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THE LIMITS OF FREE SPEECH: DEMOCRATIC LEGITIMACY IN CANADA AND NEW
ZEALAND

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Abstract:

This paper explores the balancing act between freedom of expression and hate speech. It takes its cue from a recent dialogue between Ronald Dworkin and Jeremy Waldron concerning democratic legitimacy. This dialogue forms the conceptual starting point for the paper, and a detailed analysis of democratic principles will follow. Robert Post's participatory theory of democracy is critiqued, and his recent conversion to democratic relativism is analysed. The operation of hate speech laws in Canada and New Zealand will both be assessed in order to see how both of these countries treat the issue of democratic legitimacy.

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*'The free flow of information and ideas informs political debate. It is a safety valve: people are more ready to accept decisions that go against them if they can in principle seek to influence them.'*¹ Lord Steyn

*'Look, I don't see why bad artists - I mean artists who are obviously incompetent...why they should be presented hypocritically as good artists just because they're supposed to be advancing the frontiers of freedom of expression or...demonstrating that there should be no limit on subject matter.'*² Anthony Burgess

I Introduction

Generally, freedom of expression is considered fundamental to democracy. The above quotation from Lord Steyn explains why. For a state to pass legitimate laws governing its citizens, the citizens must be able to have their say on what those laws should be. Freedom of expression is not absolute, however, and there are many exceptions. The exception this paper will focus on is 'hate speech'. When expression or speech exposes sections of society to hatred is where many states choose to intervene. The issue has occupied states for centuries, and for different reasons. For example, Tiberius Gracchus controversially executed any soldier who denigrated the ex-slaves among them, for fear of military disharmony.³

Over two thousand years later, the correct legal approach to hate speech is no closer to being settled. The Danish cartoon controversy of 2006, where derogatory caricatures of Muhammed resulted in deadly outrage, fomented fresh debate as to where to draw the line.⁴ Inspired by this and other topical issues of freedom of expression, two recent anthologies have illuminated the debate. Ronald Dworkin provides the Foreword to *Extreme Speech and Democracy*.⁵ In the space of five pages, Dworkin constructs an elegant and succinct defence of freedom of expression: hate speech laws are said to spoil the democratic legitimacy of the states that enact them. In *The Content and Context of Hate Speech*, Jeremy Waldron's essay directly responds to and rebuts Dworkin's position.⁶ The two positions form the conceptual bases of this paper, and both will be expanded upon and critiqued.

¹ *R v Secretary of State for the Home Department, ex p Simms* [1999] 3 WLR 328 (HL) at 337.

² Anthony Burgess *Earthly Powers* (Vintage Books, London, 2004) at 311.

³ Niccoló Machiavelli *The Discourses* (Penguin Classics, London, 1984), Book II.

⁴ See Christopher Hitchens "God-Fearing People" *Slate* (July 2007)

http://www.slate.com/articles/news_and_politics/fighting_words/2007/07/godfearing_people.html

⁵ Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, New York, 2009).

⁶ Michael Herz and Peter Molnar (eds) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, New York, 2012).

This paper will offer a brief overview of what is commonly defined as ‘hate speech’ and the international framework encompassing it. The philosophical divide between the United States and other Western democracies will be explained. This will provide the contextual background to detailed discussion about democratic legitimacy, in which the dialogue between Waldron and Dworkin will be analysed. This dialogue will be supplemented by key theoretical principles, such as state neutrality and democratic relativism. After finding more force in the arguments proffered by hate speech prohibitionists, this paper will then see how the principle of democratic legitimacy is treated in the Commonwealth states of Canada New Zealand. This paper will conclude by exploring recent developments in both countries’ jurisprudence.

II Hate Speech and the International Framework

A International Obligations

‘Hate speech’ is generally taken to refer to conduct that may incite violence towards or bring into contempt a group of people identifiable on grounds such as race, ethnicity, or sexual orientation.⁷ The effects of hate speech are considered harmful enough that many states have prohibited such conduct even if violence is not a likely outcome. The geneses for most modern hate speech laws are the international obligations of the International Covenant on Civil and Political Rights (ICCPR) and the International Convention on the Elimination of All Forms of Racial Discrimination (ICERD).⁸ Although Article 19 of the ICCPR states that everyone shall have the right to freedom of expression,⁹ Article 20 tapers this by stating that ‘any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law’.¹⁰ The ICERD, enacted in 1965 in response to widespread anti-Semitism,¹¹ similarly calls upon signatories to legislate against ‘all dissemination of ideas based on racial superiority or hatred’.¹²

B The United States Anomaly

Most signatories to the ICCPR and ICERD accepted their obligations to legislate against hate speech. The United States was a notable exception.¹³ The ‘First Amendment tradition’ guarantees a

⁷ Bhikhu Parekh “Is There a Case for Banning Hate Speech?” in Herz, Michael and Peter Molnar (eds.) *The Content and Context of Hate Speech* (Cambridge University Press, New York, 2012) 37 at 40.

⁸ International Covenant on Civil and Political Rights (opened for signature 16 December 1966, entered into force 23 March 1976); International Convention on the Elimination of All Forms of Racial Discrimination (opened for signature 21 December 1965, entered into force 4 January 1969).

⁹ ICCPR, art 19.

¹⁰ ICCPR, art 20.

¹¹ Natán Lerner *The U.N. Convention on the Elimination of All Forms of Racial Discrimination* (BRILL, London, 1980) at 1.

¹² ICERD, art 4.

¹³ The United States Senate made a reservation to the ICERD stating ‘That the Constitution and laws of the United States contain extensive protections of individual freedom of speech, expression and association.’

very broad right to freedom of expression.¹⁴ Unless the speech in question is likely to incite imminent lawless action, it is protected under the United States Constitution. This is known as the ‘Brandenburg Principle’, named after the 1969 case where the Supreme Court held that a Ku Klux Klan rally in an isolated Ohio farm was a protected form of expression.¹⁵

Since *Brandenburg*, the United States Supreme Court has stridently permitted hate speech that falls below the ‘imminent lawless action’ threshold.¹⁶ The United States is something of a lone wolf in this regard. In its first report on the United States in 1995, the United Nations Human Rights Committee stated that it ‘regrets the extent’ of the United States’ reservations, declarations and understandings.¹⁷ These had the effect of ensuring the United States ‘has accepted only what is already the law of the United States’. Conversely, laws prohibiting the denial of the Holocaust are commonplace in Europe. Julie Suk noted that ‘[t]o the American legal mind, the punishment of Holocaust denial would not even constitute a hard case: such a prohibition would be a paradigmatic violation of the First Amendment’s free speech guarantee’.¹⁸

III Dworkin’s Foreword

A The Need for a Democratic Background

One of these American legal minds is the late Ronald Dworkin. His Foreword in a 2009 anthology presented a contemporary exposition of why hate speech must be protected.¹⁹ Dworkin approvingly notes the famous US case of *Skokie*, where neo-Nazis were permitted to carry swastikas through a town of Holocaust survivors.²⁰ Dworkin uses the same principled bases to defend the rights of novelists in furthering intellectual boundaries that he does to defend the rights of swastika-laden racists. He cites the most famous defence of free speech, John Stuart Mill’s reasoning in *On*

Accordingly, the United States does not accept any obligation under this Convention, in particular under articles 4 and 7, to restrict those rights, through the adoption of legislation or any other measures, to the extent that they are protected by the Constitution and laws of the United States’.

¹⁴ The First Amendment to the United States Constitution states that ‘Congress shall make no law...abridging the freedom of speech’.

¹⁵ *Brandenburg v Ohio* 395 US 444 (1969).

¹⁶ The ‘First Amendment tradition’ is in fact relatively new. As late as 1952, a conviction for group defamation was upheld. The case, *Beauharnais v Illinois*, concerned a white supremacist who had distributed racist leaflets urging whites to unite and protect themselves against blacks. The conviction was upheld even though it was found that there was no ‘clear and present danger’. Although *Beauharnais* has never been explicitly overruled, but it has been thoroughly undermined and practically gutted. See generally Bernard Schwartz *The Warren Court: A Retrospective* (Oxford University Press, New York, 1996).

¹⁷ United Nations Human Rights Committee “Concluding Observations of the Human Rights Committee: United States of America” UN Doc A/50/40 (1995) at [279].

¹⁸ Julie C. Suk “Denying Experience: Holocaust Denial and the Free-Speech Theory of the State” in Michael Herz and Peter Molnar (eds) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, New York, 2012) 144 at 144.

¹⁹ Ronald Dworkin, Foreword, in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, New York, 2009).

²⁰ *National Socialist Party of America v Village of Skokie* 432 US 43 (1977).

Liberty.²¹ Mill believed that hate speech should be permitted, because when ideas are ‘vigorously and earnestly contested’, truth will emerge.²² Therefore, in a war of words, the intellectual dishonesty of bigots will not stand up to reasoned debate. For Mill, unless the reasons for free speech are valid in an extreme case, they are not valid in any case.²³

Dworkin rejects this philosophical argument. For many religious people, for instance, their long-held convictions already form the truth and they will not be swayed by a Millian thought experiment. Nor, as Dworkin notes, have we had much evidence that racist speech will contribute ‘to its own refutation’.²⁴ Instead, Dworkin examines the principle of democratic legitimacy.

A democracy must take into account the voices of its people. If, Dworkin argues, a state passes a law in a manner that ‘respects each individual’s status as a free and equal member of the community’, then it can be said to be legitimately imposing a collective decision.²⁵ Of course, the immediate counterpoint is that majoritarian laws are generally deemed sufficient expressions of the will of the people. Dworkin argues, however, that these principles form merely a necessary condition of democratic legitimacy, rather than a sufficient one. A ‘democratic background’ is needed – everyone must have a voice alongside their vote.²⁶ Otherwise, ‘the majority has no right to impose its will on someone who is forbidden to raise a voice in protest or argument or objection before the decision is taken’.²⁷

B Upstream and Downstream Laws

Dworkin distinguishes between ‘upstream’ and ‘downstream’ laws concerning hate speech. This paper will employ the same analogy. Upstream laws are directly focussed at hate speech; for example, banning racial slurs against minorities. These contrast to downstream laws, which protect people that are the target of hate speech; this category includes laws against discrimination in the workplace, specific laws against hate crimes, and the right of equal opportunity. Dworkin is an advocate for downstream laws, stressing the need to protect against unfairness in civil society by enacting legislation. But, upstream laws are not permitted in his concept of democratic legitimacy. If pre-emptive state intervention forbids expressions or prejudices that foment unfairness, then the collective opinion has been ‘spoiled’.²⁸ The state then loses its justification to pass downstream laws, as they will lack democratic legitimacy. In other words, to cautiously extend Dworkin’s metaphor, we cannot muddy the water and then sell it as pure.

