

***Truth, Civility, and Religious Battlegrounds:  
The Contest Between Religious Vilification Laws and  
Freedom of Expression***

JOEL HARRISON\*

**I INTRODUCTION**

As part of the response to the Court of Appeal's decision in *Living Word Distributors Ltd v Human Rights Action Group Inc Wellington*,<sup>1</sup> the New Zealand government announced a general inquiry into hate speech in August 2004.<sup>2</sup> Public awareness of the inquiry was heightened as vocal debate and outrage was raised over the desecration of Jewish cemeteries, the sending of offensive letters to Muslim communities, and the barring of Holocaust denier David Irving's entry into the country.<sup>3</sup> While the Human Rights Commission advocated extension of the grounds of criminal vilification beyond racial groups,<sup>4</sup> the overwhelming majority of submissions were opposed to implementing a new, general hate speech law, leading Chairwoman Yates to label the inquiry, despite the importance of the subject, a "little luxury".<sup>5</sup> In other jurisdictions however, prohibition of religious vilification now has the force of law. This article looks at two instances: the Racial and Religious Tolerance Act 2001 (Victoria, Australia) and the Canadian Criminal Code.<sup>6</sup> These Acts prohibit inciting one's audience to hatred on the basis of a person's religion. In doing so, the Acts adopt two propositions. First, the argument that hate speech insidiously corrupts listeners by reinforcing a narrative that denigrates the self-worth of minorities, and secondly, the view that such speech should be prohibited in order to recognise the infliction of psychological harm on the target group.<sup>7</sup> Prohibition

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\* BA/LLB(Hons); Judge's Clerk, Court of Appeal of New Zealand. My thanks go to Professor Paul Rishworth for supervising the dissertation on which this article is based and for his thought-provoking lectures. Thank you also to Eesvan Krishnan, Nicholas Whittington, and Kate Gillies for their helpful comments on earlier drafts.

<sup>1</sup> [2000] 3 NZLR 570 (CA) ("*Living Word*"). In *Living Word* the Court ruled that the Film and Literature Board of Review had erred in law when banning two religious videos expressing unfavourable views on homosexuality.

<sup>2</sup> "Have Your Say: Inquiry into Hate Speech" (2004) House of Representatives <<http://www.clerk.parliament.govt.nz/programme/committees/submissions/gahatenq.htm>> (at 15 August 2006).

<sup>3</sup> See Saxton, "Where to draw the line on hate-speech law", *New Zealand Herald*, (Auckland, New Zealand, 22 October 2004). Available from <<http://www.nzherald.co.nz/print.cfm?objectId=3602837>> (at 8 January 2006); "Cowards in our midst" *The Dominion Post* (Wellington, New Zealand, 16 September 2004) 4. All websites accessed at 15 August 2006 unless otherwise stated.

<sup>4</sup> "Submission to the Government Administration Committee into the Inquiry into Hate Speech (NZ)" (2005) Human Rights Commission [2.22]. Available from <<http://www.hrc.co.nz/home/hrc/newsandissues/submissiontotheinquiryintohatespeech.php>>. Sections 61 and 131 of the Human Rights Act 1993 already prohibit racially motivated hate speech.

<sup>5</sup> Murphy, "We need no law to define 'hate' speech", *New Zealand Herald*, (Auckland, New Zealand, 19 March 2005). Available from <<http://www.nzherald.co.nz/print.cfm?objectId=10116130>> (at 8 January 2006).

<sup>6</sup> Reference will also be made to some of the controversies surrounding the introduction of the Racial and Religious Hatred Bill (UK) (now the Racial and Religious Hatred Act 2006 (UK)).

<sup>7</sup> See especially the influential article of Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1988-1989) 87 Mich L Rev 2320. See also Delgado and Yun, "Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation" (1994) 82 Cal

advocates argue that minority groups subjected to hate speech suffer a “psychic tax”<sup>8</sup> as they disproportionately bear the burden of free speech, engaging the right to equality where participation in the community and personal identity formation is curtailed.<sup>9</sup> The arguments in this article could provide support for a wider contention against prohibiting hate speech more generally, drawing often from United States’ jurisprudence. However religion forms a locus of identity that, with its different historical and personal significance, requires a distinct and separate analysis. Whereas race is constant, religion is contestable and whereas racial minorities are usually distinct, religion is often characterised by competing minorities.<sup>10</sup> Designed to penalise incitement to hatred or the insulting of persons based on religious belief, religious vilification laws have ironically led to increased inter-religious conflict. It is between competing religious groups that these laws have had their most notable impact, leading me in large part to canvass in this article freedom of speech arguments particular to religious-identity formation.

Part I of this article establishes the factual backdrop for the subsequent arguments. It introduces the reader to the two principal narratives upon which this article is based: the cases of *Islamic Council of Victoria v Catch the Fire Ministries Inc*<sup>11</sup> (“*ICV v CTFM*”) from Victoria, Australia and *R v Harding*<sup>12</sup> from Canada. Part II continues the *ICV v CTFM* narrative, demonstrating how the Tribunal decides essentially theological questions of truth (and blasphemy) in the process of finding incitement to hatred against persons. Part III discusses the “chilling effect” of religious vilification laws, in particular, the strict requirements of “balanced discussion” (an elevation and privileging of academic discourse) and the use of legal tools to silence one’s ideological opponents. Part IV contends with the conceptual uncertainties of religious vilification laws, focusing on the breadth of their scope and the attempt to limit this by arbitrarily distinguishing between “high” and “low” speech. Part V, with reference to the remedies and penalties imposed, illustrates how religious vilification laws lend themselves to the construction of martyrdom, arguing that what is at stake is a contest of competing religious and secular duties. Part VI concludes the arguments by detailing how speech is used as a means of forming identity (collectively and individually) and mounting political arguments, such that its curtailment represents official condemnation of entire lifestyles and ideas. Each of these arguments is generated out of the main right threatened by religious vilification laws: freedom of expression. The Court of Appeal of New Zealand has stated that

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L Rev 871; West-Newman, “Reading Hate Speech from the Bottom in Aotearoa: Subjectivity, Empathy, Cultural Difference” (2001) 9 Waikato Law Review 231.

