TARA SCHOELLER – BURKE

FREEDOM OF HATE SPEECH: THE FIRST AMENDMENT, *SNYDER V PHELPS* AND BEYOND

LLM RESEARCH PAPER

LAWS 520: CENSORSHIP AND EXPRESSION

FACULTY OF LAW

TE WHARE WĀNANGA O TE ŪPOKO O TE IKA A MĀUI
VICTORIA
UNIVERSITY OF WELLINGTON

2014

Table of Contents

Abstract

This paper assesses the United States position on the protection of hate speech under the First Amendment and questions whether, in light of the harm hate speech causes and the inconsistencies with free speech rationales, the position is justified. The most recent Supreme Court pronouncement on the issue is Snyder v Phelps *which this paper utilizes as an exemplar of the state's aversion to regulating speech on the basis of content. The ultimate thesis of this paper is that while hate speech is a complex issue, especially given the United States constitutional climate, complete lack of regulation leaves an appreciable harm without a remedy. The approach in the United States can no longer be justified in reliance on oft cited free speech rationales. Though international experiences in hate speech regulation have not been without their difficulties, it serves to illustrate the point that regulating some forms of speech on the basis of content does not necessarily result in the "chilling effect" that heavily concerns First Amendment scholars.*

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 14 950 words.

Subjects and Topics

Hate Speech; The First Amendment; *Snyder v Phelps*; Freedom of Expression; International Regulatory Approaches.

I Hate Speech: The First Amendment

A Introduction

Scholars note that states are currently undergoing a global "third wave" of hate propaganda, typically characterized by the dissemination of cyber hate and the expansion of target groups.[1] Despite perceptions, hate speech is not an issue that died with the prosecution of anti-Jewish and anti-Black hate propaganda in the 1970s and 1980s. [2] The promulgation of hateful messages, whether based on discriminatory views grounded in gender, race, religion or otherwise, results in real harm, both to the intended victims and to the society in which it is permitted to fester. The means by which states are addressing the issue of hate speech therefore remains to be an important question, and is the central focus of this paper.

Part I will seek to provide an exposition of the constitutional protection attributed to hate speech under the First Amendment in the United States, and criticisms thereof as assessed against the contribution hate speech makes to the three most commonly cited rationales behind stringent speech protection. These are the market place of ideas, democratic debate and individual self-fulfillment. Part II will assess the treatment of hate speech in the most recent Supreme Court pronouncement on the issue in *Snyder v Phelps*, as a means to further demonstrate the United States aversion to allowing regulation of speech on the sole ground of the speech's offensive or disagreeable content. The final part of this paper (Part III) will adopt a comparative approach, and look to how the politically congenial states of Canada, the United Kingdom and New Zealand have dealt with this issue, and problems they have faced in doing so.

The ultimate thesis of this paper is that while hate speech is a complex issue, especially in the context of the United States constitutional climate, complete lack of regulation leaves an appreciable harm without a remedy. The approach in the United States can no longer be justified by relying on oft-cited free speech rationales. Though

[1] Jonathan Cohen "More Censorship or Less Discrimination? Sexual Orientation Hate Propaganda in Multiple Perspectives" (2000) 46 McGill L Rev 69 at 78.
[2] Cohen, above n 1, 78; Chris Gosnell "Hate Speech on the Internet: A Question of Context" (1998) 23 Queens L J 369.

international experiences in hate speech regulation have not been without their difficulties, it serves to illustrate the point that regulating speech on the basis of content does not necessarily result in the "chilling effect" that so heavily concerns First Amendment scholars.

B "Freedom for the Thought We Hate"

1 Defining hate speech

'Hate Speech' is notoriously difficult to define in any legislative scheme, involving contested parameters of intent, effect, incitement and harm causation, and contested exceptions for fact, comment, religious belief and humor.[3] As a concept in legal and political theory, it refers to verbal conduct which willfully expresses intense antipathy towards some group or towards an individual on the basis of membership in some group.[4] The groups in question are usually those distinguished by ethnicity, religion or sexual orientation.[5] It is not to be confused with other toxins that pollute public discourse: Incivility, overheated rhetoric, and speech which merely causes offence. By contrast, hate speech is language tuned to the frequency of hate which has the impact of excluding a targeted group from wider society.[6]

2 The First Amendment

American First Amendment case law and jurisprudence holds that the First Amendment protects the speech we hate just as rigorously as the speech we value.[7] The wording of the First Amendment is unequivocal. It states:[8]

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or of

[3] 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, Legislation* (LexisNexis NZ, Wellington, 2008) 294 at 318.
[4] Robert Mark Simpson "Dignity, Harm and Hate speech" (2013) 32 Law and Philosophy 701 at 701.
[5] Simpson, above n 4, at 701.
[6] Gary Fry "Hate Speech: Anything Goes" *Arizona Attorney* (Arizona, October 2011) at 76.
[7] Anthony Lewis *Freedom for the Thought we Hate: A Biography of the First Amendment* (Basic Books, New York, 2007).
[8] The Constitution of the United States, Amendment 1.

> the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

However, despite a perception that the First Amendment rights are absolute,[9] the United States Supreme Court has over time created categorical exceptions to this unequivocal statement, and established a hierarchy of classes of speech based on their value. Rather than balancing the First Amendment value of the speech against competing rights or social harm, Courts have typically carved out categories of expression that are deprived of constitutional protection (or are more capable of restriction).[10] High value speech worthy of the utmost levels of protection under the First Amendment includes political speech[11], religious speech[12], and scientific, artistic and educational speech. Low value speech which is more amenable to restriction includes pornography and obscenity[13], false statements of fact (or defamatory statements), true threats[14] and 'fighting words'.[15]

The 'fighting words' concept was established in *Chaplinski v New Hampshire*[16] where it was held that speech is unprotected if it constitutes words that are without social value, are directed to a specific individual, and would provoke a reasonable member of the group about whom the words are spoken.[17] A person cannot utter a racial or ethnic epithet to another if those words are likely to cause the listener to react violently. This 'fighting words' exception or category has been substantially narrowed by later cases, namely *Cohen v California*[18] which made it clear that offensiveness would not suffice to categorize the speech as fighting words. *Cohen* also suggests that the Court would be resistant to adding additional categories of unprotected speech,

[9] See, for example, Alex Kozinski and Eugene Volokh "A Penumbra Too Far" (1993) 106 Harv L Rev 1639 at 1654 who characterized the First Amendment as "about as close to absolute as the Constitution gets".
[10] See, for example, *Miller v California* 413 US 15 (1973); Daniel A. Farber "The Categorical Approach to Protecting Speech in American Constitutional Law" (2009) 84 Indiana L J 917 at 922.
[11] See, for example, *New York Times v Sullivan* 376 US 254 (1964) at 270; *Hustler Magazine v Falwell* 485 US 46 (1988) at 51.
[12] See, for example, *Cantwell v Conneticut* 310 US 296 (1940).
[13] See, for example, *Miller v California* 413 US 15 (1973).
[14] *Virginia v Black* 538 US 343 (2003)
[15] *Chaplinsky v New Hampshire* 315 US 568 (1942).
[16] *Chaplinski*, above n 15.
[17] *Chaplinsky*, above n 15.
[18] *Cohen v California* 403 US 15 (1971); Farber, above n 10, at 921.

and in the 38 years since the *Cohen* decision, the Court has added only child pornography and "true threats" to the list.[19]

The protection given to "protected speech" is not unlimited. Although protected speech does receive a high degree of protection from direct censorship, even speech that enjoys the most extensive First Amendment protection may be subject to "regulations of the time, place and manner of expression which are content neutral, are narrowly tailored to serve a significant government interest, and leave open ample alternative channels of communication".[20] This has become especially relevant in the context of funeral picketing, and states have responded to the rise in funeral protests (specifically the infamous activities of the Westboro Baptist Church) by implementing these limited regulations. An assessment of whether these regulations are sufficiently remedying the harm that is at stake here will be assessed in Part II of this paper.

A person whose speech falls under an "unprotected" class of speech can still have a First Amendment claim. The cross-burning case of *R.A.V v City of St. Paul*[21] is indicative of this. Justice Scalia, writing for the majority, stated that the approach of categorizing speech into "protected" and "unprotected" classes does not mean that unprotected speech is "entirely invisible to the Constitution."[22] What it means is that though content-based regulations are presumptively invalid, certain classes of speech can be regulated because of their constitutionally proscribable content, but they cannot be made "vehicles for content discrimination" on a broader scale.[23] Justice Scalia uses the analogy of the government being constitutionally permitted to lawfully proscribe libel; but they may not proscribe libel *only* critical of government, as this amounts to content discrimination.[24]

The St Paul ordinance at issue in the *R.A.V v City of St. Paul* criminalized any communicative act if the speaker "knows or has reasonable grounds to know" that the action "arouses anger, alarm or resentment in others on the basis of race, color, creed,

[19] Farber, above n 10, at 917.
[20] *Clark v Community for Creative Non-Violence* 468 US 288 (1984).
[21] *R.A.V. v City of St Paul* 505 US 377 (1992).
[22] *R.A.V,* above n 21, at 383.
[23] *R.A.V.*, above n 21, at 383.
[24] *R.A.V.*, above n 21, at 384.

religion or gender."[25] The state court construed the ordinance to apply only to "fighting words" of which the Petitioner's actions of burning a cross on a black family's lawn could constitute. However, Justice Scalia viewed the ordinance as impermissible content discrimination, stating that under the Ordinance, abusive communications "no matter how vicious or severe" are permitted unless they relate to one of the prohibited categories.[26] Expressing hostility on the basis of political affiliation or homosexuality for example was permitted.[27] The Ordinance was therefore held to be an example of impermissible viewpoint (or content) discrimination, which is not permitted even for what has traditionally been placed into a category of "unprotected speech".[28]

The United States aversion to regulating speech on the basis of content is fundamentally at odds with any attempts made at regulating hate speech. The brief for the City of St Paul asserted that a general "fighting words" law would not meet the city's needs because only a content-specific measure can communicate to minority groups that the "group hatred aspect of such speech is not condoned by the majority."[29] However it was unequivocally stated that "the point of the First Amendment is that majority preferences must be expressed in some fashion other than silencing speech on the basis of its content"[30], making the discussion of hate speech in the United States a complex one.

C Criticisms and Free Speech Rationales

The United States approach of unwavering protection of hate speech on First Amendment grounds has been criticized in the international community for placing too much emphasis upon individual freedoms, while failing to recognize the "collective dimension of human existence and the rightful role of the state in promoting caring, empathetic communities".[31] The underlying assumption in the

[25] Farber, above n 10, at 928.
[26] *R.A.V.*, above n 21, at 384.
[27] Farber, above n 10, at 928.
[28] Farber, above n 10, at 928.
[29] *R.A.V.*, above n 21, at 392.
[30] *R.A.V.*, above n 21, at 392.
[31] Ian Cram "Coercing Communities or Promoting Civilized Discourse? Funeral Protests and Comparative Hate Speech Jurisprudence" (2012) 12 H R L Rev 455 at 459.

United States is that the truth will ultimately prevail, and thus the best corrective to hate speech is more speech.[32] This naively presupposes that the countering speech will be egalitarian speech inciting a reasoned debate, and completely ignores the harm that is being caused to minority groups at the receiving end.[33]

1 Waldron and the harm in hate speech

Jeremy Waldron in *The Harm in Hate Speech* rejects the absolutist approach of First Amendment jurisprudence and argues hate speech should be regulated "as part of our commitment to human dignity and to inclusion and respect for members of vulnerable minorities".[34] As will be canvassed in Part III of my paper, the United States differs fundamentally in the protection it gives to hate speech from almost every other advanced democracy. Waldron questions whether the United States should continue to act as an outlier in this regard.[35]

He provides two key counter arguments to Anthony Lewis's position that it is better to tolerate "the thought we hate" than open the floodgates to state repression.[36] Firstly, Waldron asserts that the issue is not the *thought* that we hate "as though defenders of free speech laws wanted to get inside people's minds".[37] It is the physical manifestations of these thoughts, and the subsequent deleterious effect it has on wider society:[38]

> "The issue is publication and the harm done to individuals and groups through the disfiguring of our social environment by visible, public, and semi-permanent announcements to the effect that… members of another group are not worthy of equal citizenship."

[32] Robert M. O'Neil "Hate Speech, Fighting Words and Beyond: Why American Law is Unique" (2013) 76 Alb L Rev 467 at 492.
[33] David O'Brink "Millian Principles, Freedom of Expression and Hate Speech" (2001) 7 Legal Theory 119 at 140.
[34] Jeremy Waldron *The Harm in Hate Speech* (Harvard University Press, Cambridge, 2012).
[35] Waldron, above n 34, at 29.
[36] Waldron, above n 34, at 32.
[37] Waldron, above n 34, at 33.
[38] Waldron, above n 34, at 33.

Secondly, the issue is not just *our* learning to tolerate the thought *we* hate. He states "it is not the harm… to the white liberals who find the racist invective distasteful."[39] It is not the intellectual resilience to hate speech that is at issue but the direct targets and victims of the abuse. Waldron attempts to shift the focus from the constitutionality of the rights being asserted by the speaker, to the harm caused to those on the receiving end of the speech, and the subsequent harm to wider society. First Amendment scholars have a tendency to heavily emphasize the *rights* of the speaker, while framing the potential subsequent harm to members of the audience as an infringement of their *interests*.[40] The terminology of distinguishing between "rights" and "interests" suggests the listener's right to freedom from discrimination to be in lesser need of protection. The assertion of individual free speech rights to the detriment of competing rights and considerations is what Waldron fundamentally opposes, and argues that a communitarian consideration of rights (and interests) needs to take prominence.

The harm Waldron highlights can be analyzed as 'first order' harms and 'second order' harms. First order harms are the disadvantages suffered by the immediate targets of the hate speech. Waldron goes beyond this analysis however, and also considers the prospect of hate speech sustaining complex social structures whose wide-scale operations lower the social status of members of targeted groups.[41] On a societal level, hate speech acts to exacerbate existing inequalities, and may even lead to the contribution of a more violent and unstable society (due to the connection between hate speech and the commission of hate crimes.)[42] Though the extent by which hate speech can be held responsible for creating or sustaining identity-based social hierarchies is in dispute[43], it nonetheless has a contributory role to play. Ultimately, Waldron seeks to justify the legal restriction of hate speech in account of the way it infringes against people's dignity.