²¹ John Stuart Mill *On Liberty* (John W. Parker & Son, London, 1859).

²² Chapter 2.

²³ Dworkin, Foreword, above n 19, at vii.

²⁴ At vii.

²⁵ At vii.

²⁶ At vii.

²⁷ At vii.

²⁸ At viii.

C Do Upstream Laws Prevent Political Discussion?

One immediate objection is that extreme speech generally does not consist of coherent political discussion. To return to the landmark *Skokie* decision, it is unclear what political purpose carrying swastikas through a community of Holocaust survivors served. This would have simply inflicted an immense affront to the Jewish community's dignity.²⁹ Therefore, it could be said that upstream laws banning this type of invective do not de-legitimize laws against discrimination. Dworkin, however, goes further, and does not limit the argument to productive political speech. He argues that policy and legislation are rooted in a community's 'moral and cultural environment' rather than in political speeches and pamphlets.³⁰ This is true – in liberal democracies, electoral campaign promises are largely shaped from popular opinion, and not the other way around. Therefore, a decision imposed on the collective can only be democratically legitimate if everyone has their chance to contribute to the moral environment, no matter how informally and vile they choose to do so. If citizens choose to contribute to this environment by marching swastikas through a town of Holocaust survivors – so long as imminent lawless action is not likely to follow – then they must be allowed to have their say in this way for the sake of democratic legitimacy.

IV Dworkin's General Theory of Legitimacy

Legitimacy carries a multitude of meanings, so it is important to identify in what sense Dworkin uses the term. Dworkin appears to have meant legitimacy in one of two ways: either that there is a political obligation to obey the downstream laws, or that force can be appropriately used to uphold the downstream laws. To expand on this, it is necessary to explore Dworkin's earlier text on legitimacy and democracy.

In a 2006 text, Dworkin explained the link between political legitimacy and equal concern.³¹ In order for a state's coercive power to be legitimate, the state must satisfy certain moral conditions. Dworkin requires the state to act in a certain way so its citizens are morally obliged to obey it. He proposes two principles of human dignity: the principle of intrinsic value, and the principle of personal responsibility. The first principle holds that each human life has a special kind of objective value, so one should regret a moral injustice regardless of where and to whom it occurs.³² The latter principle

²⁹ The past conditional tense is used here because although the neo-Nazis won the legal battle, they chose to march in Chicago away from any Jewish neighbourhood. See Michael Rosenfeld "Hate Speech in Constitutional Jurisprudence" in Michael Herz and Peter Molnar (eds) *The Content and Context of Hate Speech* (Cambridge University Press, New York, 2012) at 254-255.

³⁰ At viii.

³¹ Ronald Dworkin *Is Democracy Possible Here? Principles for a New Political Debate* (Princeton University Press, Princeton, 2006) at 94.

³² At 10.

holds that ‘each person has a special responsibility for realizing the success of his own life’.³³ The legitimacy of a state is found by accepting these two principles as constraints on its actions, and acting consistently with these two principles. If the state acts illegitimately, citizens do not have any moral obligation to accept the state’s coercive powers. Because each life has intrinsic value, the state must show ‘an equal concern for each of the people over whom it claims dominion’.³⁴ Also, because dignity involves personal responsibility, a democratically legitimate state requires a feeling of self-government. A legitimate state cannot expect its citizens to submit to its authority if they are denied a role in the decision-making process.

Dworkin’s above explanation of political legitimacy was in the context of taxation, but it is meant as a universally applicable concept. Both principles can be found in his arguments against upstream laws. The existence of upstream laws, in Dworkin’s view, entails that a state is not treating its citizens with equal concern; for example, citizens with racist views would be denied forms of expression that are important to them. Upstream laws do not allow for self-government because they deny sections of society the chance to participate in and shape the political community whatever way they see fit.

V Identifying Illegitimacy

Dworkin’s argument is an elegant one, but needs further unpacking. The upstream-downstream analogy can be interpreted in different ways. On a narrow reading, the upstream laws only affect the democratic legitimacy of legislation passed *directly* downstream; that is, legislation directly aimed at preventing discrimination on grounds such as race. This is where the analogy makes the clearest sense. Upstream and downstream laws are both aimed at the same outcome, and the legitimacy issue is focussed on when it is appropriate for the state to step in. On a broader reading, the upstream laws affect the legitimacy of every other piece of legislation. This seems to be the logical implication of Dworkin’s comments on the ‘moral and cultural environment’. All laws will have suffered from diminished legitimacy when a section of society is barred from fully contributing to that environment, and the downstream laws merely serve as the clearest example of this.

Dworkin has previously proposed a type of *in personam* approach to democratic legitimacy:³⁵

‘I can have no obligation to a community that treats me as a second-class citizen; the apartheid government of South Africa had no legitimate authority over blacks...South Africa could not claim any political allegiance from its black citizens because its disregard of the equal importance of their lives was total’.

³³ At 10.

³⁴ At 5.

³⁵ Dworkin *Is Democracy Possible Here?*, above n 31, at 96.

This suggests that downstream laws lose their illegitimacy in respect of the citizens that object to the upstream laws. Robert Post approaches democratic legitimacy through the same *in personam* lens, arguing that ‘if a state were to forbid the expression of a particular idea, the government would become, with respect to individuals holding that idea, heteronomous and nondemocratic’.³⁶ As Waldron notes, however, this seems superficial given the generality of hate speech laws – they apply to everyone, even if enforcement will only be necessary for a select few.³⁷ Also, one objective of upstream laws is to have a moulding effect on everyone’s future conduct. So, an *in personam* approach to democratic legitimacy is ill-fitting. Either upstream laws are democratically legitimate as applied to everyone, or they are not. Dworkin appears to agree with Waldron in the Foreword, arguing that upstream laws spoils the moral obligation of everyone to obey and respect the state’s coercive power.³⁸

VI What Happens Next?

It is unclear from Dworkin how citizens can demonstrate their dissidence from ‘illegitimate’ upstream laws. If majoritarian procedures (such as representative democracy) are not enough, and if the majority has no right to impose their will on a silenced minority, then there seems to be serious consequences. Dworkin dials it back later in the Foreword, saying that it is simply ‘unfair’ to impose upstream laws on the wider community.³⁹ He does not say what the consequences should be. An analogy may be drawn with his earlier work on taxation and legitimacy. Dworkin argued that if an otherwise legitimate state has taxation laws that show contempt for the poor, citizens may be morally entitled to a ‘limited and targeted civil disobedience’ but not to full-scale rebellion.⁴⁰ Perhaps, then, hate speech proponents may likewise be entitled to such civil disobedience if anti-discrimination measures have been enacted whilst their voices cannot be heard. This, of course, is not an exact science, and the point at which disobedience becomes morally acceptable is impossible to divine.

If his argument is accepted, then the troubling conclusion is that almost all democracies have spoilt their legitimacy: countries such as Canada, Denmark, France, Germany, India, Norway, and New Zealand (to name a few) are all deficient in legitimacy due to their upstream laws.⁴¹ The consequences sit uneasily. For example, can a New Zealand employer ignore the Human Rights Act and discriminate against Māori in recruitment, because his voice has been stifled by upstream laws?

³⁶ Robert Post “Racist Speech, Democracy and the First Amendment” *Wm. & Mary L. Rev* 32 (1991) 267 at 290.

³⁷ Jeremy Waldron “Hate Speech and Political Legitimacy” in Michael Herz and Peter Molnar (eds) *The Content and Context of Hate Speech* (Cambridge University Press, New York, 2012) 329 at 334.

³⁸ Dworkin, above n 19, at viii.

³⁹ At viii.

⁴⁰ Dworkin, above n 31, at 97.

⁴¹ For example, the extremely broad s 153A of the Indian Penal Code criminalises speech that ‘promotes, or attempts to promote, on grounds of religion, race, place of birth, residence, language, caste or community or any other ground whatsoever, disharmony or feelings of enmity, hatred or ill-will’. See Indian Penal Code, No. 45 of 1860, s 153 (1) (a).

After all, the employer was inherently stifled from properly expressing his opinion on the downstream laws that govern him. It is hoped that public opinion would answer this in the negative; civil disobedience could look oxymoronic in this context. The nature of illegitimate laws, however, is that they may not have to be followed. Dworkin certainly argues this much. Therefore, this paper will draw upon Waldron's rebuttal and then will expand its scope to include key principles for and against Dworkin's position.

VII Waldron and Legitimacy

A Degrees of Legitimacy?

Waldron has written extensively and incorrigibly in defence of hate speech laws. His writings on the subject largely focus on how hate speech breaches a fundamental human right: dignity, or a basic social standing in society.⁴² In his recent book *The Harm in Hate Speech*, he devotes a chapter to the legitimacy concerns.⁴³ He argues strongly that Dworkin's argument lends itself to a more moderate approach, and questions whether or not legitimacy is a matter of degree. Waldron claims that by saying upstream laws 'spoil' the legitimacy of downstream laws, Dworkin actually means that they diminish the legitimacy.⁴⁴ Indeed, Waldron finds Dworkin in an earlier text noting that legitimacy is not all or nothing.⁴⁵

Waldron examines hypothetical dissent from an antidiscrimination bill.⁴⁶ One person may dissent because he espouses a racial theory that a minority group is scientifically inferior to others in intelligence. Another person may dissent by printing a leaflet comparing that minority group to cockroaches.⁴⁷ The latter expression is almost certainly banned by existing hate speech laws, whereas the former might be permissible. Apart from narrowly targeted upstream laws such as Holocaust denial bans, there exists a general spectrum of toleration in countries' approaches to hate speech. Waldron argues that if hate speech laws are only targeted at the more obscene and vituperative end of the spectrum, any deficit in democratic legitimacy is very minor. Once this difference is established, then it becomes easier to perform a balancing act – if upstream laws have vitally important objectives and are reasonably implemented, then 'complaints [about democratic legitimacy] may be much less credible as a result'.⁴⁸ This paper agrees that the notion of degrees of democratic legitimacy is a strong proposition in dealing with hate speech and, indeed, could be taken

⁴² Jeremy Waldron *Dignity, Rank and Rights* (Oxford University Press, New York, 2012).