<sup>8</sup> Matsuda, *supra* note 7, 2323.

<sup>9</sup> *Ibid* 2376-2377. The right to equality was accepted by the majority of the Supreme Court of Canada in *R v Keegstra* [1990] 3 SCR 697 as being violated by State tolerance of group hatred. Paul Rishworth characterises the argument as a claim for indirect horizontality in Bills of Rights, that is, an argument that the State is ultimately responsible for rights infringements in the private sphere: Rishworth, “Liberty, Equality and the New Establishment” in Huscroft and Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (2002) 91, 97 (“Liberty, Equality”). The Court of Appeal in *Living Word* rejected this view (see *Living Word*, *supra* note 1, 584), accepting that the contest is between the *right* to free speech and the State’s *interest* in protecting individuals against harm caused by speech.

<sup>10</sup> In New Zealand “[a]ll religious groups are now minorities”: Rishworth et al (eds), *The New Zealand Bill of Rights* (2003) 281 (“*The New Zealand Bill of Rights*”).

<sup>11</sup> [2004] VCAT 2510 (“*ICV v CTFM*”).

<sup>12</sup> *R v Harding* 45 OR (3d) 207 (2000), *affd* 52 OR (3d) 714 (2001), *affd* 160 CCC (3d) 225 (2002), *cert denied* [2002] 3 SCR viii.

freedom of expression extends “as wide as human thought and imagination”<sup>13</sup> In the area of religion, thought and imagination translates into the formation of world-views and concepts of true and false, good and evil, arguments of a spiritual order that the court is ill-equipped to decide.

## II THE FACTUAL BACKDROP

### Islamic Council of Victoria v Catch the Fire Ministries Inc

The Islamic Council of Victoria (ICV) is an umbrella community advocacy group and service provider representing the twenty-six Muslim organisations present in Victoria. Catch the Fire Ministries (CTFM) is a charismatic Christian ministry organisation driven principally by its founder Pastor Danny Nalliah, who with Pastor Daniel Scot claims as his mission Christian outreach to, in particular, Muslims. CTFM is in a large part the product of the Pastors’ experiences. Pastor Nalliah spent time in Saudi Arabia between 1995 and 1997, living near sacred Muslim sites where Christian worship was a criminal offence punished by the death penalty.<sup>14</sup> In 1997 he published a book entitled *Worship Under the Sword*, documenting his experiences of life in Saudi Arabia (including having Christian friends who were tortured).<sup>15</sup> Born into a Christian family in Pakistan, Pastor Scot was summoned to attend a College Investigative Council after twelve years of teaching mathematics. He was asked to account for his religious views, becoming the first individual to be accused under Pakistan’s blasphemy law. Fearing for his life and pursued by students, he went into hiding, exiling himself overseas when the prosecution stalled.<sup>16</sup>

The complaints made by the ICV centred around three publications of CTFM: a website article published after September 11, 2001, entitled “An Insight into Islam by Richard”; a newsletter written by Pastor Nalliah in 2001 entitled “2020 — Will Australia be a Christian Country?”; and a seminar held by CTFM in March of 2002 at Full Gospel Assembly, Surrey Hills, Victoria labelled “Insight into Islam”. The website article characterised terrorism as the very nature of Islam.<sup>17</sup> The newsletter described Islam or Muslims as “the enemy” and then objected to the granting of visas to refugees (“boat people”) entering Australia when Christians from the same countries are being raped, tortured, and killed. It further asked, “What stops Muslims from doing the same in Australia?”<sup>18</sup> The seminar, which formed the main basis of the complaint, was attended by between 200 and 250 people, including three Muslims. During the seminar Pastor Scot articulated his views on what he considers to be “true” Islam, basing this on his interpretation of passages in the Qur’an. In the

<sup>13</sup> *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, 15 (CA). Freedom of expression in New Zealand is found in the New Zealand Bill of Rights Act 1990 (“NZBORA”) s 14: “Everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form.” Freedom of expression is also found internationally in the International Covenant on Civil and Political Rights, 16 December 1966, art 19 (entered into force 23 March 1976) (“ICCPR”).

<sup>14</sup> *ICV v CTFM*, supra note 11, [394].

<sup>15</sup> *Ibid* [391].

<sup>16</sup> *Ibid* [190]-[193].

<sup>17</sup> *Ibid* [394].

<sup>18</sup> *Ibid* [391].

Victorian Civil and Administrative Tribunal (“the Tribunal”), Judge Higgins found that Pastor Scot stated:<sup>19</sup>

- (a) The Qur’an promotes violence and killing (especially of Jews and Christians);
- (b) The Qur’an teaches that women are of little value (“like a field to plough”, “women, dog and donkey are of equal value”);
- (c) There is a “Silent Six Jihad” underway with the intention of converting Australia into an Islamic state;<sup>20</sup>
- (d) “True” Muslims are terrorists (against a backdrop of the Qur’an promoting martyrdom);
- (e) Allah is the great deceiver;
- (f) The Qur’an allows a Muslim to have a child wife; and
- (g) Muslims are demons.

