be rare moments of collective hysteria where people of a particular society lose their lucidity for a short period of time. An example of a situation like that for a non-ideal society is the Rwanda genocide. We believe that the context of the genocide in Rwanda would justify a restriction of free speech based on this type of justification.

Let us now consider the second way. The second possibility will justify restricting hate speech through an adjustment, a balance, among the basic liberties (which we understand to be only a regulation of liberties).

The situation of balance among basic liberties is also more common in non-ideal societies, but we believe that it could also occur in an ideal society. In this way, the problem would not be with the basic structure of society, but with individual conduct. As we said, the non-ideality arising from a deliberate individual conduct would not justify breaking the priority of basic liberties. In that case, what has to be done is punishment for those who have deviated from just action. So, what would be the difference between this real situation and the ideal situation? And insofar as some criminality will exist even in an ideal society, how, then, can we differentiate them?

For an ideal society, in the aspect of punishment, Rawls says that "in a well-ordered society, sanctions are not severe and may never need to be imposed." (RAWLS, 1999, p. 211). This would lead us to conclude that they would be societies with very low criminality, which may even be non-existent in limited periods of time. Therefore, we do not believe that this is, for example, the reality of North American society, which has the largest prison population in the world. Much less the Brazilian reality, where some states experience situations of violence comparable to that of nations at war. Perhaps we could consider the situations of some European countries with low crime rates, but this is far from being a global reality. And even among the so-called developed countries, few would be able to fit in this so-called ideal reality in terms of criminality. It is important to note that we are trying to leave Rawlsian idealism within the scope of what we consider to be the feasible, since that was the author's objective.

However, if criminality exists in both the ideal and the real society, what would be the difference in terms of treatment (ideal-real)? The suggestion we make is that real societies, because they have specific histories of violence and injustice, should, therefore, have a personalized balance among basic liberties. For example, in a country with a relatively recent past of slavery, as is the case with Brazilian and North American reality, when building a balanced system of basic liberties, it must take this into account. Our history of racism is long, and this must be considered when building the balance between our set of basic liberties.

The first principle, in its version elaborated in Political Liberalism, establishes as follows:

> a. Each person has an equal claim to a fully adequate scheme of equal basic rights and liberties, which scheme is compatible with the same scheme for all; and in this scheme the equal political liberties, and only chose liberties, are to be guaranteed their fair value (RAWLS, 1993, p. 5).

And the basic liberties are as follows:

> freedom of thought and liberty of conscience; the political liberties and freedom of association, as well as the freedoms specified by the liberty and integrity of the person; and finally, the rights and liberties covered by the rule of law (RAWLS, 1993, p. 291).

Here we can identify more clearly a harm to the person's integrity. However, the harm from hate speech will be better explained in the next topic.

The last point that needs to be clarified before we deal with the harm caused by hate speech concerns the relationship that is built between these speeches and possible racist attitudes that would be motivated by them. Due to that, let us remember the syllogism elaborated by Taylor: 1) speakers defend radical, fanatical doctrines; 2) listeners are motivated by them to discriminate (consciously

or unconsciously) historically oppressed groups; 3) and the implementation of fair equality of opportunity would therefore be very compromised.

Notice that in this syllogism, part of the concern is not with the discourse itself but with the possibility that this discourse will influence other people to discriminate. However, in our understanding, such a relationship would be breaking with the assumption that people should be treated as having the ability to guide themselves through their sense of justice. We believe that it is a mistake for any liberal conception of the State to assume a paternalistic attitude of not recognizing this capacity in people. So, it would be a mistake to justify/legitimize a restriction on a speech from the assumption that this discourse can convince/convert people. A paternalistic attitude like this could clearly be classified as censorship and as a damage to the public market of ideas. This situation is the one that would be at the heart of free speech protection. It is an important point to note that when someone who has broken a rule is punished, we do not do it because that person did not have the ability to choose what attitude to take, quite the contrary, we punish exactly because we presuppose this ability to self-orient, that is, we punish because we assume that they were aware of their actions and consequences. The framework elaborated by Simmons states that a paternalistic attitude would only be justified in the face of individual non-voluntary attitudes, such as, for example, with minors or adults who, for some other reason, permanent or transitory, had their cognitive capacities affected in order to impair an adequate development of their moral capacities. From this point, we still think it would be interesting to recall the criticism made by Zofia Stemplowska and Adam Swift about the idealization arising from natural or accidental limitations of human life since, as they rightly put it, even in ideally perfect societies, probably there will be children or people with disabilities.