[39] Waldron, above n 34, at 33.
[40] Guy E. Carmi "Dignity – The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as Free Speech Justification" (2014) 9 U P J Cons L 957 at 992.
[41] See, for example, Simpson, above n 4.
[42] Alan Allport *Freedom of Speech* (Chelsea House, Philadelphia, 2003) at 25; Michael Whine "Expanding Holocaust Denial and Legislation Against It" in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, New York, 2010) 539 at 543.
[43] See, for example, Simpson, above n 4.

2 Democratic debate, the marketplace of ideas and individual self-fulfillment

This paper will now turn to the relationship between hate speech and the theories of free speech protection, and whether consistencies with the theories serve to justify the United States position. There is dispute as to what the framers of the First Amendment intended the First Amendment's precise scope to be. Zecharia Chafee argues it was intended "to wipe out the common law of sedition, and make further prosecutions for criticisms of the government without any incitement to law breaking, forever impossible in the United States."[44] Leonard Williams on the other hand contends the framing generation had in mind a narrower scope than Chafee suggested, as broad libertarian theories of the First Amendment did not surface until post 1798 with the rise of Jeffersonians.[45] In reality it seems evident that "we know very little of the precise intentions of the framers and ratifiers of the speech and press clauses of the First Amendment."[46] Because of these uncertainties, it is important to look at the rationales for guidance in this field, and adopt a foundational approach to free speech. The three primary theories underlying free speech protection are as stated above: The protection and promotion of citizen participation in the democratic process, the pursuit of truth in the marketplace of ideas, and the citizen's autonomy rights and individual self-fulfillment.

Freedom of expression lies at the heart of democratic governance, and acts to protect, promote and encourage citizen participation in the democratic process. Free speech guarantees are viewed by most as a necessary implication of democracy, to the extent that a state's democratic status hinges upon the level of protection it gives to free speech.[47] Alexander Meiklejohn argues the paramount purpose of free speech protection to be the protection of the rights of citizens to engage in political issues so

[44] David A. Strauss "Freedom of Speech and the Common Law Constitution" in Lee C. Bollinger and Geoffrey R. Stone (eds) *Eternally Vigilant: Free Speech in the Modern Era* (University of Chicago Press, Chicago, 2002) 33 at 40.
[45] Leonard Williams Levy "Legacy of Suppression: Freedom of Speech and Press in Early American History" in Walter Berns "Free Speech and Free Government" (1972) 2 Political Science Reviewer 217 at 219.
[46] *Ollman v Evans* 750 F 2d 970 (DC Cir 1984) (Bork J concurring).
[47] C. Edwin Baker "Hate Speech" in Michael Herz, Peter Molnar *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, New York, 2012) at 65; Ronald Dworkin "Foreword" in Weinstein and Hare (eds), above n 42, at viii.

as to be able to successfully participate in a democratic society.[48] The democracy theory therefore primarily rests on the ability of citizens to criticize the government and prevent abuses of power.[49]

Hate speech does not fulfill the democracy rationale for a plethora of reasons. Firstly, instead of promoting or encouraging citizen participation, hate speech acts to silence or hinder the voices of minority groups.[50] Post outlines three ways in which minority groups are silenced by hateful speech:[51]

> "(1) Victim groups are silenced because their perspectives are systematically excluded from dominant discourse; (2) victim groups are silenced because the pervasive stigma of racism systematically undermines and devalues their speech; and (3) victim groups are silence because the visceral "fear, rage, [and] shock" of racist speech systematically preempts response."

Ultimately, a target groups ability to publicly defend themselves against discriminatory stereotypes is eroded as their status as legitimate and truthful social commentators is undermined.[52] Though Post limits this analysis to racist hate speech, the reasoning is equally applicable to hate speech aimed at other minority groups. In the context of hate speech on the basis of sexual orientation for example, the hallmark of homophobia has been said to be "the invisibility of its victims".[53] Espousing a preference for a heterosexual domination in society, or hatefully advocating rigid or traditional gender roles, has an innumerable effect in the sense that it promotes "closetry."[54] The number of victims of sexual orientation hate speech cannot be quantified, as it can act to push its victims to anonymity and ensures they maintain the façade of heterosexuality.

---

[48] Alexander Meiklejohn *Free Speech and Its Relation to Self-Government* (Port Washington, Kennikat Press, 1948).
[49] James Weinstein and Ivan Hare "General Introduction: Free Speech, Democracy, and the Suppression of Extreme Speech Past and Present" in Hare and Weinstein (eds), above n 42, at 1.
[50] See, for example, Cohen, above n 1, for an analysis on hate speech on grounds of sexual orientation; H. L. Gates, A. P. Griffin, D. E. Lively, R. C. Post, W. E. Rubenstein, & N. Strossen (eds) *Speaking of Race, Speaking of Sex* (New York University Press, New York, 1995).
[51] Nadine Strossen "Regulating Racist Speech on Campus: A Modest Proposal?" in H. L. Gates, A. P. Griffin, D. E. Lively, R. C. Post, W. E. Rubenstein, & N. Strossen (eds), above n 50, at 143.
[52] Canadian Bar Association "Submission on Hate Speech under the Canadian Human Rights Act" (2010) at [5].
[53] Cohen, above n 1, at 74.
[54] Cohen, above n 1, at 74.

Cohen states that the harm here is not limited to the psychological traumas experienced by members of the target group, but has far reaching impacts on democracy because it removes the group out of the pool of democratic participation.[55] Scholar Nicholas Wolfson furthers this argument, and states that "democratic values are cheapened by this process since the oppression by hateful speech lessens the ability of subjugated groups to participate on an equal basis in the democratic process."[56] When faced with hate speech, many individuals are forced to flee rather than engage in dialogue, therefore fundamentally undermining this rationale by hindering the free exchange of ideas feeding our search for political truth.[57]

There is also a conflict with other fundamental democratic values when hate speech is left to fester in society. Though the right to free speech has been said to be synonymous with democracy[58], it is not a right that should be asserted to the exclusion of all other democratic rights and values. The right to human dignity and freedom from discrimination, for example, is enshrined in many domestic Bills of Rights and International Human Rights instruments and lies at the core of a stable democratic environment.[59] Recognition and protection of these rights regardless of race, ethnicity religion and sexual orientation is an essential component of democracy. The discussion of hate speech inevitably leads to the issue of these contested rights, and which democratic right should take prominence. The United States has typically prioritized the right to free speech above all else, while European legislative and judicial opinion largely falls in favor of the protection of human dignity and equality.[60] Therefore the fullest protection of free speech does not further the democracy rationale, when such a level of protection does violence to other fundamental democratic values.

[55] Cohen, above n 1, at 75.
[56] Nicholas Wolfson *Hate Speech, Sex Speech, Free Speech* (Praeger Publishers, Connecticut, 1997) at 84.
[57] See, for example, *Ross v New Brunswick School District No. 15* (1996) 1 SCR 825 at 91.
[58] C. Edwin Baker "Hate Speech" in Michael Herz and Peter Molnar *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, New York, 2012) at 65; See also Dworkin, above n 42, at viii.
[59] See, for example, Bill of Rights Act (NZ), s 19; Universal Declaration of Human Rights, Preamble, art 1, art 7; International Covenant on Civil and Political Rights, art 27.
[60] See, for example, *Norwood v United Kingdom* (2004) 40 EHRR 111 (ECHR).

Lastly, speech (of whatever form) directed at *private* individuals is not synonymous with speech directed at the government or other political institutions. In the hate speech context we are primarily dealing with a situation of vulnerable victims with no political power, as opposed to critique or comment on the government of the day. Thus, to the extent that this rationale can be said to rest upon upholding the rule of law and preventing governmental abuses of power, hate speech plays no role in furthering this. In summary, the critique observes that hate speech does not take a position within democratic discourse, but rather aims at thwarting democracy and democracy's discourses by means of actual or expressive exclusion.[61] For this reason, this paper submits that the theory from democracy, far from being advanced, is being undermined.

The second rationale behind stringent free speech protection is the market place of ideas. This theory has its roots in John Stuart Mill's *On Liberty* which holds that a free market place of ideas will by itself uncover truths so long as speech remains uninhibited to the fullest extent.[62] This line of "Millian thought" was affirmed by Justice Holmes' dissent in *Abrams v United States,* where he famously stated:[63]

> "…[T]he ultimate good desired is better reached by free trade in ideas -- that the best test of truth is the power of the thought to get itself accepted in the competition of the market, ... That, at any rate, is the theory of our Constitution."

In relation to hate speech, this theory holds that society should tolerate even the speech it hates, disagrees with or is false, because in free and intellectual debate the truth will eventually prevail.[64] To prohibit an opinion based on the disagreeable nature of the content would undermine the three reasons behind this rationale: Namely that the state's infallibility cannot be unwaveringly accepted, citizens should be able to express arguments which in turn promote their intellectual development and the development of truth needs to be promoted, by any means.[65]

[61] C. Edwin Baker "Hate Speech" in Herz and Molnar (eds), above n 58, at 65.
[62] John Stuart Mill *On Liberty* first published in 1859 (reprinted by Ticknor and Friends, Boston, 1863).
[63] *Abrams v United States* 250 US 616 (1919) (Justice Holmes dissenting) at 630.
[64] Mill, above n 62.
[65] Mill, above n 62.

The 'marketplace of ideas' metaphor creates an analogy between ideas to goods and services.[66] Traditionally, in the goods and services sense, economic theory suggests that in a perfect market, good (or trustworthy) products will survive and conquer in the market, while bad (or deficient) products will eventually fail.[67] However, in the context of hate speech and verbal assaults on minority groups, the market place is fundamentally flawed and a 'perfect market' does not exist. The marketplace theory presumes an "even playing field" where each individual comes to the market as equals.[68] However, as already stated, this is infrequently the case. This is because the instigators of hate speech act as monopolists who provide 'barriers to entry' to the minorities they are attempting to silence. To push the analogy to a marketplace of goods further, most states (including the United States) have regulatory bodies[69] who ensure anti-competitive behavior within the market does not occur. This may lend weight to the argument that a marketplace – whether of ideas, or of goods and services – requires some form of regulation to ensure effective operation.

Furthermore, one of the reasons cited in support of this rationale is the promotion of the intellectual development of citizens. However, when hate is being professed, debate is rarely intellectual or reasoned. Members of organizations espousing hate rarely present their views in an environment devoted to open dialogue, in which opposing views are encouraged and the promotion of hatred has no room. Rather, hate groups are often an uninvited presence,[70] where the purpose of their expressive activities is the distillation of hatred against their targets. Therefore it is evident that the marketplace metaphor is not a watertight defense for stringent free speech protection in the unique context of hate speech. The power plays at stake in this specific market are complex and, as has often been asserted, it is superficial to state that the best remedy against evil speech is more speech.[71]

---

[66] Laura Beth Nielson *License to Harass: Law, Hierarchy, and Offensive Public Speech* (Princeton University Press, New Jersey, 2004) at 28.
[67] Herbert Hovenkamp "The Basic Economics of Antitrust" in *Federal Antitrust Policy: The Law of Competition and its Practice* (2nd ed, West Group, St Paul, 1999) at 3.
[68] Anthony Cortese *Opposing Hate Speech* (Praeger Publishers, Westport, 2006) at 138.
[69] See, for example, New Zealand's Commerce Commission; The United States Federal Trade Commission.
[70] The activities of the Westboro Baptist Church prove illustrative.
[71] See, for example, *Whitney v California* 274 US 357 (1927) per Brandeis J at 377; Eric Barendt *Freedom of Speech* (Oxford University Press, Oxford, 2005); David A. Strauss "Persuasion, Autonomy, and Freedom of Expresion" (1991) 91 Col L Rev 334 at 335.

The final rationale this paper will touch on is the 'autonomy defense', or the self-fulfillment theory of free speech.[72] Primarily, "the argument from autonomy… maintains that, not to honor an individual's choice to speak… would violate that person's right to autonomy."[73] The autonomy argument is often invoked to protect all kinds of speech (hate speech included) in order to emphasize the notion that the state cannot paternalistically dictate to its citizenry which views are correct.[74] Ronald Dworkin argues that restricting people's speech based on contempt for their view of good and evil violates their right to autonomy or "moral independence."[75] Under this theory, free speech can be justified as an end in itself - Rather than connecting it to the collective search for truth or the processes of self-government, it should be protected merely because of the high "value of speech conduct to the individual."[76] The United States Supreme Court in *Procunier v Martinez* affirmed this rationale as a fundamental basis upon which free speech protection rests, stating:[77]

> "The First Amendment serves not only the needs of the polity, but also those of the human spirit -- a spirit that demands self-expression. Such expression is an integral part of the development of ideas and a sense of identity. To suppress expression is to reject the basic human desire for recognition and affront the individual's worth and dignity."

The self-fulfillment rationale, where speakers claim protection for the sheer pleasure of speaking, has an unseemly ring of hedonism, and has been extensively criticized by the works of Robert Bork.[78] To ground freedom of speech in this theory indulges the individual in a right of self-gratification that legal systems have traditionally not been obliged to respect.[79] Bork argues that if the protection of speech is linked to the pursuit of pleasure, then the state should be permitted to regulate speech in the same manner as it regulates other pleasure seeking activities, such as the consumption of

[72] Carmi, above n 40, at 972.
[73] Carmi, above n 40, at 973.
[74] Carmi, above n 40, at 973.
[75] Carmi, above n 40, at 973.
[76] Edwin C. Baker "Scope of First Amendment Freedom of Speech" (1978) 25 UCLA L Rev 964 at 966.
[77] *Procunier v Martinez* 416 US 396 (1974) at 416.
[78] Robert H. Bork "Neutral Principles and Some First Amendment Problems" (1971) 47 Ind L J 26.
[79] Rodney A. Smolla "Academic Freedom, Hate Speech and the Idea of a University" in William W. Van Alstyne *Freedom and Tenure in the Academy* (Duke University Press, London, 1993) at 199.

drugs or engaging the services of a prostitute.[80] Though this comparison may seem extreme, it is exemplary of the state's tendency to regulate conduct when the public interest so requires. There is a legitimate public interest in promoting social equality and preventing harm to victims of hate speech. Individual self-development and self-fulfillment at the expense of another's individual dignity and self-worth is not a viable rationale to defend free speech protection in the hate speech context.