Judge Higgins concluded that all three occasions constituted a breach of section 8 of the Racial and Religious Tolerance Act 2001 (“the Victorian Act”). It provides:

A person must not, on the ground of the religious belief or activity of another person or class of persons engage in conduct that incites hatred against, serious contempt for, or revulsion or severe ridicule of, that other person or class of persons.

### **R v Harding**

Mr Harding was charged with promoting hatred contrary to section 319(2) of the Criminal Code:

Everyone who, by communicating statements, other than in private conversation, wilfully promotes hatred against any identifiable group<sup>21</sup> is guilty of

- (a) an indictable offence, and is liable to imprisonment for a term not exceeding two years; or
- (b) an offence punishable on summary conviction.

The charges against Mr Harding stemmed from three publications, all produced in 1997. First, in response to what he saw as a pro-Muslim article concerning prayer in a local high school, Mr Harding distributed in the neighbourhood a pamphlet entitled “Let’s Take a Serious Look at What’s Happening to Western Collegiate High School”. In it he:<sup>22</sup>

- (a) Described horrific acts of violence committed by Muslims in other countries, claiming that these Muslims are “no different” to those found in Toronto;

<sup>19</sup> Ibid [80], [383].

<sup>20</sup> The “silent Jihad six time approach” refers to a supposed process being undertaken in Australia to convert people to Islam by way of marriage, birthing practices, bribery, business connections, and training schools: *ICV v CTFM*, supra note 11, [53].

<sup>21</sup> Section 318(4) defines “identifiable group” as “any section of the public distinguished by colour, race, religion or ethnic origin.”

<sup>22</sup> 160 CCC (3d) 225, 229 (2002).

- (b) Described Muslims as violent and hateful towards Jews, Christians, and those that deny Islam;
- (c) Stated that Muslims “sound peaceful and try to act peaceful, but underneath their false sheep’s clothing, are raging wolves” ready to devour Toronto;
- (d) Suggested Islam allows polygamy; and
- (e) Suggested the college auditorium had been converted into a mosque for Islamic prayer, promoting the teaching of a false and dangerous religion.

His second pamphlet, “Are all Muslims living in Canada today TERRORISTS [sic]”, contained statements to similar effect, exhorting the reader to prevent the rise of Islam in Canada.<sup>23</sup> The third publication was a telephone message, recorded for whoever dialled Mr Harding’s number, stating that Muslims continue to “savagely torture, maim, starve, beat and kill Christians around the globe in the name of their God”.<sup>24</sup> Found guilty at first instance, Mr Harding’s appeal failed in both the Superior Court of Justice and the Ontario Court of Appeal, the case reaching a conclusion when leave to appeal to the Supreme Court was denied.

### III DECIDING QUESTIONS OF TRUTH

#### Settling “True” Faith

The Victorian Act provides that a person must not engage in conduct that incites “revulsion” or “severe ridicule” of a person based on their religious belief. One method of promoting revulsion or severe ridicule is to characterise a person’s belief system as evil, dangerous, or even ridiculous, therefore maligning its adherents. Misrepresentation of a religious belief system translates into inciting hatred when the misrepresentation, in the view of the Tribunal, provides reasons to hold believers in contempt. For Judge Higgins the way in which Islam was represented was crucial, taking up a large portion of his judgment. Three things can be inferred from this. First, as the judgment itself shows, settling the “true” faith allows Judge Higgins to identify the “class of persons” being vilified, namely “mainstream” Muslims. Secondly, as recognised by the Canadian Criminal Code, if a characterisation of a particular group is settled as true, and therefore allowable, the implication is that rather than being an incitement to hate, the statement constitutes something analogous to an exposition.<sup>25</sup> Thirdly, the exclusion of false statements as an allowable utterance is seen as more legitimate, resting on a line of thought that where a statement is untrue it lacks instrumental value. This third inference (on which I believe the exclusion of false statements implicitly rests) is drawn from the exclusionary approach of United States jurisprudence expressed in the following terms:<sup>26</sup>

It has been well observed that such utterances, are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.

<sup>23</sup> Ibid 231.

<sup>24</sup> Ibid 233.

<sup>25</sup> The Canadian Criminal Code provides for a defence of truth in s 319(3)(a).

<sup>26</sup> *Chaplinsky v New Hampshire* 315 US 568, 572 (1941) (“*Chaplinsky*”).

Whereas the trend in American free speech methodology has been to eschew the categorical exclusion approach in favour of a finding of likely harm that is “both serious and palpable”,<sup>27</sup> the exclusionary approach as imposed against hateful speech has been accepted by the majority of the Canadian Supreme Court.<sup>28</sup>

Judge Higgins was therefore highly influenced by expert witnesses expressing views on what could be considered the correct interpretation of the Qur’an and consequently, what can be thought of as “true” Islam. In response to assertions such as Pastor Scot’s “the prophet [Mohammed] said all you who believe fight those disbelievers who are in your neighbourhood”, relying on citations such as chapter 9, verse 23 of the Qur’an,<sup>29</sup> Dr Abdul Kazi for the ICV countered that although the references were correct, “The word fighting/combating has been taken literally, rather than figuratively.”<sup>30</sup> Again, in relation to the accusation that Mohammed was a paedophile (marrying Aishah when he was fifty-four and she was six, consummating the marriage when she was nine), the following was said by Dr Abdul Kazi (Judge Higgins paraphrasing):<sup>31</sup>

[O]ne cannot use a set of cultural values and people living them at one time [and] make a value and moral judgment on a totally different people in a different cultural context. Asked whether they are bound to treat the life of Mohammed as an example of the morality which they apply in their own lives, he said: “That is so in a general sense, but you do not follow it in every way.”

