

LAURA MARY LINCOLN

**PUBLIC NUDITY AND THE RIGHT TO FREEDOM OF EXPRESSION:
BALANCING COMPETING INTERESTS**

LAWS 524: HUMAN RIGHTS

Submitted for the LLB (Honours) Degree

Faculty of Law

Victoria University of Wellington



2013

Abstract

With little case law concerning nudity and the right to freedom of expression, this paper aims to uncover the appropriate frameworks to be used to determine the following questions: (a) when is public nudity “expression” for the purposes of s 14 of the New Zealand Bill of Rights Act 1990, and (b) in what circumstances involving “expressive” public nudity would it be reasonable and demonstrably justifiable to limit the right to freedom of expression using s 4(1)(a), as per s 5 of the Bill of Rights Act? As regards the first of these questions, this paper critiques the current test in use in New Zealand for determining whether conduct is expression – the test developed by the Canadian Supreme Court in *Irwin Toy Ltd v Attorney-General (Quebec)* – and advocates for the adoption of a purposive approach to determining the scope of the right to freedom of expression. As for the second of these questions, this paper advocates for the adoption of “the modified *Hansen* sequence” proposed by Professor Claudia Geiringer. This paper then uses recent examples of public nudity involving naturists and protestors to test these frameworks and to illustrate how they would operate in practice.

Keywords: Public nudity, Freedom of Expression, Meaning of expression, *Irwin Toy Ltd v Attorney-General (Quebec)*, Purposive Approach, Self-fulfillment, Marketplace of Ideas, Democracy, Limiting expression, *R v Hansen*, New Zealand Bill of Rights Act

Table of Contents

<i>Abstract</i>	2
<i>Table of Contents</i>	3
<i>Word Count</i>	4
<i>I Introduction</i>	5
<i>II Public Nudity</i>	7
A Public Nudity Examples	7
B Naturism	8
C Protest	10
<i>III The Regulation of Public Nudity in New Zealand</i>	12
<i>IV Determining the Scope of the Right to Freedom of Expression</i>	14
A What is Expression?	14
B Is Conduct Expression?	15
C Applying the Approach in <i>Irwin Toy</i> to Public Nudity Examples	17
D An Appropriate Approach to Interpreting the Right to Freedom of Expression?	21
E A Purposive Approach to Interpreting Section 14 of the Bill of Rights Act	22
<i>V Rationales Underlying the Right to Freedom of Expression</i>	24
A The Advancement of Knowledge and Discovery of Truth (“The Marketplace of Ideas Theory”)	24
B The Achievement and Maintenance of Democratic Self-Government (“The Democracy Theory”)	25
C Individual Self-fulfillment (“The Liberty Theory”)	27
<i>VI When is Public Nudity “Expression”?</i>	29
A Overview	29
B Naturism Examples	30
C Protest Examples	32
D Summary	33
<i>VII Limiting Expression</i>	33
A “The Modified <i>Hansen</i> Sequence”	33
B Overview of Section 5	36

C “Prescribed by Law”	36
D “Reasonable and Demonstrably Justified”	37
1 <i>R v Hansen</i> : Adoption of the <i>Oakes</i> Approach.....	37
2 Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?	38
3 Is the limiting measure rationally connected with its purpose?	40
4 Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?	41
5 Is the limit in due proportion to the importance of the objective?	43
<i>VIII Conclusions</i>	47
<i>IX Bibliography</i>	49

Word count

The text of this paper (excluding abstract, table of contents, footnotes, and bibliography) comprises approximately 14, 601 words.

I Introduction

There is no law specifically prohibiting public nudity in New Zealand. However, those who choose to bare all in public run the risk of being prosecuted for behaving offensively, a charge brought under s 4(1)(a) of the Summary Offences Act 1981 (the Summary Offences Act). Prosecution usually occurs where a person's exhibition prompts a complaint from a member of the public, as was the case in *Pointon v New Zealand Police (Pointon (No 1))*.¹ In that case, a complaint was lodged with the police after Mr Pointon was seen jogging in an isolated area of a public park wearing only sneakers.

Mr Pointon is a naturist. He believes that it is “natural and proper” for a person to be naked, and that clothing is “an artificial construct that covers the human form”.² Mr Pointon is not the first naturist to be charged under s 4(1)(a) because of his public nudity.³ However, he was the first to argue successfully that the right to freedom of expression, as protected in s 14 of the New Zealand Bill of Rights Act 1990 (the Bill of Rights Act), negated the charge. This begs the following questions: (a) when is public nudity “expression” for the purposes of s 14, and (b) in what circumstances involving “expressive” public nudity would it be reasonable and demonstrably justifiable to limit the right to freedom of expression using s 4(1)(a), as per s 5 of the Bill of Rights Act? This paper aims to construct a framework for answering these questions, and to test this framework using recent examples of public nudity.

This paper begins by providing the reader with the context pertinent to any discussion about public nudity. Part II briefly describes examples of public nudity, drawn from recent case law and media publications, in order to provide readers with an appreciation of the circumstances in which people choose to appear naked in public. Part III adds to this context by outlining the legislative provisions used to regulate public nudity in New Zealand.

Part IV considers an approach for answering the first of the questions identified above: in what circumstances is public nudity “expression” for the purposes of s 14? This Part begins

¹ *Pointon v New Zealand Police* [2012] NZHC 3208 [*Pointon (No 1)*].

² At [7].

³ See *Lowe v New Zealand Police* HC Wellington CRI-2009-485-135, 2 March 2010; *Ceramalus v Police* HC Auckland AP76/91, 8 July 1991 [*Ceramalus (No 1)*]; *Ceramalus v The Police* HC Auckland AP131/95, 27 October 1995 (*Ceramalus (No 2)*); *Pointon v New Zealand Police* [2013] NZHC 2352 [*Pointon (No 2)*].

by describing the prevailing conception of the scope of the right to freedom of expression in s 14 of the Bill of Rights Act and the current approach used to determine whether conduct, such as nudity, is expression. This approach, taken from the Supreme Court of Canada's decision in *Irwin Toy Ltd v Attorney-General (Quebec)*,⁴ considers whether the conduct in the circumstances is communicative in nature, in that it conveys, or attempts to convey, a meaning. This paper critiques this approach, arguing that it excludes conduct that does not convey a meaning but is self-expressive, and that a purposive approach to interpreting the scope of the right is more appropriate. A purposive approach would result in expressive conduct being any activity which implicates any of the three core rationales or values that underlie the right to freedom of expression. These rationales – the marketplace of ideas theory, the democracy theory, and the self-fulfillment or liberty theory – will be introduced in Part V. Part VI then tests this purposive approach by using it to determine the extent to which the public nudity examples described in Part II fit within the scope of the right to freedom of expression, and illustrates that the purposive approach would include self-expressive conduct as expression because such conduct strongly implicates the self-fulfillment rationale.

Part VII begins the second half of this paper by establishing a framework for answering the second of the two proposed questions: in what circumstances involving “expressive” public nudity would it be reasonable and demonstrably justifiable to limit the right to freedom of expression using s 4(1)(a), as per s 5 of the Bill of Rights Act? This part starts by advocating for the adoption of “the modified *Hansen* sequence” proposed by Professor Claudia Geiringer, before discussing the application of s 5 of the Bill of Rights Act, which mandates a proportionality inquiry to determine the reasonableness and justifiability of proposed limits on protected rights. This discussion focuses on the Canadian *Oakes* test, which was applied by the Supreme Court in *R v Hansen*,⁵ and describes each limb of the test in turn, using some of the examples of public nudity deemed expression in Part VI to illustrate how the test would be applied in practice.

Part VIII concludes this paper by advocating that the frameworks it has developed be used in future cases involving public nudity, to determine when that nudity is expression for the

⁴ *Irwin Toy Ltd v Attorney General (Quebec)* [1989] 1 SCR 927 (SCC).

⁵ *R v Hansen* [2007] NZSC 7, [2007] 3 NZLR 1.

purposes of s 14, and when limitations on this expression can be considered reasonable and demonstrably justified.

II Public Nudity

A Public Nudity Examples

It is relatively easy to envisage scenarios in which a person may be completely, or partially, naked in public or quasi-public places. For example, a person may be naked for artistic purposes, while participating in activities such as body-painting, plays, exhibitions or other performances. Such performances could include those in adult entertainment establishments, a fact illustrated by the body of American case law addressing nude dancing and the right to free speech.⁶ Alternatively, a person may be naked in public because they have chosen to engage in acts of streaking or flashing. Streaking involves abandoning one's clothes and running naked through public, whereas flashing is the exposing of one's genitals with the intent to shock or distress another person.⁷ According to Barcan, the pleasure one gains from streaking relies on the strength and universality of the prevailing taboo of public nudity, because breaking this taboo is often physically and psychologically exhilarating.⁸ In contrast, a person may also be naked in public as they carry out normal everyday activities, such as breast-feeding children or undressing in public changing rooms.

External restrictions placed on the length of this paper make it impossible to test the frameworks developed for answering the questions of whether particular examples of public nudity are expression for the purposes of s 14 of the Bill of Rights Act, and whether any limits placed on those examples of expression by s 4(1)(a) of the Summary Offences Act are reasonable and demonstrably justified, using all possible examples of public nudity.

⁶ In *Barnes v Glen Theatre Incorporated* (1991) 501 US 560 and *City of Erie v Paps AM* (2000) US 277, the United States Supreme Court had the responsibility of determining whether regulations requiring exotic dancers to wear G-strings and pasties while performing were permissible limitations on the right to free speech guaranteed by the United States Constitution's First Amendment. The outcome of these cases is not important for the purposes of this paper, as the approach to determining free speech cases differs in this jurisdiction, where the absence of a justified limits provision in the First Amendment requires limits to be incorporated into the right itself.

⁷ Ruth Barcan *Nudity: A Cultural Anatomy* (Oxford University Press, New York, 2004) at 188.

⁸ At 188.

Consequently, this paper will focus on only two examples of public nudity: nudity by naturists and nudity used in protest. The following paragraphs outline the specific scenarios in which naturists have been prosecuted for being naked in public and people have protested naked that will be used to test the above frameworks.

B Naturism

As alluded to in the introduction to this paper, public nudity has recently come before the New Zealand courts in the context of a charge of offensive behaviour under s 4(1)(a) of the Summary Offences Act laid against male defendants who subscribe to naturist lifestyles.⁹

Naturism (or nudism) is considered a lifestyle choice in today's society, rather than the movement for social change that it once was.¹⁰ Historically, naturists had many different reasons for appearing naked in public. Ruth Barcan summaries the key themes within nudist writing that identify these reasons: combatting shame and modesty (the condemnation of clothing and the innocence of nudity); connectedness to nature (the naturalness of nudity); relations between the sexes (a cure to sexual hypocrisy); the medical importance of sunlight (the link between nudism and physical and mental health); the contribution of nudity to the health and beauty of the race and the elimination of class distinctions.¹¹ Without exploring any of these themes in detail, it is clear that there are various reasons, both personal and political, for why people have historically chosen a naturist lifestyle.¹² Although naturism is now considered a lifestyle choice rather than a social movement, the reasons for this lifestyle choice may still reflect the historical roots of naturism, so that any naturist brought before the court on a charge of offensive behaviour could have been nude in public for a reason related to any of these themes.

⁹ For example, *Pointon (No 1)*, above n 1; *Lowe v New Zealand Police*, above n 3; *Ceramalus (No 1)*, above n 3; and *Ceramalus (No 2)*, above n 3; *Pointon (No 2)*, above n 3.

¹⁰ Ruth Barcan "Regaining what mankind has lost through civilisation: early nudism and ambivalent moderns" (2004) 8(1) *Fashion Theory* 63 at 78.

¹¹ At 65.

¹² At 78.

Many of the historical reasons identified above are strongly communicative, but because naturism is a lifestyle choice it can be, and is often referred to as being, self-expressive.¹³ This idea was implied in the recent Canadian decision *R v Coldin*.¹⁴ In that decision, Douglas J stated that:¹⁵

The evidence is very clear that many people, call them naturists, find some fulfillment in the conduct of being nude, and, not simply in being nude in private, alone, but being nude in some form of quasi-public place, such as a naturist camp. For them, the conduct of public nudity is imbued with meaning; hence, expressive.

If a naturist has no intention of communicating an idea to others, and wishes only to live in accordance with their lifestyle choice, then the public nudity in those circumstances is self-expressive because it is imbued with meaning as to that person's identity. The self-expressive nature of public nudity by naturists raises questions as to whether this conduct comes within the scope of the right to freedom of expression. This is because the definition of expression commonly adopted by the courts focuses on only communicative behaviour being protected by the right. This definition arguably excludes self-expressive conduct by a person who lacks any intention to communicate an idea. This issue will be discussed further in Part IV.