⁴³ Jeremy Waldron *The Harm of Hate Speech* (Harvard University Press, Cambridge, 2012).

⁴⁴ At 188.

⁴⁵ Ronald Dworkin *Is Democracy Possible Here?*, above n 31, at 97.

⁴⁶ Waldron *The Harm of Hate Speech*, above n 43, at 189.

⁴⁷ Presumably, the reference here is to the 1994 Rwandan genocide which was in part fuelled by infamous broadcasts by the radio station Radio Télévision Libre des Mille Collines.

⁴⁸ At 192.

further: politically, racial denigrations dressed up as science may be more damaging than a pamphlet comparing minorities to cockroaches.⁴⁹

B Is the Debate Over?

Waldron's second argument is not as persuasive. Mill believed that as we progress as a society, doctrines of truth will become firmer and there will be a gradual 'cessation of serious controversy'.⁵⁰ Waldron outlines that in an earlier era, certain races were regarded as inferior to others, but we have moved on. Waldron notes that 'there is no longer any intelligent contestation on this issue...the fundamental debate about race is over – won; finished'.⁵¹ Dworkin's insistence that the racist outliers have their say on antidiscrimination laws is thus misguided, as they have nothing material to contribute. Waldron questions the need for democratic legitimacy to depend on giving racists the freedom to hatefully vent 'so that the losers have a chance to persuade the majority of the truth of their position the next time around'.⁵²

Apart from being unintentionally dictatorial – the above quotation could be a criticism of a democratic election, after all – Waldron's argument rests on unsettled grounds. That a particularly fundamental debate is over could be (and is) just as emphatically claimed by the targets of upstream laws. It is wished that Waldron's view of history was the case; sadly, it is not. Logically, if there has been a cessation of serious controversy on issues of race, then there would be no need for hate speech laws (nor, perhaps, for any anti-discrimination laws). These upstream laws attempt to not only shape future generations, but also to stifle pre-existing problems of racial disharmony.

The 1990s saw the Balkans implode amidst violent racial ideologies. In the twenty-first century, racial chants and slogans are seen at football stadia all over Europe.⁵³ Other common targets of hate speech, on grounds of religion or sexuality, are not spared either. The Danish cartoon controversy saw retribution from Muslims, who saw the cartoons as hateful of their religion. In the writing of this paper, the Indian Supreme Court reinstated a 153-year old colonial law which defined a same-sex relationship as an 'unnatural offence', carrying a ten-year jail term.⁵⁴ Here, then, are recent examples of the serious controversy failing to cease in regards to common targets of hate speech. Waldron's claim is admirable but quixotic. The claim has not manifested itself in many modern societies. Referring to the Balkans, Stephen Holmes rightfully points out that certain kinds of speech may

⁴⁹ See the classic example of Richard Herrnstein and Charles Murray *The Bell Curve: Intelligence and Class Structure in American Life* (Free Press, New York, 1996).

⁵⁰ Mill *On Liberty*, above n 22, at 106.

⁵¹ Waldron *The Harm of Hate Speech*, above n 43, at 195.

⁵² At 196.

⁵³ Tom Kington "Italian Football Fans Stand Up for Their Right to be Abused by Their Rivals" *The Guardian* (9 October 2013) <http://www.theguardian.com/world/2013/oct/09/italian-football-fans-abuse-milan-napoli> accessed 5 Jan 2014.

⁵⁴ Preteek Rana "Indian Court Reinstates Law Banning Gay Sex" *Wall Street Journal* (December 11 2013) <http://online.wsj.com/news/articles/SB10001424052702304014504579251302477470782>

appear dead but are merely repressed, and we ‘cannot rely on surface behaviour’.⁵⁵ The flint may only to be struck once. Currently, even surface behaviour does not decisively point towards Waldron’s claim. For these reasons, Waldron’s claim that the debate is over is not a good foundation to counter legitimacy concerns of hate speech laws.

VIII State Neutrality

A Dworkin

The dialogue between Dworkin and Waldron is a useful gateway into bigger questions about the proper role and identity of the state. Dworkin’s argument entails that the state must be completely neutral as its communities decide the moral and cultural environment; otherwise, if views are silenced by regulation, not every person has had the opportunity to ‘confirm his or her standing as a responsible agent in, rather than a passive victim of, collective action’.⁵⁶ State neutrality is seen in many quarters to be fundamental to democratic legitimacy, especially in media censorship. Since a state ought to reflect popular will, it cannot choose sides when determining what the popular will is. Therefore, in the First Amendment tradition, speech relating to self-determination must be constitutionally protected. This is the essence of democratic self-government.

B Meiklejohn’s Town Hall

The most famous argument of its kind, Alexander Meiklejohn’s theory of self-government insists upon the importance of freedom of expression to a democracy.⁵⁷ A democracy means agreeing that public issues must be decided by universal suffrage. Meiklejohn viewed democracy as ‘the voting of wise decisions’.⁵⁸ A democracy is imagined as a town hall meeting, where the state resides as chief moderator. The moderator’s primary job is to keep speech flowing so that the audience can receive all ideas necessary to make a fully informed decision. The moderator *can* step in, as speech may be curtailed ‘as the doing of the business under actual conditions may require’.⁵⁹ Speech inconsistent with ‘responsible and regulated discussion’ ought to be shut down.⁶⁰ Therefore, ‘what is essential is not that everyone shall speak, but that everything worth saying shall be said’.⁶¹ This might sound like hate speech may be regulated, but what Meiklejohn meant is that private speech is not protected by freedom of expression. Public speech ‘admits of no exceptions’, and so must include racist or

⁵⁵ Stephen Holmes “Waldron, Machiavelli, and Hate Speech” in Michael Herz and Peter Molnar (eds) *The Content and Context of Hate Speech* (Cambridge University Press, New York, 2012) 345 at 350.

⁵⁶ Dworkin, above n 19, at vii.

⁵⁷ Alexander Meiklejohn *Political Freedom: The Constitutional Power of the People* (Harper & Bros., New York, 1960).

⁵⁸ At 26.

⁵⁹ At 24.

⁶⁰ At 24.

⁶¹ At 26.

hateful speech.⁶² If this is not the case, then the state has picked a side in the debate, and its democratic legitimacy is undermined. The United States Supreme Court characterised the issue of democratic legitimacy similarly to Meiklejohn in *R.A.V v City of St. Paul*. The Court struck down a local ordinance that banned erecting burning crosses, concluding that ‘St Paul...has no authority to license one side of the debate to fight freestyle, while requiring the other follow Marquis of Queensbury Rules’.⁶³

Unintentionally, Meiklejohn’s state as moderator metaphor helps to explain why upstream laws may serve to protect democratic legitimacy, rather than to spoil it. Meiklejohn allows hate speech to have its time at the town hall meeting, but does not permit abusive speech. Yet, many countries enact upstream laws intending to draw the same line – hateful speech may be legal whereas speech that incites hatred in a group may be prohibited. Meiklejohn’s town hall scenario works at a procedural level of democracy. For example, if the moderator effectively allows every person present sixty seconds of speaking time, then this seems like a healthy form of democracy. There is a temporal restraint, but the moderator is indifferent as to the content. In reality, some speakers may be dissuaded from speaking up and expressing their viewpoints because their opponents treat them as inherently inferior. If this is the case, then the town hall meeting is not truly democratic – perhaps the moderator may have to restrain some viewpoints if they are expressed too vituperatively.

C The Fair-Minded Parliamentarian

Owen Fiss also sees the state acting as a ‘fair-minded parliamentarian’, ensuring that all views of society are presented.⁶⁴ Fiss sees the state playing a more active role than Meiklejohn does. The principle of content neutrality, Fiss argues, is important in combatting the concern that the state might use its coercive power to skew public debate in advancement of certain outcomes.⁶⁵ When private parties skew debate, however, this is when the moderator should step in to promote free and open debate. Threats to freedom of expression do not solely emanate from the state – the principle might be under attack from private actors, too. So, for Fiss, the state *should* disfavour particular viewpoints and ‘make judgments based on content...but only to make certain that all sides are heard’.⁶⁶ Put another way, enacting upstream laws is simply the moderator telling one side to turn down the volume so all parties can be heard.

⁶² At 26.

⁶³ *R.A.V v City of St. Paul* 505 US 377 (1992) at 391.

⁶⁴ Owen Fiss *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* (Westview Press, Colorado, 1996) at 118.

⁶⁵ Owen Fiss *The Irony of Free Speech* (Harvard University Press, New York, 1998) at 24.

⁶⁶ Fiss, above n 65, at 21.

D Post and Public Discourse

Robert Post provides a ‘participatory theory’ theory of state neutrality.⁶⁷ According to Post, self-governance is located in ‘processes through which citizens come to identify a government as their own’. Like Fiss, Post criticises Meiklejohn’s analogy, but goes even further by rejecting the state-as-moderator metaphor altogether. Post focusses on the need for citizens to experience ownership of the state. For this to occur, the state must not prevent its citizens from participating in the ‘communicative processes relevant to the formation of democratic public opinion’.⁶⁸ These processes are identified as the ‘public discourse’.⁶⁹ In the context of hate speech, upstream laws cut out citizens from participating in the public discourse. What is important for Post is the autonomy of a state’s citizens, rather than the quality of public discourse.

For Post, the state can never function as a neutral moderator. A moderator must distinguish between the relevant and irrelevant, the abusive and the forceful, and so on. Post argues that the state cannot possibly remain neutral when undertaking this task. This is because public discourse is ‘the site of political contention about the nature of collective identity’.⁷⁰ In determining what is relevant and what is not, the moderator must refer to some collective identity as a reference point. In doing so, the state pre-empts the democratic process in which citizens form their collective identity. In Post’s participatory approach, hate speech in the public discourse cannot be regulated because the content of hate speech is a matter of ‘public concern’.⁷¹ Post therefore comes to the slightly unpalatable conclusion that irrational and abusive speech can serve as bases for democratic legitimacy.⁷²

It is important to note the public-private distinction in Post’s participatory theory. The state can and should regulate hate speech in non-public domains, such as in the workplace and within universities. It is at the public level of social order labelled ‘democracy’ where upstream laws weaken democratic legitimacy. In Post’s view, public discourse is the arena where the will of individual citizens becomes the general will of the *demos*. Yet, it is not difficult to picture this arena becoming too gladiatorial and perhaps antidemocratic. This is especially the case if irrational and abusive speech are permitted. At its extreme, hate speech wholly disregards the autonomy of other citizens. Suppose a white supremacist group implores black citizens to leave the area because they are inferior. In this example, one group of citizens does not respect the autonomy of another. How, then, can democratic deliberation take place? For citizens to come together and form the general will, mutual respect is

⁶⁷ Robert Post “Reconciling Theory and Doctrine in First Amendment Jurisprudence” in Lee C. Bollinger and Geoffrey R. Stone (eds) *Eternally Vigilant: Free Speech in the Modern Era* (University of Chicago Press, Chicago, 2002) 155 at 166.