Able to rely on privileging figurative and culturally contextual interpretation over literal (absolute) interpretations, Judge Higgins concluded that Pastors Scot and Nalliah were presenting an extremist view that bore no relationship to “mainstream” Australian Muslim beliefs.<sup>32</sup> “Mainstream”, as an identification label for the “class of persons” against whom hatred is incited, becomes the hallmark of “true” Islam. CTFM thus joins a class of persons (extremists) who misuse interpretation and consequently misrepresent Islam. In effect the Tribunal has shown a willingness to enter the debate as to what the Qur’an does and does not require of its followers, limiting through the Act what can be considered a true interpretation.

This is not to say that Pastors Scot and Nalliah’s views on Islam are as valid as those of a person of Dr Abdul Kazi’s credentials.<sup>33</sup> Rather it is a question of interpretive communities, specifically, whether the court (or Tribunal) — as opposed to theologians and interested religious commentators or practitioners — should be engaging in and deciding essentially theological arguments. For instance, it is easy to imagine a person asserting that Christianity promotes the subjugation of women,

<sup>27</sup> See Weinstein, “An American’s View of Canadian Hate Speech Decisions” in Waluchow (ed), *Free Expression: Essays in Law and Philosophy* (1994) 175, 181. The Seventh Circuit has stated that the balancing approach (weighing the value of speech and the costs of its restriction) inherent in *Chaplinsky* is appropriate only for content-neutral speech: *American Booksellers Association Inc v Hudnut* 771 F 2d 323 (7<sup>th</sup> Cir, 1985); affd 475 US 1001 (1986).

<sup>28</sup> *R v Keegstra*, supra note 9, 761-763 per Dickson CJ.

<sup>29</sup> *ICV v CTFM*, supra note 11, [40].

<sup>30</sup> *Ibid* [157].

<sup>31</sup> *Ibid* [180].

<sup>32</sup> *Ibid* [387].

<sup>33</sup> *Ibid* [150]. Dr Abdul Kazi, witness for the ICV, is a retired academic who held the position of Professor of Islamic Studies at the International Islamic University of Malaysia, prior to which he was Associate Professor at the University of Melbourne teaching Arabic and Islam.

relying for example on *1 Corinthians 11*.<sup>34</sup> Could it therefore be argued that this promotes hatred against Christians as a class because it mischaracterises Christianity by failing to take into account the cultural context of the early Corinthian church? To make this finding a Judge would have to settle some difficult, perhaps unanswerable, questions:<sup>35</sup> whether modern Christianity promotes the subjugation of women, or even, whether the wearing of a hat in church is a biblical requirement for all women.<sup>36</sup> Fundamentally, it raises the point that the court, faced with the truthfulness of ideas, should leave the answers (with potential emphasis on the plural) to citizens themselves. This reflects the framing of freedom of expression as a liberty right, conceived in relation to the state negatively as a freedom from prohibition and compulsion of ideas and positively as a duty (a claim right) not to be interfered with in espousing ideas.<sup>37</sup> The point was recognised by Jackson J for the United States Supreme Court in *West Virginia State Board of Education v Barnette*:<sup>38</sup>

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein. If there are any circumstances which permit an exception, they do not now occur to us.

### A New Blasphemy Law

Settling doctrinal questions and using interpretation of religious texts as evidence of inciting hatred would indicate religious vilification laws are potentially a new form of blasphemy law. Introducing the proposed religious vilification law for the United Kingdom in December 2004, the then Secretary of State for the Home Department Mr David Blunkett stated: “It is not a new blasphemy law and will protect people rather than ideologies.”<sup>39</sup> This dichotomy between the ideology and the person has two problems. First, the argument that a person’s fundamental belief system can be criticised without causing offence to or vilification of that person is fallacious. Secondly, it raises the question of how harm is constructed under vilification laws.

<sup>34</sup> *1 Corinthians 11:3* states “the head of the woman is man”, *1 Corinthians 11:5* states “And every woman who prays or prophesies with her head uncovered dishonours her head – it is just as though her head were shaved”. See also *Ephesians 5:22*. All references are to the New International Version (NIV).

<sup>35</sup> Questions not particularly capable of, in Fish’s terminology, a “beyond a reasonable doubt” answer. See Fish, *There’s No Such Thing as Free Speech* (1994) 113.

<sup>36</sup> Potentially a ground for intra-faith dispute also. Other examples easily come to mind. For example, a person claiming that Christianity is homophobic and therefore to be reviled, relying on *Leviticus 18:22, 20:13* (lying with another man is to be detested and results in a punishment of death), and *1 Corinthians 6:9-10* (homosexuals, like thieves and drunkards, will not inherit the kingdom of God).

<sup>37</sup> See generally Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (2004) 11.

<sup>38</sup> 319 US 624, 642 (1943).

<sup>39</sup> Blunkett, “Incitement to Religious Hatred” (2004) House of Commons Hansard Written Ministerial Statements <<http://www.publications.parliament.uk/pa/cm200405/cmhansrd/cm041207/wmstext/41207m02.htm>>. Mr Blunkett’s sentiments are also reflected in *Robin Fletcher v The Salvation Army Australia* [2005] VCAT 1523 (“*Robin Fletcher*”) where Stuart Morris J stated at [7]: “The Act is not concerned with the vilification of a religious belief or activity as such. Rather it is concerned with the vilification of a person, or class of persons on the ground of the religious belief or activity ...”