To date, three naturists have been charged with behaving offensively under s 4(1)(a) of the Summary Offences Act. In *Pointon (No 1)* and *Lowe v New Zealand Police* the appellants were seen by members of the public exercising naked. Mr Pointon was seen running naked, apart from running shoes, along tracks within a relatively secluded wooded area of a public park at 8.30 am on a weekday morning in the middle of winter.¹⁶ Mr. Lowe, a "committed cyclist and naturist", was seen naked, save for a heartbeat monitor worn across his chest and a helmet protecting his head, training on his bike along a public road, by a woman in her car.¹⁷ Both Mr Pointon and Mr Lowe successfully appealed their convictions.

¹³ American Association for Nude Recreation "Discover Nudism" (2010) < www.aanr-wc.com >.

¹⁴ *R v Coldin* [2012] OJ No. 1009; 2012 ONC LEXIS 2509.

¹⁵ At [67].

¹⁶ *Pointon (No 1)*, above n 1, at [1].

¹⁷ *Lowe v New Zealand Police*, above n 3, at [4].

On two later occasions, Mr Pointon was seen gardening, or mowing lawns, naked at his residential property. In the District Court, Judge Harding found Mr Pointon guilty of both charges of offensive behaviour under s 4(1)(a). Mr Pointon appealed his convictions on the basis that he was denied a fair trial, but not on the basis that his behaviour was inoffensive in those circumstances. He was unsuccessful in appealing his convictions.

Mr Ceramalus is another naturist who has faced charges of offensive behaviour under s 4(1)(a). Mr Ceramalus believes strongly in the benefits of naturism for his physical and mental health,¹⁸ but was convicted for sunbathing naked on a beach approximately ten metres away from 105 primary school children who were visiting the beach as part of a school field-trip.¹⁹ He successfully appealed his conviction. On a separate occasion, Mr Ceramalus was convicted under s 4(1)(a) for walking down his residential street naked on the way home from the beach but was not successful in overturning this charge on appeal.²⁰

A case with comparable facts, referred to in the discussion of self-expression above, was recently heard in Canada by the Ontario Court of Justice. In *R v Coldin*,²¹ Mr Coldin, a naturist, faced similar charges relating to appearing naked in public, save for a pair of shoes, in four different situations: walking along the side of a public highway, walking in a public park, driving his vehicle through and attempting to order at a fast food restaurant's drive-through, and as a passenger in a friend's car, again ordering at a fast-food restaurant's drive-through.²² Mr Coldin was convicted under s 174 of the Criminal Code of Canada as a result of his nudity in each of these situations.²³

C Protest

¹⁸ *Ceramalus (No 1)*, above n 3, at 3.

¹⁹ *Ceramalus (No 1)*, above n 3, at 2.

²⁰ *Ceramalus (No 2)*, above n 3, at 4.

²¹ *R v Coldin*, above n 14.

²² At [1]-[27].

²³ Section 174 of the Canadian Criminal Code provides that everyone who, without lawful excuse, is nude in a public place, or is nude and exposed to public view while on private property, is guilty of an offence. To be nude, a person must be so clad as to offend against public decency or order.

Nudity is often used as a tool in protest. A recent and notoriously controversial New Zealand example of public nudity is the street parade “Boobs on Bikes” facilitated by Mr Steve Crow, a New Zealander infamous for his pornography empire. At the time of writing, the 10th anniversary of this event looms.²⁴ In the past, this event has attracted between 80,000 to 100,000 people, who have lined the main street of Auckland to watch topless women parade down the street on motorbikes.²⁵ Crow has argued that this parade engages the right to freedom of expression as, by holding the parade, he wishes to make a point about sexual expression and tolerance.²⁶ There is also arguably an element of commercial expression in this display of public nudity, as Crow’s “Erotica Expo” takes place soon after the event and the parade could be understood as promoting it.

Another less controversial example of public nudity being used as a tool in protest is the World Naked Bike Ride. This international event is described as a “clothing optional” bike ride and has been carried out in over 20 countries, including New Zealand.²⁷ The event is designed to expose the unique dangers that cyclists and pedestrians face due to automobiles, as well as the negative consequences everyone faces due to the world-wide dependence on non-renewable sources of energy.²⁸ Other recent protests involving nudity include the People for the Ethical Treatment of Animals (PETA) protests in the name of animal welfare,²⁹ and the numerous topless protests by Ukrainian feminist group FEMEN.³⁰

Individuals have also utilised nudity in protest. For example, in 2012, American John Brennan made headlines for successfully appealing his charge of indecent exposure for stripping naked at an airport to protest invasive security measures.³¹ There are only two New

²⁴ David Williams “Len Brown’s view of Boobs on Bikes” *The National Business Review* (New Zealand, 28 September 2012).

²⁵ *Auckland City Council v Erotica Expo Ltd* DC Auckland CRI-2008-004-001938, 19 August 2008, at [43].

²⁶ At [33].

²⁷ World Naked Bike Ride “Frequently Asked Questions” (19 June 2012) <www.worldnakedbikeride.org>.

²⁸ World Naked Bike Ride “Frequently Asked Questions” (19 June 2012) <www.worldnakedbikeride.org>.

²⁹ PETA “The Peta Files” (2013) People for the Ethical Treatment of Animals (PETA): The Animal Rights Organisation <www.peta.org>.

³⁰ FEMEN “FEMEN – About” (20 August 2013) <www.femen.org>.

³¹ Nigel Duara “Judge: man who stripped nude at airport not guilty” (July 18 2012) Fox News <www.foxnews.com>.

Zealand cases that involve individuals protesting using public nudity. In *White v Police*,³² Mr White was convicted of three charges of behaving in an offensive manner under s 4(1)(a) of the Summary Offences Act. He was seen cycling on two occasions wearing only a bicycle helmet and a vest made of sackcloth.³³ He was wearing nothing on his bottom-half, so that his genitals and buttocks were visible to the public.³⁴ On another occasion he was seen wearing only a small bag in the nature of a sporran around his waist.³⁵ Although Mr White's right to freedom of expression was never pursued in the District Court, or in the High Court on appeal, Mr White explained that he dressed in this way "in order to express solidarity with unborn children and concern about the sex industry".³⁶

The other New Zealand case involving an individual using public nudity as a tool in protest is *Police v Willis*.³⁷ Ms Willis was charged with offensive behaviour under s 4(1)(a) for being topless in Queen Street, alone, sometime after a protest march that she had participated in earlier had ended.³⁸ Ms Willis' partial nudity was integral to her earlier protest against the Destiny Church. She had written "keep your religion out of my uterus" on her body.³⁹ She was not charged during the protest, but charged afterwards, when she was the sole participant carrying on the demonstration in a different part of Auckland, in a market-style area where there were a lot of people, including families.⁴⁰ The Court believed that Ms Willis' behaviour could be considered offensive, but dismissed the case as the Police had charged the defendant with offensive behaviour in Hobson Street, not Queen Street, and had not applied to amend the information.⁴¹

III *The Regulation of Public Nudity in New Zealand*

³² *White v Police* HC Christchurch CRI-2006-409-000119, 3 October 2006.

³³ At [5].

³⁴ At [5].

³⁵ At [10].

³⁶ At [10].

³⁷ *Police v Willis* DC Auckland (File number not given), 3 June 2005.

³⁸ *Police v Willis*, above n 37.

³⁹ *Police v Willis*, above n 37.

⁴⁰ *Police v Willis*, above n 37.

⁴¹ *Police v Willis*, above n 37.

The primary mechanism for regulating public nudity in New Zealand is s 4(1)(a) of the Summary Offences Act, and it is this provision that this paper is concerned with, rather than the legislative provisions targeted at specific types of nudity, such as streaking.⁴² Section 4(1)(a) makes behaving in an offensive or disorderly manner in or within view of any public place an offence. In New Zealand, the majority of public nudity cases reaching the High Court have involved naturists appealing their convictions for offensive behaviour under s 4(1)(a).⁴³

The meaning of “offensive” in s 4(1)(a) has recently been the subject of judicial scrutiny, with the Supreme Court reformulating the definition of offensive behaviour in *Morse v Police*.⁴⁴ Following *Morse*, offensive behaviour is behaviour that is productive of disorder, and behaviour that is productive of disorder includes behaviour that inhibits the use and enjoyment of a public space to such an extent that it is beyond what can be expected to be tolerated by other reasonable people in a democratic society.⁴⁵ This definition was applied to the public nudity exhibited by Mr Pointon in the recent decision *Pointon (No 1)*.⁴⁶

For completeness, s 27 of the Summary Offences Act should be discussed, as it is clearly targeted at proscribing public nudity. This section creates the offence of intentionally and obscenely exposing any part of one’s genitals in or within view of a public place. In *Philpott v Police*, a case concerning whether the exposure of female genitalia during a strip-tease performance in a nightclub amounted to indecent exposure, Heron J held that to be obscene, the exposure of a person’s genitals must offend contemporary standards of propriety, to the extent that a reasonable observer would regard it with “loathing, disgust and revulsion.”⁴⁷ This is largely a matter of individual impression, depending on contemporary standards and

⁴² For example, s 27 of the Major Events Management Act 2007 is a limited and targeted provision aimed at disincentivising streaking at major sporting events (see (23 August 2007) 641 NZPD 11445). This section creates the offence of invading the pitch at a major sporting event. It was enacted as an alternative to s 4(1)(a) of the Summary Offences Act, and carries a heavier penalty than that section (a maximum penalty of \$5000 or 3 years imprisonment, compared to \$1000 for breaching s 4(1)(a)).

⁴³ *Ceramalus (No 1)*, above n 3; *Ceramalus (No 2)*, above n 3; *Pointon (No 1)*, above n 1; *Lowe v New Zealand Police*, above n 3; *Pointon (No 2)*, above n 3.

⁴⁴ *Morse v Police* [2011] NZSC 45, 2 NZLR 1.

⁴⁵ At [62]-[64] per Blanchard J, [70]-[72] per Tipping J, [103] per McGrath J.

⁴⁶ *Pointon (No 1)*, above n 1, at [23]-[32].

⁴⁷ *Philpott v Police* HC Christchurch AP-138-142, 13 July 1993, at [10]-[11].

the time, place and circumstances.⁴⁸

In *Ceramalus v Police*, Mr Ceramalus was initially charged under both s 4(1)(a) and s 27 of the Summary Offences Act, but the police did not pursue the s 27 charge at trial. The trial judge approved of this course of action, believing that the s 4(1)(a) charge was more appropriate. The existing New Zealand case law illustrates that s 27 is used to address overt, sexualised, genital exposure, such as that exhibited in *Philpott*, and in cases such as *Police v Horst*, where the defendant placed his penis through a hole between two toilet cubicles.⁴⁹ The nudity of naturists or protestors outlined in the examples in Part II has not been treated by the Police or the courts as indecent behaviour, therefore s 27 will not be discussed further in this paper.

IV Determining the Scope of the Right to Freedom of Expression

A What is Expression?

Section 14 of the Bill of Rights Act states that:

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.

Defined in inclusive terms, this right has been described as being “as wide as human thought and imagination”,⁵⁰ and broad enough to include both written and spoken words, as well as art and other symbolic forms of expression.⁵¹ This expansive scope of the right is

⁴⁸ At [12].

⁴⁹ *Police v Horst* DC Whangarei CRI-2008-088-005979, February 4 2009.

⁵⁰ *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 at [15] per Tipping J.

⁵¹ See Grant Huscroft “Freedom of Expression” in Paul Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, New York, 2003) 308 at 309. Section 14 of the Bill of Rights Act is even broader than its international human rights law equivalent – Article 19 of the International Covenant on Civil and Political Rights. Article 19 states that the right includes the freedom to seek, receive and impart information and ideas of all kinds “either orally, in writing or in print, in the form of art, or through any other media of his choice”. In comparison, s 14 includes the ability to seek, receive and impart information and opinions of any kind *in any form*. Symbolic forms of expression are often recognised by the New Zealand courts, for example, in *Hopkinson v Police* [2004] 3 NZLR 704, France J accepted that flag-burning fell within the scope of s 14.

uncontroversial,⁵² due to s 5 of the Bill of Rights Act which permits limitations upon the right, so long as those limitations are prescribed by law and are considered to be reasonable and demonstrably justified in a free and democratic society.

The pronouncement from Tipping J in *Moonen*, that the scope of the right is “as wide as human thought and imagination”, is frequently cited by judges in cases where the right to freedom of expression is raised.⁵³ As a consequence, there have been few attempts to elaborate on the meaning of expression.⁵⁴ In most cases where s 14 is argued to apply, the applicability of s 14 is accepted with little, if any, discussion.⁵⁵ This generous interpretation of the scope of the right is not unusual. A generous interpretation of constitutional rights has been seen as necessary to “avoid the austerity of tabulated legalism” and to “give to individuals the full measure of the fundamental rights and freedoms referred to”.⁵⁶ This approach was advanced by the Privy Council and has been accepted by courts in other jurisdictions, including New Zealand and Canada.⁵⁷

B Is Conduct “Expression”?