Thus, the problem of hate speech for a liberal society is not in its possible capacity to influence people to commit crimes, since these people probably will only be convinced, if they already had values with intolerant tendencies. In this case, the discourse only served as a mechanism to bring to light those values that they already had, and that are not in keeping with the ideal of well-ordered Rawlsian society. The error is, therefore, in those values by themselves, which are stated, explicit, in those who proclaimed the speech, and underlying, implicit, in those who can be influenced by it. A person with these values does not share a Rawlsian ideal of justice; their values are not part of a reasonable pluralism.

4. THE HARM IN HATE SPEECH

In matter of harm in hate speeches, the statements made by Waldron (2012) when he talks about the assurances are quite pertinent:

> The content of the assurances conveyed in this way might vary. [...]. But in the real world, when people call for the sort of assurance to which hate speech laws might make a contribution, they do so not on the controversial details of someone's favorite conception of justice, but on some of the fundamentals of justice: 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. Hate speech or group defamation involves the expressed denial of these fundamentals with respect to some group in society. And it seems to me that if we are imagining a society on the way to becoming well-ordered, we must imagine ways in which these basic assurances are given, even if we are not yet in a position to secure a more detailed consensus on justice (WALDRON, 2012, p. 82-83).

One of Rawls' main points regarding his theory of justice is the stability that it can generate, and it is even one of the foundations of the lexical priority of the principle of liberties. Regarding stability, let us remember the characteristics that we have said a so-called well-ordered society must have. The idea of a public conception of justice would be implicit in the concept of a well-ordered society, i.e., it is a society in which each citizen accepts, and knows that the others equally accept, the same political conception of justice, which, in Rawls' theory, materializes in its principles of justice. It would also be implicit in this concept that the basic structure of society (its main political and social institutions and how they relate to the cooperative system) respects these principles of justice. Finally, it would be an assumption of a well-ordered society that its citizens have an effective sense of justice, i.e., a sense that enables them to understand and apply these publicly recognized principles of justice, acting in accordance with them.

Concerning these three characteristics, as for stability, we want to highlight one point of the first characteristic: you know that the others equally accept the same political conception of justice. Thus, taking into account the fact already mentioned here several times that the society for Rawls is not a utopian society in a dreamlike sense of the term, some dose of factual unreality will exist in this statement, that is, in general, citizens accept the same political conception of justice and they know that others do it too, but there is a fear, even if unconscious, that this is not entirely true or that someday it will cease to be, something that comes from the awareness of human limitations, the weakness of their wills, and that could undermine the longed-for social stability. This problem is even more pressing in real societies because they have a specific historical reality that will directly influence the way their citizens read reality. In view of that, hate speech itself will inflict direct harm to that sense of security that these assumptions are intended to guarantee, and that is precisely why we said that Rawls does not dispense the need for a state with some coercive power. As we

have already explained above, in a democratic Rawlsian State there will be sanctions that many times will give just a symbolic power/support to guarantee to citizens that, even in moments of human weakness, there will be a State to protect them, a structure that will guarantee and safeguard the fair terms of social cooperation. In that context, another point that can be enlightened regarding the existing differences between an ideal society and a real one is that, in an ideal, normative sanctions would have much more of a symbolic function than an actual performance, differently from what would occur in a real society.

That is why Waldron is so concerned with what a society looks like. Would it be full of prejudiced and racist messages? This appearance for Waldron would have much more than an aesthetic value; "it is the conveying of an assurance to all the citizens that they can count on being treated justly" (WALDRON, 2012, p. 85). In other words, a society polluted with this type of speech, a society whose basic structure does not restrict or regulate this type of thing, will not properly transmit this assurance. Let us now think about the situation in which a black family wakes up with a burning cross in their backyard or one that a Jewish family wakes up with a swastika painted on the front wall of their house. An act like that does not intend only to offend them; there is a symbolism, an implicit statement that people of that skin color or that religion are not welcome in that neighborhood, in that city or in that society, i.e., aims to undermine their security in their daily actions, and in the face of such situation it is undeniable that the members of that family will think two or even three times before returning to their home unaccompanied, they will feel insecure in their small daily actions, which will make their stay there very difficult, and that is precisely what the author of the message wants to cause: fear, insecurity. Implicitly, they are saying: - *You think you are just like me, but you are not. You think you can feel safe, but you can't. Be careful because there is no one here to protect you.* Notice that this will be directly linked to the historical context of each society. For example, a swastika in German society likely has a deeper meaning; the same occurs with respect to the symbols of the Ku Klux Klan before American society. So, for a real society, all this must be weighed in order to find its own regulation, an individual and personalized balance among its basic liberties.