In a pivotal statement, Judge Higgins stated:<sup>40</sup>

Pastor Scot, throughout the seminar, made fun of Muslim beliefs and ... conduct. It was done, not in the context of a serious discussion of Muslims' religious beliefs; it was presented in a way which is essentially hostile, demeaning and derogatory of all Muslim people, their god, Allah, the prophet Mohammed and in general Muslim religious beliefs and practices.

The statement focuses not only on the demeaning of Muslim people, but of their God, prophet, and religious tenets. There can be no bright line between criticising doctrine and criticising a person who adheres to it. For many, religion forms the centrepiece of life, dearly cherished beliefs, criticism of which evinces a personal attack. In this way there is no real difference between saying "Christianity is evil" as opposed to "all Christians are evil" — both have the potential to incite religious hatred.<sup>41</sup>

An argument could be offered that these two areas of law are distinct. The common law misdemeanour of blasphemous libel, applying only to the Christian faith, requires that there be something that shocks or *offends* a believing Christian.<sup>42</sup> This contrasts religious vilification laws like the Victorian Act which require that the "ordinary reasonable reader" objectively understand they are being incited to hatred against a target group.<sup>43</sup> However, in disparaging and ridiculing a religious belief, both offence and incitement is the end result. If a belief is a target of ridicule then surely its adherents must be also. To illustrate this we can look to Judge Higgins' method of finding that there was an objective incitement. After discussing the reactions of the offended attendees at length, including references to fears for personal safety and embarrassment,<sup>44</sup> Judge Higgins stated: "The extent to which they were upset at what they saw and heard is a factor to be taken into account".<sup>45</sup> A finding of objective incitement is supported by the offence suffered by target group members.

Such encounters may indeed be psychologically difficult, but as discussed later,<sup>46</sup> in the context of religion it is to be expected that systems of religious thought can be radically challenged, resulting ultimately in offence and even the rejection of one's own identity. Offence in a religious context includes offence caused by a "negative"<sup>47</sup> approach to another religion, but despite this, in matters of theological truth the Court must remain "reluctant to determine what are at heart ecclesiastical disputes where matters of faith and doctrine are at issue."<sup>48</sup>

<sup>40</sup> *ICV v CTFM*, supra note 11, [383].

<sup>41</sup> Another example of how criticism of a lifestyle cannot be distinct from "insulting" a person is the case of *Harry Hammond v DPP* [2004] EWHC 69. Mr Hammond, a 67 year old street preacher with Asperger's syndrome, was convicted for displaying a sign stating, "Stop immorality, Stop homosexuality, Stop lesbianism" under s 5 of the Public Order Act 1986 (displaying an insulting sign likely to cause harassment, alarm or distress). Despite the fact that Mr Hammond himself was assaulted by the on-looking crowd, the High Court upheld the conviction on the basis that the magistrates were entitled to find the sign to be insulting because it related homosexuality to immorality.

<sup>42</sup> *Whitehouse v Lemon* [1979] AC 617, 632, 656-657 (HL) discussed in Mortensen, "Art, Expression and the Offended Believer" in Ahdar (ed), *Law and Religion* (2000) 181, 184.

<sup>43</sup> *ICV v CTFM*, supra note 11, [14].

<sup>44</sup> *Ibid* [44].

<sup>45</sup> *Ibid* [77].

<sup>46</sup> See infra note 186 and accompanying text.

<sup>47</sup> *ICV v CTFM*, supra note 11, [276].

<sup>48</sup> *Mabon v Conference of the Methodist Church of New Zealand* [1998] 3 NZLR 513, 523 (CA). In the US statements are made to similar effect: see *US v Lee* 71 L. Ed. 2d 127, 132; *Thomas v Review Board of the Indiana Employment Security Division* 67 L. Ed. 2d 624, 631 discussed in Cumper, "The Public



#### IV CHILLING EFFECT

The “chilling effect” of laws limiting freedom of expression refers to the self-imposed censorship of ideas brought about by the fear of litigation and its risk of financial ruin, jail, collegial ostracism, or embarrassment. It represents the thought that although a person’s speech may not fall within the intended scope of a prohibition, why take the chance? The “chilling effect” of religious vilification laws can be divided into three arguments. The first argument challenges the strict requirements of debate and full disclosure imposed by religious vilification cases and asks whether the standard of “balanced discussion” is too onerous. The second argument develops what Braun has labelled “parallel cultures of extralegal silencing”.<sup>49</sup> The third is the judicial argument that a law is either overbroad or unduly vague, failing to meet the requirement of being a proportional limitation on free speech. This third argument raises crucial questions as to whether the law can be construed narrowly so as to limit freedom of expression as little as possible and as such, is treated separately below in Part V.

##### The “Balanced Discussion” Standard

In *R v Harding* Chief Provincial Judge Linden at first instance found that Mr Harding’s statements and publications were “the typical specious reasoning of a hate-monger, jumping to baseless generalizations”.<sup>50</sup> There were several problems with Mr Harding’s diatribes. He was found to have distorted statements made in various newspaper articles, omitting the words “rebels”, “militants”, and “insurgents”, and substituting the word “believers” to obscure the distinction.<sup>51</sup> He exaggerated the extent of officially endorsed Muslim prayer in a local school.<sup>52</sup> And finally, the Ontario Court accepted as an indication of his insincerity Mr Harding’s “unwillingness to accept Shabir Ally’s”<sup>53</sup> invitation to debate with him in a public forum.<sup>54</sup> In *ICV v CTFM* the finding that the seminar was not a “balanced discussion” was based on the fact that Pastor Scot engaged in a “unilateral uncontested dialogue”.<sup>55</sup> Using a sarcastic or sneering tone or producing laughter in the audience was impermissible.<sup>56</sup> Paraphrasing and selective quoting was seen as problematic when referencing religious texts,<sup>57</sup> as was, potentially, not using the text’s original language,<sup>58</sup> or using a certain translation.<sup>59</sup> As well as using this as evidence that the speakers misrepresented a faith and therefore maligned its adherents, the quality of a “balanced discussion” is imposed in accordance with the defences under the relevant Acts. The Victorian Act provides in section 11:

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Manifestation of Religion or Belief: Challenges for a Multi-Faith Society in the Twenty-First Century” in O’Dair and Lewis (eds), *Law and Religion* (2001) 311.