Notwithstanding the benefits of a generous interpretation of the right to freedom of expression, difficulty arises when conduct, rather than words, is argued to constitute expression. The New Zealand courts have accepted that conduct is capable of being expressive. In *Police v Geiringer* it was held to be “self-evident” that the actions of a protester who lay in front of a Cabinet Minister’s car in order to prevent the Minister from

⁵² Grant Huscroft, above n 51, at 312.

⁵³ See *Schubert v Wanganui District Council* [2011] NZAR 233 at [95]; *R v Morse* [2009] NZCA 623, [2010] 2 NZLR 625 at [87]; *Television New Zealand Ltd v Viewers For Television Excellence Inc* [2005] NZAR 1 at [38]; *Re Society for the Promotion of Community Standards Inc (No 1)* [2002] NZAR 884 at [29]; *Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington)* [2000] 3 NZLR 570 at [36].

⁵⁴ See *Thompson v New Zealand Police* [2013] 1 NZLR 848; *Schubert v Wanganui District Council*, above n 53.

⁵⁵ See, for example, *Pointon (No 1)*, above n 1, at [7] and [37]; *Hopkinson v Police*, above n 51, at [41]; *Zdrahal v Wellington City Council* [1995] 1 NZLR 700 at 710.

⁵⁶ *Ministry of Home Affairs v Fisher* [1980] AC 319 at 328 (PC).

⁵⁷ See *Flickinger v Crown Colony of Hong Kong* [1991] 1 NZLR 439 at 440 (CA); *Ministry of Transport v Noort*; *Police v Curran* [1992] 3 NZLR 260 at 268 per Cooke P and 292 per Gault J; *R v Goodwin* [1993] 2 NZLR 153 at 168 per Cooke P; *Hunter v Southam* [1984] 2 SCR 145 at 156; *R v Big M Drug Mart* [1985] 1 SCR 295 at 344; *Re Prov Electoral Boundaries (Sask)* [1992] 2 SCR 158 at 179.

leaving fell within the scope of the right to freedom of expression.⁵⁸ Similarly, in *Hopkinson v Police* France J concluded that:⁵⁹

There cannot be any doubt that prohibition of the appellant's conduct is *prima facie* a breach of his right to freedom of expression. The scope of the right is broad and it is well established that it includes non-verbal conduct such as flag burning.

France J cited Huscroft, who referred to legislation prohibiting the desecration of the flag being struck down by the United States Supreme Court.⁶⁰ While Huscroft accepted that burning the flag with the intention to dishonor it is clearly expression, he doubted whether conduct such as that exhibited in *Geiringer* should fall within the right, arguing that:⁶¹

It makes little sense to proffer an expansive conception of the right if no real protection is to attach to an activity. Virtually all conduct can be said to have an expressive component. If the mere existence of an expressive component brings conduct within the protection of the right, then the right is rendered meaningless. Difficult judgments must be made, but on any sensible approach the actions of a protester in blocking the path of a Cabinet Minister's car need not be analysed as an exercise of the right to freedom of expression as appears to have been assumed in *Police v Geiringer*.

This tension between interpreting the right broadly and retaining a meaningful conception of the right was recently raised in *Thompson v New Zealand Police*.⁶² In determining whether calling cats loudly was expressive conduct, Priestley J noted that:⁶³

While it is dangerous... to exclude from "expression" certain types of conduct lest the right itself be diluted, equally it is farcical to suggest that every human activity is an exercise of the right to free expression.

⁵⁸ *Police v Geiringer* [1990-92] 1 NZBORR 331 at 337 (DC).

⁵⁹ *Hopkinson v Police*, above n 51, at [41].

⁶⁰ Grant Huscroft "Freedom of Expression", above n 51, at 314, cited in *Hopkinson v Police*, above n 51, at [41].

⁶¹ At 313.

⁶² *Thompson v New Zealand Police*, above n 54.

⁶³ At [75].

To address this concern, Priestley J adopted the definition of expression constructed by the Supreme Court of Canada in *Irwin Toy*.⁶⁴ In *Irwin Toy*, the Court held that an activity can be classified as expression when a person can demonstrate that that activity did in fact have expressive content.⁶⁵ In order to have expressive content, the activity must convey or attempt to convey a meaning,⁶⁶ and so the court must look at the purpose of the conduct in the circumstances. As Richard Moon notes, this definition “suggests that what distinguishes expression from other voluntary acts is the intention to form a relationship of communication with another”.⁶⁷ This test was also endorsed by the High Court in *Schubert v Wanganui District Council*.⁶⁸ Clifford J noted that this approach would accord with New Zealand authority, citing *Geiringer*, *Hopkinson* and the Court of Appeal in *R v Morse*,⁶⁹ and that it was in line with both American and Canadian case law.⁷⁰ This test was referred to in *Pointon (No 1)* to describe the scope of the right to freedom of expression. Although the test was not explicitly applied,⁷¹ it can be inferred from Heath J’s acknowledgment that Mr Pointon runs naked “to draw attention to his lifestyle choice” that the judge believed that Mr Pointon’s nudity was sufficiently communicative. The *Irwin Toy* test has also been endorsed as “a sensible and relatively straightforward test” by Andrew and Petra Butler, the learned authors of *The New Zealand Bill of Rights Act: A Commentary*.⁷²

C Applying the Approach in *Irwin Toy* to Public Nudity Examples

1 Naturism Examples

In *Lowe*, the appellant was charged with offensive behaviour for cycling naked along a rural road. Although Clifford J did not expressly apply the *Irwin Toy* test in his brief discussion of

⁶⁴ *Irwin Toy Ltd v Attorney General (Quebec)*, above n 4.

⁶⁵ At 169-970.

⁶⁶ At 169-970.

⁶⁷ Richard Moon “The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication” (1995) 45 UTLJ 419 at 427.

⁶⁸ *Schubert v Wanganui District Council*, above n 53.

⁶⁹ *R v Morse*, above n 53.

⁷⁰ At [98].

⁷¹ *Pointon (No 1)*, above n 1, at [36].

⁷² Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005) at [13.7.7].

whether the right to freedom of expression was engaged, he did consider the purpose of Mr Lowe's conduct in the circumstances, in order to see whether he was attempting to convey a meaning. The Judge considered that if there was an element of expression in Mr Lowe's behaviour, it was not high in Mr Lowe's mind.⁷³ In support of this conclusion, Mr Lowe admitted that it was merely coincidental that he was cycling on World Nude Bike Day.⁷⁴ Ultimately, Clifford J did not decide whether Mr Lowe's nudity was expression in the circumstances, as he had already decided that it did not meet the threshold of offensive behaviour required by s 4(1)(a) of the Summary Offences Act.⁷⁵ If this had been decided, and the test in *Irwin Toy* applied, it is unlikely that Mr Lowe's conduct would have been considered expressive. This is because he does not appear to have been nude in an attempt to communicate any ideas.

In *Pointon (No 1)*, Heath J used the definition of expression in *Irwin Toy* to "explain the nature and potential scope of the right".⁷⁶ Following this, Heath J accepted, without any explanation, that when Mr Pointon runs naked, he exercises his right to freedom of expression, and that he engages in that activity in order to draw attention to his lifestyle choice.⁷⁷ However, Heath J also acknowledged that Mr Pointon had chosen to run in an isolated area of a public park where it was unlikely, although not impossible, that he would be seen by a member of the public,⁷⁸ and at a time of day where he might reasonably have expected no school-aged children to be using that area of the park.⁷⁹ If Heath J had expressly applied the definition of expression in *Irwin Toy* to the circumstances it would have been difficult for him to conclude that Mr Pointon was attempting to convey a message about his lifestyle choice to members of the public, when it was clear that he was deliberately trying to avoid them.

A similar conclusion can be drawn when considering the facts in *Pointon (No 2)*. Mr Pointon was on his own private property, gardening and mowing his lawns while naked. He was

⁷³ *Lowe v New Zealand Police*, above n 3, at [31].

⁷⁴ At [31].

⁷⁵ At [31].

⁷⁶ *Pointon (No 1)*, above n 1, at [37].

⁷⁷ At [37].

⁷⁸ At [45].

⁷⁹ At [45].

arrested for offensive behaviour after being observed by his neighbours. Mr Pointon did not argue that he was exercising his right to freedom of expression in these circumstances, nor are there any additional facts in the judgment to suggest that he was attempting to convey a message to his neighbours. If the *Irwin Toy* test is applied to these circumstances, it is unlikely that his conduct would be considered to be expression.

Mr Ceramalus' conduct of sunbathing naked and walking down a residential street naked also appears to fail the *Irwin Toy* test for whether conduct is expression. In both circumstances, Mr Ceramalus did not argue that he was attempting to communicate anything by his nudity. Instead, his nudity was merely a consequence of his lifestyle choice. Thus, if the *Irwin Toy* test is applied, Mr Ceramalus' nudity is not expression.

In the Canadian decision *R v Coldin*, Douglas J accepted that “the evidence is very clear” that for naturists the conduct of public nudity is imbued with meaning and is therefore expressive.⁸⁰ However, he believed that the conduct of Mr Coldin (walking naked along the side of a public highway and in a public park, and driving his vehicle through and attempting to order at a fast food restaurant's drive-through twice while naked) was not protected expression because the public nudity engaged in by Mr Coldin was not linked to the philosophy or practice of nudism.⁸¹ Mr Coldin was acting alone in his conduct, emphasising that he was “disconnected from the tenets of naturalism”.⁸² Furthermore, “contrary to some of these core tenets”, Mr Coldin was confrontational in his approach in an attempt to convert the clothed population around him.⁸³ Douglas J concluded that given the “proselytizing nature” of Mr Coldin's conduct, it was not so imbued with meaning as to be protected expression, “especially given the affront it causes to others”.⁸⁴

Considering that *Irwin Toy* was a decision of the Supreme Court of Canada, this test should have been applied. If it had been, the ‘proselytizing nature’ of the conduct in question would surely have led the Court to conclude that the conduct was expression for the purposes of s 2(b) of the Canadian Charter of Rights and Freedoms 1982. Mr Coldin was arguably

⁸⁰ *R v Coldin*, above n 14, at [161].

⁸¹ At [163].

⁸² At [168].

⁸³ At [168].

⁸⁴ At [169].

attempting to convey a meaning to those who observed his public nudity. His message was one about his alternative and, in his view, more desirable lifestyle choice and he was attempting to convert others to join his cause. Compared to the above examples of public nudity by naturists, Mr Coldin is arguably the only naturist who attempted to convey a meaning by being naked.

2 *Nudity and Protest*

A protest is not effective if the meaning of that protest is not conveyed. Most acts of protest involve the use of words and other props utilising language, such as placards or media campaigns, to facilitate the communication of this meaning to the observer. When applying the *Irwin Toy* test to general examples of nudity used in protest, such as the “Boobs on Bikes” parade or the World Naked Bike ride event, the question is whether public nudity as a tool in protest is used to convey a meaning, or to draw attention to the protest. Just as a protest is not effective if the meaning of the protest is not conveyed, a protest is also not effective if it goes unnoticed. If the *Irwin Toy* definition of expression is applied to the group examples of protest utilising nudity in Part II, it can be argued that the nudity can be separated from the language that accompanies it, and is only used to draw attention to the protest, not to convey a meaning. Alternatively, it can be argued that the nudity is so integral to the meaning conveyed, or that the meaning would not be conveyed without the nudity (as the protest would go unnoticed), that the nudity is expression according to *Irwin Toy*.

The application of the *Irwin Toy* test to the individual examples of public nudity in *White* and *Willis* is more straightforward. In *White*, the defendant was charged under s 4(1)(a) for cycling with his genitals and buttocks visible to the public. In *Willis*, the defendant was charged with offensive behaviour for being topless in Queen Street, sometime after a protest march that she had participated in earlier had ended. In both cases, the defendants did not argue that they were exercising their right to freedom of expression in the circumstances, however the facts of these cases could engage s 14 if the test from *Irwin Toy* is applied. Mr White explained that he was nude in public “in order to express solidarity with unborn children and concern about the sex industry”.⁸⁵ Adopting the *Irwin Toy* test, Mr White’s public nudity was expressive because he was attempting to convey this message to members

⁸⁵ *White v Police*, above n 32, at [10].

of the public. Similarly, Ms Willis was topless in public to protest against the Destiny Church, and so, was attempting to convey her objections to the Church to the public.