Thus, under this bias, that is, understanding the right to assurance like a basic right of any citizen (I dare say of any human being), we can affirm that such speeches aim to undermine the status of equal citizenship of some members of society. This *status* has a fundamental importance on the justice model proposed by Rawls, and it is also one of the foundations of his first principle of justice, of his priority, just like what happens with stability (and damage to this condition would be what it is called as objective damage to dignity).

> This helps us to see what hate speech is about. The point of the bigoted displays that we want to regulate is that they are not just autonomous self-expression. They are not simply the views of racists letting off steam. **The displays specifically target the social sense of assurance on which members of vulnerable minorities rely. Their point is to negate the implicit assurance that a society offers to the members of vulnerable groups — that they are accepted in society, as a matter of course, along with everyone else; they aim to undermine this assurance, call it in question, and taint it with visible expressions of hatred, exclusion, and contempt. And so it begins: 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 (WALDRON, 2012, p. 88-89 – Emphasis added).

Another point raised by Waldron is the effect that this type of speech can have in terms of a warning sign, an invite for others: "a public manifestation of hatred by some people to indicate to others that they are not alone in their racism or bigotry" (WALDRON, 2012, p. 95). So, to this extent, those who share the value of intolerance are able to recognize each other and, from there, they can act in a coordinated way.

This view is sometimes objected to by saying that the laws that prohibit hate speech would not actually solve the problem but would only camouflage it. In other words, these laws would only drive the problem to the underground. This argument is directly related to that one which says that intolerant speech is resolved only with more speech and not with sanction, punishment, censorship or anything like that. This is an interesting argument, and it is important to make some considerations about it.

Because of this argument, it is necessary to clarify what is desired with the type of regulation we are advocating. Therefore, it is necessary to clarify that the focus of the issue, at least in the short term, is not the offender, i.e., the objective here is not to make them change their mind. Here, the focus is different; the focus is the offended, who is often neglected in the decisions of the American courts on the matter. These laws aim to bring them a feeling of protection and support. It serves as a symbolic institutional message that the State will be there to guarantee equal protection for all in matters of safety. It is, therefore, a more short-term goal. This objective is extremely important for the State to try to dismantle a possible coordinated action by haters, as such action would, even more, undermine the sense of assurance that the State must try to transmit to its citizens.

A change of mind on the offender's part would be linked to a long-term goal, which does not deny the need to maintain short-term goals, given the importance of working on the issue in an integral way (offended and offender). About long-term goals, Rawls recalls the psychological principle that determines that those who have their liberty protected and benefit from a just constitution will acquire loyalty to that constitution, but only over time and from the moment they

live similar circumstances that they went through. In other words, in order to acquire this awareness, it is necessary time for intolerant people to live experiences that make them break their paradigms. For example, think about a member of the Ku Klux Klan having their life saved by a black physician or even being a victim of intolerance either because they belong to another minority group or because, over time, the social majorities and minorities can be inverted. In this situation, the same State will be there now to support them, which will enable them to acquire understanding and loyalty to that State, to that constitution, which guarantees everyone liberty and equal protection. We can justify it because, in our understanding, the protection against hate speech can be justified from the original position. In other words, from this point of view (original position), we believe that it is not difficult to agree on the need to guarantee equal assurance in the terms described by Waldron.

In the original position, due to the veil of ignorance, the parties do not know their specific social position or the comprehensive doctrine of the people they represent. The parties also ignore the ethnic group, sex, sexual identity, sexual orientation or even natural gifts such as people's strength or intelligence. It occurs in this way because the conditions for an equal agreement between free and equal people on the principles of justice must eliminate the advantageous positions of negotiation. It is in this condition that we ask them if these people could take the risk of living in a society belonging to a group that is constantly the victim of social exclusion through expressions of hatred and intolerance. Situations like that, for example, can leave these people constantly alert and afraid of possibly being physically or verbally attacked. Because they do not have the same assurance as other groups, those people who are victims of hate speech end up not being able to practice the same daily actions, such as, for example, kissing their boyfriend or girlfriend at a square. On a romantic night, a homosexual couple, under penalty of being verbally or even physically assaulted, will not be able to perform the same acts as a heterosexual couple. At least as far as assurance is concerned, we believe it is the role of the State to minimally safeguard it by guaranteeing everyone, regardless of the group they belong to, the possibility to practice their daily actions. We believe that this could justify the parties, given a balance among basic liberties, accepting regulations on their freedom of expression by restricting or, in some other way, discouraging the so-called hate speech.