⁶⁸ At 166.

⁶⁹ Post is employing the term used by the United States Supreme Court in *Hustler v Falwell* 485 US 46 (1988) at 55.

⁷⁰ At 167.

⁷¹ Robert Post “Racist Speech, Democracy and the First Amendment”, above n 36, at 289.

⁷² Post, above n 67, at 169.

required. Upstream laws may correct this by encouraging participation by more citizens. As Fiss says, upstream laws function to ‘enhance the public’s capacity to properly exercise...the right of collective self-determination’, rather than to usurp the right.⁷³ Democratic legitimacy may therefore be strengthened.

E The Role of Mutual Respect Between Citizens

Post argues that mutual respect has no place in public discourse. He thinks that mutual respect is a norm of a particular ‘community’, a ‘social formation that inculcates norms into the very identities of its members’.⁷⁴ These norms are to be suspended ‘so that citizens can freely determine how they wish to live’,⁷⁵ in the name of democracy. As Steven Heyman suggests, this appears to be an artificial distinction between a democracy and a community.⁷⁶ To allow for democratic deliberation, there must be minimum standards of respect and dignity. One important ground-rule is that each citizen must recognise other citizens’ equal standing in society. As Post himself concedes, democracy ‘depends in some measure on the spontaneous persistence of civility’.⁷⁷ What Post misses is the possibility of this spontaneity remaining latent. If civility never materialises, then the state will have to externally impose restrictions on public discourse to maintain democratic legitimacy. This is the essence of ‘civic republicanism’, a theory of democracy favoured by academics such as Fiss and Cass Sunstein.⁷⁸ They argue that democracy suffers from the ‘lack of a fully participatory body politic’.⁷⁹ The focus is still on democratic participation, but at a universal level, rather than at individual autonomy.

IX Democratic Relativism

A France and Holocaust Denial

From the above discussion, it is clear that Dworkin’s concept of democratic legitimacy is not universally shared. Exploring France’s regulation of Holocaust denial, Julie Suk presents a radically different model of democratic legitimacy.⁸⁰ Since the Vichy regime was overthrown, France has used criminal law as a ‘realm of memory’ in facing their collective responsibility for the Holocaust.⁸¹

⁷³ Fiss, above n 64, at 117.

⁷⁴ Robert Post “Hate Speech” in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, New York, 2009) at 133.

⁷⁵ At 133.

⁷⁶ Stephen J. Heyman “Hate Speech, Public Discourse, and the First Amendment” in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, New York, 2009) 158 at 173.

⁷⁷ Robert Post *Constitutional Domains: Democracy, Community, Management* (Harvard University Press, Cambridge, 1995) at 301.

⁷⁸ Cass R. Sunstein *Democracy and the Problem of Free Speech* (The Free Press, New York, 1993) at 244-245.

⁷⁹ Blake D. Morant “Equality-Based Perspectives on the Free Speech Norm: Twenty First Century Considerations – An Introductory Essay” (2009) 44 Wake Forest L. Rev 315 at 317.

⁸⁰ Suk, above n 18, at 144.

⁸¹ At 148.

Alongside pre-existing general upstream laws, Holocaust denial was criminalised in 1990, carrying a maximum sentence of one year's imprisonment.⁸² The '*loi Gayssot*' banned the public contestation of 'the existence of crimes against humanity', directly referencing the Holocaust.⁸³ Holocaust denial, of course, is a specific type of hate speech: usually, the intended inference is that the Jewish people concocted the genocide in order to win sympathy for the creation of Israel.⁸⁴

Dworkin's formal democratic legitimacy would have no place for the *loi Gayssot*. Indeed, after the Danish cartoon controversy, Dworkin took the opportunity in a *Guardian* column to call for 'a new understanding of the European Convention on Human Rights that would strike down the Holocaust-denial law'.⁸⁵ Every citizen must have their say. Suk takes the opposite view in the French context. Suk firstly notes that very few prosecutions occur under the *Gayssot*. Also, most prison sentences are suspended, and the usual punishment is a criminal fine. Holocaust deniers are not *de facto* silenced. Rather, the *Gayssot* functions to 'strongly express the state's moral outrage'.⁸⁶ For Suk, arguments as to whether or not the *Gayssot* actually function to suppress anti-Semitic expression (or to spread it) miss the point.

The *Gayssot* does not undermine democratic legitimacy – in fact, Suk argues that democratic legitimacy actually requires this law. The state must choose (and must be seen to have chosen) the anti-racism side. Suk explores the historical background to the *Gayssot*, and explains that the active role of the state has been embedded in the post-World War II constitutional order.⁸⁷ Throughout modern French legal history, hate speech laws were enacted 'not only to protect individuals subject to racist speech, but to reconceptualise the victim of racist speech as the *republic itself*' (emphasis added).⁸⁸ Presumably, this is why upstream laws in France are within the criminal law rather than under the civil heading. Because freedom of speech was seen as a means to protect the republican state, hate speech laws were regarded as fully compatible with and buttressing democratic legitimacy. If strong hate speech laws are not present, then this could lead to the pernicious conditions that dismantled the French republic in the 1930s.

It is clear in Suk's arguments that context matters – she does not argue for strong upstream laws to be implemented in the United States. Indeed, she argues that the constitutional identities of France and the United States are very different. Constitutionally, 'the people' are always deemed to be

⁸² Loi 90-615 du 13 juillet 1990 tendant à réprimer tout acte raciste, anti-Semite, ou xenophobe, art 9.

⁸³ Art 9.

⁸⁴ See generally Walter Laqueur *The Changing Face of Antisemitism: From Ancient Times to the Present Day* (Oxford University Press, New York, 2006).

⁸⁵ Ronald Dworkin "Even Bigots and Holocaust Deniers Must Have Their Say" *The Guardian* (United Kingdom, 14 February 2006) <http://www.theguardian.com/world/2006/feb/14/muhammadcartoons.comment> accessed online 15 December 2013.

⁸⁶ Suk, above n 18, at 150.

⁸⁷ At 154-160.

⁸⁸ At 154.

sovereign in the United States.⁸⁹ Within the United States constitutional framework, Robert Post's insistence that the state be neutral makes more sense: once the state picks a side, the constituent power of the people cannot legitimately self-govern. In France, 'the Republic remains sovereign...this means that some values and political outcomes are not up for grabs'.⁹⁰ The republican form of government is eternally enshrined in France.⁹¹ This leads Suk to conclude that France's legitimacy is reliant on its adherence to republican values, whereas democratic legitimacy in the United States has historically depended on the state allowing all voices to have their say.

B Post's Volte-Face

As recent as 2007, Post was steadfast in the universal application of his participatory theory.⁹² Interestingly, Post appears to have since drastically altered his staunch anti-upstream laws stance. He acknowledges that the United States and Europe hate speech jurisprudence arrive at different conclusions of where democratic legitimacy is found. Firstly, Post argues that the First Amendment tradition is extremely protective of expression because public discourse 'has the extraordinarily difficult task of ensuring difficult task of ensuring democratic legitimacy in a climate of comparatively severe suspicion and distrust'.⁹³ In contrast, Europe is a 'comparative newcomer' to democracy, and purportedly defers to political authority as though a monarchy still reigned supreme.⁹⁴ In Post's view, this point of difference means that European democracies do not need to keep public discourse open to all individual participation.

So far, this is consistent with his universal participatory theory – European democracies suffer from reduced democratic legitimacy because the citizens are too deferential to question their states' actions. His second hypothesis, however, concerns 'the relative imperative on the two continents of sustaining community identity'.⁹⁵ Post expands upon this in an interview with Peter Molnar, conceding that 'participation in opinion formation in certain ways, in certain countries, in certain national contexts, destabilizes democracy rather than legitimizes it'.⁹⁶ At a formal level, Post still believes that restricting hate speech constitutes a breach of democratic legitimacy. His recent concession is a major one, though, recognising that not all democracies find their legitimacy in this formal construction of democratic participation: 'which forms of speech will and will not make the

⁸⁹ Preamble to the United States Constitution 1787.

⁹⁰ Suk, above n 18, at 161.

⁹¹ French Constitution 1958, art 89. This states that 'the republican form of government shall not be the object of an amendment'. Suk does not elaborate on the differing interpretations of this 'eternity clause': for example, it may be interpreted to only prohibit a return to monarchism.

⁹² Robert Post *Religion and Freedom of Speech: Portraits of Muhammad*, 14 *Constellations* 72 (2007).

⁹³ Post, above n 74, at 137.

⁹⁴ At 137. In this passage, Post also concedes that he is no sociologist.

⁹⁵ At 137.

⁹⁶ Peter Molnar "Interview with Robert Post" in Michael Herz and Peter Molnar (eds) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, New York, 2012) at 25.

state more democratically legitimate is in part a historical question'.⁹⁷ Therefore, in stark contrast to his participatory theory, a state *can* impose a collective identity on its citizens without relinquishing democratic legitimacy. Suk's example of the *loi Gayssot* illustrates Post's new-found democratic relativism. Of course, Dworkin would reject Post's relativism. For Dworkin, the principle of free speech is intrinsically linked with democratic legitimacy. To those that defend upstream laws on the basis of historical context, he dismisses them by saying that 'they may be right about the impact of history on conviction...however, explanation of a conviction's genesis is not an argument for its truth.'⁹⁸

C Heinze's Criteria

Although conceding historical context informs the makeup of a particular democracy, Post's comments are not particularly helpful in deciding when upstream laws serve to enhance democratic legitimacy, rather than to diminish or spoil it. With context in mind, regulating Holocaust denial in France seems more legitimate than regulating it in India, for instance. In a forthcoming article, Eric Heinze attempts to establish criteria for determining when upstream laws buttress legitimacy. Heinze uses the 'long standing, stable and prosperous democracy' paradigm.⁹⁹ A 'long-standing' democracy is where general norms and practices have generalised within its citizen population; a 'stable' democracy is one that can police itself via alternative means (like downstream laws) such that particular viewpoints do not need to be suppressed. A prosperous democracy is 'sufficiently wealthy to maintain effective penalties against violence and discrimination, as well as non-punitive means of combating intolerance and protecting vulnerable individuals, while preserving viewpoint neutrality within public discourse'.¹⁰⁰ If a state satisfies these criteria, Heinze argues, then any upstream laws weaken a state's democratic legitimacy. His argument ought not to be pre-empted here, but it is presented to add colour to Post's enigmatic democratic relativism.