D An Appropriate Approach to Interpreting the Right to Freedom of Expression?

In *Irwin Toy*, the Supreme Court of Canada stated that by defining expression as an activity that attempts to convey, or conveys, a meaning, little activity would *not* be considered expression as “most human activity combines expressive and physical elements”.⁸⁶ The only activity not protected would be that which is “purely physical and does not convey or attempt to convey a meaning”.⁸⁷

The previous section illustrates that the examples of public nudity used in protest will often fall within the definition of expression devised in *Irwin Toy*, but that the opposite can be said of the examples of nudity by naturists. Despite some of the strong communicative ideas associated with naturism, using the facts that were presented in court in the cases examined, Mr Lowe, Mr Pointon and Mr Ceramalus were not nude in an attempt to convey a meaning, and so, their nudity is not considered expression according to *Irwin Toy*.

However, as mentioned in Part II, the conduct of these naturists is arguably self-expressive, because it is imbued with meaning as to their individual identities. By running, walking, sunbathing, cycling and gardening naked, these naturists are living in accordance with their chosen lifestyle choice, and their nudity speaks to their identities as naturists. It is thus problematic that the definition of expression in *Irwin Toy* excludes this self-expressive conduct.

The question is whether there is an alternative approach to determining the scope of the right to freedom of expression, and whether that approach should be adopted. As Professor Robin Elliot argues, the framework for resolving freedom of expression cases developed in *Irwin Toy* has been criticised for a range of reasons.⁸⁸ Some of these reasons relate to the meaning given to “expression”, the only element of the *Irwin Toy* framework to be adopted in New

⁸⁶ *Irwin Toy Ltd v Attorney General (Quebec)*, above n 4, at 969.

⁸⁷ At 969.

⁸⁸ Robin Elliot “Back to Basics: A Critical Look at the *Irwin Toy* Framework for Freedom of Expression” (2011) 15(2) Review of Constitutional Studies 205 at 206.

Zealand. For example, Elliot argues that the meaning the Court has given to expression “lacks a solid justificatory basis”, especially as the Court excluded violent expression from the scope of the right without justifying this exclusion.⁸⁹ Writing in the Canadian context, Elliot also argues that by adopting this definition, the Court has ignored general interpretative principles the Court has previously adopted in relation to the Canadian Charter.⁹⁰

Elliot believes that instead of adopting the approach in *Irwin Toy*, the Court should take a purposive approach to interpreting the right to freedom of expression.⁹¹ This would require the Court to satisfy itself that the activity furthers one of the rationales for protecting freedom of expression in order for that activity to fall within the scope of the right.⁹² This approach has been contemplated by other free speech theorists, who also criticise the Court in *Irwin Toy* for failing to define the right to freedom of expression without explicit reference to the values that underlie it.⁹³

This paper agrees with the approach advocated for by Elliot, and argues that there is a better way of determining the scope of the right rather than limiting it based on the conduct’s communicative nature. As will be explained in the following sections, this approach is consistent with the approach currently taken to interpreting other rights within the New Zealand Bill of Rights Act.

The next section outlines how the right can be interpreted purposively, and Part V follows with a discussion of the rationales underlying the right to freedom of expression that are a crucial component of this approach. Whether the scope of the right to freedom of expression, when determined purposively, will include the examples of public nudity described in Part II will be explored in Part VI of this paper.

E A Purposive Approach to Interpreting Section 14 of the Bill of Rights Act

⁸⁹ At 207.

⁹⁰ At 207.

⁹¹ At 228.

⁹² At 228.

⁹³ Richard Moon “Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights” (2002) 40 Osgoode Hall LJ 337 at 341; Chanakya Sethi “Beyond *Irwin Toy*: A New Approach to Freedom of Expression under the *Charter*” (2012) 17 Appeal 21 at 29.

Section 5(1) of the Interpretation Act 1999 requires a court to take a purposive approach towards interpreting legislative provisions. It mandates that the meaning of an enactment be ascertained from its text and in the light of its purpose. This approach has been endorsed by the courts in respect of the interpretation of the rights contained within the Bill of Rights Act. For example, in *Ministry of Transport v Noort*, Cooke P stated that is the duty of the courts to “give [the Bill of Rights Act] such fair, large, and liberal construction and interpretation as will best ensure the attainment of its object according to its true intent, meaning, and spirit”.⁹⁴ In that case, Richardson J also validated the purposive approach, explaining that:⁹⁵

A purposive approach to the interpretation of the Bill of Rights Act requires the identification of the particular right. The Act’s guarantees are cast on broad and imprecise terms and the identification of the object of the particular right allows for the inclusion within its scope of conduct that truly comes within that purpose and the exclusion of activity that falls outside.

This statement by Richardson J was repeated in *R v Te Kira*,⁹⁶ and has been affirmed in following cases with respect to the interpretation of other rights in the Bill of Rights Act.⁹⁷

As Geiringer and Price discuss, taking a purposive approach to the rights within the Bill of Rights Act means that the scope of the protection afforded by a particular right is established by reference to the purposes or values that underlie it.⁹⁸ Although there is a large volume of literature concerning the rationales that form the theoretical basis for the right to freedom of expression, there is judicial consensus as to the core values that underlie the right.⁹⁹ Freedom of expression has been seen as essential:

⁹⁴ *Ministry of Transport v Noort*, above n 57, at 271.

⁹⁵ At 279.

⁹⁶ *R v Te Kira* [1993] 3 NZLR 251 (CA) at 271 per Richardson J.

⁹⁷ For example, see *Hamed v R* [2011] NZSC 101, [2012] 2 NZLR 305 at [10] in respect to s 21 of the New Zealand Bill of Rights Act 1990.

⁹⁸ Claudia Geiringer and Steven Price “Moving from Self-Justification to Demonstrable Justification – the Bill of Rights and the Broadcasting Standards Authority” in Jeremy Finn and Stephen Todd (eds) *Law, Liberty and Legislation* (LexisNexis, Wellington, 2008) at 320.

⁹⁹ See, for example, *Brooker v Police* [2007] NZSC 30, 3 NZLR 91 at [114] per McGrath J, at [244] per Thomas J; *Hosking v Runting* [2005] 1 NZLR 1 at [178] per Tipping J; *Lange v Atkinson* [1998] 3 NZLR 424 (CA) at 460-461; *Jennings v Buchanan* [2005] 2 NZLR 577 (PC) at [6] per Lord Bingham of Cornhill.

- to facilitate the advancement of knowledge and the discovery of truth (the “marketplace of ideas” theory);
- to achieve and maintain democratic self-government (the “democracy” theory); and
- for individual self-fulfillment (the “liberty” theory).

Part V below will outline the rationales as they have been understood at their most basic level. Following this, these rationales will be used to determine whether the examples of public nudity involving naturists and protestors fall within the scope of the right to freedom of expression.

V Rationales Underlying the Right to Freedom of Expression

A The Advancement of Knowledge and Discovery of Truth (“The Marketplace of Ideas Theory”)

The most pervasive and influential rationale for the protection of freedom of expression is drawn from the philosophical views of John Milton and John Stuart Mill.¹⁰⁰ This rationale gained widespread support within United States First Amendment discourse, the most famous pronouncement being that of Supreme Court Justice Oliver Wendell Holmes in his dissent in *Abrams v United States*.¹⁰¹ Holmes J argued that “the best test of truth is the power of the thought to get itself accepted in the competition of the market”.¹⁰²

Often described as “the marketplace of ideas” theory, this rationale holds that the advancement of knowledge and discovery of truth can only be achieved by a free trade in ideas. It is this “marketplace of ideas” that freedom of expression is designed to protect. This theory argues that any external restrictions placed on expression will distort the market, so that it will be unable to operate to reveal the truth in the form of both accurate facts and valuable opinion.¹⁰³ Mill argued that this applied to both objectively “true” and “false” beliefs. In respect of the former, Mill argued that government acts naturally on what it

¹⁰⁰ Andrew Butler and Petra Butler, above n 72, at [13.6.4].

¹⁰¹ *Abrams v United States* (1919) 250 US 616.

¹⁰² At 630 per Holmes J.

¹⁰³ Andrew Butler and Petra Butler, above n 72, at [13.6.3].

believes is right when legislating, but it can only be confident that its policies are suitable if the opponents of those policies are free to challenge them.¹⁰⁴ In respect of the latter, Mill argued that if restrictions are placed on objectively “false” speech, proponents of “true” beliefs will not be compelled to defend their views, such defence being necessary to validate the truth.¹⁰⁵

There are a number of formulations of this theory, each that differ in detail from the generalised explanation given in the preceding paragraph. For example, where both Milton and Mill believed that the truth was absolute and would emerge in the long run through the clash of adverse opinions,¹⁰⁶ Holmes J thought that all truths were relative and subject to replacement by new truths.¹⁰⁷ As Schauer recognises, no formulation is authoritative but core principles can be found in all expressions of the theory.¹⁰⁸ Common among these formulations is a “shared belief that freedom of speech is not an end, but a means... of identifying and accepting truth”, a “common faith in the power of truth to prevail in the adversary process” and a “deep skepticism with respect to accepted beliefs and widely acknowledged truth, logically coupled with a keen recognition of the possibility that the opinion we reject as false may in fact be true”.¹⁰⁹

B The Achievement and Maintenance of Democratic Self-Government (“The Democracy Theory”)

Linked to the “marketplace of ideas” theory is another frequently cited justification for the protection of expression. Freedom of expression has been considered the “engine room of a democratic state”,¹¹⁰ essential for the achievement and maintenance of democratic self-government. Of all three rationales, this rationale seems to have gained the most support

¹⁰⁴ John Stuart Mill “Of the Liberty of Thought and Discussion” in John Stuart Mill *On Liberty and Other Essays* (Oxford University Press, Oxford, 1991) at 22-24. See also, Eric Barendt *Freedom of Speech* (Oxford University Press, New York, 1985) at 9.

¹⁰⁵ John Stuart Mill, above n 104, at 40.

¹⁰⁶ At 8.

¹⁰⁷ At 8.

¹⁰⁸ Frederick Schauer, *Free Speech: a philosophical enquiry* (Cambridge University Press, New York, 1982) at 16.

¹⁰⁹ At 16.

¹¹⁰ Andrew Butler and Petra Butler, above n 72, at [13.6.7].

among leading free speech theorists, being hailed as the most easily understood, fashionable, and powerful free speech theory in modern Western democracies.¹¹¹

The leading proponent of this theory, American philosopher Alexander Meiklejohn, suggested that only when ideas are freely expressed are citizens exposed to the information that they need to make the informed judgements required by democratic self-government.¹¹² It follows that restrictions on speech prevent vital information from being transmitted to the public and disable people from formulating their own beliefs and opinions in response to that information and the beliefs and opinions of others. As a result, citizens are unable to participate effectively in a democracy and policy is prevented from being developed in accordance with the public will. In fact, the Australian courts have held that despite the lack of specific constitutional protection, this right is so necessary for the achievement and maintenance of democratic self-government that it should be protected.¹¹³

This rationale restricts the protection of expression to political expression, so it is important to consider what political expression includes. The ambit of political expression as considered by Meiklejohn is fairly wide. Meiklejohn believed that political expression is expression “from which the voter derives the knowledge, intelligence, sensitivity to human values; the capacity for sane and objective judgment which, so far as possible, a ballot should express”, and so includes expression in the form of literature, art, science and philosophy and education.¹¹⁴ However, Meiklejohn excluded expression such as corporate advertising from his category of protected political expression.¹¹⁵ In contrast, Thomas Emerson, a leading American theorist on the right to free speech in the First Amendment of the United States Constitution, believed that this theory did not limit the right to free expression of political

¹¹¹ Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, New York, 2005) at 28; Peter W Hogg *Constitutional Law of Canada* (5th ed, Thompson Carswell, Ontario, 2007) vol 2 at [43.4].

¹¹² Alexander Meiklejohn “The First Amendment is Absolute” (2005) *Supreme Court Review* at 245-247 in Joseph J Hemmer Jr (ed) *The First Amendment Theoretical Perspectives* (Hampton Press Inc, Cresskill, 2006) at 30-36.

¹¹³ In *Australian Capital Television Pty v Commonwealth* (1992) 177 CLR 106 (HCA) and *Nationwide News Pty v Wills* (1992) 177 CLR 1 (HCA) the High Court held that the right to freedom of expression could be inferred from the description of Australia as a democracy in the Australian Constitution. See also Andrew Butler and Petra Butler, above n 72, at [13.6.12].

¹¹⁴ Alexander Meiklejohn, above n 112, at 245-247.

