Freedom and equality as necessary constituents of a liberal democratic state

Doomen, J.

Chapter 11. The ignore principle

11.1 In the previous chapter I adhered to the adverb 'reasonably' in saying that only manifestations that can reasonably be ignored should be allowed. I have thereby accepted an admittedly vague notion. One must be careful not to identify 'reasonably' in the present sense with 'reasonably' in the sense of 'according to reason', which would be a relatively unproblematic phrase, the considerations of chapters 2, 5 and 6 notwithstanding. 'Reasonably' as it is applied presently has a wide scope: it has a similar meaning as 'equitably', which may be associated with 'equity' as it is used in (civil) legal systems. This means that the notion has no 'moral' connotation. The vagueness that the concession of including 'reasonably' in this inquiry adds to it is the price to pay for providing not only a consistent but a credible theory, i.e., a theory that accommodates the difficulties and specific circumstances an individual liberal democratic state must confront. I will try to remedy the problem of vagueness by illustrating my position by means of a number of examples.

11.2 A proper place to start is the workplace. Employees and prospective employees who are treated unequally with other (prospective) employees cannot ignore such treatment. They could ignore the discrimination and look for work elsewhere, but a matter such as employment is arguably an integral part of life (apart from the obvious issue of acquiring an income), so that any unwarranted interference with people pursuing it is unacceptable in any liberal democratic state. (I say 'unwarranted', not ruling out *any* interference, because in *special* instances, discrimination on the basis of, e.g., race, must be allowed (cf. the example in the introduction of the criteria to select actors).) Discrimination qualifies, then, in such a case, as harm that cannot reasonably be ignored.

In the most extreme case, allowing employers to dismiss the principle of prescriptive equality might result in an unwelcome segregation, manifesting in some jobs a disproportionate representation of some categories (e.g., relatively many black people and/or women). Such differences may, incidentally, continue to exist; whether they should be artificially combated – through a policy of positive discrimination – cannot be conclusively answered from the present perspective, which demands only that basic equality be acknowledged, meaning that no discrimination be allowed, so the relevant qualities of employees being the criterion.

Such a segregation would in the long run not only affect individual employees, but the state as a whole, if the danger should arise that employees decide to rebel against their disadvantageous position. (Some categories of employees might display the same behavior if they collectively consider their wages to be lower than what they might expect, but that is an issue that lies beyond the scope of the present inquiry and demands its own response, whether it be in political, economic or penal terms.) In such cases, 'reasonably' can be linked

to reason in the sense in which it was used in part 1 of this study, namely, as the decisive criterion for prescriptive equality, if basic equality is specified by basic rationality.

11.3 To illustrate the ignore principle by means of another example, libelous acts themselves can be ignored but their consequences may be so dire that they affect someone's life in a serious way. In this case, 'reasonably' cannot be as easily determined as in the first case: it does not follow from prescriptive equality that libelous acts should be prohibited. 'Reasonably' must now be interpreted differently, namely, as the standard of appropriateness in the law, to be decided by the circumstances.[394] In this case, the link with 'equity' mentioned above is clear.

Yet another drawback of the limitations of the *a priori* perspective that has featured as the guiding approach throughout this inquiry becomes apparent here:[395] no clear criterion seems available to decide the issue. I – again – acknowledge the limitations here, and will not attempt, by means of a series of unconvincing contortions, to fabric a procrustean standard to merely *seemingly* accommodate the facts while in fact not doing justice to the complexity of the situation, but rather leave said perspective in this instance. This does mean that I must resort to an (*a posteriori*) alternative to complete the account, so that an *a posteriori* 'superstructure' must be added to the *a priori* basis.

11.4 A third example is hate speech. The phrase 'hate speech' is somewhat misleading: if it were interpreted literally, it would mean speech in which the hate towards (a group of) people is expressed or even instilled in those who listen to it and take it seriously. The usual sense, however, is speech that is used to incite people to violence to other (groups of) people. Speech of the latter kind cannot reasonably be ignored, in contrast to hate speech in the literal sense just mentioned, i.e., the speech that expresses hate, which *can* reasonably be ignored so long as it does not also belong to the second category. In any event, by 'hate speech' I will refer to the usual rather than the literal meaning.

It is, just as in the second example, necessary to distinguish here between the *contents* (i.e., what is said) and the *consequences*; the former can reasonably be ignored while the latter cannot. If someone considers the members of a particular race to be inferior to those of

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[394] Cf. E. Burke, *Reflections on the Revolution in France*, p. 240: "Circumstances […] give in reality to every political principle its distinguishing color and discriminating effect."