<sup>49</sup> Braun, *Democracy Off Balance: Freedom of Expression and Hate Propaganda Law in Canada* (2004) 126.

<sup>50</sup> *R v Harding* 45 OR (3d) 207, 221 (2000).

<sup>51</sup> *Ibid* 214-215.

<sup>52</sup> *Ibid* 216.

<sup>53</sup> Shabir Ally is a prominent Muslim apologist and academic who frequently participates in public debates with Christians.

<sup>54</sup> *R v Harding* 45 OR (3d) 207, 217 (2000).

<sup>55</sup> *ICV v CTFM*, supra note 11, [58].

<sup>56</sup> *Ibid* [58], [81], [383].

<sup>57</sup> *Ibid* [235]-[236], [251], [276].

<sup>58</sup> *Ibid* [227].

<sup>59</sup> *Ibid* [183].

A person does not contravene Section 7 or 8 if the person establishes that the person's conduct was engaged in reasonably and in good faith – ...

- (b) In the course of any statement, publication, discussion or debate made or held, or any other conduct engaged in, for –
  - (i) any genuine academic, artistic, religious or scientific purpose ...

Section 319(3)(b) of the Canadian Criminal Code also provides a defence “if, in good faith, he expressed or attempted to establish by argument an opinion on a religious subject”.

Professor Gary Bouma, who was an expert witness for the ICV, wrote later in the Victorian newspaper *The Age* that the law enforces “the need for religious groups to behave honestly and honourably with each other”, creating what he calls “religious maturity”.<sup>60</sup> What this envisages is the creation of a debating club of academics.<sup>61</sup> The average Minister or person cannot be expected to be aware of and provide a comprehensive review of all the competing arguments. Furthermore, should they have to? The requirement of a two-way debate (extending to formal ones with renowned academics such as Shabir Ally) appears entirely to ignore the context of these statements.

Although open to the public, Pastors Scot and Nalliah advertised their seminar through church circles and via the CTFM website and convened it in a church, opening with a prayer and twenty minutes of praise and worship singing.<sup>62</sup> Mr Harding distributed pamphlets, dropped letters in letterboxes, and created a phone-in message. Of course these dialogues were uncontested. It could hardly be expected that the speakers would undertake a detailed exegesis. Indeed, at least in the case of Mr Harding, this is curtailed by the speaker's limited knowledge. There is an element of scholarly inclination that belies the reality of statements in the public sphere and in so doing attempts to enforce its own desire for absolute civility. Hyperbole and the use of humour to undermine opposing views are the realities of rhetoric<sup>63</sup> and run counter to the notion that a speaker must be “subjectively honest” and their statements must, when “objectively viewed”, “endeavour to minimise the harm ... [their words] will, by definition, inflict.”<sup>64</sup> The defence itself appears to be of little weight, the Canadian Courts confining it to “rare cases”.<sup>65</sup> Once it is shown that the speech in question promotes or incites hatred it is natural to reach the conclusion that the labels “good faith” and “reasonable” do not apply. Indeed the Ontario Court of Appeal went

<sup>60</sup> Bouma, “Why Costello is wrong on vilification laws” (2004) *The Age* <<http://www.theage.com.au/articles/2004/05/31/1085855495283.html?from=storyhs>>.

<sup>61</sup> The views of Malcolm Arthur Thomas, one of the complainants, are recorded by Judge Higgins, including the quirky finding that “slides were presented, but they were not a prominent feature of the presentation and he did not believe that they had the effect of making the presentation more academic, clinical or analytical”: *ICV v CTFM*, supra note 11, [71].

<sup>62</sup> *Ibid* [242].

<sup>63</sup> In *Cantwell v Connecticut* 310 US 296, 310 (1940) the Supreme Court noted that on religious and political views “[t]o persuade others to his own point of view, the pleader, as we know, at times, resorts to exaggeration, to vilification of men who have been, or are, prominent in church or state, and even to false statement.”

<sup>64</sup> *ICV v CTFM*, supra note 11, [388]-[389].

<sup>65</sup> *R v Keegstra*, supra note 9, 779 per Dickson CJ; *R v Harding* 45 OR (3d) 207, 222-223 (2000); *R v Harding* 52 OR (3d) 714, 731 (2001).

so far as to imply such speech escapes the scope of “religious expression” entirely.<sup>66</sup> Faced with requirements regulating how one may comment on a religion, it is simple to infer that speech will be “chilled” and left to the suitably “qualified”, a privileging of academic discourse that is reflected also in the distinctions made between “high” and “low” speech discussed below.<sup>67</sup>

### Parallel Cultures of Extra-Legal Silencing

In his book *Democracy Off Balance*, Canadian Stefan Braun cites numerous incidents where competing religious minorities have exchanged the burden of discursively communicating social right for the ease of asserting public might through legal tools.<sup>68</sup> Speech is chilled not only by effective recourse to the law, but also through calling upon the law to give one’s argument moral authority and vindication. Competition between rival minority groups is reflected in Victoria also where the pattern of silencing has crept outward from the *ICV v CTFM* case. Amir Butler, who once supported the introduction of the Victorian Act writes:<sup>69</sup>

At every major Islamic lecture I have attended since litigation began against Catch the Fire Ministries, there have been small groups of evangelical Christians – armed with notepads and pens – jotting down any comment that might later be used as evidence in the present case or presumably future cases.