¹¹⁵ Alexander Meiklejohn, above n 112, at 245-247.

discourse. Emerson argued that people also have the right to participate in building the culture of the society that they are a part of.¹¹⁶ By doing so, he extended the protection offered by this rationale to religious expression, literature, art, science and “all other areas of human learning and knowledge”.¹¹⁷ At the other extreme, the approach articulated by Robert Bork narrows this rationale to “explicitly and predominately political speech”, such as “speech concerned with governmental behaviour, policy or personnel”.¹¹⁸

Some conduct, such as flag-burning, is obviously political, and thus fits squarely within the core of this theory. However, it may not be as clear that other conduct, such as public nudity, is implicated by this rationale. Thus, the alternative conceptions of this rationale may prove to be important in the application of the rationale to nudity examples, when determining whether the nudity in the circumstances falls within the scope of the right to freedom of expression. In these instances, the extent to which this rationale is implicated may depend upon how widely one conceptualises “political expression”, and whether one believes that this rationale extends beyond the political realm.

C Individual Self-fulfillment (“The Liberty Theory”)

The third and final rationale for the protection of expression is individual self-fulfillment, which favours the protection of free expression because it is essential for a person’s emotional, intellectual and spiritual development, and allows a person to reach his or her full potential.¹¹⁹ This theory argues that when restrictions are placed on a person’s expression, the growth of his or her personality is inhibited,¹²⁰ and therefore all forms of expression must be protected, regardless of the popularity or mainstream acceptance of the particular expression, whether it is aesthetically or morally in good taste, and whether it contributes to the functioning of democratic government.¹²¹ This rationale recognises that there is diversity in

¹¹⁶ Thomas I Emerson *The System of Freedom of Expression* (Vintage Books, New York, 1970) at 3-4 in Joseph J Hemmer Jr (ed) *The First Amendment Theoretical Perspectives* (Hampton Press Inc, Cresskill, 2006).

¹¹⁷ At 3-4.

¹¹⁸ Robert H Bork “Neutral Principles and Some First Amendment Problems” (1971) 47 Ind LJ 1 at 27-28.

¹¹⁹ Eric Barendt, above n 104 at 14.

¹²⁰ At 14.

¹²¹ Andrew Butler and Petra Butler, above n 72, at [13.6.13].

forms of individual self-fulfillment, and stresses the importance of tolerance, both for those who wish to convey a meaning, and for those to whom meaning is conveyed.¹²²

This theory is undeniably broad and, as Barendt argues, “unless some reasons can be given for treating expression as particularly significant, the case for a free speech principle made on this basis becomes hard to distinguish from general libertarian claims to do anything which an individual may consider integral to his personality”.¹²³ Barendt favours Thomas Scanlon’s formulation of the theory, which is focused on the recipients of the speech. Scanlon’s version begins with the premise that “the powers of the state are limited to those that citizens could still recognise while still regarding themselves as equal, autonomous, rational agents”.¹²⁴ Under his theory, a person is only autonomous if he is personally able to weigh the arguments for and against a course of action that are put before him by others.¹²⁵ Barendt believes that this theory is important because it emphasises a reason for why speech should not be suppressed, because it inhibits free people from accessing the ideas and information they require to make their own decisions.¹²⁶

Despite the criticism relating to the broad scope of this theory, the theory continues to be recognised by the judiciary when interpreting the right to freedom of expression. For example, the majority of the Supreme Court of Canada in *R v Sharpe* held that the possession of child pornography fell within the scope of s 2(b) of the Canadian Charter of Rights and Freedoms because of its role as an instrument of self-fulfillment, going so far to say that certain kinds of purely private child pornography deeply implicate s 2(b) freedoms, “engaging the values of self-fulfillment and self-actualisation and engaging the inherent dignity of the individual”.¹²⁷ Unsurprisingly, the limit placed on the right by the Criminal Code, making it an offence to possess child pornography, was held to be justified under s 1 of the Charter. This theory has also been referenced in New Zealand case law concerning the right to freedom of expression. However, picking up on the criticism outlined above, some

¹²² *Irwin Toy Ltd v Attorney General (Quebec)*, above n 4, at 975.

¹²³ Eric Barendt, above n 104, at 13.

¹²⁴ At 16.

¹²⁵ At 16.

¹²⁶ At 18.

¹²⁷ *R v Sharpe* [2001] 1 SCR 45 at [107] per McLachlin CJ

members of the judiciary have suggested that there is a limit to the utility of this rationale. In *Hosking v Runting* Tipping J argued that:¹²⁸

The liberty theory is the broadest and potentially the most problematic of the three. The theory is essentially that it is for the ultimate good of society for citizens to be able to say and publish to others what they want. Liberty is fine in the abstract, but in concrete terms all those living in an organised society must accept some curtailment of their abstract liberty to enjoy freedom of expression when the curtailment is necessary for the greater good of society as a whole and its individual members. Therein lies the conundrum. The liberty theory rests on the ultimate public good; but the full flowering of the theory undoubtedly has the capacity to harm the public good. When the expression in issue provides little public benefit, except in theory, but significant individual or public harm in concrete terms, the theory must give way. Thus, in the particular instance society's pragmatic needs or the welfare of its individual members can outweigh the general benefits supported by the theory of liberty.

Tipping J's views about the limit to the usefulness of the self-fulfillment rationale were supported by Thomas J in *Brooker v Police*.¹²⁹ With this in mind it appears that the rationale is still a legitimate underlying rationale for the right to freedom of expression, but it may not be the most persuasive.

VI When is Public Nudity 'Expression'?

A Overview

Taking a purposive approach to interpreting the scope of the right to freedom of expression means that the scope is established by reference to the purposes or values that underlie it. The three main rationales for the right to freedom of expression were outlined in the preceding Part: the "marketplace of ideas" theory, the "democracy" theory, and the "liberty" theory.

This section applies the purposive approach to interpreting the right to freedom of expression to the examples of public nudity involving naturists and protestors described in Part II of this paper in order to test this framework for interpreting the scope of the right. It will then

¹²⁸ *Hosking v Runting*, above n 99, at [234] per Tipping J.

¹²⁹ *Brooker v Police*, above n 99, at [250].

conclude by drawing comparisons between the application of this approach and the approach adopted in *Irwin Toy*. It is important to note that this exercise does not value the expression in each example. This is a task that is required by the proportionality inquiry mandated by s 5 of the Bill of Rights Act, undertaken to determine whether any limitations on a right are reasonable and demonstrably justified in a free and democratic society.

B Naturism Examples

As explained above, the nudity exhibited in *Lowe*, and the cases involving Mr Pointon and Mr Ceramalus, are similar in that it is doubtful, on the limited facts given, that the naturists were communicating a message by their nudity. Instead, there is a stronger argument that their nudity was self-expressive in the circumstances, in that it was imbued with meaning as to their identities as naturists.

The application of this self-expressive nudity to the rationales underlying the right to freedom of expression sees this nudity contribute only weakly to the “marketplace of ideas” and “democracy” theories. It can be argued that the expression of one’s identity is an idea that can be contributed to the marketplace, but the extent to which this idea advances knowledge or leads to the discovery of truth is marginal. This is because the passive expression of one’s identity may fail to give an observer any detailed information about the person and their lifestyle choice, or even that they subscribe to a lifestyle that advocates nudity. This is also the reason why the nudity in these circumstances contributes weakly to the “democracy” theory. This is because this rationale is only implicated if the formulation of this theory is extended beyond the political realm, so that the nudity can be seen as contributing to the building of the culture of a community. If the rationale is formulated narrowly, in that includes speech concerned with governmental behaviour, policy or personnel, the nudity in these circumstances does not implicate the theory, as it does not concern any of these things.

However, the third and final rationale underlying the right to freedom of expression, the “liberty” theory, is strongly implicated in these circumstances. Identity is integral to personality, the growth of which the protection of expression is seen to facilitate. It is arguable that the self-expression of one’s identity implicates the values of self-fulfillment and self-actualisation, and engages the inherent dignity of the individual to a greater extent, for

example, than the possession of child pornography does as considered by the Court in *R v Sharpe*.

With Tipping J's warning in mind about the limits to the application of this rationale, the strong links between the liberty theory and self-expression of personal identity lead one to the conclusion that unless there are sufficient competing interests to outweigh the protection of this expression, tolerance should be observed by members of the community who are exposed to the nudity of these naturists. However, this is a decision to be made during a s 5 inquiry, when determining whether limitations on the right to freedom of expression are reasonable and demonstrably justified in a free and democratic society. For the purposes of this part, the application of a purposive approach to determining the scope of the right to freedom of expression means that the public nudity of Mr Lowe, Mr Pointon and Mr Ceramalus finds protection under s 14, as it strongly implicates the self-fulfillment rationale and thus falls within the right's scope.

In comparison, Mr Coldin's nudity illustrates how public nudity by naturists can strongly implicate all three rationales, not just the liberty theory. In *Coldin*, Douglas J drew attention to the fact that Mr Coldin was attempting to convert others to join his cause. Therefore, Mr Coldin's behaviour implicates the first of the three rationales, as he was communicating ideas (that there exists an alternative and more desirable lifestyle that people should adopt) to the "marketplace". According to this rationale, the expression of these ideas needs to be protected so that the truth can be discovered, regardless of whether other people (such as members of the public walking through the park) find the ideas objectionable. Following Mill's argument outlined in Part V, if the objective truth is that wearing clothing is the appropriate way to behave in public, by expressing the alternative view of the naturist lifestyle and persuading others to join it, debate is encouraged and that truth, already revealed, is defended. If it is not the truth, then according to this theory the truth will be revealed by the sharing of all ideas about alternative lifestyle choices.

As was the case with the application of the "democracy" theory to the nudity of the other naturists above, the alternative conceptions of this second rationale prove important in the application of the rationale to Mr Coldin's expression. This is because the extent to which this rationale is implicated in the circumstances depends upon how wide one conceptualises "political expression", and whether one believes that this rationale extends beyond the

political realm. Under Bork's narrow conception of this theory, the message conveyed by Mr Coldin's public nudity, if interpreted as a statement about the legal regulation of nudity, would be concerned with government policy and thus, would implicate this rationale. However, if it is merely seen as a statement about the desirability of an alternative lifestyle choice, Mr Coldin's expression would not implicate this narrowly formulated rationale. In contrast, this expression could fit within Emerson's wider conception of the theory, as it arguably contributes to the building of the culture of his society via the communication of his cultural expectations.

Finally, Mr Coldin's expression fits solidly within the third and final rationale underlying the right to freedom of expression, as being able to express one's views is considered a fundamental aspect of self-fulfillment. When Mr Coldin attempts to communicate the desirability of his lifestyle choice to others, it allows him to develop emotionally, spiritually and intellectually. It is important that his expression is protected so that he is able to do so. Furthermore, where his naturist lifestyle is so interconnected with his identity and personality, there is a stronger argument for the protection of expression according to this rationale, as any suppression of this type of expression will inhibit the development of the Mr Coldin's personality. Furthermore, in accordance with Scanlon's theory, one could argue that this expression needs to be protected so that members of the public are personally able to weigh the arguments for and against the adoption of this lifestyle choice.

C Protest Examples

Where nudity is used as a tool in protest, the rationales underlying the right to freedom of expression are implicated. Whether it is nudity exhibited by a group protesting in the name of animal welfare or sexual tolerance, or nudity used by an individual to protest invasive security measures or the actions of the Destiny Church, all three rationales are implicated. First and foremost, ideas are being communicated: ideas related to the nature of the particular protest, with nudity used to aid the communication of those ideas, or to demonstrate the level of commitment that the protester has for the protest, or how serious they believe the protest is. Secondly, protest is integral to self-government. It is a means of publicly sharing information, beliefs and opinions to others, including policy-makers, so that people are exposed to the information they need to make informed judgments necessary for democratic self-government. It also allows policy to be developed in accordance with the public will, as

protest has the effect of putting pressure on policy-makers to alter current policy, and on other members of the public to join in advocating for change. Finally, nudity used in protest also implicates the self-fulfillment rationale. By protesting, a person is able to develop emotionally, intellectually and spiritually, through the communication of important ideas to others. This form of speech further enhances the dignity of a person, by allowing that person to express his or her views in a public forum, where they can articulate, justify, and seek support for their own beliefs, ideas and opinions.

D Summary

The court in *Irwin Toy* has been criticised for failing to define the right to freedom of expression without explicit reference to the values that underlie it.¹³⁰ This has resulted in a definition of expression that exists without any principled basis. A principled approach is the purposive approach to interpreting the right to freedom of expression, which should be applied by the courts in each case that comes before them that has the potential to implicate the right. A purposive approach to interpretation means that the scope of the protection afforded by a particular right is established by reference to the purposes or values that underlie it. Applying this approach to the examples of public nudity involving naturists and protestors allows for a broader, more generous, scope of the right to freedom of expression. Unlike the *Irwin Toy* definition of expression, a purposive approach allows for nudity described in each of the examples discussed to come within the right's scope. As will be acknowledged later in this paper, this approach also has the added bonus of being useful for the purposes of considering whether or not a limitation placed on the right to freedom of expression is reasonable and demonstrably justified in a free and democratic society.