X Concluding Thoughts on Theory

Ultimately, the divergence of opinion on upstream laws stems from the differing views of the state-citizen relationship. Both sides of the argument agree that the state is not *really* neutral, and that the state has an active voice in public discourse. For example, Post is encouraging of a president that implores the citizens to 'raise the tone of public conversation'.¹⁰¹ The Dworkinian view would limit the coercive power of the state to downstream laws, whereas upstream proponents would enable that

⁹⁷ At 25.

⁹⁸ Ronald Dworkin "Reply to Jeremy Waldron" in Michael Herz and Peter Molnar (eds) *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, New York, 2012) 341 at 344.

⁹⁹ Eric Heinze "Hate Speech and the Normative Foundations of Regulation" (2013) 9 IJLC 590 at 594.

¹⁰⁰ At 595.

¹⁰¹ Peter Molnar, above n 96, at 22.

voice to silence others via criminal sanctions and other means. Waldron and other hate speech prohibitionists see a greater role for the state to shape how its citizens act towards each other. Dworkin sees no such role. In his view, it is only government that owes its citizens equal concern; prohibitionists conflate ‘our responsibilities when acting collectively and coercively in politics and our responsibilities as individuals operating within the structure of coercive law’.¹⁰² Citizens are not saints, and they must be welcome to offend and be offended, to hate and be hated.

This paper accepts that the Dworkinian position is a robust one to employ as the default setting. It is accepted that upstream laws will restrict how people can express certain views. With strong upstream laws, a person that vehemently believes one race is superior to another may not have their voice heard by the *demos* as strongly as they would have liked. Substantively and formally, this diminishes a voice from the democratic equation. All parties to the debate concede this much. For Dworkin and Post, the inquest into democratic legitimacy stops there – any ‘matter of degree’ relates to what the affected party is morally permitted to do in response. In this way, Dworkin and other opponents of upstream law treat democratic legitimacy as conceptually separate from the possible effects of hate speech.

It is evident that prohibitionists believe that this is an essentially artificial separation. Although Dworkin has been characterised as a substantive democrat,¹⁰³ his position here may not be substantive enough. If a group is targeted and denigrated by unbridled hate speech, then they may find it tough to participate in the political process. At the public level of ‘democracy’, they may not be able to comfortably air their opinions in a miasmic environment. Proponents of upstream laws are much quicker to account for these effects in the democratic ledger. If hate speech serves to shut out sections of society as they feel marginalised – Patricia Williams goes as far as to call this ‘spirit murder’ – then a democracy cannot truly represent its citizens.¹⁰⁴ If upstream laws are in place, they may serve to provide for an even playing field in a democracy, as minority groups are protected and feel welcomed into the democratic debate.¹⁰⁵ Hateful views will remain extant, but not to a level that denies dignity and self-development to sections of society. The actual effects of hate speech and its regulation are much disputed: Waldron can point to the Yugoslavian example as easily as Heinze can point to Holocaust denial bans that counter-productively elevate David Irving.¹⁰⁶ Although the

¹⁰² Dworkin “Reply to Jeremy Waldron” above n 98, at 342.

¹⁰³ Joel I. Colón-Ríos *Weak Constitutionalism: Democratic Legitimacy and the Question of Constituent Power* (Routledge, Abingdon, 2012) at 42.

¹⁰⁴ Patricia Williams “Spirit-Murdering the Messenger: The Discourse of Finger-Pointing as the Law’s Response to Racism” (1987) 42 UMLR 127 at 129.

¹⁰⁵ See generally Mari J Matsuda, Charles R Lawrence III, Richard Delgado and Kimberle Williams Crenshaw (eds.) *Words that Wound: Critical Race Theory, Assaultive Speech and the First Amendment* (Westview Press, Colorado, 1993).

¹⁰⁶ Eric Heinze “Wild-West Cowboys versus Cheese-Eating Surrender Monkeys: Some Problems in Comparative Approaches to Hate Speech” in Ivan Hare and James Weinstein (eds) *Extreme Speech and*

effects are still hotly contested, to ignore possible anti-democratic effects of hate speech is to undermine the pro-democratic argument against upstream laws. Both approaches seek to provide a democratic playing field for public discourse, and both seek the same outcomes. The rules, however, are very different.

XI Canada

A The History of Upstream Laws in the Criminal Code

This paper will now examine how Canada has treated the concept of democratic legitimacy with regards to hate speech. Three intertwining pieces of legislation are central to this discussion: the Criminal Code; the Charter of Rights and Freedoms; and the Canadian Human Rights Act. Firstly, the history of upstream laws in the Criminal Code will be examined.

In apparent contrast to its southern neighbour, Canada's laws reflect a commitment to cultural diversity and towards an 'ethnic mosaic'.¹⁰⁷ Multiculturalism in Canada has not always had an easy ride, however, and the 1960s saw the rise of extremely hateful propaganda. Anti-Semitism was rife in Ontario and Quebec, and white supremacist groups migrated from the United States and became active. For example, the National White Americans Party widely distributed pamphlets calling for the immediate sterilization of Jews, and claimed that 'negroes...are on a much lower level to the whites'.¹⁰⁸ Public concern led to the creation of the Special Committee on Hate Propaganda (the Cohen Committee) in 1965. The Cohen Committee was tasked with addressing hate speech in a way that 'balanced the need to suppress the malice and poison of [hate speech] with the need to keep open all proper lines of free expression in a democratic society'.¹⁰⁹ The Cohen Committee's Report recommended that upstream laws be enacted at the federal level for the first time. Bill C-53 was introduced into Parliament in 1969, and came into force a year later. Upstream laws are now found in sections 318-320.1 of the Canadian Criminal Code. Section 319(2) is of particular importance here. This section criminalises the communication of statements, other than in private conversation, that wilfully promote the hatred of any identifiable group.¹¹⁰ A breach of s 319(2) could lead to imprisonment for up to two years.

Democracy (Oxford University Press, New York, 2009) at 199. Heinze argues that Holocaust denial bans in Europe have given revisionist historian David Irving a platform that he would not otherwise have gained.

¹⁰⁷ Will Kymlicka *Multicultural Citizenship: A Liberal Theory of Minority Rights* (Oxford University Press, Oxford, 1995).

¹⁰⁸ William Kaplan "Maxwell Cohen and the Report of the Special Committee on Hate Speech" in William Kaplan and Donald McRae (eds) *Law, Policy and International Justice: Essays in Honour of Maxwell Cohen* (McGill-Queens University Press, Montreal, 1993) at 247.

¹⁰⁹ At 247.

¹¹⁰ Criminal Code RSC 1985, s 319 (2).

B Why Criminalise?

Although the Bill was initially concerned with the effects of hate speech, the notion of democratic legitimacy has been a constant presence in the history of the Criminal Code. At the second reading of the Bill, Justice Minister John Turner passionately defended criminalizing hate speech. Turner argued that using the criminal law sanction was ‘an articulation of the total integrity of the Canadian community’.¹¹¹ This was a clear example of what Post and Dworkin would see as spoiling democratic legitimacy: the state is operating as an active moderator of its citizens’ expressions and it is thus circumventing democratic self-government. Therefore, Canada’s downstream laws and general legitimacy may be called into question.

Like with Holocaust denial laws in France, it is notable that Canada has chosen to focus on the criminalisation of hate speech. Turner’s comments illustrate that Canada itself was portrayed as the victim of hate speech: an attack on one section of the community constitutes an attack on the nation as a whole. To date, very few prosecutions are brought under s 319(2), and they require the consent of the Attorney General as a safeguard against frivolous complaints.¹¹² This emphasises the symbolic function of Canada’s upstream laws: the point of s 319(2) is not to suppress sections of society, but to express the state’s opprobrium as to a particular viewpoint. The Government was confident that s 319 (2) would advance democracy, rather than diminish it. However, prosecutions do occur, and it could be argued that sections of society have been made to conform to a moral and cultural environment they did not accede to.¹¹³ Since the 1970 amendments, have Canadian lawmakers shown any concern about the democratic legitimacy of upstream laws, or do they simply focus their attention at the consequential level? To answer this question, Canada’s primary constitutional document must be brought into the picture: the Canadian Charter of Rights and Freedoms.

C The Charter

Enacted in 1982, the *Charter* brought about profound change in the Canadian political and legal systems. Legislative and executive orders became judicially reviewable,¹¹⁴ and citizens could challenge the legitimacy of the state’s actions when fundamental rights were thought to be breached. After initial concern about judicial activism,¹¹⁵ the *Charter* is now extremely popular with Canadian

¹¹¹ Kaplan, above n 108, at 262.

¹¹² Criminal Code RSC 1985, s 319 (6).

¹¹³ For example, in 2005, a Saskatchewan First Nations politician was convicted under s 319 (2) for referring to Jews as ‘a disease’ and claiming that ‘the Second World War was created by the Jews’. See *R v Ahenakew* 2005 SKCA 93.

¹¹⁴ An important caveat to mention here is s 33 of the Charter, the ‘notwithstanding clause’. This enables the federal, provincial and territorial legislatures to nullify judicial review by overriding certain rights in the Charter, including freedom of expression. It remains controversial, and is scarcely used.

¹¹⁵ Peter H. Russell “The *Charter* and Canadian Democracy” in James B. Kelly and Christopher P. Manfredi (eds) *Contested Constitutionalism* (UBC Press, Vancouver, 2009) at 290.

citizens and is championed for its role in nurturing multiculturalism. Both sides of the theoretical debate about upstream laws are contained in the *Charter*:

2. Everyone has the following fundamental freedoms: (b) freedom of thought, belief, opinion and expression...

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

27. This Charter shall be interpreted in a manner consistent with the preservation and enhancement of the multicultural heritage of Canadians.