Each rationale canvassed above has fundamental flaws when assessed against the backdrop of hate speech. The fact that hate speech fails to accord with these free speech justifications raises questions as to the extent of protection it should be afforded, both in the United States and abroad. The Supreme Court case of *Snyder v Phelps* most recently affirmed United States commitment to the protection of hate speech. The reasoning and means of justification of both Chief Justice Roberts for the majority, and Justice Alito in dissent will be analyzed and critiqued in Part II of this paper.

II Snyder v Phelps

A Introduction

Snyder v Phelps involved a First Amendment battle that reached the Supreme Court on October 6th 2011. The Supreme Court upheld the First Amendment right of the Westboro Baptist Church and its members to picket the military funeral of Marine Lance Corporal Matthew Snyder. Though the 8-1 decision was not unexpected (in light of the constitutional setting and First Amendment precedents already canvassed) this does not detract from the cases constitutional importance. Some factual background, by way of introduction, is necessary.

B The Westboro Baptist Church

The Defendant, Pastor Fred Phelps founded the Westboro Baptist Church (WBC) in 1955. Most of the Church's congregation consists of Phelps's extended family

[80] Bork, above n 78; See also: Smolla, above n 79, at 199.

including his 13 children, 54 grandchildren and seven great grandchildren.[81] The Church subscribes to a very literal interpretation of the Bible, and believes that God is punishing the United States tolerance of homosexuality (particularly in the military) by killing soldiers at war as retribution for that tolerance.[82] It has risen to infamy in recent years after adopting a new tactic of picketing the funerals of military service men in order to proselytize their views. Its messages are strongly homophobic, anti-Semitic, anti-Catholic and hate driven.

The Church orchestrates its protests strategically for maximum media exposure, targeting the mourners attending funerals in a uniquely distinctive way: The protest is directed at mourners not as a means to speak to them, but rather as a means to magnify the protestors audience for its public message.[83] The media is irresistibly drawn to tragedy and the sight of persons visibly in grief, so the Church's strategy, as Justice Alito commented, is one that "works"[84] in its aim of gaining mass media attention. The Church has in the past exchanged free airtime on popular radio stations for the cancellation of intended funeral pickets. In 2006 the Church cancelled its threatened protest at the funeral of five Amish girls killed by a crazed gunman in exchange for publicity on a talk show.[85] Margie Phelps, the daughter of Fred Phelps who is both a member of the Church and acts as the Church's lawyer in legal disputes, has admitted that the key motivation behind its choice of funerals as protest grounds is the level of publicity it results in: "It's how many ears we can reach. That is our job, that is our goal."[86] Essentially, the Church uses mourners as stage props, turning private funerals into tragic media spectacles.

C Procedural History: The Path to the Supreme Court

[81] Margaret Greco "Take a Step Back: The Constitutionality of Stricter Funeral Picketing Regulations after Snyder v Phelps" (2014) 23 B U Pub Int L J 151 at 151.
[82] John C Schoen and Edward J Schoen "Snyder v Phelps: A Cautiously Outrageous Protest" (2013) 23 Southern L J 167 at 168.
[83] Alan Brownstein and Vikram David Amar "Death, Grief and Freedom of Speech: Does the First Amendment Permit Protection against Harassment and Commandeering of Funeral Mourners?" (2010) 1 Cardozo L Rev 368 at 380.
[84] *Snyder v Phelps* 131 US 1207 (2011) at [1224] per Alito J.
[85] At [1225] per Alito J.
[86] Nicole Santa Cruz and Seema Mehta "Westboro church agrees not to take protest to shooting victims funerals" *Los Angeles Times* (United States, 13 January 2011).

The father of deceased military service member Mathew Snyder brought action against the WBC and its members, succeeding in the lower courts on claims of intentional infliction of emotional distress (IIED) and invasion of privacy by intrusion upon seclusion. Picketers had displayed their signs for thirty minutes before the funeral began which stated: "Thank God for Dead Soldiers"; "Fags Doom Nations"; and "You're going to Hell".[87] Snyder saw the signs when driving to the funeral (the drivers rerouted so as to avoid the display as much as possible) however did not learn of the signs content until watching the news that night. The Church also posted an online rant or "Epic" on their website after the physical protest which was found by Matthew Snyder's parents when entering a Google search of his name.[88] The Epic was not addressed in the Supreme Court for procedural reasons (a decision which did not escape criticism)[89], however it made specific reference to the Snyder family, stating: [90]

> "You raised him for the devil. Albert and Julie ripped that body apart and taught Matthew to defy his creator, to divorce and to commit adultery. They taught him how to support the largest pedophile machine in the history of the entire world, the Roman Catholic Monstrosity."

Following the filing of Snyder's suit, the Church sought summary judgment requesting to dismiss the case outright on all causes of action citing its rights under the First Amendment. [91] The District Court dismissed the Snyder's claim of defamation and publicity given to private life after oral arguments pre-trial. The remaining issues were determined by a jury who found for Snyder, and granted 8 million dollars in punitive damages, and 2.9 million dollars in compensatory damages.[92] Judge Bennett in the District Court for the District of Maryland affirmed the jury's verdict, stating that the "First Amendment does not provide absolute

[87] *Snyder v Phelps*, above n 84, at 1213.
[88] Christina Wells "Regulating Offensiveness: Snyder v Phelps, Emotion and the First Amendment" (2010) 1 California L Rev 71 at 74.
[89] The writ of certiorari which the Snyder's filed with the Supreme Court did not mention the epic: See Supreme Court Rules 14.1(g), Petition must contain setting out the facts material to consideration of the question presented; Jeffrey Shulman "Epic Considerations: The Speech that the Supreme Court Would Not Hear in *Snyder v Phelps*" (2011) Cardozo L Rev 35.
[90] *Snyder v Phelps*, above n 84, at 1226.
[91] *Snyder v Phelps*, above n 84, at 1214.
[92] *Snyder v Phelps*, above n 84, at 1214.

protection to individuals committing acts directed at other private individuals."[93] On appeal to the Fourth Circuit Court of Appeals this decision was overturned, with an ultimate finding that WBC had engaged in protected speech and thus escaped liability.

It is useful to canvas the reasoning and critiques of the Fourth Circuit Court of Appeals decision (a decision which one commentator stated is lacking in "precision or clarity")[94] prior to commenting on the decision of the Supreme Court. The Fourth Circuit decided that the issues raised by the WBC in protest, namely homosexuality in the military, sex abuse scandals within the Catholic Church and the moral conduct of the United States, were matters of "public concern."[95] Though this is undoubtedly correct, as was submitted by counsel for Snyder in the opening Brief to the Supreme Court, the Fourth Circuit erred in failing to find a rational connection between the "matters of public concern" identified above, and Snyder's association to these issues.[96] The Fourth Circuit ought to have considered whether the connection to Matthew Snyder was of public concern, rather than the content of the speech itself.[97]

In determining the public speech vs. private speech distinction, and how to correctly categorize the speech in question, the Court followed the lead of the Supreme Court decision of *Hustler Magazine v Falwell.*[98] Jeffery Shulman argues *Hustler* to be distinguishable on the basis of different actors, different speech, a different communicative setting and different underlying policy considerations.[99] It is difficult to come to an alternative conclusion to Shulman, when one considers the different factual considerations at play in *Hustler*. *Hustler* magazine published a parody advertisement attacking well-known televangelist Jerry Falwell by implying he had lost his virginity to his mother in an outhouse.[100] The Court held that when a *public* figure brings an IIED claim based on speech, the First Amendment prevents

[93] *Snyder v Phelps et al* 533 F Supp 2d 567 (D Md 2008).
[94] Jeffrey Shulman "Free Speech at What Cost?: *Snyder v Phelps* and Speech-Based Tort Liability" (2010) Cardozo L Rev 1.
[95] *Snyder v Phelps* 580 F 3d 206 (4th Cir 2009) at 223.
[96] "Brief for Petitioner Albert Snyder" in the Supreme Court of the United States at 19, *Snyder v Phelps*, above n 84.
[97] Shulman, above n 94, at 2.
[98] *Hustler Magazine v Falwell* 485 US 46 (1988).
[99] Shulman, above n 94, at 2.
[100] *Hustler Magazine v Falwell*, above n 98, at 48.

recovery.[101] Despite *Snyder v Phelps* involving a private figure who has not in any way sought the spotlight prior to bringing the claim, the Court determined the ratio in *Hustler* to be equally applicable. Shulman surmises:[102]

> "The Fourth Circuit failed to give these differences due weight, and took a step too far when it applied *New York Times* protection to speech undeserving of such constitutional solicitude."

The Fourth Circuit then determined that even if the speech was not of public concern, it was mere "rhetorical hyperbole", thus it was not provably false and it was protected opinion.[103] The Court appeared to be doctrinally borrowing concepts stemming from the law of defamation, which Shulman opines is not appropriate in a claim of intentional infliction of emotional distress.[104] The Snyder's submission on this submits that the Court's reasoning turns "outrageousness" from a threshold element from the tort of intentional infliction of emotional distress into an affirmative defense.[105] This creates a perverse incentive to be especially abusive and inflammatory as the more "hyperbolically hateful" the speech, the more constitutional protection it is afforded.[106] This, according to Shulman, makes little sense when the plaintiff is bringing a claim on the grounds of emotional distress, as extreme rhetorical hyperbole is exactly the sort of speech that can act to *heighten* a plaintiff's emotional distress.[107]

Shulman acknowledged the difficulties the Fourth Circuit Court of Appeals faced in dealing with fundamental colliding interests, given the "doctrinal funhouse" that made up United States constitutional law on speech-based tort claims.[108] He concluded, however that it would be up to the Supreme Court to correct the failings of the lower Court and ensure a better balance is struck between the need to protect robust political debate and the need to protect individuals from personal abuse and hate speech.

---

[101] *Hustler Magazine v Falwell*, above n 98, at 56.
[102] Shulman, above n 94, at 2.
[103] *Snyder v Phelps*, above n 95.
[104] Schulman, above n 94, at 3.
[105] "Brief for Petitioner Albert Snyder", above n 96, at 20.
[106] Shulman, above n 94, at 3.
[107] Shulman, above n 94, at 3.
[108] Schulman, above n 94, at 1.

D Chief Justice Roberts

Chief Justice Roberts (Roberts CJ) wrote for the majority and, like the Fourth Circuit Court of Appeals, framed the central issue as being whether the speech in question was public (code for 'protected') speech.[109] Speech on public issues "occupies the highest rung of the hierarchy of First Amendment values"[110] and is therefore rarely amenable to exception. The case law on when speech constitutes a matter of public concern, or pushes the speech into the 'public speech' category suggests hate speech is encompassed by this. Roberts CJ cites *Rankin v McPherson*[111] which held a statement's arguably "inappropriate or controversial character… is irrelevant to the question whether it deals with a matter of public concern."[112] If the speech falls within the 'public speech' ambit, the First Amendment is capable of serving as an almost infallible defense to Snyder's claim of tort liability.[113] Instead of first assessing whether the Plaintiff's tort claim of intentional infliction of emotional distress was made out, and then proceeding to assess the defenses available to the Church, Roberts CJ used the First Amendment as the starting point from which to base his assessment.

In determining whether the speech was of public concern, Roberts CJ assessed the "content, form and context of that speech" as revealed by all the circumstances.[114] The Court determined that the content of Westboro's signs "plainly related to broad issues of interest to society at large."[115] While Roberts CJ conceded that a few of the signs contained messages related to the particular individual,[116] the dominant thrust of the speech highlighted issues of public import, such as homosexuality in the military and the general fate of the nation.[117] It was held that the funeral context and the connection with Matthew Snyder's funeral could not change the nature of the speech to something unprotected and open to tort liability.[118] The Court instead framed the "context" as speech that was merely expressed in a "public place adjacent to a public

[109] *Snyder v* Phelps, above n 84, at 1211.
[110] *Connick v Myers* 461 US 138 (1983).
[111] At [1211] per Roberts CJ.
[112] At [1211] per Roberts CJ.
[113] At [1211] per Roberts CJ.
[114] At [1216] per Roberts CJ.
[115] At [1216] per Roberts CJ.
[116] At [1217] per Roberts CJ.
[117] At [1217] per Roberts CJ.
[118] At [1217] per Roberts CJ.

street"[119] which somewhat ignores the precise facts at issue and the proximity to the funeral procession. As public streets and public places have historically been the "archetype of a traditional public forum" [120] framing the context in this way significantly undermined any chances of the Snyder's claim succeeding. Roberts CJ concluded that:[121]

> "Given that Westboro's speech was at a public place on a matter of public concern that speech is entitled to special protection under the First Amendment. Such speech cannot be restricted simply because it is upsetting or arouses contempt."

The conclusion drawn by Roberts CJ is somewhat flawed when one takes into consideration the following factors: The way in which the Court framed the "context" of the speech, the Court's concession that some of the speech's content was aimed at the Snyders specifically and thus were private messages, and the fact that the boundaries between public speech and private speech have been notoriously unclear and often difficult to define and apply.[122] Furthermore, the Court only considered the contents of the Westboro Church's placards and declined to consider the "Epic" posted on its website (sections of which have been referred to and reproduced above). The epic can only be described as a personal attack on the Snyders and containing speech that was on matters of purely private concern. Therefore, in making the determination that the speech related to matters of public import, the Court failed to address the parts of the Church's speech that was a clear verbal assault on the Snyders.[123] An assessment of the content, form and context of the speech "as revealed by the whole record"[124] was therefore not undertaken.[125]

The distinction made by Roberts CJ between private speech, public speech and public speech intermingled with private speech has been subject to valid criticism, both by commentators, and by Alito J in dissent.[126] There is an arbitrary distinction between the latter two categories, both of which the Court have classed as protected First

[119] At [1218] per Roberts CJ.
[120] At [1217] per Roberts CJ.
[121] At [1219] per Roberts CJ.
[122] At [1216] per Roberts CJ.
[123] Shulman, above n 89, at 36.
[124] At [1216] per Roberts CJ.
[125] Shulman, above n 89, at 36.
[126] Shulman, above n 94, at 313; See also *Snyder v Phelps*, above n 84, at [1228] per Alito J.