[395] Cf. E. Burke, *Reflections on the Revolution in France*, p. 311: "The science of constructing a commonwealth, or renovating it, or reforming it, is, like every other experimental science, not to be taught *a priori*." I would not assent to the following statement, though: "Nothing universal can be rationally affirmed on any moral or any political subject." E. Burke, *An Appeal from the New to the Old Whigs*, p. 80. Such a radical observation, at least with regard to politics, is incompatible with the *basis* of my inquiry, whose *a priori* nature is undeniable. For the same reason, MacIntyre's point of view differs significantly from mine: "There is no standing ground, no place for enquiry, no way to engage in the practices of advancing, evaluating, accepting, and rejecting reasoned argument apart from that which is provided by some particular tradition or other." *Whose Justice? Which Rationality?*, p. 350; cf. *After Virtue*, pp. 126, 127.

other races and consequently calls for the destruction of the former race, his opinion may reasonably be ignored, while those who are intended cannot avoid the consequences that follow from what he says, if his plea is taken to heart and carried out. It may be considered a hate speech act and be forbidden for the same reasons why other (potentially) harmful[396] acts are forbidden. (The word 'potentially' is problematic; I will deal with this in section 11.6, where the problems with the similar phrase 'possible consequences' are addressed.)

11.5 The application of the ignore principle may be further illustrated along the lines of actual legal cases. I point to the Skokie case,[397] in which it was decided that Nazi sympathizers should be allowed to march through Skokie, Illinois (where relatively many Holocaust survivors resided), wearing the uniform of the National Socialist Party of America and promoting anti-Semitism. Crucially, the First Amendment to the Constitution of the U.S.A. protects freedom of speech and the right to assemble peacefully. Whether the latter condition (a *peaceful* assembly) was met can of course be debated; in any event, the Appellate Court of Illinois ruled that 'fighting words'[398] are not covered by the First Amendment but that this exception did not apply in the case at hand as far as the demonstration itself was concerned.

Significantly, the intentional display of the swastika *was* prohibited, as it might evoke violent reactions of some of Skokie's residents.[399] So "[…] Intentionally displaying the swastika on or off their persons […]" was not allowed, but the Illinois Appellate Court stated that it should in principle be considered part of freedom of speech and based its injunction – which was overturned by the Supreme Court – on the fact that "[…] the tens of thousands of Skokie's Jewish residents must feel gross revulsion for the swastika and would immediately respond to the personally abusive epithets slung their way in the form of the defendants' chosen symbol, the swastika. The epithets of racial and religious hatred are not protected speech […]."; "In the instant case, the evidence shows precisely that substantial numbers of citizens are standing ready to strike out physically at whoever may assault their sensibilities with the display of the swastika."[400]

One may wonder whether the Skokie residents could not reasonably ignore the demonstration, including the swastikas that would be displayed. Indeed, this was the conclusion of the Supreme Court of Illinois, which ruled, stating that advance notice of the demonstration had been given so that no one would be forced to see any swastikas, that "The display of the swastika, as offensive to the principles of a free nation as the memories it recalls may be, is symbolic political speech intended to convey to the public the beliefs of

[396] One may restrict this to *physically* harmful acts.

[397] National Socialist Party of America v. Village of Skokie (432 U.S. 43, 1977; 69 Ill. 2d 605, 373 N.E. 2d 21, 1978).

[398] Cf. Chaplinsky v. New Hampshire (315 U.S. 568, 1942).

[399] 51 Ill. App. 3d 279, 366 N.E. 347, 1977.

[400] 51 Ill. App. 3d 279, 366 N.E. 347, 1977.

those who display it. It does not, in our opinion, fall within the definition of "fighting words," and that doctrine cannot be used here to overcome the heavy presumption against the constitutional validity of a prior restraint."[401]

Whether a demonstration such as the one that prompted the Skokie case should indeed be allowed depends on the possibility for those that might be offended (and thus harmed, on the basis of my own broad notion) to reasonably ignore it. Feinberg's assessment is roughly the same as mine in this respect, pointing out that the demonstration had been announced well in advance, so that it could be avoided,[402] and that "[…] the seriousness of the offense in the actual Skokie case had to be discounted by its relatively easy avoidability."[403]

The judgment whether such expressions should be allowed depends on the circumstances of the situation. As Rosenfeld writes, "As made manifest by the *Skokie* cases, the United States can afford to tolerate Neo-Nazi propaganda because of its minimal effect on its intended audience or on the affairs of the polity. In contrast, in Germany because of the Nazi past and of the fear that the Nazi monster may one day be reawakened, Neo-Nazi hate speech does loom as a potential threat to the unity and integrity of the polity."[404] Whether this is a correct assessment I do not know, but supposing the same suppression of Jews that took place during World War II in Germany were to arise anywhere, it would be an understatement to say that they would be unable to reasonably ignore the hate speech directed at them, let alone the more dire acts accompanying it.