Furthermore, the rights enshrined in the *Charter* are not absolute. Like many other Bills of Rights, the Charter contains a 'limitations clause'. Section 1 provides that the rights and freedoms protected by the *Charter* are subject to 'such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society.' This section means an enquiry into the constitutionality of a provision is a two-step process. This process has been used by the Canadian Supreme Court to strike an appropriate balance between upstream laws and freedom of expression.

D Keegstra

1 Background

James Keegstra, a rather revisionist history teacher, informed his students that the Jews were, among other things, 'sadistic', 'child killers', invented the Holocaust for sympathy and were inherently evil.¹¹⁶ The students were expected to sit their exams mindful of this knowledge. If they dared to disagree with Keegstra's historiography, then their marks would suffer.

In 1985, Keegstra was convicted under section 319(2) of the Criminal Code.¹¹⁷ The Supreme Court, by a bare 4-3 majority, held that the provision was constitutional. At the first step of the inquiry, the provision violated the Canadian *Charter*'s enshrined right to freedom of expression.¹¹⁸ The Court was in complete agreement that the upstream law constituted a breach of s 2(b) of the *Charter*. Writing for the majority, Dickson CJ emphasised that it was not simply political expression protected by the *Charter*. As well a Supreme Court judge might, Dickson CJ agreed with Dworkin that majoritarian principles are not enough for democracy, stating that 'the *Charter* will not permit

¹¹⁶ At [3].

¹¹⁷ Criminal Code RSC, s 319(2).

¹¹⁸ *R. v Keegstra* [1990] 3 SCR 687 at [44].

even the democratically elected legislature to restrict the rights and freedoms crucial to a free and democratic society.¹¹⁹

Canada's upstream laws were constitutional, however, due to the 'reasonable limits' clause – the restriction was justified by references to principles fundamental to a free and democratic society.¹²⁰ The majority in *Keegstra* embarked on a lengthy quest to find these principles. Time was dedicated to the harm principle – like Waldron has done recently, the majority emphasised the importance of human dignity in regulating hate speech. Like Dworkin, the majority was sceptical of Mill's advocacy for the marketplace of ideas, citing a study by the Canadian Parliament that 'under strain and pressure in times of irritation and frustration, the individual is swayed and even swept away by hysterical, emotional appeals'.¹²¹

More pertinently for this paper, the Court's reasoning carries overtones of the concept of democratic legitimacy. Citing an earlier case,¹²² Dickson CJ enumerated two principles as to why freedom of expression was crucial to democratic legitimacy. Firstly, participation in social and political decision-making is to be fostered and encouraged.¹²³ Secondly, 'diversity in forms of individual self-fulfilment and human flourishing ought to be cultivated in a tolerant and welcoming environment for the sake of both those who convey a meaning and those to whom meaning is conveyed'.¹²⁴

What is clear is that the majority in *Keegstra* did not think that hate speech legitimately contributed to political discussion, stating that 'hate propaganda contributes little to...either the quest for truth, the promotion of individual self-development or the protection and fostering of a vibrant democracy where the participation of all individuals is accepted and encouraged'.¹²⁵ Of course, this does not rebut Dworkin's central point – even if hate speech does not serve a political purpose, it must be allowed to form *some* part of a society's 'moral environment'. Also, James Keegstra was undeniably expressing a political opinion, no matter how repugnant. The Court, however, goes further, and allows for a nuanced view of democratic legitimacy. It does this in five ways.

2 The Uniquely Canadian Democracy

Firstly, Dickson CJ set out what he thought the values and principles of a democratic society should be.¹²⁶

¹¹⁹ At [96].

¹²⁰ At [85].

¹²¹ At [66].

¹²² *Irwin Toy Ltd. v Quebec (Attorney General)* [1989] 1 SCR 927.

¹²³ *Keegstra*, above n 118, at [30].

¹²⁴ At [30].

¹²⁵ At [99].

¹²⁶ At [49].

[the] respect for the inherent dignity of the human person, commitment to social justice and equality, accommodation of a wide variety of beliefs, respect for cultural and group identity, and faith in social and political institutions which enhance the participation of individuals and groups in society’.

By reference to these principles and by rejecting the First Amendment tradition, Dickson CJ accepted the idea of democratic relativism. Counsel for Keegstra relied heavily on First Amendment jurisprudence, imploring the Court to import the *Brandenburg* test. Noting the constitutional commitments to equality and multiculturalism in the Charter, Dickson CJ explained that differences in democratic identity ‘may require that Canada’s constitutional vision depart from that endorsed in the United States’.¹²⁷ Democracy was not treated as a one size fits all concept. Rather, the uniquely Canadian vision of a free and democratic society required a positive commitment by the state to multiculturalism. This was informed by the constitutional guarantees of equality and adherence to multiculturalism. If the Canadian approach to democracy meant that hate speech was not afforded constitutional protection, ‘this is the approach which must be employed’.¹²⁸

Immediately in the majority judgment, we see a departure from the rigid framework of Dworkin - in Dickson CJ’s view, democratic legitimacy required the state to shape its citizens’ moral and cultural environment in order to adhere to multiculturalism. This reasoning by itself is flimsy, however. Although agreeing that the *Charter* has ‘constitutionalised’ multiculturalism, Stefan Braun points out that ‘it is hardly obvious that it does so by constitutionalizing legal suppression of public discourse suggesting alternatives to the official vision’.¹²⁹

3 A Matter of Degree

Secondly, like Waldron, Dickson CJ adopted a moderate interpretation of Dworkin’s argument by treating democratic legitimacy as a matter of degree. Dickson CJ concedes that section 319 ‘undeniably muzzles the participation of a few individuals in the democratic process... the state therefore cannot act to hinder or condemn a political view without to some extent harming the openness of Canadian democracy and its associated tenet of equality for all’.¹³⁰ In the Dworkinian sense, the state incurs a democratic deficit by not showing each citizen equal concern. But, Dickson CJ noted, ‘the degree of this limitation is not substantial’.¹³¹ Later on in the judgment, Dickson CJ emphasises that hate speech is ‘a special category of expression which strays some distance from the spirit of the [*Charter*] and [hence] restrictions on expression of this kind might be easier to justify than other infringements’.¹³² Waldron’s interpretation of Dworkin’s argument seems perfectly in line with the reasoning in *Keegstra* – if the

¹²⁷ At [55].

¹²⁸ At [61].

¹²⁹ Stefan Braun *Democracy Off Balance* (University of Toronto Press, Toronto, 2004) at 25.

¹³⁰ At [94].

¹³¹ At [95].

¹³² At [99].

upstream laws are targeted at the vituperative end of the scale, and not merely at the offensive, then the democratic deficit is very minor. The inference is that downstream laws (and the general legitimacy of the state) are only spoiled very slightly by activity further upstream.

4 Mutual Respect Between Citizens

Thirdly, the s 15 right of equality informs Dickson CJ's reasoning that democracy requires equal respect and concern between citizens, not just from the state to its citizens. The perpetrators of hate speech, the Court argues, aim to subvert the democratic process itself: 'open participation [in the political process] must involve to a substantial degree the notion that all persons are equally deserving of respect and dignity'.¹³³ If the democratic process is to be at all meaningful, hate speech that denies equal respect and dignity must be silenced. The long-term outlook of democracy depended on whether or not vulnerable groups could feel equally valued in wider society.¹³⁴ Dickson CJ's biographers believed that the Chief Justice was 'quite prepared to deny individual rights that were incompatible with the continued survival of a distinctive community'.¹³⁵ This is very apparent in his civic republican approach to democracy.

5 A Democratic Surplus?

Fourthly, the majority seemed more concerned than Dworkin about the democratic participation of the *targets* of hate speech. Whilst subjected to hate speech, the victims cannot gain social standing in society. The democratic deficit incurred by hate speech laws is, in substance, outweighed by the democratic surplus afforded to victims of hate speech. The Court in *Keegstra* does not find this balancing act too difficult a task, because hate speech consists of expressive activity 'wholly inimical to the democratic aspirations of the free expression guarantee'.¹³⁶ Here is the affirmation of multiculturalism in action, by providing substantive notions of democratic legitimacy.

6 The Role for the Criminal Sanction

Fifthly, Dickson CJ was highly supportive of the use of the criminal law. It was contended that the criminal sanction of s 319(2) unacceptably impaired the *Charter*'s guarantee of freedom of expression. Mediation under human rights statutes was offered as a more conciliatory way to approach hate speech. In this way, the offender can amend their conduct without facing the stigma of the criminal law. The state could therefore still act as an active moderator and participant in public discourse without disbaring anyone from the town hall. Dickson CJ believed that this was not enough. Hate speech was

¹³³ At [79].

¹³⁴ Jameson W. Doig "New Constitutions and Vulnerable Groups: Brian Dickson's Strategies in Interpreting the 1982 *Charter*" in Stephen Tierney (ed) *Multiculturalism and the Canadian Constitution* (UBC Press, Vancouver, 2007) at 176.

¹³⁵ Robert J. Sharpe and Kent Roach *Brian Dickson: A Judge's Journey* (University of Toronto Press, Toronto, 2003) at 109.

¹³⁶ At [95].

too loud and too potentially dominant in the public discourse. This called for the ‘more confrontational response’ of the criminal law.¹³⁷ The majority of the Court was content for the state to issue a strong, condemning riposte in the marketplace of ideas.

E Whatcott

1 Background

The Canadian Supreme Court has also been called upon to review upstream laws at the provincial level. For example, section 14 of the 1979 Saskatchewan Human Rights Code states that ‘no person shall publish or display...any representation that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of prohibited ground’.

Saskatchewan’s long-standing upstream laws were subjected to judicial review in 2013.¹³⁸ William Whatcott, a ‘social activist’, distributed thousands of flyers warning of the perils of homosexuality. Two such flyers were entitled “Keep Homosexuality out of Saskatoon’s Public Schools!” and “Sodomites in our Public Schools”.¹³⁹ The flyers compared homosexuality to paedophilia and child abuse.¹⁴⁰ Whatcott was found to have violated s 14(1) under the Saskatchewan Human Rights Code, as the flyers exposed person to hatred and ridicule based on their sexual orientation.¹⁴¹ Following *Keegstra*, the Supreme Court held that the provision was constitutional: section 2 of the *Charter* was breached but the provision survived due to the ‘reasonable limits’ clause of section 1.¹⁴²

2 Democratic Deficit Denied

The Court in *Whatcott* directly cites Dworkin as a proponent for leaving hate speech to the ‘marketplace of ideas’ in the search for truth.¹⁴³ As outlined, Dworkin explicitly rejected the validity of this argument, and focussed on democratic legitimacy. The Court gives short shrift to this contention in any case. They stress that suppressing hate speech does not necessarily lead to a democratic deficit, as hate speech can reduce and stifle the political participation of others. In essence, ‘speech that has the effect of shutting down public debate cannot dodge prohibition on the basis that it promotes debate’.¹⁴⁴ Again, support for the notion that legitimacy is a matter of degree is evident, with factors to weigh up for and against. The Court also recognised that it is too simplistic to proclaim a cession of controversy on issues that hate

¹³⁷ At [136].