Amendment speech. Purely private speech is not immune to regulation. Justice Powell has noted that if we had a constitutional order that held otherwise "a woman of impeccable character who was branded a whore by a jealous neighbour would have no effective legal recourse."[127] Schulman poses a variation on this, where the neighbor instead proclaims outside the Church in which the woman attends Sunday mass: "This woman, like all Catholics, is a whore."[128] The harm inflicted upon the woman remains the same in both scenarios. Is the speech protected because though a private person is targeted it purports to address a matter of public concern? Roberts CJ approach of assessing the "dominant thrust" of the speech would suggest this to be the case, which appears to be a concerning precedent to set. Alito J further highlighted these difficulties, in which he failed to see why actionable speech should be immunized "simply because it is interspersed with speech that is protected."[129] His opinion is commented on below.

E Justice Alito in Dissent

Justice Alito provided an emotive and ardent dissent, opening his judgment with the statement: "Our profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case."[130] Unlike the reasoning of the majority, Alito J began by assessing the elements of the tort of intentional infliction of distress, which he found to be made out, and then assessed this against the value and category of the speech in question. He reasoned that the tort of IIED is already extremely narrow, and will be reserved to a limited class of cases where the wounds are "truly severe" and "incapable of healing themselves."[131] For the tort of IIED to succeed, Snyder needs to show that the Church's intentional conduct was so extreme and so outrageous as to "go beyond all possible bounds of decency and to be regarded as… utterly intolerable in a civilized community."[132] The speech needs to be shown to have caused Snyder to suffer severe emotional distress.[133] Snyder testified to the harm he has suffered as a result of Westboro's actions: He

[127] Shulman, above n 94, at 313.
[128] Shulman, above n 94, at 313.
[129] At [1227] per Alito J.
[130] At [1222] per Alito J.
[131] At [1222] per Alito J.
[132] At [1222] per Alito J.
[133] At [1222] per Alito J.

stated that he was unable to separate the thought of his dead son from his thoughts of Westboro's picketing, and that he often becomes tearful, angry and physically ill when he thinks about it.[134] Alito J considered the elements of the tort of IIED satisfied.

The Church in its submissions did not dispute that the tort of IIED was not made out.[135] They instead contended that the First Amendment gave them a right to engage in such conduct.[136] Alito J rebutted this outright, and unequivocally stated that the Church, in this regard, "are wrong."[137] On deciding the question of whether the First Amendment precluded tort liability he assessed the value of the speech and whether it can properly be characterized as 'public speech' in line with the reasoning of the majority. He held the speech in question made no contribution to public debate,[138] and cites the Courts proposition in *Chaplinski v. New Hampshire.*[139] The Court in *Chaplinksi* stated that the First Amendment does not shield utterances which form "no essential part of any exposition of ideas."[140] While this statement was made in reference to the Courts creation of the 'fighting words' principle, it is nonetheless indicative of the Courts readiness to limit speech when it is of low value, and does not serve as a suggestion that Alito J considers the fighting words exception to require extension beyond its current scope.

Fundamental to Alito J's reasoning is the category of speech he attributes to the Church's demonstration. In assessing this question he considers the analysis of the majority as superficial in the respect that it did not address the "Epic" which acts as clear evidence of the Church's intent, and reaffirms the meaning of the Church's protest.[141] He considered the epic and the funeral protest to be part of a single course of conduct, requiring a cumulative examination.[142] In determining that the speech was beyond the realms of "commentary on public concern", and thus not worthy of the fullest First Amendment protection, he based his decision on a number of factors.

[134] At [1214] per Roberts CJ.
[135] At [1222] per Alito J.
[136] At [1222] per Alito J.
[137] At [1222] per Alito J.
[138] At [1222] per Alito J.
[139] *Chaplinski v. New Hampshire* 315 US 568 (1942).
[140] At [1223] per Alito J.
[141] At [1226] per Alito J.
[142] At [1226] per Alito J.

Firstly, the choice of protest venue in close proximity to Matthew Snyder's funeral meant that a reasonable person would have interpreted the signs as being connected to Matthew Snyder.[143] Secondly, a consideration of both the Epic and at least *some* of the signs at the funeral demonstrations indicated the intended nature of the speech to be a specific attack on Matthew Snyder and the Snyder family.[144] Thirdly, both Matthew Snyder and the Plaintiff were private figures.[145]

Thus, Alito J concludes that while "commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder's purely private conduct does not."[146] He instead frames the speech as a personal attack and personal abuse which "is not in any proper sense communication of information or opinion safeguarded by the Constitution."[147] In characterizing the protest as a verbal attack on Snyder, Alito J analogized Phelps to an assailant who physically attacks a random victim, knowing that his assault will be newsworthy as a deliberate strategy to amplify his public message.[148] Alito J argues neither the physical assault, nor the verbal assault is worthy of constitutional protection and just as a physical assault can occur on a public street, so too can IIED.[149]

Justice Alito's dissent does not, by any stretch, go as far as to attempt to argue for a categorical exception to the First Amendment in the case of hate speech. The phrase "hate speech" does not even appear in Alito J's judgment. According to Alito J, this is simply a brutal, personal attack on the Snyder family to which the tort of IIED should extend. He expressly states that the Church's opportunities to undertake their hateful tirades are almost limitless: "They could have picketed the United States Capitol, the White House, the Supreme Court, the Pentagon, or any of the more than 5,600 military recruiting stations in this country."[150] His key concern was the funeral setting

[143] At [1226] per Alito J.
[144] At [1226] per Alito J.
[145] At [1226] per Alito J.
[146] At [1226] per Alito J.
[147] At [1222] per Alito J.
[148] At [1227] per Alito J; Michael Bakhama "Building Picket Fences: Maryland's Funeral Picketing Law After Snyder v Phelps" (2012) 71 Md L Rev 1231 at 1241.
[149] At [1227] per Alito J.
[150] At [1223] per Alito J.

as a time of intense emotional sensitivities, adding to the viciousness of the attack and the unique level of harm at play. He holds that:[151]

> "Allowing family members to have a few hours of peace with harassment does not undermine public debate… *In this setting* the First Amendment permits a private figure to recover for the intentional infliction of emotional distress caused by speech on a matter of private concern."[152]

By very much limiting IIED protection to the specific factual context, Alito J is ensuring the floodgates to wide ranging speech based tort liability are not opened. As the WBC is the only organization to utilize the tactic of picketing funerals in the United States, and this is largely what Alito J considers synonymous with "outrageous or extreme" conduct for the purposes of satisfying the elements of the tort of IIED,[153] allowing the Snyders to succeed on their claim would only hinder or have a chilling effect upon the future conduct of the WBC. The Church's activities were expressed by Roberts CJ as "hurtful and [their] contribution to public discourse … negligible."[154] Given these findings, and the fact that only a very limited portion of public debate would be stifled when the requisite level of harm can be proven under the tort of IIED, it is surprising the Majority did not take a stand and utilize the tort as a means of circumventing the First Amendment. The majority's refusal to do so only acts to further indicate the high levels of protection given to speech in the United States, and affirms the position of hate speech as remaining within the realm of protected speech subject to few regulatory constraints.

F Post Snyder v Phelps: Academic Reception

Academic discourse within the United States generally favors the view that the Supreme Court came to the correct decision in finding the First Amendment extended to protect the speech of the WBC. Christina Wells stated that to find otherwise would undo decades of the Courts' jurisprudence protecting "offensive speech".[155] The Courts' free speech jurisprudence, as canvassed in the previous section of this paper,

[151] At [1228] per Alito J.
[152] At [1228] per Alito J.
[153] At [1229] per Alito J.
[154] At [1220] per Roberts CJ.
[155] Wells, above n 88, at 72.

does not allow government sanctioned punishment of speech based on content or opinions. Additional objective indications of harm are generally required, such as speech accompanied by physical invasions, threats or violence.[156] Wells argues that the Courts protection of "offensive speech" is based on two premises: Firstly speech of public concern retains its value even when delivered in an offensive manner; and secondly any attempts to punish offensive speech can often lead to censorship of unpopular ideas.[157] She states that *Snyder v Phelps* "implicates the Courts' offensive speech jurisprudence in its purest sense."[158]

However, the flaw in Wells' argument lies in her mischaracterization of the speech at issue in *Snyder* as speech that merely "offends". There are obvious issues in regulating against solely offensive speech (which this paper will explore further when it assesses international regulatory approaches to hate speech), however the speech the WBC was professing both online and in connection to the funeral was speech that professed *hate*. It is difficult to see how statements which revel in the deaths of soldiers, and attribute the downfall of America to the tolerance of homosexuality, can be classed as anything otherwise. The speech in *Snyder v Phelps* is not just unpopular opinion, which is "outside mainstream thought."[159] It is hate speech, pure and simple. The distinction between hate speech and offensive speech is an important one to draw, and one that has not garnered a lot of attention in United States First Amendment jurisprudence.[160]

Christina Wells strongly opposes the extension of tort liability to cover this sort of speech. She states that the very nature of IIED and the "outrageousness" requirement encourages lawsuits when plaintiffs are insulted by the defendant's speech.[161] The Court has never allowed punishment for speech on the basis of the apparent invalidity of conflicting beliefs.[162] She posits that tort liability in particular is especially inapplicable in this context, as unlike generally applicable criminal laws that clearly

[156] Wells, above n 88, at 72.
[157] Wells, above n 88, at 75.
[158] Wells, above n 88, at 75.
[159] Wells, above n 88, at 76.
[160] See, for example, Part III of this Paper which will further expand on the importance of the distinction between hate speech and offensive speech at pp 40, 45, 46.
[161] Wells, above n 88, at 84.
[162] Wells, above n 88, at 84.

indicate what behavior is unlawful, tort lawsuits involve private disputes between discrete parties.[163] Therefore, she concludes that if the Court were to have held the Phelpses liable in *Snyder*, this would have been synonymous to allowing censorship of speech based on its unpopular message, via a censorship mechanism that is both wholly inappropriate and fundamentally at odds with First Amendment jurisprudence.[164]

Conversely, some observers argue that the emotional impact of the speech, and the harm at issue is the exact reason why tort liability *should* extend to this sort of scenario.[165] These claims centre around the arguments already outlined, namely that the First Amendment should not interfere with "the use of words as weapons" and robust public discourse will not be chilled by allowing tort liability in cases of hate speech.[166] Schulman argues that the availability of tort remedies for injurious speech is critical if private individuals are to peacefully exercise their own constitutional rights, especially given the lack of criminal regulation.[167] Why should the private plaintiff be left defenseless against emotionally injurious speech that serves no valid communicative purpose? Shulman posits that the state has a substantial interest in protecting families' "personal stake in honoring and mourning their dead" and in keeping their most intimate moments from "unwarranted public exploitation."[168] Given this substantial state interest, Shulman argues Mr. Snyder should have the opportunity to show the tort of IIED is made out. As Wells admits, the intent requirement of the tort limits liability to the "worst actors",[169] which should serve to quell concerns regarding chilling effects on speech. The state interest is further exemplified by the funeral picketing regulations enacted in forty states as a direct result of the activities of WBC.[170] Although, Alito J observed that the regulations do

[163] Wells, above n 88, at 73.
[164] Wells, above n 88, at 73.
[165] Shulman, above n 94.
[166] Shulman above n 94, at 336; Chelsea Brown "Not Your Mother's Remedy: A Civil Action Response to the Westboro Church's Military Funeral Demonstrations" (2009) 112 W Va L Rev 207 at 232.
[167] Shulman, above n 94, at 3.
[168] Shulman, above n 94, at 3.
[169] Wells, above n 88, at 84.
[170] Wells, above n 88, at 73.

not obviate the need for IIED protection,[171] they illustrate the unique and significant public interest at play in this context.

G State Regulations on Funeral Picketing

In order for funeral picketing regulations to be constitutionally compliant, they can only regulate the "time, place and manner" of the activity, and cannot be aimed at the content. [172] The majority judgment in *Snyder v Phelps* suggested that the implementation of these new laws would prevent or at least mitigate the wounds inflicted by these verbal assaults at funerals.[173] However WBC's picketing would have been in full compliance with the Maryland regulation that was enacted in response to the Church's protest as it prohibited picketing within 100 feet of a funeral service or funeral procession.[174] The Church's protest took place outside of this "buffer zone" on a plot of public land located about 1000 feet from the funeral site.[175] Justice Alito concluded that the regulations are significant only to the extent that they are evidence of societies interest in preserving the sanctity and privacy of funerals, but as is evident in *Snyder v Phelps* itself, they fall short of remedying the harm at issue.[176] An assessment of the means by which states are attempting to address the issue of the conduct of the WBC, while nevertheless staying true to established First Amendment jurisprudence, is further evidence of the difficulties the United States treatment of the First Amendment poses in a situation where there is a legitimate public interest in hindering the expression.