This is not surprising. The three Muslim attendees at the CTFM seminar were made aware of it through their association with the ICV.<sup>70</sup> In what is truly disquieting, the attendees were encouraged to attend at the behest of May Halou who was both a member of the Executive of the ICV *and* employed by the Equal Opportunity Commission, the Act’s primary administrative body.<sup>71</sup> The most vulnerable groups in this battleground are those who will choose not to respond in kind, or alternatively, those that lack the resources and organisational clout to fund litigation. The Victorian Act specifically provides for the ability of representative bodies to bring complaints before the Equal Opportunity Commission where they have a “sufficient interest in the complaint.”<sup>72</sup> In Canada and the UK, permission must be sought from the Attorney-General before any action can proceed.<sup>73</sup> The potential effect of this, however, is to transpose interest group politics onto the criminal law.<sup>74</sup> Moreover, having the Attorney-General act as a safety-valve does not prevent the law from being utilised as a tool to threaten one’s opponents into silence. It is to be expected then that the appropriate response to “it seems they are ... interested in just shutting us

<sup>66</sup> *R v Harding* 160 CCC (3d) 225, 239 (2002): “[T]he appellant did express opinions of the religious belief that he appeared to sincerely hold but ... the opinions expressed went above and beyond expression of religious belief and were not made in good faith.”

<sup>67</sup> See *infra* note 119 and accompanying text.

<sup>68</sup> Braun, *supra* note 49, 91, 101, 125-128.

<sup>69</sup> Butler, “Why I’ve changed my mind on Victoria’s anti-vilification laws” (2004) Online Opinion: Australia’s e-journal of social and political debate <<http://www.onlineopinion.com.au/view.asp?article=2274>> (“Why I’ve changed my mind”).

<sup>70</sup> *ICV v CTFM*, *supra* note 11, [47], [51].

<sup>71</sup> *Ibid* [67].

<sup>72</sup> Racial and Religious Tolerance Act 2001 s 19(3) (Vic).

<sup>73</sup> Criminal Code s 319(6) (Canada); Racial and Religious Hatred Act 2006 cl 29L (UK).

<sup>74</sup> See, eg Maher, “Free Speech and its Postmodern Adversaries” (2001) 8(2) Murdoch U E L <[http://www.murdoch.edu.au/elaw/issues/v8n2/maher82\\_text.html](http://www.murdoch.edu.au/elaw/issues/v8n2/maher82_text.html)>.

up”<sup>75</sup> is to respond in kind, recalling as Strossen does the observation of Black J in the United States Supreme Court: “If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: ‘Another such victory and I am undone’.”<sup>76</sup>

Amir Butler writes: “If we create an atmosphere where people cannot speak freely – however offensive that speech might be – it is impossible for these ideas to be appropriately repudiated or debunked in the public square.”<sup>77</sup> Allowing speech is beneficial. First, in making one’s opponent visible we can offer counter-speech to affirm an identity contrary to that being promoted. Discursively, the act of speaking participates in the constitution of the subject, engaged when we contest our opponent’s characterisation of the “other”.<sup>78</sup> Secondly, allowing speech is a means of re-affirming our collective commitment to tolerance. The point belongs to Bollinger<sup>79</sup> who argues that free speech is concerned with developing the capacity of the mind to master our fear over ideas,<sup>80</sup> a symbolic demonstration of self-control that counters the “perfectly logical” desire to “sweep away all opposition” identified by Holmes J in *Abrams v United States*.<sup>81</sup> Met with the intolerance of violent reactions and counter-productive legal claims, discussion on religion is effectively chilled. It is not simply the virulent and “clear case” that falls within the scope of this chill; it is also speech that may not have even been considered when drafting legislation. This forms the argument concerning overbreadth and vagueness to which I will now turn.

## V CONCEPTUAL UNCERTAINTIES: OVERBREADTH, VAGUENESS, AND THE HIGH-LOW SPEECH DISTINCTION

Under the New Zealand Bill of Rights Act 1990 (NZBORA), to be consistent with the right to freedom of expression a limit on the right must be “prescribed by law” and “reasonable”.<sup>82</sup> This can be characterised as requiring that the right is limited only insofar as is necessary to promote the countervailing interest and furthermore, that the limits imposed by a law are ascertainable in advance, rather than arbitrary or undiscoverable.<sup>83</sup> Broadly, these two requirements run counter to the problems, identified in United States jurisprudence, of overbreadth and vagueness. Dissenting

<sup>75</sup> “I did not say Muslims are demons” (2005) Catch the Fire Ministries <<http://www.catchthefire.com.au/articles/home/mediareleases.htm>> (at 8 January 2006).

<sup>76</sup> Strossen, “Liberty and Equality: Complementary, Not Competing, Constitutional Commitments” in Huscroft and Rishworth (eds), *Litigating Rights: Perspectives from Domestic and International Law* (2002) 149, 172 quoting *Beauharnais v Illinois* 343 US 250, 275 (1952) per Black J dissenting.

<sup>77</sup> Butler, “Muzzling the haters doesn’t make hate vanish” (2005) Online Opinion: Australia’s e-journal of social and political debate <<http://www.onlineopinion.com.au/view.asp?article=2971>> (“Muzzling the haters”).