¹³⁸ *Saskatchewan (Human Rights Commission) v Whatcott* [2013] SCC 11.

¹³⁹ At [8].

¹⁴⁰ At [187].

¹⁴¹ Saskatchewan Human Rights Code, s 14(1)(b).

¹⁴² *Whatcott*, above n 138, at [6].

¹⁴³ At [103].

¹⁴⁴ At [117].

speech target. Yugoslavia, Darfur, Rwanda, Uganda were all pointed to, alongside the fact that the internet has enabled increased profligacy of extremist views.¹⁴⁵

Following Post's lead, Whatcott contended that upstream laws force an illegitimate encumbrance upon some citizens in public discourse. The Court was unimpressed with this argument; in fact, it was the threat to freedom of expression from private actors that was the pressing concern. The Court hypothesised a downstream law that promoted anti-discrimination in schools as to sexual conduct and orientation. By labelling homosexuals as paedophiles, hate speech such as Whatcott's 'requires the protected group to first defeat the absolutist position that all homosexuals are pedophiles in order to justify a level of societal standing'.¹⁴⁶ The protected group can only participate in the deliberative democratic process once this precondition is met. This is an alternative way to look at the upstream-downstream analogy, and is aligned with civic republicanism: the Court reasoned that upstream laws must be in place in order for all to have their say further downstream.

3 Religious Convictions and Treading Carefully

Interestingly, the Court took the opportunity to distinguish between Whatcott's flyers. Two of them were found to contain pure invective against homosexuality which was objectively likely to expose a vulnerable group to detestation and vilification. Nothing of substance was added to political discourse. The Court, however, was very careful to protect genuine political discussion. Whatcott can express his views on sexuality – just not via hate speech.¹⁴⁷ For example, one flyer reprinted the classified sections of a publication. Whatcott had scrawled "Saskatchewan's largest gay magazine allows ads for men seeking boys" on the flyer, and added that "'If you cause one of these little ones to stumble it would be better that a millstone was tied around your neck and you were cast into the sea' Jesus Christ".¹⁴⁸ According to the Court, this was not objectively likely to expose a group to hatred. The reasonable person would interpret biblical phrases aware that more than one message may be conveyed. This demarcation between political debate and hate speech is redolent of Waldron's interpretation of Dworkin. The further the expression strays from the spirit of section 2 of the Charter, the less it would be afforded protection. As touched on, this feels a somewhat artificial difference. Dressed-up political rhetoric has immense latent potential to stir up racial hatred, perhaps more so than distributing flyers at universities. In fact, the Court explicitly acknowledges this, agreeing that 'history demonstrates that some of the most damaging hate rhetoric can be characterized as "moral", "political" or "public policy" discourse'.¹⁴⁹ Nonetheless, they draw a line similar to Waldron in order to permit as much political

¹⁴⁵ At [72].

¹⁴⁶ At [76].

¹⁴⁷ Indeed, Whatcott has continued to candidly express his views. The last update on Whatcott's Twitter account (<https://twitter.com/BillWhatcott>) matter-of-factly notes that "UK politician correctly blames storms, floods on 'gay' pseudo marriage".

¹⁴⁸ At [195].

¹⁴⁹ At [116].

discussion as possible, and to recognise that deep-held religious beliefs can be inherently offensive to others.

F Recent Developments

The decision in *Whatcott* caused great controversy in Canada, with a groundswell of support for relaxing upstream laws. The main target was not the criminal sanction upheld in *Keegstra*, however. In June of 2013, the Senate repealed section 13 of the Canadian Human Rights Act 1977.¹⁵⁰ This had been coming. Section 13 stated that it was a discriminatory practice to:¹⁵¹

communicate telephonically or to cause to be so communicated ... by means of the facilities of any matter that is likely to expose a person or persons to hatred or contempt by reason of the fact that that person or those persons are identifiable on the basis of a prohibited ground of discrimination.

This very specific provision – aimed at one mode of communication – was due to the rise in Canada of telephone hate lines set up by extreme right-wing organisations in the 1970s.¹⁵² The Human Rights Commission screens all complaints and sends meritorious ones to the Human Rights Tribunal for adjudication. If necessary, the Tribunal can then order individuals to cease their discriminatory practices and levy penalties accordingly. In 2001, s 13 was amended to include hate speech on the internet within the Tribunal's jurisdiction.¹⁵³ There were a number of issues with the provision that distinguished it from the more accepted s 319(2) of the Criminal Code: the Attorney-General's consent was not required, no defences were available, and individuals could freely and frivolously bring claims against other individuals. There was considerable backlash to the Human Rights Commission's lead investigator's stance that 'freedom of speech is an American concept, so I don't give it any value. It's not my job to give value to an American concept'.¹⁵⁴ It is concluded that although the treatment of democratic legitimacy regarding upstream laws is settled in the eyes of the judiciary, it remains an ongoing concern for the wider public.

¹⁵⁰ Michael Woods "Hate Speech Laws No Longer Part of Canada's Human Rights Act" *National Post* (27 June 2013) <http://news.nationalpost.com/2013/06/27/hate-speech-no-longer-part-of-canadas-human-rights-act/> accessed 10 December 2013.

¹⁵¹ Human Rights Act RSC 1977, s 13(1).

¹⁵² Luke McNamara *Human Rights Controversies: The Impact of Legal Form* (Routledge-Cavendish, Oxon, 2007) at 190.

¹⁵³ Anti-Terrorism Act 2001 RSC, c 41, s 88.

¹⁵⁴ Jordan Michael Smith "Canada's Clampdown on Free Speech" *Boston Globe* (27 March 2010) http://www.boston.com/bostonglobe/editorial_opinion/oped/articles/2010/03/27/canadas_clampdown_on_free_speech/ accessed 25 Jan 2014.

XII New Zealand

A History

Like Canada, New Zealand has had upstream laws in place for many decades. Section 25 of the Race Relations Act 1971 (RRA) provided a criminal sanction for public hate speech, fulfilling New Zealand's obligations under the ICCPR and the ICERD.¹⁵⁵ The Race Relations Office received many complaints alleging breaches of s 25, but it had no jurisdiction to take the complaints further.¹⁵⁶ Widespread dissatisfaction with the operational limitations of s 25 led to the addition of s 9A to the RRA. This was a civil provision that made it unlawful to:¹⁵⁷

‘...publish or distribute written matter which is threatening, abusive, or insulting, or to broadcast by means of radio or television words which are threatening, abusive, or insulting...being matter or words likely to excite hostility or ill will against or bring into contempt or ridicule any group of persons in or who may be coming to New Zealand on the ground of the colour, race, or ethnic or national origins of that group of persons’.

The consensus then swung the other way: New Zealand's upstream laws were now thought to be over-inclusive.¹⁵⁸ Between 1980 and 1990, over half of the complaints to the Race Relations Office concerned s 9A of the RRA.¹⁵⁹ A notorious case concerned Hana Te Hemara's ‘kill a white’ comment at the Auckland University marae.¹⁶⁰ After a tumultuous legislative and operational history, s 9A was repealed and superseded by the Human Rights Act 1993 (HRA). The criminal sanction remained in place, but only one prosecution has succeeded under it or its predecessor since 1971.¹⁶¹ Instead, the focus here is the civil standard of section 61 of the HRA. The key difference between s 9A of the RRA and s 61 of the HRA is the higher threshold of the latter: the words ‘ill will’ and ‘ridicule’ were omitted, and so potential harm is now limited to ‘hostility’ and ‘contempt’.

On its face, s 61 is a fairly standard upstream law. There is no requirement for incitement to imminent violence – the likelihood of bringing a group into contempt is enough to be considered an unlawful practice. Because s 61 is not limited to two modes of communication, it is broader in scope than the corresponding s 13 in the Canadian Human Rights Act. In theory, both sections run into the same issue of democratic legitimacy that the Canadian Parliament was so eager to address. As will be seen, however, the New Zealand position is much less restrictive in practice.

¹⁵⁵ Race Relations Act 1971, s 25.

¹⁵⁶ McNamara, above n 152, at 209.

¹⁵⁷ Race Relations Act 1971, s 9A (1).

¹⁵⁸ McNamara, above n 152, at 209.

¹⁵⁹ Grant Huscroft “Freedom of Expression” in Grant Huscroft and Paul Rishworth (eds) *Rights and Freedoms* (Brookers, Wellington, 1995) at 195.

¹⁶⁰ At 195.

¹⁶¹ *King-Ansell v Police* [1979] 2 NZLR 531.

B The Bill of Rights

Since 1990, issues of freedom of expression in New Zealand are contextualised by the Bill of Rights Act (BORA). Where possible, enactments must be interpreted consistently with the rights and freedoms contained in the BORA.¹⁶² The relevant rights are located in sections 14 and 19:¹⁶³

14. Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.

19. Everyone has the right to freedom from discrimination on the grounds of discrimination in the Human Rights Act 1993.

Following the lead of Canada, section 14 is not merely limited to political expression. The right of s 14 has been characterised by the Court of Appeal ‘as wide as human thought and imagination’.¹⁶⁴

The real scope can only be deduced once the limitations clause of section 5 of the BORA is taken into account, which is identical to s 1 of the Canadian *Charter*.¹⁶⁵ It is important to note that New Zealand’s constitutional makeup is very different from Canada’s. The New Zealand Supreme Court is not empowered with the ability to strike down legislation inconsistent with the BORA – this is explicitly outlined in the BORA itself.¹⁶⁶ The jurisprudence on upstream laws is therefore less substantial than the detailed reasoning found in Canadian judgments.