There are long established Supreme Court precedents holding the right to freedom of speech is capable of being subject to reasonable time, place and manner restrictions. [177] In determining a regulation's constitutionality, the first focus is whether the regulation is content-neutral.[178] The enactment of the regulation cannot

[171] *Snyder v Phelps,* above n 84, per Alito at [1228].
[172] *Clark v Community for Creative Non-Violence* 468 US 288 (1984).
[173] At [1227] per Alito J.
[174] Crimes Against Public Health, Conduct and Sensibilities Md Code Ann Crim Law § 10-205.
[175] Bakhama, above n 148, at1232.
[176] At [1227] per Alito J.
[177] *Clark v Community for Creative Non-Violence* 468 US 288 (1984) at 295; *Tinker v Des Moines Independent Community School District* 393 US 503 (1969); *Ward v Rock Against Racism* 491 US 781 (1989).
[178] *RAV v City of St Paul* 505 US 377 (1992) at 386.

have been triggered by the content of the speech but by another, external indicator, and any burden thereby placed on freedom of expression may only be incidental. The Supreme Court has stated that a statute is content-neutral if its "restrictions apply equally to all demonstrators, regardless of viewpoint and the statutory language makes no reference to the content of the speech."[179] A content-neutral restriction is subject to an 'intermediate scrutiny' test by the Courts which means the restriction must serve a significant government interest; be narrowly tailored; and permit for alternative channels of communication.[180] The regulation must be as minimal a restriction on freedom of expression as required to advance the state interest in question.[181] As they are a fairly recent phenomenon in the specific context of funeral demonstrations, the constitutionality of many of these state laws is still being determined.[182]

While the Supreme Court has not yet made a ruling on the regulations, the Sixth Circuit Court of Appeals has upheld Ohio's funeral protest law in *Phelps–Roper v Strickland*[183] as a content-neutral measure narrowly tailored to serve a significant state interest in protecting funeral mourners' privacy. The regulation in question restricted protesting activities to a 300 feet buffer zone that could not take place one hour before or after the funeral procession.[184] In making this determination, the Sixth Circuit relied on Supreme Court pronouncements on the issue of time, manner and place restrictions generally.[185] The Supreme Court has specifically held that a city could ban intrusive residential picketing in order to protect residential privacy,[186] and that a state could restrict speakers from approaching non-consenting individuals entering a medical facility.[187]

In the context of residential picketing, it was held that individuals in their home are captive audiences to unwanted communication, and "there is simply no right to force

[179] *Hill v Colorado* 530 US 703 (2000) at 719.
[180] *Clark v Cmty for Creative Non-Violence,* above n 177, at 293; *Ward v Rock against Racism*, above n 177, at 791.
[181] *Clark v Cmty for Creative Non-Violence*, above n 177.
[182] See, for example, *Phelps-Roper v City of Manchester* 697 F 3d 678 (8th Cir 2012).
[183] *Phelps-Roper v Strickland* 539 F 3d 356 (6th Cir 2008).
[184] Ohio Rev Code Ann § 3767.30 (West 2006).
[185] See, for example, *Frisby v Shultz* 487 US 474 (1988); *Hill v Colorado*, above n 179; *Madsen v Women's Health Center, Inc* 512 US 753 (1994).
[186] *Frisby v Schultz,* above n 185, at 484.
[187] *Hill v Colorado,* above n 179, at 715; *Madsen v. Women's Health Center, Inc,* above n 185, at 768.

speech into the home of an unwilling listener."[188] In the context of medical clinics, it was held that the regulation served a significant and legitimate government interest in providing unimpeded access to health care and avoiding potential trauma to patients who are often in "particularly vulnerable physical and emotional conditions."[189] In concluding that Ohio has an important interest in the protection of funeral attendees, the Sixth Circuit made analogies to both these Supreme Court authorities and stated:[190]

> Just as a resident subjected to picketing is "left with no means of avoiding the unwanted speech" mourners cannot easily avoid unwanted protests without sacrificing their right to partake in the funeral or burial service. And just as "persons who attempt to enter health care facilities are often in particularly vulnerable physical and emotional conditions" it goes without saying that funeral attendees are also emotionally vulnerable.

By contrast, the Eight Circuit Court of Appeals struck down a similar funeral protest ordinance under the First Amendment in *Phelps-Roper v City of Manchester*[191] failing to find any significant government interest in the protection of funeral attendees. The ordinance contained the same restrictions as in *Strickland.*[192] The Court was brief in its opinion, and has left the question of the constitutionality of funeral picketing regulations as largely unanswered, with two Appellate level courts differing in their position on essentially the same statute. It is therefore a question that requires a conclusive determination by the Supreme Court. Considering that members of the WBC have to date been extremely zealous in commencing legal proceedings in the name of their First Amendment rights, there is no doubt that the Supreme Court will have ample opportunity to determine this question shortly.

It is interesting to note that the only two Court of Appeal cases to determine the issue of the constitutionality of funeral picketing regulations have been brought by members of the WBC. This further reinforces the fact that regulation of this speech, whether through expansion of the tort of IIED or through the more First Amendment

[188] *Frisby v Schultz,* above n 185, at 485.
[189] *Madsen v Women's Health Center, Inc.,* above n 185, at 718.
[190] *Phelps-Roper v Strickland,* above n 183, at 8.
[191] *Phelps-Roper v City of Manchester*, above n 182.
[192] Bakhama, above n 148, at 1244.

consonant mechanism of time, manner and place restrictions, largely only constrains members of the WBC. Given that the Church has been termed by the Southern Poverty Law Centre as "the most obnoxious and rabid hate group in America"[193] curbing or restraining their activities in the name of human dignity and freedom from discrimination should not appear groundbreaking.

H Conclusion

In conclusion, the position of "hate speech" in the United States has remained outside the regulatory reach of the state via tort liability, and the constitutionality of time, manner and place restrictions is a question that remains to be authoritatively decided upon. Alito J in dissent ardently argued for tort liability to extend to this context, but his reasoning limited the extension of the tort of IIED to the precise facts at issue, which does little to advance the case for wider hate speech regulation in the United States. The reasons for the United States aversion against any kind of censorship or regulation in this context is largely based on fears surrounding the 'chilling effect' on speech, and slippery slope concerns. Part III, the final part of this paper will adopt a comparative approach, and assess the position in three politically congenial states where regulatory mechanisms have been adopted by the Legislature. The comparative approach is adopted to provide some insight into the constitutional invincibility of hate speech in the United States, and to demonstrate that the 'slippery slope' fears in regulating speech based on content may not be as real as they appear.

III International Experiences in the Regulation of Hate Speech

A Introduction

This paper will now seek to examine the mechanisms and definitions the three states of Canada, the United Kingdom and New Zealand have adopted to curb the proliferation of hate propaganda domestically. Although there is some common ground across the three countries on the approaches adopted, Luke McNamara notes there are significant differences in terms of the manifestations of these values in legal

[193] Intelligence Files "Westboro Baptist Church" Southern Poverty Law Center <www.splcenter.org>

form.[194] Unlike the United States, the three comparator countries have ratified the International Convention on the Elimination of Racial Discrimination (ICERD), which contains specific obligations in Article 4 to legislate against hate propaganda.[195] It obliges parties to adopt "immediate and positive measures" to eradicate forms of incitement and discrimination that is based on the idea of racial supremacy.[196]

The extent to which these obligations are met in each state, and the extent to which these state's balanced their obligation under ICERD against the competing right to freedom of expression will be assessed, against the background of each state's unique constitutional setting. The notion of 'balancing' competing rights is from the outset in stark contrast to the "anti-balancing" approach that is typical of the United States. Justice Hugo Black of the United States Supreme Court epitomized this in his statement in *Konigsberg v State Bar,* where he held that the First Amendment's "unequivocal command… shows that the men who drafted our Bill of Rights did all the "balancing" that was to be done in this field."[197] As this Paper has demonstrated, regulation in the United States has thus far only been held to be legitimate when it is balanced against a non-speech element. It is evident therefore that the United States operates from a firmly different constitutional platform to the states canvassed below.

B Canada

Canada has been described as "the most enthusiastic consumer of hate propaganda norms in the international community" [198] in terms of its implementation of its treaty obligations under ICERD, the International Covenant on Civil and Political Rights, the Convention on the Prevention and Punishment of the Crime of Genocide, and the Convention for the Protection of Human Rights and Fundamental Freedoms. It has an

[194] Luke McNamara *Human Rights Controversies: The Impact of Legal Form* (Routledge-Cavendish, New York, 2007).
[195] ICERD was ratified by the United Kingdom in March 1969, Canada in October 1970 and New Zealand in November 1972.
[196] International Convention on the Elimination of Racial Discrimination (1969), art 4.
[197] Eric Heinze "Towards the Abolition of Hate Speech Bans" in M.L.P Loenen and J.E. Goldschmidt (eds) *Religious Pluralism and Human Rights in Europe* (Intersentia Publishers, Antwerp 2007) at 295.
[198] Joseph Magnet "Hate Propaganda in Canada" in W.J. Waluchow *Free Expression: Essays in Law and Philosophy* (Clarendon Press, Oxford, 1994) at 229.

extensive array of hate speech legislation on the statute books, located both in the Criminal Code and in provincial human rights instruments.

Canada's main approach to combatting hate speech has been through the use of criminal sanctions. This stems back to recommendations made in the Cohen Report, released in 1966 at a time when neo-Nazi activity and white supremacist organizations were considered to be on the rise.[199] They were feared to be leading Canada towards "a climate of malice, destructive to the central values of Judaeo-Christian Society."[200] Though the activities of these organizations were limited and ineffective, the Committee concluded that hate propaganda could lead to a wider societal breakdown and needed to be suppressed through criminal prohibition.[201] The criminalization of hate speech was therefore the primary regulatory approach considered, and Parliament accepted and enacted these recommendations in 1970 via amendments to the Criminal Code of Canada.[202]

1 The Criminal Code of Canada

Sections 318 and 319 of the Criminal Code of Canada are the primary hate speech provisions. Section 318 outlaws the advocacy of genocide.[203] Section 319(1) outlaws the incitement of hatred against an identifiable group likely to lead to a breach of the peace.[204] Section 319(2) outlaws the willful promotion of hatred against an identifiable group, regardless of the effect of the behavior, so long as the requisite level of intention is present.[205] Inciting or willfully promoting hatred carries a two-year maximum penalty, while advocating genocide carries a five-year maximum penalty.[206] In 2004, the meaning of identifiable group was amended to include a group identified on the basis of their sexual orientation.[207] Section 319(3) provides defenses to a charge of willful promotion of hatred under s 319(2), lessening the incursions into countervailing free speech rights. A defendant can either raise the defense of truth,

[199] Magnet, above n 198, at 231.
[200] Magnet, above n 198, at 231.
[201] Magnet, above n 198, at 232.
[202] Magnet, above n 198, at 232.
[203] Criminal Code RS C 1985 c C-46, s 318.
[204] Criminal Code RS C 1985 c C-46, s 319(2).
[205] Criminal Code RS C 1985 c C-46, s 319(2).
[206] Criminal Code, above n 203, ss 318(1) and 319(1)(a).
[207] An Act to amend the Criminal Code (Hate Propaganda) RS C 2003 c C-46.

religious opinion being expressed in good faith, or can show the subject matter was both in the public interest, in the public benefit and in circumstances where the defendant had reasonable grounds in believing the truth of the statements.[208]

The constitutional validity of s 319 (the "hate speech laws") is a question that has long been settled by the Courts.[209] Much like the United States, the Canadian Supreme Court can strike down provincial and federal legislation on grounds of Charter incompatibility. Section 1 of the Charter however, confers upon the Courts wider powers and greater flexibility than is available to the United States Supreme Court. It allows Courts to uphold the validity of the legislation if it can be demonstrably justified.[210] In 1990 a Supreme Court majority in *R v Keegstra* held s 319(2) of the Criminal Code to be a demonstrably justified limitation on citizen's right to freedom of expression, using the test formulated in *R v Oakes*:[211]

> Section 319(2) of the *Code* constitutes a reasonable limit upon freedom of expression. Parliament's objective of preventing the harm caused by hate propaganda is of sufficient importance to warrant overriding a constitutional freedom. Parliament has recognized the substantial harm that can flow from hate propaganda and, in trying to prevent the pain suffered by target group members and to reduce racial, ethnic and religious tension and perhaps even violence in Canada, has decided to suppress the wilful promotion of hatred against identifiable groups.

Hate speech was characterized by the Supreme Court as having only a "tenuous connection… with s 2(b) values."[212] Despite the narrow margin by which this provision was upheld as constitutional, the Supreme Court has shown no inclination thus far to revisit the question of validity.[213]

2 Human Rights Statutes

(a) The Federal Human Rights Act

---

[208] Criminal Code RS C 1985 c C-46, s 319(2).
[209] *R v Keegstra* [1990] 3 SCR 697; *R v Andrews* [1990] 3 SCR 870; *Canadian Human Rights Commission v Taylor* [1990] 3 SCR 892.
[210] Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982, s 1.
[211] *R v Keegstra* [1990] 3 SCR 697; *R v Oakes* [1986] 1 SCR 103.
[212] McNamara, above n 194, at 196.
[213] McNamara, above n 194, at 199; *R v Krymowski* [2005] 1 SCR 101.