VII Limiting Expression

A “The Modified Hansen Sequence”

Although the right to freedom of expression in s 14 of the Bill of Rights Act is protected, limits can be placed on the right in favour of other rights or interests as per s 5 of that Act.

¹³⁰ Richard Moon, above n 93, at 341.

The right to freedom of expression is routinely limited in practice¹³¹ and, in the words of Tipping J, is “not some universal panacea which must be seen as trumping other rights and values in most, if not all circumstances”.¹³² Section 4(1)(a) of the Summary Offences Act acts as a limit on the right to freedom of expression in circumstances where expression is prohibited because it meets the threshold of “offensive behaviour”. Before considering whether particular applications of s 4(1)(a) of the Summary Offences Act are justifiable, it is first important to consider how a court should approach s 4(1)(a) of the Summary Offences Act when the right to freedom of expression is raised. Section 4(1)(a) involves questions of judgment, degree and intensity.¹³³ Even though there are judicially formulated “tests” for “offensive” and “disorderly” behaviour, the assessment of whether certain behaviour is “offensive” or “disorderly” remains one of fact, degree and circumstance.¹³⁴ For example, in respect of “offensive” behaviour, Tipping J in *Morse* concluded that this depends on the degree of tolerance the Court considers that the affected party should have in respect of the rights and interests of others.¹³⁵ This level of tolerance is decided according to matters of time, place and circumstance.¹³⁶ Similarly, Blanchard J in *Morse* considered that it was for the Court to decide.¹³⁷

Whether, in the circumstances, the intensity of proved offensive aspects of the defendant’s behaviour amounts to interference with the use by others of the public place to the extent that the conduct should be classed as offensive behaviour in terms of s 4(1)(a)... That degree of interference must go beyond what a society respectful of democratic values is expected to tolerate.

Likewise, the assessment of whether certain behaviour is “disorderly” for the purposes of s 4(1)(a), in accordance with the Supreme Court decision of *Brooker*, relies upon a judicial

¹³¹ *R v Hansen*, above n 5, at [65] per Blanchard J.

¹³² *Hosking v Runting*, above n 99, at [231].

¹³³ Claudia Geiringer "Shaping the Interpretation of Statutes: where are we now in the section 6 debate" in NZLS Using the Bill of Rights in Civil and Criminal Litigation (Continuing Legal Education NZLS, Wellington, 2008) at 19.

¹³⁴ At 19.

¹³⁵ *Morse v Police*, above n 44, at [72].

¹³⁶ At [72].

¹³⁷ At [103] and [104].

assessment of what any “affected members of the public could not reasonably be expected to endure”,¹³⁸ or of what “a reasonable citizen... should be expected to bear”.¹³⁹

As a result, the application of the tests for offensive and disorderly behaviour in each circumstance must be in accordance with s 5 of the Bill of Rights Act, so that a person is not convicted of disorderly or offensive behaviour if this would place unjustified limits on his or her protected rights, such as the right to freedom of expression.¹⁴⁰

As evidenced by the decisions of *Morse*, *Brooker* and, in relation to public nudity, *Pointon (No 1)*, this s 5 inquiry is not often explicitly engaged in, and is instead incorporated within the test for offensive or disorderly behaviour, so as to heighten the threshold level of behaviour that must be met for conduct to be offensive where the right to freedom of expression is engaged. Such an approach results in a lack of clear reasoning and justification, which could have been achieved if the s 5 *Oakes* test adopted in *Hansen*,¹⁴¹ discussed in the following section, had instead been carried out.

Here, the “modified *Hansen* sequence” proposed by Professor Claudia Geiringer is useful and can be used by a Judge at first instance when determining whether the behaviour at issue is disorderly or offensive in circumstances where a protected right is engaged. This sequence is especially helpful because it has been specifically constructed around s 4(1)(a) of the Summary Offences Act. Geiringer outlines the methodology as follows:¹⁴²

1. Identify all of the circumstances on which the charge of disorderly [or offensive] behaviour is founded.
2. Consider whether a conviction in these circumstances would create an inconsistency with freedom of expression. Specifically, the issue is whether the defendant’s behaviour contained an expressive component, thereby attracting the protection of s 14. (If so, determination of guilt should proceed without further consideration of the Bill of Rights).

¹³⁸ *Brooker v Police*, above n 99, at [56] per Blanchard J.

¹³⁹ At [93] per Tipping J.

¹⁴⁰ Claudia Geiringer, above n 133, at 19.

¹⁴¹ *R v Hansen*, above n 5.

¹⁴² Claudia Geiringer, above n 133, at 20.

3. If so, consider whether the inconsistency is justifiable under s 5. In other words, is a restriction on a person's freedom of expression justified in all the circumstances? (If so, determination of guilt should proceed without further consideration of the Bill of Rights).
4. If not, consider whether conviction is so clearly compelled by the statute that it would be inconsistent with the text and purpose of the statute to acquit.
5. Is so, convict. Otherwise, acquit.

Part VI above has addressed point 2 by identifying the situations where public nudity fits within the scope of the right to freedom of expression. This part now moves to consider point 3: the justifiability of particular applications of s 4(1)(a) of the Summary Offences Act.

The next section provides an overview of s 5 of the Bill of Rights Act, before outlining the test the Supreme Court in *Hansen* adopted to determine reasonableness and justifiability under this section. Following this, this paper will apply the test set out in *Hansen* to some of the examples of “expressive” public nudity, as identified in Part VI, to determine whether it would be reasonable and demonstrably justifiable to limit the right to freedom of expression using s 4(1)(a) in those examples.

B Overview of Section 5

Section 5 of the Bill of Rights Act provides that limits may be placed upon the right to freedom of expression, so long as those limits are reasonable, are prescribed by law, and can be demonstrably justified in a free and democratic society. It is important to emphasise that the s 5 inquiry is not concerned with determining whether a particular right is infringed, or the scope of that right. The s 5 inquiry takes place *after* the infringement of a particular right has been recognised, and is focused on determining the justifiability of the limitation that infringes that right.

C “Prescribed by Law”

Section 5 requires that any limitation on a right must be “prescribed by law”. There are three elements that must be met for this requirement to be satisfied. The first requires that the limitation be authorised by law, and identifiable in the form of statutes, subordinate

legislation and the common law.¹⁴³ Secondly, the limiting provision must be accessible and, thirdly, it must be precise. In terms of accessibility and precision, any limitation needs to be adequately accessible to the public and formulated with sufficient precision so that people are able to plan their conduct accordingly, and that people in charge of applying the law have sufficient guidance in order to do so.¹⁴⁴ There is little doubt that s 4(1)(a) of the Summary Offences Act meets these three requirements.

D “Reasonable and Demonstrably Justified”

1 *R v Hansen: Adoption of the Oakes Approach*

The leading New Zealand authority concerning this inquiry is the Supreme Court decision *Hansen*.¹⁴⁵ In *Hansen*, the Court adopted the Canadian test set out in *R v Oakes*¹⁴⁶ to determine whether a limit on a right is reasonable and demonstrably justified in accordance with s 5 of the Bill of Rights Act. Frequently cited is Tipping J’s interpretation of the test,¹⁴⁷ set out as follows:¹⁴⁸

- (a) does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?
- (b)
 - (i) is the limiting measure rationally connected with its purpose?
 - (ii) does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?¹⁴⁹

¹⁴³ Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* [1984–1985] I AJHR A6 at [10.28]; *R v Hansen*, above n 5, at [180].

¹⁴⁴ Geoffrey Palmer, above n 143, at [10.28]; *Brooker v Police*, above n 99, at [39] per Elias CJ.

¹⁴⁵ *R v Hansen*, above n 5.

¹⁴⁶ *R v Oakes* [1986] 1 SCR 103.

¹⁴⁷ See, for example, *Commissioner of Police v Burgess* [2011] 2 NZLR 703 at [51]; *Commerce Commission v Air New Zealand Ltd* [2011] NZCA 64, [2011] 2 NZLR 194 at [66]; *Television New Zealand Ltd v West* [2011] 3 NZLR 825 at [94].

¹⁴⁸ At [104].

¹⁴⁹ In *R v Oakes*, this limb read that the limiting measure should impair “as little as possible” the right or freedom in question. This was altered in case law following *R v Oakes*. In *R v Edwards Books and Art* [1986] 2

- (iii) is the limit in due proportion to the importance of the objective?

The first limb, (a), is concerned with establishing that Parliament has a sufficiently important objective to justify limiting a right protected in the Bill of Rights Act. The second limb of this test, (b), is a proportionality inquiry which is focused on determining the proportionality of the means chosen to achieve Parliament's sufficiently important objective.

The *Oakes* approach was discussed by each judge in *Hansen*. Elias CJ noted that where s 5 was at issue, the *Oakes* test was "helpful",¹⁵⁰ and Blanchard J pointed to the fact that the New Zealand courts have commonly adopted the *Oakes* test.¹⁵¹ Likewise, McGrath J stated that the *Oakes* test was the "most workable basis for applying s 5 of the Bill of Rights Act in cases involving the criminal law".¹⁵² Anderson J also outlined the *Oakes* test but modified the first limb in the process.¹⁵³ As a result, there are slight nuances in the various pronunciations of the *Oakes* test in *Hansen*. Tipping J's formulation, however, captures the essence of the test. The aspects in which the judges differ in interpretation or application of the test will be explored in the following sections of this Part.

2 *Does the limiting measure serve a purpose sufficiently important to justify curtailment of the right or freedom?*

The first limb of the *Oakes* test considers whether the limiting measure serves a purpose that is sufficiently important to justify curtailing the right to freedom of expression. For the purposes of this paper, this means that s 4(1)(a) of the Summary Offences Act must be sufficiently important, in that it relates to concerns which are "pressing and substantial in a free and democratic society".¹⁵⁴ In *Hansen*, McGrath J emphasised that a lot of deference is given to the legislature to determine what is and is not a pressing concern in New Zealand

SCR 713, Dickson CJ changed the wording to "as little as reasonably possible". The reasons for this change were discussed and supported by Blanchard and Tipping JJ in *R v Hansen*, above n 5, at [79] and [126], and are discussed further in this paper at Part VII D 4.

¹⁵⁰ At [42].

¹⁵¹ At [64].

¹⁵² At [205].

¹⁵³ At [272].

¹⁵⁴ *R v Chaulk* [1990] 3 SCR 1303 at 1335 cited by Blanchard J in *R v Hansen*, above n 5, at [64]; see also *R v Hansen*, above n 5, at [272] per Anderson.

society, so that “it would be rare... for the Courts to decide that the objective of the legislature in criminalising certain behaviour was in pursuit of a policy goal that was not a legitimate aim.”¹⁵⁵ McGrath J also noted that when the Court attempts to identify the objective of the limiting provision, they should do so in a way that does not go directly to the particular means of achieving that objective, so as not to cause confusion.¹⁵⁶ Tipping J confirmed this warning, acknowledging that the way the legislative objective is described can influence the application of the later limbs of the *Oakes* test.¹⁵⁷ Peter Hogg explains how this can occur: when the objective is stated with a high level of generality, the more obviously desirable the objective appears to be, but the more difficult it is to assess other limbs of the proportionality inquiry. For example, if the objective is stated at a high level of generality, it is difficult to determine the third limb of the *Oakes* test: whether the limiting measure impairs the right or freedom no more than is reasonably necessary for the sufficient achievement of its purpose.¹⁵⁸ This is because it is often not difficult to think of alternative ways in which a wide objective could be achieved with less interference to the constitutional right at issue.¹⁵⁹ However, at least the limbs of the proportionality inquiry have work to do. In contrast, where the objective is stated narrowly, it is more difficult to think of alternative ways in which that objective can be achieved, and the limbs of the *Oakes* test that form the proportionality inquiry are left with no work to do, as they are easily satisfied.¹⁶⁰ Therefore the *Oakes* test requires the objective to be stated widely, in order for the limbs of the proportionality inquiry to function properly.¹⁶¹ Hogg also stresses that the statement of the legislative objective should supply a reason for infringing the constitutional right, rather than relate to other goals.¹⁶²

The judges in both *Brooker* and *Morse* discussed the purpose of s 4(1)(a) of the Summary Offences Act when interpreting the definition of “disorderly” and “offensive”. Section 4(1)(a) is a provision listed under the heading “Offences Against Public Order” and was

¹⁵⁵ *R v Hansen*, above n 5, at [207] per McGrath J.

¹⁵⁶ At [206] per McGrath J.