Regarding the harm inflicted by hate speech and in maintaining the fair value of political liberties, which is also linked to the idea of equal citizenship status, it is interesting to bring to this work some points made by Owen Fiss (1996) when he talks about the silencing effect that a more libertarian interpretation of the right of free speech can cause. As we have already pointed out, Fiss' argument is not that the speech will convince listeners to act in a certain way. That is not the point,

the point is the feeling of insecurity generated by it. This will make it hard for these disadvantaged groups to participate in public discussions, or at least to participate properly, thus being underrepresented in the marketplace of ideas. In this context, the American classic remedy "more speech" sounds empty, considering that those who should respond will not do it. They fear exposing themselves publicly and having to face even worse situations than they already have daily. Hate speech would undermine both the sense of assurance and "the victims' sense of worth, thus preventing their full participation in many of the activities of civil society, including public debate" (FISS, 1996, p. 16). It is important here to think about the strength of self-respect in Rawls's thought. It is also one of the fundamentals of the priority of liberties and the necessary assumption for each person to have conditions for the adequate exercise of their rationality, which is needed for the choice and development of an ultimate end that they want to give to their life. As we explained in the first chapter, for Rawls, self-respect is perhaps the most important primary good since, without it, we doubt our own value, the value of our life plan, and our ability to carry it out. The hate speech may harm it. Even when these people come to expose their voices, they may not have the same weight as other voices, and when we say the same weight, imagine, as a metaphor, the situation of a room where several people shout an information “X” and a single “Y”, because others are afraid to join the chorus of “Y” and have to face an even harder life. In this situation, the sound of “X” will cover “Y”. The heart of the matter here is not for one to be convinced, that would be a matter of a sense of justice and value judgment. Which could be criticised by Dworkin's argument that it is not possible and it is not a duty of the State to demand from its citizens that they do not think that a particular opinion is not a bad or a ridiculous one (DWORKIN, 2006, p. 372), it cannot be demanded. The point here is really to be heard; it is the possibility of the argument, of the opinion, at least to reach people so they can analyze it. The respect for opinion cannot be demanded. However, the respect for the person and a fair equality of opportunity within the scope of political liberty can be demanded, and all of that is even more serious in a real (not ideal) society as far as it may have specific historical contexts that not only can, but must be taken into account.

In these situations, it is not the State that threatens the public debate, the market for ideas. State intervention regulating this type of discourse here would guarantee and ensure that, in fact, everyone has a voice. Also, we emphasize that what Rawls wants to guarantee when he talks about the fair value of political liberties, as it fits into his concept of fair equality of opportunity is something really robust, not just simply more substantial access to political liberties, but instead an effective and equal access for all to the public sphere regardless of their social class. Rawls places the political liberties and the guarantee of its fair value as necessary to be safeguarded already in the first principle and not in the second. Someone might object by saying “what gives the state the right to

choose the speech rights of one group over the other?" (FISS, 1996, p. 17). The way we face this question will depend on the way we view the political interests at stake, the "libertarian and democratic conceptions of freedom" (FISS, 1996, p. 17) would be in conflict. Fiss argues that in this case, the State would not be trying to arbitrate between the discursive interests of the various groups but merely trying to establish essential preconditions for self-government, ensuring that all sides are presented to the public (FISS, 1996, p. 18). If this could be achieved simply by strengthening disadvantaged groups, the State's objective would be achieved. But Fiss expressly states that American experience with affirmative action programs and the like has taught that the issue is not so simple. Sometimes, it is necessary to go further and "lower the voices of some in order to hear the voice of others" (FISS, 1996, p. 18 - our translation). The concern here is not simply with the social position of the groups that could be harmed by the discourse whose regulation is contemplated, but with the postulations of those groups regarding an integral and isonomic opportunity to participate in the political debate.