Canada's human rights legislation exists on both federal and provincial levels. There are 13 provincial human rights statutes (for each province and territory) and a Federal Human Rights Act. Section 13 of the Federal Human Rights Act acted as the relevant "hate speech provision", banning hate speech transmitted over the telephone.[214] It held that it was a discriminatory practice for a person or group of persons acting in concert to communicate telephonically or to cause to be so communicated by means of telecommunication facilities any matter likely to expose a person or persons to hatred or contempt by reason of the fact that that person is identifiable on the basis of a prohibited ground of discrimination.[215] The mode of telecommunication was specifically legislated against due to the emerging presence of private hate lines at the time of the provisions enactment. The immediate impetus was a hate line operated by the Western Guard in Toronto by white supremacist leader John Ross Taylor.[216] The hate line operated so that members of the public who dialed an advertised number would hear a prerecorded hate message. Due to speech being private conversations to which s 319 did not extend, there appeared a lacuna in the law arguably remedied by the implementation of s 13.[217]

John Taylor was the first to be successfully prosecuted under s 13, in which the Supreme Court held s 13 to constitute a justifiable limitation under s 1 of the Charter.[218] However since the *Taylor* decision in 1990, Parliament has extended the scope of the section by applying it to communications transmitted over the Internet.[219] In light of Parliament's extensions, the Human Rights Tribunal has stated that it was unlikely the provision would withstand a further round of constitutional scrutiny.[220] This led to a nationwide debate as to whether s 13 should remain, or whether it was restricting Canadian's free speech rights to the extent that it necessitated repeal. The Canadian Bar Association opposed its repeal, stating in its submission that the social evil of promoting hatred had not diminished and the emergence of new mediums like

[214] Canadian Human Rights Act RS C 1985 c H-6, s 13.
[215] Canadian Human Rights Act, above n 214, s 13.
[216] Richard Moon *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet* (Canadian Human Rights Commission, October 2008) at 5.
[217] Moon, above n 216, at 5.
[218] *Canadian Human Rights Commission v Taylor* [1990] 3 SCR 892.
[219] Anti-terrorism Act S C 2001 c 41, s 88.
[220] Ranjan K. Agarwal "The Politics of Hate Speech: A Case Comment on *Warman v Lemire*" (2011) 19 Constitutional Forum 65 at 69.

the Internet ensured its promulgation has become more widespread.[221] The sanctions for breaching s 13 were far less serious than a conviction under s 319, and Tribunals most commonly used remedial mechanism was a cease and desist order. The Association submitted this remedy should be retained, and any punitive provisions Parliament has enacted be eradicated, as the overarching purpose was to promote equality and eliminate discrimination which could be effectively achieved by cease and desist orders.[222]

However, the arguments *for* the sections repeal were abundant. Critics of the section had a major distrust in the Human Rights Tribunals (or "kangaroo courts") within which s 13 claims were being heard.[223] Alberta Conservative MP Brian Storseth who introduced the private members bill calling for the section's removal, called the Canadian Human Rights Tribunal "a quasi-judicial, secretive body that takes away your natural rights as a Canadian."[224] It was also argued that the section would be too difficult to enforce against material published and disseminated on the Internet, and the lack of intent or foreseeability required by the provision broadened the scope of the section so that it included communication that ought not to be prohibited.[225] This point was expressly countered by Dickson CJ in *Taylor* who stated:

> "The preoccupation with effects and not with intent is readily explicable when one considers that systemic discrimination is much more widespread in our society than is intentional discrimination. To import a subjective intent requirement into human rights provisions rather than allowing tribunals to focus solely on effects would thus defeat one of the primary goals of anti-discrimination statutes."[226]

Ultimately, the criticisms were grounded in the idea that the section was over inclusive to the extent that it no longer operated as a shield to protect civil liberties, but as a sword to attack free speech rights. The section was repealed in 2013, removing the authority of the Human Rights Commission to investigate online hate

[221] Canadian Bar Association, above n 52, at 3.
[222] Canadian Bar Association, above n 52.
[223] Letter from Brian Storseth (Member of Parliament) to the citizens of Canada to discuss the private members bill, Bill C-304 *An Act to Amend the Canadian Human Rights Act: Protecting Freedom* (7 March 2012).
[224] Storseth, above n 223.
[225] *Human Rights Commission v Taylor,* above n 218, per McLachlin J (in dissent).
[226] Moon Report, above n 216, at 8.

speech and request that violating websites be taken down.[227] Free speech defenders hailed the repeal a victory, but with the ever-growing emergence of "keyboard warriors"[228] the repeal is likely to result in a real and identifiable gap in the law to which a legal remedy ought to extend.

(b) Provincial human rights statutes

Provincial human rights statutes' hate speech provisions have however remained on the statute books. Section 14(1)(b) of the Saskatchewan Human Rights Code is illustrative of a typical provision banning hate propaganda:

> No person shall publish or display… representation that exposes or tends to expose to hatred, ridicules, belittles or otherwise affronts the dignity of any person or class of persons on the basis of a prohibited ground.

The Supreme Court determined the constitutionality of the Saskatchewan provision in *Saskatchewan (Human Rights Commission) v Whatcott*.[229] Bill Whatcott was charged with promoting hate under this section after he distributed flyers expressing his strong religious convictions against homosexuals.[230] The Court found that the provincial rules against hate speech were limitations prescribed by law within the meaning of s 1 of the Charter of Rights, and were demonstrably justified in a free and democratic society. It concluded however that the part of the section that " 'ridicules, belittles, or otherwise affronts the dignity of' did not rise to the level of ardent and extreme feelings constituting hatred required to uphold the constitutionality of a prohibition of freedom of expression in human rights legislation."[231] The Court therefore struck those words from the Saskatchewan provision.

[227] An Act to Amend the Canadian Human Rights Act (Protecting Freedom) RS C 2013 c C-304.
[228] A colloquial term used to describe someone who manifests their anger through the text based medium of the internet in the form of aggressive and hateful writing.
[229] *Saskatchewan (Human Rights Commission) v Whatcott* [2013] 1 SCR 467.
[230] McNamara, above n 194, at 205.
[231] *Whatcott*, above n 229, at 471.

In making the distinction between merely offending someone and actively promoting hatred, the Court relied on its earlier decision in *Taylor* where "hatred" (in reference to the now repealed s 13) was defined as follows:[232]

> The phrase "hatred or contempt" … refers only to unusually strong and deep-felt emotions of detestation, calumny and vilification and, as long as human rights tribunals continue to be well aware of the purpose … and pay heed to the ardent and extreme nature of feeling described in that phrase, there is little danger that subjective opinion as to offensiveness will supplant the proper meaning of the section.

While the lines of separation between being very offensive versus likely promoting hatred are not obvious ones, clear guidance by the Courts should act to ameliorate these concerns. Provincial Human Rights Tribunals have been guided by the decision in *Taylor* and narrowly interpret relevant statutes, to ensure only extreme expression that is hateful or contemptuous in character falls within the regulatory ambit of the state.[233] *Whatcott* confirmed that hate speech prohibitions require purely objective determinations of whether a reasonable person would view the speech as exposing the protected group to hatred.[234]

3 Issues

While the validity of hate speech laws in the post 1990 environment is for the most part a non-issue in Canada, implementation problems remain.[235] Firstly, human rights statutes do not require proof of actual harm, often merely requiring speech which has the *tendency* produce the harm, leaving Tribunals guessing as to what statements are likely to have that effect.[236] However, legislating against conduct which has the tendency of exposing groups to hatred is important as it goes to the heart of the "second order harms" discussed in Part I, and avoids wider societal harms like the exacerbation of inequalities and the general destabilization of society.

---

[232] *Canadian Human Rights Commission v Taylor* [1990] 3 SCR 892.
[233] *Whatcott*, above n 229, at 498.
[234] *Whatcott*, above n 229, at 501.
[235] McNamara, above n 194, at 207.
[236] Whatcott, above n 229, at 492.

A second possible concern in the Canadian system is that defenses built in to the criminal regime are not available to a respondent in a human rights claim.[237] This may strengthen the argument that the criminal law is a more appropriate mode of intervention as it is a lesser of two evils in terms of the incursions it makes upon free speech rights. Dickson CJ furthered this position in *Keegstra* where he considered hate speech to be too loud and too dominant in public discourse, thus requiring the more confrontational response of the criminal law.[238] However statistics show that the criminal response is one which is seldom utilized - In the first twenty years of hate speech laws being in the Criminal Code there were only six prosecutions.[239] This may be attributable to the requirement of the consent of the Attorney-General for prosecution, and the high burden of proof under the Criminal Code. The impact on both free speech rights and individuals who would seek recourse under this statute is therefore fairly minimal.

C The United Kingdom

Like Canada, the United Kingdom has dealt with hate speech by criminalizing the conduct, but diverges from the Canadian approach by not adopting civil prohibitions in addition to criminal intervention.[240] The relevant offence was initially located in the Race Relations Act 1965, and carried a two-year maximum sentence.[241] It was designed to "prevent the stirring up of racial hatred which may beget violence and public disorder"[242], but has never contained a breach of the peace component as appears in the Canadian Criminal Code.

1 The Public Order Act 1986

(a) Inciting hatred

[237] Criminal Code, above n 203, s 319 (3).
[238] *R v Keegstra* [1990] 3 SCR 697.
[239] Magnet, above n 198, at 230.
[240] McNamara, above n 194, at 169.
[241] Race Relations Act 1965 (UK), s 6(1).
[242] McNamara, above n 194, at 169.

Racial hatred is now dealt with in Part III of the Public Order Act 1986. Section 18(1) states that:

> A person who uses threatening, abusive or insulting words or behavior, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if –
>
> (a) he intends thereby to stir up racial hatred, or
>
> (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.

This provision creates an either/or approach to whether the offence should be defined in terms of subjective intent or the objectively assessed likely effect. While intention to incite religious hatred is not a requirement under the Act, s 18(5) provides that a defendant needs to intend, or be aware that, his words or behavior might be threatening, abusive or insulting.[243] The Racial and Religious Hatred Act 2006 extended this offence to cover religious hatred, and the Criminal Justice and Immigration Act 2008 added the offence of inciting hatred on the basis of sexual orientation.[244]

Due to a significant media and political campaign against the Religious Hatred Bill 2005,[245] the Government accepted a different form of provision to that of racial hatred.[246] The requirement of intention to incite religious hatred was included, which is in stark contrast to the either/or approach of s 18. Intention requirements were also included in the offence of inciting hatred on the basis of sexual orientation. Opponents to the differing approaches have said the inclusion of intention requirements render the provisions almost unenforceable.[247] Kay Goodall writes that "without a confession it will be very difficult to prove purpose intention… The Lords

[243] Public Order Act 1986 (UK), s 18(5).
[244] Criminal Justice and Immigration Act 2008 (UK); Racial and Religious Hatred Act 2006 (UK).
[245] See, for example, Jamie Doward "Atkinson in last-gasp bid to bury religious hate bill" *The Observer* (United Kingdom, 29 January 2006); BBC News "Atkinson's religious hate worry*" BBC News* (United Kingdom, 7 December 2004); BBC News "New effort to ban religious hate" *BBC News* (United Kingdom, 11 June 2005).
[246] Helen Fenwick *Civil Liberties and Human Rights* (4th ed, Routledge Cavendish, New York, 2007) at 502.
[247] Kay Goodall "Incitement to Religious Hatred: All Talk and No Substance" (2007) 70 M L R 89 at 113.

have pruned the statute so hard they have left a stump."[248] Conversely, commentators argued that extending the legislation to religion was one step too far.[249] Yet instead of adopting a principled position for free speech advocates, arguing the incitement to hatred offences need to be repealed in their entirety, opponents relied on arguments seeking to distinguish race and religion.[250] Ivan Hare stated that:[251]

> "The U.K. already has ample general criminal law provisions to deal with incitement to hatred and any public order consequences which may follow from it and therefore has no need of further restrictions which are certain to make us less free and are likely to prove to be counterproductive."

The varying standards adopted by the Legislature suggest Parliament is less willing to intervene when speech incites hatred on grounds of religion or sexual orientation, or considers it less of a social issue requiring the paternal hand of the state. It can be explicable by the perception that it is considered to be less egregious to attack somebody on the basis of one's belief system, than it is to attack somebody on the grounds of racial composition. This however leads to the inevitable question as to how a more stringent legal standard can be justified for inciting hatred on the ground of sexual orientation. This may be rooted in a misguided public impression that one's sexual orientation is an immutable concept subject to change, in comparison to one's race which is an unchangeable characteristic.[252] Regardless of the reasons behind the differing standards, the position remains that the offence of inciting hatred on the grounds of religion and the offence of inciting hatred on the grounds of sexual orientation requires proof of a positive intent to do so. Under s 18 and the offence of inciting religious hatred, lack of this element does not bar intervention.

The role of the Attorney-General must be born in mind here. The Law Commission, in its report on hate crime, stated that the requirement of the Attorney-General's

---

[248] Goodall, above n 247, at 113.
[249] Ivan Hare "Crosses, Crescents and Sacred Cows: Criminalizing Incitement to Religious Hatred" (2006) P L 520.
[250] Hare, above n 249.
[251] Hare, above n 249.
[252] See, for example, Joseph Osmundson "I Was Born this Way: Is Sexuality Innate and Should it Matter?" (2011) LGBTQ Policy Journal at Harvard Kennedy School; Edward Clark "The Construction of Homosexuality in New Zealand Judicial Writing" (2006) 37 VUWLR 199 at 208.

consent acts as a "sufficient" check on free speech incursions.[253] As in Canada, the Attorney General applies ordinary principles of sufficiency of evidence and public interest in determining whether to consent to a prosecution, which acts as an important filter against vexatious cases. As part of the Attorney-General's determination, he must also act in accordance with the Human Rights Act.[254] The role of the Attorney-General strengthens the argument that the intent requirements are unnecessary and the right to free speech is unlikely to be washed away in a flood of unmeritorious claims. Furthermore, enforcement levels for the *racial* incitement offence have been notoriously under prosecuted, with the period of 1987 to 2005 seeing only 65 prosecutions and 44 convictions.[255] However that figure is likely to be attributable to some hate speech incidents falling outside the limits of s 18, but nevertheless being prosecuted under the broader public order offence in s 5.[256]

(b) "Threatening, abusive or insulting words"

Section 5 of the Public Order Act makes it a crime to use or display threatening, abusive or insulting words, within the hearing or sight of a person likely to be caused harassment, alarm or distress thereby.[257] This 'general disorder offence' has been an important part of the United Kingdom's legal regime in dealing with hate speech, despite the low threshold of what can qualify as offending behavior under the provision. In *Hammond v DPP*[258] a Christian street preacher was successfully prosecuted under s 5 for holding placards which stated "Stop Homosexuality. Stop Lesbianism. Stop Immorality." Lord Justice May, in finding the section had been breached, held freedom of expression to be an axiomatic freedom which was capable of restriction in certain circumstances, citing the following passage from *Brutus v Cozens*:[259]

> "… vigorous and it may be distasteful or unmannerly speech or behavior is permitted so long as it does not go beyond any one of three limits. It must not be threatening. It must not be abusive. It must not be insulting. I see no reason why

[253] United Kingdom Law Commission *Hate Crime: Should the Current Offences be Extended?* (UKLC 348, 2014) at 32.
[254] UK Law Commission, above n 253, at 32.
[255] McNamara, above n 194, at 175.
[256] McNamara, above n 194, at 176.
[257] Public Order Act 1986 (UK), s5.
[258] *Hammond v DPP* [2004] EWHC 69 (Admin) (England and Wales High Court).
[259] *Brutus v Cozens* [1973] AC 854 (HL); *Hammond v DPP*, above n 258, at 6.