¹⁵⁷ At [121] per Tipping J.

¹⁵⁸ Peter W Hogg, above n 111, at [38.9].

¹⁵⁹ At [38.9].

¹⁶⁰ At [38.9].

¹⁶¹ At [38.9].

¹⁶² At [38.9].

enacted as a response to the legislature's concern with preserving public order, rather than as a means of protecting individuals from upset, private affront or annoyance.¹⁶³ As Elias CJ in *Brooker* explained, there are other criminal provisions that protect privacy or personal sensitivities to the extent that the legislature considers necessary, and s 4(1)(a) is not to be used as “a grab bag to scoop up any behaviour thought to be deserving of condemnation through criminal law”.¹⁶⁴

Instead, s 4(1)(a) was designed to protect members of the public “from disorder calculated to interfere with the public's normal activities”.¹⁶⁵ For behaviour to interfere with the public's activities, it need not be violent. In fact, offensive and disorderly behaviour that is likely to cause violence against persons or property is a separate offence proscribed by s 3 of the Summary Offences Act. Violence is an “additional element of seriousness” that leads s 3 to carry a higher maximum fine than s 4(1)(a), and a penalty of imprisonment.

The objective of s 4(1)(a) can therefore be defined at a relatively high level of generality as the preservation of public order. This statement of the objective also meets Hogg's requirement of being related to the infringement of the right to freedom of expression, as prohibiting expressive behaviour that is disruptive of public order infringes that right. The ultimate question is whether this objective is sufficiently important, in that it relates to concerns which are “pressing and substantial in a free and democratic society”. Here, the social concern is the protection of the rights of members of the public to enjoy tranquility and security in public spaces. This is a legitimately pressing concern, for the only way that people can fully utilise public spaces is if they feel safe and secure whilst in them. These feeling of safety and security can only be achieved by the preservation of public order. Thus, the preservation of public order is a sufficiently important objective. This conclusion is further supported by the long-standing history of this provision, even prior to the Summary Offences Act.¹⁶⁶

3 *Is the limiting measure rationally connected with its purpose?*

¹⁶³ *Morse v Police*, above n 44, at [3] per Elias CJ; *Brooker v Police*, above n 99, at [33] per Elias CJ.

¹⁶⁴ *Brooker v Police*, above n 99, at [41].

¹⁶⁵ At [3].

¹⁶⁶ See *Brooker v Police*, above n 99, at [25] per Elias CJ.

The second limb of the *Oakes* test forms the first limb of the proportionality inquiry. At the heart of this limb is a causal relationship between the objective of the limiting provision and the limiting provision itself.¹⁶⁷ This limb requires that the limiting measure (s 4(1)(a)) is rationally connected with its purpose (the preservation of public order).

In *Hansen*, McGrath and Blanchard JJ interpreted this limb consistently with *Oakes*, stating that in order to be rationally connected the limiting measure must not be arbitrary, unfair, or based on irrational considerations.¹⁶⁸ In *Oakes*, it was upon this limb that the presumption (that a person in possession of an illegal drug had possession of that drug for the purpose of drug trafficking) in the Narcotic Control Act, that limited the right to the presumption of innocence, failed. The Court considered that that presumption was “over-inclusive” and that it was “irrational to infer that a person had the intent to traffic on the basis of his or her possession of a very small quantity of narcotics.”¹⁶⁹

In contrast to McGrath and Blanchard JJ, Tipping J regards the rational connection inquiry as a “threshold issue” that does not often cause difficulty in application.¹⁷⁰ Here, the application of this limb in respect of s 4(1)(a) is relatively straightforward. “Offensive” behaviour under s 4(1)(a) has been interpreted by the Supreme Court as being behaviour in or within view of a public place that is productive of disorder, in that it inhibits the use of a public space by members of the public to such an extent that it is beyond what can be expected to be tolerated by reasonable people in a democratic society. Thus, s 4(1)(a) is rationally connected to the preservation of public order, as it prohibits behaviour that causes such unease that it inhibits the use of public spaces by members of the public. Furthermore, s 4(1)(a) is neither arbitrary, unfair, nor based on irrational considerations, and so, meets the requirements for rational connection set out by McGrath and Blanchard JJ.

4 *Does the limiting measure impair the right or freedom no more than is reasonably necessary for sufficient achievement of its purpose?*

¹⁶⁷ Peter W Hogg, above n 111, at [38.10].

¹⁶⁸ *R v Chaulk*, above n 154, at 1335-1336, cited in *R v Hansen*, above n 5, at [64] per Blanchard J.

¹⁶⁹ *R v Oakes*, above n 146, at 142.

¹⁷⁰ *R v Hansen*, above n 5, at [121] per Tipping J.

The third limb of test for reasonableness and justifiability, which forms the second limb of the proportionality inquiry, considers whether the limiting measure (s 4(1)(a)) impairs the right to freedom of expression no more than is reasonably necessary to achieve Parliament's purpose for enacting it (the preservation of public order).¹⁷¹ This limb has been described as a crucial, but difficult, inquiry into whether there is an alternative, less intrusive, means of achieving the legislative objective.¹⁷² This limb differs from its equivalent in the *Oakes* decision, which required that the Court chose the single measure that impaired the right the least over alternative measures.¹⁷³ This was altered in case law following *Oakes*. In *R v Edwards Books and Art*, Dickson CJ changed the wording to "as little as reasonably possible",¹⁷⁴ and it is this formulation of the test that was adopted in *Hansen*.¹⁷⁵ This approach allows for an appropriate margin of appreciation to be given to Parliament, so that a choice can be made from a number of alternatives which each impair the right no more than is reasonably necessary to achieve Parliament's objective. This is important, as the means adopted must also be practical in terms of both design and administration, and these are considerations that are best suited to Parliament.¹⁷⁶

As Hogg highlights, in respect of the application of the *Oakes* test by the Canadian courts, it is this limb that attracts the most debate and it is upon this limb that many laws have been held to be unjustified limitations on protected rights.¹⁷⁷ For the purposes of this paper, the question is whether there is an alternative and less intrusive means than s 4(1)(a) to preserve public order. Section 4(1)(a), as per the definition of offensive behaviour developed by the Supreme Court in *Morse*, preserves public order by prohibiting behaviour that inhibits the use of a public space by others to an extent beyond what can reasonably be expected to be tolerated by other reasonable people in a democratic society. As a result, whether a person's behaviour is offensive under s 4(1)(a) depends entirely upon the circumstances, and the Court, when deciding whether the behaviour is offensive, must take into account the rights and interests of both the person displaying the behaviour at issue, and the people who witness

¹⁷¹ At [79] per Blanchard J; at [126] per Tipping J.

¹⁷² At [217] per MGrath J.

¹⁷³ At [79] per Blanchard J; at [126] per Tipping J.

¹⁷⁴ *R v Edwards Books and Art*, above n 149, at 772.

¹⁷⁵ *R v Hansen*, above n 5, at [79] per Blanchard J; at [126] per Tipping J.

¹⁷⁶ Peter W Hogg, above n 111, at [38.11].

¹⁷⁷ At [38.11].

it.¹⁷⁸ As the application of s 4(1)(a) is circumstance-dependent and takes into account the rights and interests of the parties affected, it is difficult to conceive of a less intrusive means of dealing with behaviour that disturbs public order by inhibiting the use of a public space by others. Thus, s 4(1)(a) limits the right to freedom of expression no more than is reasonably necessary for the sufficient achievement of its public order.

5 *Is the limit in due proportion to the importance of the objective?*

The final limb of the proportionality inquiry appears to be the most important for the purposes of determining the justifiability of the limits placed on the right to freedom of expression by s 4(1)(a). This limb requires the courts to balance the social advantage of preserving public order against the harms of suppressing the expression in the particular circumstances.¹⁷⁹ The rationales underlying the right to freedom of expression become relevant here. These rationales can be used to weight the expression in the circumstances, so that the value of that expression can be balanced against the social advantage of preserving public order in the circumstances, in order to determine whether the important social objective of preserving public order justifies restricting the right to freedom of expression. It follows that the greater the value of the expression in the circumstances, the more severe the deleterious effects of the limitation on that right will be, and the more important the preservation of public order in the circumstances must be.

It is obvious that the purposive approach to interpreting the scope of the right to freedom of expression is helpful here, reinforcing the value of this approach as opposed to the approach in *Irwin Toy*. A court, having already determined that the rationales underlying the right to freedom of expression are implicated by the expression when determining whether the right to freedom of expression is engaged, can easily use the extent to which those rationales are implicated to determine the weight to be given to that expression. This approach was supported by Tipping J in *Hosking*, where he discussed how the nature of the expression may have a bearing on the reasonableness and justifiability of the limitation at issue.¹⁸⁰ In doing so, Tipping J placed greater weight on the marketplace of ideas and democracy rationales

¹⁷⁸ *Pointon (No 1)*, above n 1, at [32] and [37].

¹⁷⁹ *R v Hansen*, above n 5, at [134] per Tipping J.

¹⁸⁰ *Hosking v Runting*, above n 99, at [235].

than the self-fulfillment, noting that where these are not implicated, the limit on expression may be easier to justify.¹⁸¹

The nudity examples determined to be expression in Part VI are useful in illustrating how expression may be weighted in the circumstances. In the naturism examples, the nudity of Mr Lowe, Mr Pointon and Mr Ceramulus only weakly contributes to the “marketplace of ideas” and “democracy” theories. However, the “liberty” theory was strongly implicated in those circumstances. In comparison, the nudity displayed by Mr Coldin implicated all three rationales but, like the other displays of nudity, the conduct most strongly implicated the liberty theory. In the protest examples, all three rationales were strongly implicated. The more strongly implicated the rationales are in the circumstances, the more valuable that expression is, and the greater the value of the competing interest must be to outweigh that expression in the circumstances.

As the last paragraph indicates, the values underlying the competing interest – the preservation of public order – also need to be weighted so that the competing interest can be balanced against the expression in the circumstances. As Geiringer and Price explain, this involves “a case-by-case assessment of the nature and likelihood of the harm to individuals or the community that will exist if the particular speech is not regulated, bearing in mind all the circumstances.”

The current New Zealand case law on public nudity and offensive behaviour identifies factors that suggest when public order is more likely to be disturbed by public nudity, and consequently, the circumstances in which there is an increased likelihood that harms to individuals or the community will exist if the particular expressive behaviour is not regulated. These factors include the presence of children, the time of day the behaviour occurs, and the location in which the behaviour is displayed. For example, in *Pointon (No 1)*, it was important to the outcome of the case that children were unlikely to be present at the time of day Mr Pointon chose to run naked. It was also important that the location Mr Pointon chose to run in was secluded, so that he only had a chance encounter with the complainant.¹⁸² In *Lowe*, the location that Mr Lowe had chosen to cycle naked in was also important, as it also

¹⁸¹ At [235].

¹⁸² *Pointon (No 1)*, above n 1, at [45].

decreased the likelihood that others would observe his nudity. The fact that Mr Lowe chose to be naked on a relatively quiet rural road, as opposed to on a suburban street, was a factor that led Clifford J to conclude that his behaviour was not offensive.¹⁸³ Related to this was the means by which Mr Lowe had chosen to be nude – cycling down the street as opposed to walking – because the opportunity for exposure to his nakedness was “considerably less”.¹⁸⁴

The point at which freedom of expression stops being protected in favour of a competing right or interest is “in every case a matter of degree depending on the relevant time, place and circumstances”.¹⁸⁵ The ultimate question is whether the potential disruption to public order in the circumstances is sufficiently significant to justify overriding the right to freedom of expression of the ‘speaker’.

The operation of this balancing exercise can be illustrated using the two recent cases involving Mr Pointon. To recap, in *Pointon (No 1)*, Mr Pointon faced offensive behaviour charges for running naked, apart from running shoes, along tracks within a relatively secluded wooded area of a public park at 8.30 am on a weekday morning in the middle of winter.¹⁸⁶ In *Pointon (No 2)*, Mr Pointon faced offensive behaviour charges for gardening, and mowing his lawns, naked, while on his own property. Mr Pointon’s nudity, in both instances, implicated all three rationales. While the “marketplace of ideas” and “democracy” theories were only weakly implicated, the “liberty” theory was strongly implicated. If all three rationales were strongly implicated, the author would weight this expression as “high-value” expression. In contrast, if any of the rationales were only weakly implicated, the expression would be deemed to be “low-value” expression. Here, as the self-fulfillment rationale is strongly implicated, and the other two rationales weakly implicated, this author would weight the expression in both of the circumstances involving Mr Pointon as “mid-value” expression.

Following this exercise of weighting the expression in the circumstances, the value of the competing interest, the preservation of public order, needs to be weighted so that the competing rights and interests can be balanced against each other. As explained above, this

¹⁸³ *Lowe v Police*, above n 3, at [28].