11.6 The Skokie case is also of interest for the reason that reflection on it provides legislators and policymakers with a criterion they must use when the issue arises whether some liberty may be limited. What citizens cannot reasonably ignore must be their standard; the possible consequences of hate speech, for example, cannot reasonably be ignored. There is a clear problem with the addendum 'possible'. After all, in the most extreme case, all acts may be forbidden since they might result in harmful consequences citizens cannot reasonably ignore, even if the chance is remote (a cartoon produced with no other goal than to amuse children may inspire someone to commit a terrorist act, depending on his interpretation of it). The 'clear and present danger' test[405] offers no undisputable criterion, as the extent of 'clear and

[401] 69 Ill. 2d 605, 373 N.E. 2d 21, 1978.

[402] J. Feinberg, *Offense to Others*, p. 87.

[403] J. Feinberg, *Offense to Others*, p. 88.

[404] M. Rosenfeld, "A Pluralist Theory of Political Rights in Times of Stress", p. 45. Cf. U. Battis and K. Grigoleit, "Rechtsextremistische Demonstrationen und öffentliche Ordnung – Roma locuta?", p. 3462: "Die Nazis durften durch Skokie paradieren. Deutsche Gerichte hätten den Fall anders entschieden." ("The Nazis were allowed to parade through Skokie. German courts would have judged the case otherwise.")

[405] Schenck v. United States (249 U.S. 47, 1919): "The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about the substantive evils that Congress has a right to prevent." In Brandenburg v. Ohio (395 U.S. 444, 1969), the phrase 'imminent lawless action' was substituted for 'clear and present danger': "[…] the constitutional

present' may still be debated (what is the nature of the 'danger' in a specific case, and what should the timespan be within which it should (probably[406]) manifest itself?). No simple solution to this problem is forthcoming here. This is, after all, no matter of all-or-nothing, but a matter of assessing the likelihood that harm may result from an act, the extremes being the cartoon just mentioned on the one hand and an appeal to all Muslims by an imam to kill any Jew they encounter on the other.

Strictly speaking, there is no warrant to ensure that the legislator will diligently perform this task save for the threat that the electorate will express its discontent in the next elections. This may still mean that a majority may suppress a number of liberties,[407] but this need not be a problem as long as an independent judiciary is in place to ensure the exercise of liberties while being capable of balancing the import of such liberties and the consequences they might have.[408] This does not mean, though, that the issue is completely resolved, since the task of assessing the possible consequences has merely been transferred from the legislator to the judiciary, but at least the latter may appreciate the specific merits of each individual case, thus reaching a judgment tailored to the circumstances.

The judiciary's task is also of importance in countering the problem that the task of specifying what 'reasonably' means may not be in safe hands with the legislative power on account of its dependence on the electorate, which may tempt it to tailor the laws to the wants of the majority, thus sacrificing the rights of one or more minorities. (In states where judges are elected, this problem is not fully solved.) At the same time, no extraordinary abilities to reach a stance isolated from the factors that are decisive for the society in which

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guarantees of free speech and free press do not permit a State to forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action."

[406] The fact that there is a danger means that the actual harm has not manifested itself, meaning that some degree of uncertainty will remain until it does. There is more justification to intervene in the case of 'probably' than in the case of 'possible consequences' just mentioned, but even here, judges have a task to assess the circumstances of the case at hand.

[407] Cf. Th. Scanlon, "Freedom of Expression and Categories of Expression", p. 534: "[…] where political issues are involved governments are notoriously partisan and unreliable. Therefore, giving government the authority to make policy by balancing interests in such cases presents a serious threat to particularly important participant and audience interests."

[408] The judiciary must in that case be careful not to nullify its role, a danger that looms in judgments such as the following: "As in the case of "morals" it is not possible to discern throughout Europe a uniform conception of the significance of religion in society […]; even within a single country such conceptions may vary. For that reason it is not possible to arrive at a comprehensive definition of what constitutes a permissible interference with the exercise of the right to freedom of expression where such expression is directed against the religious feelings of others. A certain margin of appreciation is therefore to be left to the national authorities in assessing the existence and extent of the necessity of such interference." Otto-Preminger-Institut v. Austria (ECtHR, Application no. 13470/87, 1994). On the basis of such statements, courts are liable to negate the very purpose of their existence. (For completeness, I add that the Court does complement this judgment by stating that the authorities' margin of appreciation is not unlimited, thus mitigating the problematic nature of its consideration.)

one lives are forthcoming from judges (if such a stance is not downright impossible in the first place). After all, it seems likely that elements such as one's political climate and the ideas one encounters in one's education constitute one's outlook (although I would not try to determine to what degree). This is not to be taken to mean that one is necessarily delivered to a forlorn relativism but merely that a realistic assessment of the nature of (judicial) rulings is vital.