> any of these should be construed as having an especially wide or a specially narrow meaning. They are all limits easily recognizable by the ordinary man. Free speech is not impaired by ruling them out."

It is evident that the inclusion of "insulting" has been justified to date by importing objective determinations into its definition. Though difficult to define, Lord Reid held that "an ordinary, sensible man knows an insult when he sees or hears it."[260] It therefore remained a factual consideration to be determined by the Judge. This was understandably controversial, due to the inherent subjective nature of what constitutes insulting conduct. What is insulting to one person may not be insulting to another, giving a lot of deference to judges to determine the parameters on an ad hoc, case by case basis. Due to these concerns, s 5 was amended in February 2013 removing the term 'insulting' from the provision.[261]

2 The Human Rights Act 1998 and the European Convention on Human Rights

The Human Rights Act came into force in 1998 and provides that "it is unlawful for a public authority to act in a way which is incompatible with one or more Convention rights."[262] The pertinent rights in this context are freedom of expression, freedom of religion and freedom of assembly. Article 10(2) of the European Convention on Human Rights (ECHR) provides a similar justification provision to that of Canada and New Zealand, stating that free speech may be justifiably restricted but only when proved necessary in a democratic society in achieving a legitimate aim.[263] The Act does not contain a specific hate speech provision, but acts to codify and further give effect to the ECHR.

When the Human Rights Act was first codified there was an anticipation that provisions like ss 5 and 18 of the Public Order Act 1986 would be met with an influx of freedom of expression objections.[264] However, such incompatibility challenges have both been rare and unsuccessful. In *Norwood v DPP*[265], Mark Norwood was

[260] *Brutus v Cozens* [1973] AC 854 (HL) at 862.
[261] Pat Strickland and Diana Douse *"Insulting Words or Behavior": Section 5 of the Public Order Act 1986 – Commons Library Standard Note* (Research Briefing, January 2013).
[262] Human Rights Act 1998 (UK), s 6.
[263] European Convention on Human Rights (1953), art 10(2).
[264] McNamara, above n 194, at 180.
[265] *Norwood v DPP* [2003] EWHC 1564 (Admin).

convicted under s 5 for displaying a poster in his window that read "Islam out – Protect the UK." After being unsuccessful in the High Court, Norwood took the case to the European Court of Human Rights, claiming his article 10 free speech rights had been violated.[266] The Court firmly confirmed Strasbourg jurisprudence that both racial and religious hate speech falls outside the parameters of Convention protected freedom of expression:[267]

> "The Court, and previously, the European Commission of Human Rights has found in particular that the freedom of expression guaranteed under Art 10 of the Convention may not be invoked in a sense contrary to Art 17 [abuse of rights]… The Court notes and agrees with the assessment made by the domestic courts, namely that the words and images on the poster amounted to a public expression of attack on all Muslims in the United Kingdom."

3 Issues

Criticisms of the treatment of hate speech in the United Kingdom have primarily focused on the over-inclusiveness of s 5 of the Public Order Act. While s 5 plays an active role in curbing hate speech, its definition prior to amendment acted to catch lesser forms of speech, including speech that was 'insulting'.[268] The incorporation of such an elastic concept into domestic law created an excessively low threshold and extended the criminal law into "areas of annoyance, disturbance and inconvenience."[269] A legislative scheme where mere annoyance towards an individual dissenter's speech could in theory result in a criminal charge is one that is overly paternal and extends the powers of the state into a dangerous territory. The courts in "exhibiting a preference for public peacefulness and the avoidance of incitement, over freedom of expression"[270] were effectively reducing article 10 to little more than a paper guarantee. Essentially, prior to the amendment of s 5, the United Kingdom approach can be defined as an approach which was primarily "pro civility" where boundaries between acceptable and unacceptable speech remained unnecessarily vague, chilling freedom of expression, freedom of religion and freedom of assembly.

---

[266] *Norwood v United Kingdom* (2004) 40 EHRR 111 (ECHR).
[267] *Norwood*, above n 266, at 4; McNamara, above n 194, at 181.
[268] Public Order Act 1986 (UK), s 5.
[269] Peter Thornton *The Law of Public Order and Protest* (Oxford University Press, Oxford, 2010) at 36.
[270] Anthony Geddis "Free Speech Martyrs or Unreasonable Threats to Social Peace? "Insulting" Expression and Section 5 of the Public Order Act 1986" (2004) P L 853 at 874.

The approach of the United Kingdom is in stark contrast to the much more cautionary approaches of Canada and New Zealand when it comes to free speech considerations. As noted, the amendment repealing the inclusion of 'insulting' only came into force as of February this year. Therefore, aside from guidance in updated Police guidelines,[271] the full effect of the repeal remains unclear. However the breadth of speech that will fall under this section has been substantially narrowed. The United Kingdom serves as a useful example of the importance of clear legislative guidance as to precisely what speech is being proscribed, and serves as a reminder that the hate speech discussion ought not to be broadened to speech that merely offends or insults.

D New Zealand

New Zealand's hate speech laws are characterized by extremely infrequent enforcement. They can currently only be utilized by the limited portion of the public who have been discriminated against on grounds of color, race, ethnic or national origins.[272] Joseph Magnet has placed New Zealand into the category of states that have "ratified the Racial Discrimination Convention and the Civil and Political Rights Covenant but expressly reserve a right of non-compliance" due to a willingness to protect freedom of expression first and foremost.[273] Freedom of expression is protected by s 14 of the New Zealand Bill of Rights Act 1990.[274] The Court of Appeal in *Moonen v Film and Literature Board of Review*[275] held this right to be "as wide as human thought and imagination", casting a broad net as to what is protected speech under the provision. Section 5 however affirms the proposition that this right is not absolute.[276] Following the Canadian model, the New Zealand approach broadly protects the right to freedom of expression and then limits it with a general limitation clause.[277] In 2004 a Select Committee was launched to enquire whether or not further legislation to prohibit or restrain hate speech was warranted. This enquiry has

[271] College of Policing *Guidance on the Amendment to Sections 5(1) and 6(4) of the Public Order Act 1986* (Police College Ltd, December 2013) at 4.3.
[272] Human Rights Act 1993, ss 61 and 131.
[273] Magnet, above n 198, at 228.
[274] New Zealand Bill of Rights Act 1990, s 14.
[275] *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9 (CA).
[276] New Zealand Bill of Rights Act 1990, s 5.
[277] Andrew Butler "Limiting Rights" (2002) 33 VUWLR 537 at 540.

ultimately led nowhere, and McNamara noted that as at 2007 "the inquiry was in hiatus".[278]

1 The Human Rights Act 1993

The operative hate speech clauses in New Zealand are located in the Human Rights Act, a predecessor to which was the Race Relations Act 1975. The actual term "hate speech" does not feature in any New Zealand statutory provision. Section 61 creates a civil provision requiring the complainant to prove two things. First, the expression must be threatening, abusive, or insulting. Secondly, the expression must be considered likely to excite hostility against or bring into contempt a person or group of persons on the ground of their color, race or ethnic or national origins.[279] The speaker's intention is irrelevant as the provision is aimed at the *effect* of the unlawful speech. In assessing whether words are threatening, abusive or insulting the courts adopt an objective test.[280] In contrast, an objective approach was deemed unsuitable in the second limbs assessment of whether that speech was likely to incite hostility. Though care is taken not to adopt the standards of the extremely sensitive, the focus is on those less perceptive who are more vulnerable to be excited to hostility, due to predisposed views or opinions against a particular race.[281]

Despite the section not requiring wholly objective enquiries, the Human Rights Commission rarely pursues s 61 complaints. Of the 210 racial disharmony complaints received by the Commission in 2003, none were actioned via the Commission's formal channels. [282] This can be explained on three grounds. Firstly, the role of s 14 in the Commission's consideration of s 61 claims cannot be understated. McNamara is critical of this aspect, and notes the Commission has begun to employ s 14 as a "shield of First Amendment like proportions". [283] Secondly the threshold at which the Commission can intervene has been heightened from the statute's predecessor version. The present s 61 differs in a number of respects from its predecessor, the

[278] McNamara, above n 194, at 218.
[279] Human Rights Act 1993, s 61.
[280] *Neal v Sunday News Auckland Newspaper Publications Ltd* (1985) EOC 76299.
[281] Hannah Musgrave "What Makes Race So Special? Should hate speech provisions under the Human Rights Act 1993 be extended to cover target groups other than race?" (LLB (Hons) Dissertation, University of Otago, 2009) at 20.
[282] Human Rights Commission "Hate Expression" Human Rights in New Zealand Today <www.hrc.co.nz>.
[283] McNamara, above n 194, at 223.

most important of which was the narrowing of the offence by removing the reference to exciting ill will or bringing persons into ridicule. Thirdly, with the rise of alternative methods of dispute resolution, the Commission often opts for the mediation option rather than pursuing the claim through the formal complaints process.[284] There is therefore a legitimate public concern about the efficacy of s 61 if racial disharmony complaints seldom reach the threshold required for formal intervention.

Section 131 creates a criminal offence of inciting racial disharmony. A person is liable for bringing into contempt or ridicule a group of persons on the grounds of color, race, ethnic or national origin; or publishing or distributing written material that is threatening, abusive or insulting with the intent to excite hostility or ill-will.[285] It requires the Attorney-General's consent to prosecute and carries a maximum three-month sentence of imprisonment.[286] This provision is extremely underutilized, and in 35 years has only resulted in one prosecution (under its predecessor section, s 25 of the Race Relations Act).[287] The intent of s 131 is to prevent the *incitement* of hatred, which means it is insufficient for any material to be merely insulting if it is unlikely to stir others into sharing similar sentiments. The Human Rights Commission has attributed the lack of litigation under this section to the requirement to obtain the Attorney-General's consent, and the need to establish both the intent and predict the likely effect of the speech in question.[288]

2 Issues

While racist hate speech laws are 'on the books' in New Zealand, they are currently being interpreted as involving such a high threshold that they are effectively beyond the reach of the vast majority of groups and individuals.[289] Section 14 of the Bill of Rights Act has a key role to play in this. It is implicit in the case law that a "pro speech" position currently dominates the interpretation and application of racial

[284] Human Rights Commission "Hate Expression" Human Rights in New Zealand Today <www.hrc.co.nz>.
[285] Human Rights Act 1993, s 131.
[286] Human Rights Act 1993, ss 131 and 132.
[287] *King Ansell v Police* [1979] 2 NZLR 531.
[288] Musgrave, above n 281, at 21.
[289] McNamara, above n 194, at 217.

disharmony laws, in stark contrast to the "pro civility" position which has been the experience of the United Kingdom.

There is also an identifiable gap in the law in respect of hateful attacks on minority groups who are discriminated against on the basis of their sexual orientation, gender, disabilities or religion. Hon. Phil Goff, Minister of Justice stated at the outset of the Commission's enquiry into hate speech that arguments over whether New Zealand's hate speech laws should be extended to cover inciting hatred against people on these grounds should be considered by the Commission.[290] The Court of Appeal, however, has commented that the categories in s 61 and s 131 should not be extended, and should remain confined to categories of race and religion.[291] This status quo has remained unaltered to date, leaving New Zealand's hate speech laws out of reach to many.

The Office of Film and Literature Classification submission on hate speech found that the current legislative framework does not effectively address "hate speech" and that, although the Office has no information on the extent of hate speech in New Zealand, there is no reason to assume that New Zealand is especially immune, or that the social harm remedied by hate speech legislation elsewhere does not exist here.[292] The Human Rights Commission has noted that many New Zealanders remain unconvinced that racism exists in New Zealand to the extent that it does in other states.[293] However the 2008 Annual Review of Race Relations contained reports of Chinese people being called "Asian monkeys" on the street and an African American woman being told to go home because she was a "blackie" and a "nigger."[294] A former Ku Klux Klan member has warned about the presence of organized white supremacist groups in New Zealand.[295] While legal devices are not the only tool available to mitigate hate speech, New Zealand is currently heavily reliant on the negative social stigmas

[290] Phil Goff, Minister of Justice "Goff welcomes hate speech inquiry" (6 August 2004) The Official Website of the New Zealand Government <www.beehive.govt.nz> .
[291] Juliet Moses "Hate Speech: Competing Rights to Freedom of Expression" (1996-9) 8 AU L R 185 at 188; *Living Word Distributors Ltd v Human Rights Action Group* [2000] NZCA 179.
[292] Office of Film and Literature Classification *Submission: Inquiry into Hate Speech* (Government Administration Committee, 29 October 2004).
[293] Musgrave, above n 281, at 25.
[294] Musgrave, above n 281, at 25.
[295] "KKK Leader Warns NZ on the Dangers of Hate Gangs" (2 May 2009) TV 3 News <www.3news.co.nz> .

associated with hate speech rather than the threat of prosecution through legislative intervention.[296]

IV Conclusions

Hate speech is a complex, transnational issue, the regulation of which has been the subject of considerable controversy in all three comparator states. An exposition of the means of combatting hate speech in Canada, the United Kingdom and New Zealand shows varied degrees of regulation or state intervention. A general trend present in Canada and New Zealand is lack of enforcement, though Canada has a much more comprehensive statutory framework in place *and* judicial definitions of "hatred" to provide guidance and clarity. The United Kingdom has generally adopted a "pro civility" approach, though this trend may change with the repeal of the inclusion of "insulting" from section 5 of the Public Order Act in February. It acts as an exemplar of a state that is arguably overly paternalistic in the protection it affords to not only vulnerable minorities but also the wider citizenry, and demonstrates the problems in regulating speech that "insults".