CONCLUSION

We will attempt to conclude this work by explaining how we should interpret Rawls's claim that maintaining the fair value of political liberties must satisfy three conditions: no restrictions based on content; no excessive burden should be imposed on any political group in society (all must be affected equally); the regulation of political expression must be rationally defined in order to achieve its fair value (RAWLS, 1993, p. 357-358). We believe that they could be used as a possible or apparent counter-argument to what we propose here and, in addition, together with these clarifications, we will summarize the main conclusions made here in this work.

In particular, we are more concerned with the first condition that determines that there cannot be content-based restrictions since the other two seem to be in complete harmony with our proposal.

First, to better understand this restriction, it is important to remember that, in Rawls' thought, there is the idea of reasonable pluralism and, therefore, the content that should not be restricted must also be within the spectrum of the reasonable, that is, must be substantially within the scope of the values proposed by his principles of justice.

Second, as Fiss (1996, p. 21) puts it, the idea of content neutrality must not be seen as an end in itself. This principle responds to an underlying concern that the State may use its power to distort the debate to promote particular results, and this must always be considered something to worry about. However, we understand that that principle should not be so literally extended to situations such as hate speech or political advertising spending, where complete deregulation could restrict

debate and state regulation could actually be trying to promote a free and open debate. In these cases, the State may be disadvantaging certain discursive agents by making judgments based on content, but aiming only to ensure that all sides are being heard. Therefore, the State would simply be acting as an impartial mediator, devoted to ensuring that all points of view are being presented. When the State acts as a mediator, its purpose is not to determine the outcome but to ensure the robustness of the public debate. What we defend here is that changing the result by strengthening the debate should not be seen as a cause for concern. There is nothing wrong with that. What democracy aims to achieve is not simply a public choice but a public choice made with substantial information and under appropriate, fair conditions for reflection. "From the perspective of democracy, we should not complain, but applaud the fact that the outcome has been affected (and presumably improved) by the open and complete debate" (FISS, 1996, p. 23). About public campaign spending, Rawls (1993, p. 358) even expressly states that the prohibition of large contributions by individuals or companies to political candidates would not be an excessive burden, as such as that prohibition may be necessary for all citizens to have an equivalent right to influence government policy and to reach positions of authority regardless of their economic and social class.

Finally, thirdly, Waldron states that if, to the financial marketplace, it is not an unusual thing to talk about, even among liberals, the need for some kind of regulation, why not apply the same reasoning to the marketplace of ideas?

> Economists understand that economic markets are capable of producing some good things and not others; they may produce efficiency, but they may not produce, or they may undermine, distributive justice. In the case of the marketplace of ideas, is truth the analogue of efficiency or is it the analogue of distributive justice? I have never heard any proponent of marketplace-of-ideas imagery answer this question, mainly because such proponents admit that when they try to figure out how the marketplace of ideas might be expected to produce truth, they have no notion that is analogous to the economists' understanding of how markets produce efficiency (and undermine distributive justice). They just teach their students in law school to spout the mantra "the marketplace of ideas," and fail to remind them that, although some government regulation is generally thought important in the economic marketplace, we have not developed any analogues for "the marketplace of ideas" that would be useful in the arguments for or against hate speech regulation (WALDRON, 2012, p. 156).

In this sense, an egalitarian liberal perspective for the marketplace of ideas could indeed establish some regulations for hate speech. Regulations that, in real societies, would have their outlines defined by their historical reality. The reality of each of them should give a specific trait to the balance among basic liberties. Clarifying that through this, we are absolutely not underestimating the priority of liberties; we are simply not being blind to, in ideal terms, Rawls not aiming for anything dreamlike, taking into account human limitations and the need for symbolic

incentives; and, in real (not ideal) terms, specific historical and cultural contexts further aggravate the issue. Being worth to put the following Rawls' quotation that came in harmony with Waldron's quotation:

> The First Amendment no more enjoins a system of representation according to influence effectively exerted in free political rivalry between unequals than the Fourteenth Amendment enjoins a system of liberty of contract and free competition between unequals in the economy, as the Court thought in the Lochner era (RAWLS, 1993, p. 362).

BIBLIOGRAPHIC REFERENCE

BOOT, Martijn. *The Aim of a Theory of Justice*. Ethical Theory and Moral Practice, Vol. 15, No. 1, Sen's The Idea of Justice, p. 7-21, 2012. Available on: <http://www.jstor.org/stable/41474503>. Accessed: January 2021.