11.7 A controversial issue to mention here is the Holocaust denial. Should citizens be allowed to deny that Jews were systematically killed during World War II? To analyze the matter soberly means that one simply conducts historical research, looking for relevant data (documents, witnesses, etc.) to validate or refute the claim. Depending on the outcome of such a research, the Holocaust denier will be proved right or wrong. If he is proved wrong, and won't be convinced by compelling evidence, he does not have to be taken seriously. If the Holocaust indeed happened, those who survived it and their descendants, and even Jewish people in general, may be offended by such statements, but should be able to reasonably ignore them, just as the people in Skokie could reasonably ignore the manifestation in their hometown. If, on the other hand, he is proved right, there is no reason not to allow him to express his – correct – view, just as it would be strange to suppress a mathematician's right to claim that Cantor's theorem is correct.

The fact that a sensitive issue is at stake cannot be a valid consideration, since only the issue of whether something is correct is at stake, not whether it is *desirable* if it has indeed happened, and when the historical evidence is assessed, one must be just as critical as in other instances. As Altman puts it: "Even books by scholars of history contain demonstrably false statements. There is no reason to pick out the falsehoods of [Holocaust] deniers for special, disfavored treatment unless one takes into account the moral horror of what the falsehood covers up."[409] The sensitivity of a view and its incorrectness should not be confused. (Incidentally, not even Cantor's theorem, just mentioned, has engendered unanimous support.)

The second aspect, of desirability, *is* important, and even decisive, in another case. This bears a similarity to the previous one but must not be confused with it. The case I mean is someone calling for a new Holocaust, which may be qualified as hate speech, and accordingly be suppressed (cf. section 11.4). In this case, in contrast to the first, the issue is not whether something happened, but whether it *should* happen. That a (new) Holocaust should happen, or more generally, that there should be room to seriously consider such an operation, will be denied by anyone accepting basic rationality and what prescriptive equality demands on that basis.

[409] A. Altman, "Freedom of Expression and Human Rights Law: The Case of Holocaust Denial", p. 42.

11.8 What was said above is merely an approximation of what 'reasonably' ignore might mean, for to the difficulties stressed here is added the fact that it is hard, especially in complex situations, to create a rule that is to be applied in any possible future case, covering all the details of the circumstances. Three stages are, then, to be distinguished. First of all, there is the *a priori* stage: one is either able to ignore something or not. The shortcomings of this perspective, which is satisfactory only in very simple cases (notably when physical harm is involved), have led to the need to introduce a notion that does justice to the various interests involved, so that, at the second stage, the criterion becomes what may reasonably be ignored. Still, only actual (judicial) decisions, at the third stage, can take into consideration all the intricacies of concrete cases. It is desirable to reduce the uncertainties for the parties involved (and for society as a whole) as far as possible (by preventing a situation in which one remains completely in the dark until the decision has been made). A step in this direction is made by somewhat concretizing what 'reasonably' means,[410] although supposing that this would mean that the decisions will be predictable to a great degree would evidence a perspective that is naïve, simplistic and reductionist.

This concretization means that a manifestation such as that of the Skokie case can reasonably be ignored in some situations and not in others, which in turn means that the outcome of the assessment varies from one society to the next, and from one time to the next. Jews cannot reasonably ignore such a manifestation, for example, in an atmosphere of violence towards them (cf. what I said at the end of section 11.5). The ruling in that case can be defended, then, if such an atmosphere is absent, or, put more generally, if consequences that cannot reasonably be ignored are unlikely to emerge. (I have already indicated the difficulty with 'possible' consequences, which is revisited here; it is obvious that this adds to the burden of the notion of 'reasonably'.)

11.9 Summary and relation to chapter 12

It has become clear that the ignore principle faces some serious problems that I must, being unable to resolve them, mitigate as far as possible, an acceptable alternative to it being unavailable, as far as I am able to assess. Some room should be left to account for the circumstances in which an action takes place, which is expressed by the word 'reasonably': in each situation it will not be decisive whether someone is (potentially) harmed by an action, but rather whether he may reasonably ignore it. I have argued that the basis of the ignore principle is *a priori*, and as such valid in any liberal democratic state, but that this basis is meager and must for that reason be supplemented by an *a posteriori* superstructure, expressed

[410] If this is *not* concretized, although the adverb 'reasonably' is formally in place, this will add to the judge's task, since he will have to be the one to concretize it, lacking guidelines other than those he can find in precedent cases (the convincingness of which may in some instances be called into question in light of the present observations – there is, after all, no infinite regress into previous precedents).

by the term 'reasonably'. The next issue that must be addressed in the discussion of the reign of freedom is whether the state operates from a neutral framework. Prescriptive equality means that all positions and all citizens must be treated equally, but does that imply neutrality? This will be inquired in the next chapter.