It is evident from *Snyder v Phelps* however that the starting point in the United States remains to be that hate speech in a generically public venue may not be prohibited, despite the predictable harm members of the audience will experience, and the demonstrated inconsistencies with underlying free speech rationales. This principle has remained untouched by both the majority and dissenting judgment. The fear of stifling public debate coupled with the Courts' free speech jurisprudence remains at the forefront of Judges' considerations, and appears to be incapable of variation. Free and open discourse has not ground to a halt in the politically indistinguishable neighbour of Canada; a state this paper concludes strikes the appropriate balance between the rights of the speaker and the rights of the victim. Canada has recognized that hate speech does not contribute to public discourse, and its protection is not a price society should have to pay in order protect a foundational constitutional right. As soundly stated by Collins and Skover: "Discourse is dying in America – yet

[296] The Paul Holmes "cheeky darkie" incident proves illustrative: See, for example, Human Rights Commission 'The Paul Holmes Incident 2003' in News and Issues <www.hrc.co.nz>.

everywhere free speech thrives."[297] Perhaps the United States should follow its neighbour's suit, rather than adhering to the strict letter of the First Amendment which seemingly hides a chasm between its 18th Century intent and the 20th Century realities.

[297] Ron Collins and David Skover *The Death of Discourse* (2nd ed, Carolina Academic Press, Virginia, 2005).

V Bibliography

A Cases

1 United States

Abrams v United States 250 US 616 (1919).

Whitney v California 274 US 357 (1927).

Cantwell v Conneticut 310 US 296 (1940).

Chaplinsky v New Hampshire 315 US 568 (1942).

New York Times v Sullivan 376 US 254 (1964).

Tinker v Des Moines Independent Community School District 393 US 503 (1969).

Cohen v California 403 US 15 (1971).

Miller v California 413 US 15 (1973).

Procunier v Martinez 416 US 396 (1974).

Connick v Myers 461 US 138 (1983).

Clark v Community for Creative Non-Violence 468 US 288 (1984).

Ollman v Evans 750 F 2d 970 (DC Cir 1984).

Hustler Magazine v Falwell 485 US 46 (1988).

Frisby v Shultz 487 US 474 (1988).

Ward v Rock Against Racism 491 US 781 (1989).

R.A.V. v City of St Paul 505 US 377 (1992).

Madsen v Women's Health Center, Inc 512 US 753 (1994).
Hill v Colorado 530 US 703 (2000).

Virginia v Black 538 US 343 (2003).

Phelps-Roper v Strickland 539 F 3d 356 (6th Cir 2008).

Snyder v Phelps et al 533 F Supp 2d 567 (D Md 2008).

Snyder v Phelps 580 F 3d 206 (4th Cir 2009).

Snyder v Phelps 131 US 1207 (2011).

Phelps-Roper v City of Manchester 697 F 3d 678 (8th Cir 2012).

2 Canada

R v Oakes [1986] 1 SCR 103

R v Keegstra [1990] 3 SCR 697.

R v Andrews [1990] 3 SCR 870.

Canadian Human Rights Commission v Taylor [1990] 3 SCR 892.

Ross v New Brunswick School District No. 15 [1996] 1 SCR 825.

R v Krymowski [2005] 1 SCR 101.

Saskatchewan (Human Rights Commission) v Whatcott [2013] 1 SCR 467.

3 The United Kingdom

Brutus v Cozens [1973] AC 854 (HL).

Norwood v DPP [2003] EWHC 1564 (Admin).

Hammond v DPP [2004] EWHC 69 (Admin) (England and Wales High Court).

Norwood v United Kingdom (2004) 40 EHRR 111 (ECHR).

4 New Zealand

King Ansell v Police [1979] 2 NZLR 531.

Neal v Sunday News Auckland Newspaper Publications Ltd (1985) EOC 76299.

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

Living Word Distributors Ltd v Human Rights Action Group [2000] NZCA 179.

B Legislation

1 United States

The Constitution of the United States, Amendment 1.

Crimes Against Public Health, Conduct and Sensibilities Md Code Ann Crim Law § 10-205.

Ohio Rev Code Ann § 3767.30 (West 2006).

2 Canada

Canadian Charter of Rights and Freedoms, Part I of the Constitution Act 1982.

Criminal Code RS C 1985 c C-46.

Canadian Human Rights Act RS C 1985 c H-6.

Anti-terrorism Act S C 2001 c 41.

An Act to amend the Criminal Code (Hate Propaganda) RS C 2003 c C-46.

An Act to Amend the Canadian Human Rights Act (Protecting Freedom) RS C 2013 c C-304.

3 The United Kingdom

Race Relations Act 1965 (UK).

Public Order Act 1986 (UK).
Human Rights Act 1998 (UK).

Racial and Religious Hatred Act 2006 (UK).

Criminal Justice and Immigration Act 2008 (UK).

4 New Zealand

New Zealand Bill of Rights Act 1990.

Human Rights Act 1993.

C Journal Articles

Agarwal, Ranjan K. "The Politics of Hate Speech: A Case Comment on *Warman v Lemire*" (2011) 19 Constitutional Forum 65.

Baker, Edwin C. "Scope of First Amendment Freedom of Speech" (1978) 25 UCLA L Rev 964.

Bakhama, Michael "Building Picket Fences: Maryland's Funeral Picketing Law After Snyder v Phelps" (2012) 71 Md L Rev 1231.

Berns, Walter "Free Speech and Free Government" (1972) 2 Political Science Reviewer 217.

Bork, Robert H. "Neutral Principles and Some First Amendment Problems" (1971) 47 Ind L J 26.

Brown, Chelsea "Not Your Mother's Remedy: A Civil Action Response to the Westboro Church's Military Funeral Demonstrations" (2009) 112 W Va L Rev 207.

Brownstein, Alan and Amar, Vikram David "Death, Grief and Freedom of Speech: Does the First Amendment Permit Protection against Harassment and Commandeering of Funeral Mourners?" (2010) 1 Cardozo L Rev 368.

Butler, Andrew "Limiting Rights" (2002) 33 VUWLR 537 at 540.

Carmi, Guy E. "Dignity – The Enemy from Within: A Theoretical and Comparative Analysis of Human Dignity as Free Speech Justification" (2014) 9 U P J Cons L 957.

Clark, Edward "The Construction of Homosexuality in New Zealand Judicial Writing" (2006) 37 VUWLR 199.

Cohen, Jonathan "More Censorship or Less Discrimination? Sexual Orientation Hate Propaganda in Multiple Perspectives" (2000) 46 McGill L Rev 69.

Cram, Ian "Coercing Communities or Promoting Civilized Discourse? Funeral Protests and Comparative Hate Speech Jurisprudence" (2012) 12 H R L Rev 455.

Farber, Daniel A. "The Categorical Approach to Protecting Speech in American Constitutional Law" (2009) 84 Indiana L J 917.

Geddis, Anthony "Free Speech Martyrs or Unreasonable Threats to Social Peace? "Insulting" Expression and Section 5 of the Public Order Act 1986" (2004) P L 853.

Gosnell, Chris "Hate Speech on the Internet: A Question of Context" (1998) 23 Queens L J 369.

Goodall, Kay "Incitement to Religious Hatred: All Talk and No Substance" (2007) 70 M L R 89.

Greco, Margaret "Take a Step Back: The Constitutionality of Stricter Funeral Picketing Regulations after Snyder v Phelps" (2014) 23 B U Pub Int L J 151.

Hare, Ivan "Crosses, Crescents and Sacred Cows: Criminalizing Incitement to Religious Hatred" (2006) P L 520.

Heinze, Eric "Towards the Abolition of Hate Speech Bans" in M.L.P Loenen and J.E. Goldschmidt (eds) *Religious Pluralism and Human Rights in Europe* (Intersentia Publishers, Antwerp 2007).

Kozinski, Alex and Volokh, Eugene "A Penumbra Too Far" (1993) 106 Harv L Rev 1639.

Moses, Juliet "Hate Speech: Competing Rights to Freedom of Expression" (1996-9) 8 AU L R 185.

O'Brink, David "Millian Principles, Freedom of Expression and Hate Speech" (2001) 7 Legal Theory 119.

O'Neil, Robert M. "Hate Speech, Fighting Words and Beyond: Why American Law is Unique" (2013) 76 Alb L Rev 467.

Schoen, John and Schoen, Edward "Snyder v Phelps: A Cautiously Outrageous Protest" (2013) 23 Southern L J 167.

Shulman, Jeffery "Epic Considerations: The Speech that the Supreme Court Would Not Hear in *Snyder v Phelps*" (2011) Cardozo L Rev 35.
Shulman, Jeffery "Free Speech at What Cost?: *Snyder v Phelps* and Speech-Based Tort Liability" (2010) Cardozo L Rev 1.

Simpson, Robert Mark "Dignity, Harm and Hate speech" (2013) 32 Law and Philosophy 701.

Strauss, David A. "Persuasion, Autonomy, and Freedom of Expresion" (1991) 91 Col L Rev 334.

Christina Wells "Regulating Offensiveness: Snyder v Phelps, Emotion and the First Amendment" (2010) 1 California L Rev 71.

D Texts

Allport, Alan *Freedom of Speech* (Chelsea House, Philadelphia, 2003).

Baker, Edwin C. "Hate Speech" in Michael Herz, Peter Molnar *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, New York, 2012).

Barendt, Eric *Freedom of Speech* (Oxford University Press, Oxford, 2005).

Cortese, Anthony *Opposing Hate Speech* (Praeger Publishers, Westport, 2006).

Collins, Ron and Skover, David *The Death of Discourse* (2nd ed, Carolina Academic Press, Virginia, 2005).

Fenwick, Helen *Civil Liberties and Human Rights* (4th ed, Routledge Cavendish, New York, 2007).

Geiringer, Claudia and Price, Steven "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, Legislation* (LexisNexis NZ, Wellington, 2008) 294.

Hovenkamp, Herbert "The Basic Economics of Antitrust" in *Federal Antitrust Policy: The Law of Competition and its Practice* (2nd ed, West Group, St Paul, 1999).

Lewis, Anthony *Freedom for the Thought we Hate: A Biography of the First Amendment* (Basic Books, New York, 2007).

Magnet, Joseph "Hate Propaganda in Canada" in W.J. Waluchow *Free Expression: Essays in Law and Philosophy* (Clarendon Press, Oxford, 1994).

McNamara, Luke *Human Rights Controversies: The Impact of Legal Form* (Routledge-Cavendish, New York, 2007).

Meiklejohn, Alexander *Free Speech and Its Relation to Self-Government* (Port Washington, Kennikat Press, 1948).

Mill, John Stuart *On Liberty* first published in 1859 (reprinted by Ticknor and Friends, Boston, 1863).

Nielson, Laura Beth *License to Harass: Law, Hierarchy, and Offensive Public Speech* (Princeton University Press, New Jersey, 2004).

Smolla, Rodney A. "Academic Freedom, Hate Speech and the Idea of a University" in William W. Van Alstyne *Freedom and Tenure in the Academy* (Duke University Press, London, 1993).

Strauss, David A. "Freedom of Speech and the Common Law Constitution" in Lee C. Bollinger and Geoffrey R. Stone (eds) *Eternally Vigilant: Free Speech in the Modern Era* (University of Chicago Press, Chicago, 2002) 33.

Strossen, Nadine "Regulating Racist Speech on Campus: A Modest Proposal?" in H. L. Gates, A. P. Griffin, D. E. Lively, R. C. Post, W. E. Rubenstein, & N. Strossen (eds) *Speaking of Race, Speaking of Sex* (New York University Press, New York, 1995).

Thornton, Peter *The Law of Public Order and Protest* (Oxford University Press, Oxford, 2010)

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

Whine, Michael "Expanding Holocaust Denial and Legislation Against It" in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, New York, 2010) 539.

Wolfson, Nicholas *Hate Speech, Sex Speech, Free Speech* (Praeger Publishers, Connecticut, 1997).

E Internet Materials

Human Rights Commission "Hate Expression" Human Rights in New Zealand Today <www.hrc.co.nz>.

Phil Goff, Minister of Justice "Goff welcomes hate speech inquiry" (6 August 2004) The Official Website of the New Zealand Government <www.beehive.govt.nz> .

Southern Poverty Law Center "Intelligence Files: Westboro Baptist Church" Southern Poverty Law Center <www.splcenter.org>.

F Newspaper Articles

BBC News "Atkinson's religious hate worry*" BBC News* (United Kingdom, 7 December 2004).

BBC News "New effort to ban religious hate" *BBC News* (United Kingdom, 11 June 2005).

Jamie Doward "Atkinson in last-gasp bid to bury religious hate bill" *The Observer* (United Kingdom, 29 January 2006).

Nicole Santa Cruz and Seema Mehta "Westboro church agrees not to take protest to shooting victims funerals" *Los Angeles Times* (United States, 13 January 2011).

G Reports and Submissions

Canadian Bar Association "Submission on Hate Speech under the Canadian Human Rights Act" (2010).

Moon, Richard *Report to the Canadian Human Rights Commission Concerning Section 13 of the Canadian Human Rights Act and the Regulation of Hate Speech on the Internet* (Canadian Human Rights Commission, October 2008).

Office of Film and Literature Classification *Submission: Inquiry into Hate Speech* (Government Administration Committee, 29 October 2004).

Strickland, Pat and Douse, Diana *"Insulting Words or Behavior": Section 5 of the Public Order Act 1986 – Commons Library Standard Note* (Research Briefing, January 2013).

United Kingdom Law Commission *Hate Crime: Should the Current Offences be Extended?* (UKLC 348, 2014).

H Other

Fry, Gary "Hate Speech: Anything Goes" *Arizona Attorney* (Arizona, October 2011).

Letter from Brian Storseth (Member of Parliament) to the citizens of Canada to discuss the private members bill, Bill C-304 *An Act to Amend the Canadian Human Rights Act: Protecting Freedom* (7 March 2012).

College of Policing *Guidance on the Amendment to Sections 5(1) and 6(4) of the Public Order Act 1986* (Police College Ltd, December 2013).

Hannah Musgrave "What Makes Race So Special? Should hate speech provisions under the Human Rights Act 1993 be extended to cover target groups other than race?" (LLB (Hons) Dissertation, University of Otago, 2009).