COHEN, Gerald Allan. *Rescuing Justice and Equality*. Cambridge, Massachusetts: Harvard University Press, 2008.

DWORKIN, Ronald. *O Direito de Liberdade:* a leitura moral da constituição norte-americana. Translation Marcelo Brandão Cipolla. Technical review Alberto Alonso Muñoz. São Paulo: Martins Fontes, 2006.

FISS, Owen M. *The Irony of Free Speech*. 2nd impression. Cambridge and London: Havard University Press, 2016.

FREEMAN, Samuel. *Rawls*. London and New York: Routledge Taylor & Francis Group, 2007.

GUSTIN, Miracy Barbosa de Souza; DIAS, Maria Tereza Fonseca. *(Re)pensado a Pesquisa Jurídica:* teoria e prática. 4ª ed. rev. e atual. Belo Horizonte: Del Rey, 2013.

HABERMAS, Jürgen. *Religious Tolerance*: the pacemaker for cultural rights. Royal Institute of Philosophy. n.79, 2004, p. 05-18.

HAMLIN, Alan; STEMPLOWSKA, Zofia. *Theory, Ideal Theory and the Theory of Ideals*. Political Studies Review, vol. 10, Issue 1, p. 48-62, 2012. Available on: <https://doi.org/10.1111/j.1478-9302.2011.00244.x> Accessed: January 2021.

MEYERS, Diana Tietjens. *A Non-Punitive, Compensatory Remedy for Abusive Speech*. Law and Philosophy, Vol. 14, No. 2, Special Issue on Rights, p. 203-243, 1995. Available on: <http://www.jstor.org/stable/3505013>. Accessed:: January 2021 2018.

RAWLS, John. *A Theory of Justice*. Cambridge, Massachusetts: Harvard University Press, 1999.

RAWLS, John. *Justice as Fairness: a restatement*. Cambridge, Massachusetts: Harvard University Press, 2001.

RAWLS, John. *Political Liberalism*. New York: Columbia University Press, 1993.

RAWLS, John. *The Law of People: with the idea of public reason revisited*. Cambridge, Massachusetts: Harvard University Press, 1999B.

SEN, Amartya. *What Do We Want from a Theory of Justice?*. The Journal of Philosophy, Vol. 103, No. 5 p. 215-238, 2006. Available on: <http://www.jstor.org/stable/20619936>. Accessed: January 2021.

SIMMONS, A. John. *Ideal and Nonideal Theory*. Philosophy & Public Affairs, Vol. 38, No. 1, p. 5-36, 2010. Available on: <http://www.jstor.org/stable/40468446>. Accessed: January 2021.

STEMPLOWSKA, Zofia. *What's Ideal About Ideal Theory?*. Social Theory and Practice, Vol. 34, No. 3, Special Issue: Social Justice: Ideal Theory, Nonideal Circumstances, p. 319-340, 2008. Available on: <http://www.jstor.org/stable/23558711>. Accessed: January 2021.

STEMPLOWSKA, Zofia; SWIFT, Adam. *Rawls on Ideal and Nonideal Theory*. In MANDLE, Jon; REIDY, David A. [ed.]. *A Companion to Rawls*. Chichester:Wiley Blackwell, 2014.

TAYLOR, Robert S. *Hate speech, the priority of liberty, and the temptations of Nonideal theory*. Ethical theory and moral practice, v. 15, n. 3, p. 353-368, 2012.

UNITED STATES. Supreme Court. *Chaplinsky v. New Hampshire,* 315 U.S. 568 (1942). Available on: < https://supreme.justia.com/cases/federal/us/315/568/case.html>. Accessed: January 2021.

WALDRON, Jeremy. *The Harm in Hate Speech*. Cambridge and London: Harvard University Press, 2012.

VALENTINI, Laura. *Ideal vs. Non-ideal Theory*: a conceptual map. Philosophy Compass, VL. 7, IS 9, p. 654-664, 2012. Available on: <https://doi.org/10.1111/j.1747-9991.2012.00500.x>. Accessed: January 2021.

ZANITELLI, Leandro Martins. *Direito e teorias ideal e não ideal da justiça*. Revista Direito GV [online]. vol.12, n. 2, p.364-381, 2016. ISSN 2317-6172. Available on: <http://dx.doi.org/10.1590/2317-6172201615> Accessed: January 2021.

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