C Section 61 and Initial Concern

Grant Huscroft, well-versed in the First Amendment tradition and outspoken critic of upstream laws, was dismayed at s 61 of the HRA. Given the guarantee of freedom of expression in the BORA, Huscroft could not believe ‘how a law this bad came to be re-enacted’.¹⁶⁷ His concern was that the Human Rights Commission would trample all over freedom of expression and its importance to democracy.¹⁶⁸ Channelling Post’s arguments, Huscroft believed that democratic legitimacy is weakened by s 61: ‘the state has no right to legislate in public discourse’.¹⁶⁹ In an early case, the Human Rights Tribunal ruled that shock-jock Derek Archer had breached s 61 when broadcasting

¹⁶² Bill of Rights Act 1990, s 6.

¹⁶³ Sections 14 and 19.

¹⁶⁴ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).

¹⁶⁵ Section 5 states that ‘the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society’.

¹⁶⁶ Section 4.

¹⁶⁷ Huscroft, above n 159, at 209.

¹⁶⁸ Grant Huscroft “Freedom of Expression” in Paul Rishworth, Grant Huscroft, Scott Optican and Richard Mahoney (eds) *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 325.

¹⁶⁹ At 193.

racist remarks about Chinese people.¹⁷⁰ As Luke McNamara notes, the Tribunal was perfectly comfortable with s 61 sitting alongside s 14 of the BORA.¹⁷¹ The Tribunal made specific reference to s 19 of the BORA, arguing that ‘freedom of expression carries with it the right not to infringe the rights of others’.¹⁷² So far, the similarities with the Canadian approach are abundant. The principles of non-discrimination and equality inform both countries’ upstream laws, and the mutual respect between citizens is a valid democratic justification. As it transpired, Huscroft need not have been troubled.

D Approach of the Human Rights Commission

In *Bissett v Peters*, the Human Rights Tribunal heard an application to strike out a claim made under s 61.¹⁷³ The applicant was the New Zealand First MP Winston Peters, who had distributed a pamphlet that was widely regarded as racist towards Asian people.¹⁷⁴ This was an unusual case where the Commission had declined to proceed, but Bruce Bissett (the complainant) had taken up the option of a Tribunal hearing anyway.¹⁷⁵ In its submission to the Tribunal, the Commission stated that to be unlawful, the words published had to ‘invite a hostile action’ against a group.¹⁷⁶ This is an extremely narrow reading of s 61 of the HRA, and one which is largely in line with the *Brandenburg* test. The lower threshold of ‘bring into contempt’, which the Canadian Human Rights Commission had adhered to, had been abandoned altogether.

In explaining its high threshold, the Commission self-styled its approach as ‘civil libertarian’.¹⁷⁷ This was contrasted with a ‘harms-based approach’.¹⁷⁸ To demonstrate this difference, the Commission referred to the majority and minority judgments in *Keegstra*. Surprisingly, the Commission ‘consciously lined up its position on how the right to free speech/hate speech law balance should be struck with the position of the *minority* judges in *Keegstra*’.¹⁷⁹

¹⁷⁰ Human Rights Commission, *Proceedings Commissioner v Archer* [1996] 3 HRNZ 123.

¹⁷¹ McNamara, above n 152, at 219.

¹⁷² *Archer*, above n 170, at 129-130.

¹⁷³ *Bissett v Peters* [2004] HRRT 50/03.

¹⁷⁴ At [27].

¹⁷⁵ Human Rights Act 1993, s 92B.

¹⁷⁶ At [9].

¹⁷⁷ Human Rights Commission “Submissions by the Human Rights Commission re the Matter Between Bruce William Bissett and the Right Hon Winston Peters, MP Before the Human Rights Review Tribunal” (2004), at [2].

¹⁷⁸ At [7].

¹⁷⁹ McNamara, above n 152, at 222.

E Support for Upstream Laws?

In 2004, one year after *Bissett*, a Select Committee inquiry was launched to determine ‘whether or not further legislation to prohibit or restrain hate speech legislation is warranted’.¹⁸⁰ Although the inquiry led nowhere, the Human Rights Commission’s submission illustrates why it had aligned with the approach of the minority in *Keegstra*. Although the Commission maintained that its extremely narrow interpretation of s 61 was ‘about right’,¹⁸¹ its submission carefully considered how upstream laws would affect democratic legitimacy. Firstly, in the vein of Dworkin, the Commission argued that freedom of expression is important in order for citizens to have confidence in laws preventing discrimination.¹⁸² Any democratic deficit incurred by upstream laws, however, is treated as a matter of degree. Citing Richard Delgado, a well-known proponent of upstream laws, the Commission believed that hate speech silences its victims, and ‘undermines the very democracy that free speech is said to undergird’.¹⁸³ When hate speech fosters an atmosphere of discrimination, its victims ‘are denied the opportunity to participate equally in society’.¹⁸⁴

F The State as Active Moderator

The reason for the Commission’s self-imposed high threshold pertains more to the inefficiency of dealing with frivolous complaints than any weight given to concerns such as Post’s and Dworkin’s.¹⁸⁵ Besides a possible chilling effect, hate speech that is likely to bring an identifiable group into contempt is permitted in New Zealand, so long as imminent violence is not likely to ensue. If the threshold of s 61 has thus far been virtually unattainable, why did the Commission nevertheless caution against its repeal? The answer is found in the role of the state in the public discourse. The Commission stressed that the government ought to have a strong influence where private actors threaten freedom of speech.¹⁸⁶ For the state to be seen as neutral, it must supply an active voice. To use freedom of speech as a philosophy for allowing hate speech to silence a group is to misunderstand ‘the proper role of Government’.¹⁸⁷

¹⁸⁰ New Zealand House of Representatives “Government Administration Committee Inquiry into Hate Speech” (5 August 2004).

¹⁸¹ Human Rights Commission “Balance About Right, Hate Speech Inquiry Told” (5 May 2005) <http://www.hrc.co.nz/2005/hate-speech-balance-about-right> accessed 3 Jan 2014.

¹⁸² Human Rights Commission “Submission to the Government Administration Committee Into the Inquiry into Hate Speech” (5 May 2005) <http://www.hrc.co.nz/2005/submission-to-the-inquiry-into-hate-speech> accessed 3 Jan 2014, at [1.2].

¹⁸³ At [1.11].

¹⁸⁴ At [1.15].

¹⁸⁵ At [2.11].

¹⁸⁶ At [2.14].

¹⁸⁷ At [2.15].

G New Zealand's Democratic Identity

The above arguments are very much steeped in the prohibitionist camp. In line with this, there is a suggestion that the Commission *would* adopt the majority's position in *Keegstra* if the democratic identities of Canada and New Zealand were more similar. The Commission noted that New Zealand's Bill of Rights does not constitutionally guarantee the right to equality, and nor does it officially recognise multiculturalism.¹⁸⁸ The democratic legitimacy of Canada's upstream laws is infused by these two positive rights; the debate is contextualised.¹⁸⁹ Conversely, the Commission does not balance sections 14 and 19 of the NZBORA when interpreting upstream laws. The Commission suggests that if s 19 was a positive right to equality, then this would alter the New Zealand conception of a democratic society. The Commission's approach to s 61, it was suggested, would change accordingly.¹⁹⁰

H Recent Developments

The Commission continues to employ s 14 of the NZBORA as a 'shield of First Amendment-like proportions'.¹⁹¹ Because of how New Zealand's legal system operates, it is the Commission's approach that is crucial – not so much the legislature, nor the courts, and nor the Human Rights Tribunal. In its 2010 review, the Commission proposed a new positive right to equality and also to ensure that s 61 of the HRA fulfilled its legislative purpose.¹⁹² Neither of these propositions have made any substantial headway. The Human Rights Commission's Annual Report for 2013 shows that although it received numerous complaints of breaches under s 61, not one reached the threshold to be held unlawful.¹⁹³ The Commission referred to the 'high threshold of the section 61 of the Act when balanced against the right to freedom of expression'.¹⁹⁴ This is a continuation of the Commission's very strong emphasis on s 14 of the BORA when weighing up s 61 claims.

XIII Conclusion

To the outrage of many human rights groups, the Australian Government has recently announced plans to repeal the hate speech laws in the Racial Discrimination Act.¹⁹⁵ It can be seen that the line in the sand

¹⁸⁸ Probably the closest equivalent to a right to equality is found in Article 3 of the Treaty of Waitangi 1840: [Maori version translated into English] 'Her Majesty the Queen of England extends to the Natives of New Zealand Her royal protection and imparts to them all the Rights and Privileges of British Subjects.'

¹⁸⁹ At [5.17].

¹⁹⁰ At [7.6].

¹⁹¹ McNamara, above n 152, at 223.

¹⁹² Human Rights Commission "Human Rights in New Zealand" http://img.scoop.co.nz/media/pdfs/1012/Human_Rights_Review_2010_Full.pdf accessed 3 Jan 2014, at 6.

¹⁹³ Human Rights Commission "Annual Report 2013" (October 2013) http://www.hrc.co.nz/wp-content/uploads/1999/11/HRC_AR2013_FINAL.pdf accessed 3 Jan 2014, at 21.

¹⁹⁴ At 21.

¹⁹⁵ Greg Ansley "Abbott's Govt to Dump Hate Speech Laws" *New Zealand Herald* (November 30 2013) http://www.nzherald.co.nz/world/news/article.cfm?c_id=2&objectid=11164898

is very difficult to draw in regards to hate speech. This paper has focussed the issue of democratic legitimacy that arises when hate speech is regulated. The succinct Foreword by Dworkin has proven fruitful for a much broader discussion, incorporating principles such as state neutrality and the relative democratic identities of states. Although this paper has found the arguments in favour of upstream laws to have more substance and force, it must be again stressed that the effects of hate speech are unclear.

The operation of upstream laws in both Canada and New Zealand has been analysed. The Canadian Supreme Court has found to be acutely aware of the issue of democratic legitimacy. A moderate, civic republican approach to democratic legitimacy finds much favour north of the International Boundary – although public opinion appears to be shifting. It has also been seen that Canadian jurisprudence has strongly tied democratic legitimacy to its unique foci on equality and multiculturalism. The focus in New Zealand was on the Human Rights Commission. Essentially, it was expediency that drives the Commission's strongly pro-speech stance. In spirit, it was seen the Commission tends to agree with the principles outlined by prohibitionists. The Commission was also found to favour the principle of democratic relativism, drawing attention to New Zealand's lack of an express right to equality. It is concluded that democratic legitimacy is a fluid concept which means substantively different things to different people – even First Amendment stalwarts like Robert Post have been persuaded to change their minds.

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