¹⁸⁴ At [28].

¹⁸⁵ *Brooker v Police*, above n 99, at [133] per McGrath J.

¹⁸⁶ *Pointon (No 1)*, above n 1, at [1].

involves assessing the nature and likelihood of the harm to individuals or the community that will exist if Mr Pointon's expression in the circumstances is not regulated. In *Pointon (No 1)*, the location that Mr Pointon was running in (a secluded area of a public park), and the time of day and year that Mr Pointon chose to run at (early morning in the middle of winter), as well as the fact that children were unlikely to be present in the area at that time, are factors that lead the author to conclude, as Heath J did, that it was unlikely that Mr Pointon would disrupt public order in those circumstances. Therefore, as the disturbance of public order was unlikely in the circumstances, and Mr Pointon's nudity was mid-value expression, the author concludes that the potential disruption to public order in the circumstances is not sufficiently significant to justify overriding Mr Pointon's right to freedom of expression.

In contrast, a different conclusion is reached when considering Mr Pointon's nudity in *Pointon (No 2)*. While the value of Mr Pointon's expression in the circumstances is the same, as the same rationales are implicated to the same degree, there is an increased likelihood that public order will be disturbed by Mr Pointon's nudity. In *Pointon (No 2)*, the location that Mr Pointon chose to garden naked in was not secluded, as Mr Pointon could easily been seen by his neighbours and the people who walked past his property, which was located on a residential street. He was also gardening at a time of day where it was highly likely children were to be present, as it was the middle of school holidays. As a result, the disturbance to public order was highly likely in the circumstances, and when balanced against Mr Pointon's mid-value expression, is sufficient to justify overriding Mr Pointon's right to freedom of expression.

Following Geiringer's "modified *Hansen* sequence", if the inconsistency with the right to freedom of expression is not justified according to s 5, the Court should consider whether conviction the defendant in the circumstances is "so clearly compelled by the statute that it would be inconsistent with the text and purpose of the statute to acquit".¹⁸⁷ If it is, the Court should convict that person. If it is not, the Court should acquit him or her.¹⁸⁸ This would mean that Mr Pointon should be acquitted of the charges against him in *Pointon (No 1)*, as the limit on his right imposed by s 4(1)(a) is not justified in those circumstances. However,

¹⁸⁷ Claudia Geiringer, above n 133, at 20.

¹⁸⁸ At 20.

the limit on his right to freedom of expression is justified in relation to his nudity in *Pointon (No 2)* and he should be convicted under s 4(1)(a) for behaving offensively.

VIII Conclusions

This paper has attempted to construct a framework for answering the following questions: (a) when is public nudity “expression” for the purposes of s 14, and (b) when are the limits placed on this right by s 4(1)(a) of the Summary Offences Act reasonable and demonstrably justified in a free and democratic society? It has then sought to test these frameworks developed by applying recent examples of public nudity to them.

As regards the first of these questions – when is public nudity “expression” for the purposes of s 14 – this paper first had to consider how expression is defined, so as to determine whether public nudity, as conduct, could fit within the scope of the right. It critiqued the current test in use in New Zealand – the test developed by the Canadian Supreme Court in *Irwin Toy* – and advocated for the adoption of a purposive approach to determining the scope of the right to freedom of expression. The effect of this approach is that the scope of the protection afforded by the right is established by reference to the purposes or values that underlie it. This paper then explored the three purposes or rationales underlying the right to freedom of expression: the advancement of knowledge and the discovery of truth, the achievement and maintenance of democratic self-government, and individual self-fulfillment, before applying these to nudity examples to determine whether the nudity in those examples falls within the scope of the right. This paper discovered that the right to freedom of expression, purposively interpreted, would include the nudity in every one of the nudity examples considered.

The second half of this paper addressed the second of the above questions: in what circumstances involving “expressive” public nudity would it be reasonable and demonstrably justifiable to limit the right to freedom of expression using s 4(1)(a), as per s 5 of the Bill of Rights Act? It advocated for the adoption of “the modified *Hansen* sequence” proposed by Professor Claudia Geiringer, before discussing the application of s 5 of the Bill of Rights Act which mandates a proportionality inquiry to determine the reasonableness and justifiability of proposed limits on protected rights. In doing so, this paper outlined each limb of the Canadian *Oakes* test, applied by the Supreme Court in *Hansen*, while using examples of

public nudity deemed expression in the first half of the paper to illustrate how the test would be applied in practice.

With little case law concerning nudity and the right to freedom of expression, this paper hopes to have uncovered the appropriate frameworks to be used to determine when public nudity is “expression” for the purposes of s 14, and in what circumstances involving “expressive” public nudity would limitations on this expression be considered reasonable and demonstrably justified.

IX Bibliography

A Cases

1 New Zealand

Auckland City Council v Erotica Expo Ltd DC Auckland CRI-2008-004-001938, 19 August 2008.

Brooker v Police [2007] NZSC 30, 3 NZLR 91.

Ceramalus v Police HC Auckland AP76/91, 8 July 1991.

Ceramalus v The Police HC Auckland AP131/95, 27 October 1995.

Commerce Commission v Air New Zealand Ltd [2011] NZCA 64, [2011] 2 NZLR 194.

Commissioner of Police v Burgess [2011] 2 NZLR 703.

Flickinger v Crown Colony of Hong Kong [1991] 1 NZLR 439 at 440 (CA).

Hamed v R [2011] NZSC 101, [2012] 2 NZLR 305.

Hopkinson v Police [2004] 3 NZLR 704.

Hosking v Runting [2005] 1 NZLR 1.

Jennings v Buchanan [2005] 2 NZLR 577 (PC).

Lange v Atkinson [1998] 3 NZLR 424 (CA).

Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington) [2000] 3 NZLR 570.

Lowe v New Zealand Police HC Wellington CRI-2009-485-135, 2 March 2010.

Ministry of Transport v Noort; Police v Curran [1992] 3 NZLR.

Moonen v Film and Literature Board of Review [2000] 2 NZLR 9.

Morse v Police [2011] NZSC 45, 2 NZLR 1.

Philpott v Police HC Christchurch AP-138-142, 13 July 1993.

Pointon v New Zealand Police [2012] NZHC 3208.

Pointon v New Zealand Police [2013] NZHC 2352

Police v Geiringer [1990-92] 1 NZBORR 331 at 337 (DC).

Police v Horst DC Whangarei CRI-2008-088-005979, February 4 2009.

Police v Willis DC Auckland (File number not given), 3 June 2005.

R v Goodwin [1993] 2 NZLR 153.

R v Hansen [2007] NZSC 7, [2007] 3 NZLR 1.

R v Morse [2009] NZCA 623, [2010] 2 NZLR 625.

R v Te Kira [1993] 3 NZLR 251 (CA).
Re Society for the Promotion of Community Standards Inc (No 1) [2002] NZAR 884.
Schubert v Wanganui District Council [2011] NZAR 233.
Television New Zealand Ltd v Viewers For Television Excellence Inc [2005] NZAR 1.
Television New Zealand Ltd v West [2011] 3 NZLR 825.
Thompson v New Zealand Police [2013] 1 NZLR 848.
White v Police HC Christchurch CRI-2006-409-000119, 3 October 2006.
Zdrahal v Wellington City Council [1995] 1 NZLR 700.

2 Australia

Australian Capital Television Pty v Commonwealth (1992) 177 CLR 106 (HCA).
Nationwide News Pty v Wills (1992) 177 CLR 1 (HCA).

3 Canada

Hunter v Southam [1984] 2 SCR 145
Irwin Toy Ltd v Attorney General (Quebec) [1989] 1 SCR 927 (SCC).
R v Big M Drug Mart [1985] 1 SCR 295
R v Chaulk [1990] 3 SCR 1303.
R v Coldin [2012] OJ No. 1009; 2012 ONC LEXIS 2509.
R v Edwards Books and Art [1986] 2 SCR 713.
R v Oakes [1986] 1 SCR 103.
R v Sharpe [2001] 1 SCR 45.
Re Prov Electoral Boundaries (Sask) [1992] 2 SCR 158

4 United Kingdom

Ministry of Home Affairs v Fisher [1980] AC 319 at 328 (PC).

5 United States of America

Abrams v United States (1919) 250 US 616.
Barnes v Glen Theatre Incorporated (1991) 501 US 560.

City of Erie v Pap's AM (2000) US 277.

B Legislation

1 *New Zealand*

Major Events Management Act 2007.

New Zealand Bill of Rights Act 1990.

Summary Offences Act 1981.

Tauranga Street Use and Public Places Bylaw 2013.

2 *Canada*

Criminal Code RSC 1985 c C-46.

3 *United States of America*

Constitution of the United States of America

C Treaties

International Covenant on Civil and Political Rights 999 UNTS 171 (opened for signature 16 December 1966, entered into force 23 March 1976).

D Books and Chapters in Books

Ruth Barcan *Nudity: A Cultural Anatomy* (Oxford University Press, New York, 2004).

Eric Barendt *Freedom of Speech* (Oxford University Press, New York, 1985).

Eric Barendt *Freedom of Speech* (2nd ed, Oxford University Press, New York, 2005).

Andrew Butler and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis, Wellington, 2005).

Thomas I Emerson *The System of Freedom of Expression* (Vintage Books, New York, 1970)
in Joseph J Hemmer Jr (ed) *The First Amendment Theoretical Perspectives* (Hampton Press Inc, Cresskill, 2006).

Claudia Geiringer "Shaping the Interpretation of Statutes: where are we now in the section 6 debate" in NZLS Using the Bill of Rights in Civil and Criminal Litigation (Continuing Legal Education NZLS, Wellington, 2008).

Claudia Geiringer and Steven Price "Moving from Self-Justification to Demonstrable Justification – the Bill of Rights and the Broadcasting Standards Authority" in Jeremy Finn and Stephen Todd (eds) *Law, Liberty and Legislation* (LexisNexis, Wellington, 2008).

Peter W Hogg *Constitutional Law of Canada* (5th ed, Thompson Carswell, Ontario, 2007) vol 2.

Grant Huscroft "Freedom of Expression" in Paul Rishworth and others (eds) *The New Zealand Bill of Rights* (Oxford University Press, New York, 2003) 308.

Alexander Meiklejohn "The First Amendment is Absolute" (2005) *Supreme Court Review* in Joseph J Hemmer Jr (ed) *The First Amendment Theoretical Perspectives* (Hampton Press Inc, Cresskill, 2006).

John Stuart Mill "Of the Liberty of Thought and Discussion" in John Stuart Mill *On Liberty and Other Essays* (Oxford University Press, Oxford, 1991).

Frederick Schauer *Free Speech: a philosophical enquiry* (Cambridge University Press, New York, 1982).

E Journal Articles

Ruth Barcan "Regaining what mankind has lost through civilisation: early nudism and ambivalent moderns" (2004) 8(1) *Fashion Theory* 63.

Robin Elliot "Back to Basics: A Critical Look at the *Irwin Toy* Framework for Freedom of Expression" (2011) 15(2) *Review of Constitutional Studies* 205.

Richard Moon "The Supreme Court of Canada on the Structure of Freedom of Expression Adjudication" (1995) 45 *UTLJ* 419.

Robert H Bork "Neutral Principles and Some First Amendment Problems" (1971) 47 *Ind LJ* 1.

Richard Moon, "Justified Limits on Free Expression: The Collapse of the General Approach to Limits on Charter Rights" (2002) 40 *Osgoode Hall LJ* 337 at 341.

Chanakya Sethi "Beyond *Irwin Toy*: A New Approach to Freedom of Expression under the *Charter*" (2012) 17 *Appeal* 21.

F Parliamentary and Government Materials

(23 August 2007) 641 NZPD 11445.

Geoffrey Palmer *A Bill of Rights for New Zealand: A White Paper* [1984–1985] I AJHR A6.

G Newspaper Articles

David Williams “Len Brown’s view of Boobs on Bikes” *The National Business Review* (New Zealand, 28 September 2012).

H Internet Materials

3 News “Victory for Nude Blacks in year’s only match” (15 September 2012) 3 News <www.3news.co.nz>.

American Association for Nude Recreation “Discover Nudism” (2010) < www.aanrwc.com>.

Nigel Duara “Judge: man who stripped nude at airport not guilty” (July 18 2012) Fox News <www.foxnews.com>.

FEMEN “FEMEN – About” (20 August 2013) <www.femen.org>.

PETA “The Peta Files” (2013) People for the Ethical Treatment of Animals (PETA): The Animal Rights Organisation <www.peta.org>.

World Naked Bike Ride “Frequently Asked Questions” (19 June 2012) <www.worldnakedbikeride.org>.