<sup>78</sup> See generally Zanghellini, “Jurisprudential Foundations for Anti-Vilification Laws: The Relevance of Speech Act and Foucauldian Theory” (2003) 27 *Melb U L Rev* 458, 478-479. See also Rubenstein, “Since When is the Fourteenth Amendment Our Route to Equality? Some Reflections on the Construction of the ‘Hate Speech’ Debate from a Gay/Lesbian Perspective” in Gates et al (eds), *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights, and Civil Liberties* (1994) 280; Strossen, *supra* note 76, 162-163; Human Rights Commission, *supra* note 4, [4.5].

<sup>79</sup> Bollinger, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986) 126.

<sup>80</sup> *Ibid* 161.

<sup>81</sup> 250 US 616, 630 (1919).

<sup>82</sup> NZBORA 1990 s 5.

<sup>83</sup> See generally *The New Zealand Bill of Rights*, *supra* note 10, 141.

in *R v Keegstra*, McLachlin J cited with approval the following definition of overbreadth:<sup>84</sup>

Statutes which open-endedly delegate to administering officials the power to decide how and when sanctions are applied or licences issued are overbroad because they grant such officials the power to discriminate — to achieve through selective enforcement a censorship of communicative content that is clearly unconstitutional when achieved directly.

Distinct from overbreadth, vagueness occurs where a law is so vague that “persons ‘of common intelligence must necessarily guess at its meaning and differ as to its application’”.<sup>85</sup> In the context of University hate-speech codes, the United States Federal Court has viewed both overbreadth and vagueness as reasons for ruling the code in question unconstitutional.<sup>86</sup> For example, in *UWM Post Inc v Board of Regents of the University of Wisconsin System* the plaintiffs were successful in having ruled unconstitutional a speech code that prohibited speech demeaning a person on identifiable grounds, leading to an “intimidating, hostile or demeaning environment”.<sup>87</sup> In United States jurisprudence only certain categories of speech are excluded from First Amendment protection. This includes obscenity, incitement to imminent lawless action, and (of particular relevance to the *UWM* case) “fighting words”. To constitute fighting words speech must tend to incite an immediate breach of the peace (provoking immediate retaliation) and the words must be directed to the person of the hearer.<sup>88</sup> The Court ruled the code overbroad because in positing a standard of speech that “demeans” or “intimidates”, the regulated speech did not require (and could not be limited to) a tendency to incite violent reaction.<sup>89</sup> Courts however will only rule a statute void for overbreadth if it cannot be met by a construction of the statute that “clearly confines it within constitutional bounds” (commonly called “reading down”).<sup>90</sup> In New Zealand this process of “reading down” is reflected in the interpretive exercise required by section 6 of the NZBORA 1990.<sup>91</sup> Section 6 provides:

Whenever an enactment can be given a meaning that is consistent with the rights and freedoms contained in this Bill of Rights, that meaning shall be preferred to any other meaning.

For instance, if a statute prohibited incitement to hatred caused by “insulting” another person on the grounds of religion, a court may be able to choose from the numerous applications of the word “insulting” an interpretation that does not infringe the right to

<sup>84</sup> *R v Keegstra*, supra note 9, 818 per McLachlin J dissenting.

<sup>85</sup> *Ibid.*

<sup>86</sup> *UWM Post Inc v Board of Regents of the University of Wisconsin System* 774 F Supp 1163 (ED Wis, 1991) (“*UWM*”); *Doe v University of Michigan* 721 F Supp 852 (ED Mich 1989).

<sup>87</sup> *UWM*, supra note 86, 1165.

<sup>88</sup> *Chaplinsky*, supra note 26, as modified by *Collin v Smith* 578 F 2d 1197 (7<sup>th</sup> Cir), cert denied, 439 US 916 (1978); *Gooding v Wilson* 405 US 518 (1972); *Texas v Johnson* 491 US 397 (1989) discussed in *UWM*, supra note 86, 1169-1172.

<sup>89</sup> *UWM*, supra note 86, 1172.

<sup>90</sup> *R v Keegstra*, supra note 9, 818 per McLachlin J dissenting; *UWM*, supra note 86, 1168.

<sup>91</sup> In New Zealand, where a law may not be invalidated, neither vagueness nor overbreadth are possible as distinct legal doctrines. However, the phenomenon of overbreadth and vagueness is of course just as possible as in the US or Canada.

freedom of expression, for example, applying it only to fighting words.<sup>92</sup> However such an approach to religious vilification laws is problematic. Where the legislative intent explicitly includes promoting “dignity, sense of self-worth and belonging to the community” as it does in Victoria,<sup>93</sup> then it is difficult to limit the application of “serious contempt”, “revulsion”, and “severe ridicule” to an area of constitutionally excludable fighting words.<sup>94</sup> Moreover, it is not entirely certain that a court would have to prefer an interpretation limiting the scope of religious vilification to fighting words or (again drawing from United States jurisprudence) incitement to lawlessness.<sup>95</sup> Interpreting any religious vilification act in New Zealand, where there is no distinct doctrine of fighting words, the Court may follow the approach of the majority of the Supreme Court of Canada in *R v Keegstra*. The majority took the view that the extension of the Criminal Code beyond the boundaries of the United States fighting words doctrine was not an unreasonable limitation on the right to freedom of expression, allowing the Code to apply according to the totality of its legislative intent.<sup>96</sup> Disentitling so-called fighting words from protection also has the hallmarks of privileging one form of class-oriented speech (namely the more educated) over another, when the content is in fact the same, reflecting an arbitrary distinction between “high” and “low” speech.

The hate-speech code in *UWM* also suffered from vagueness, a quality that requires courts in the United States context to rule the impugned law unconstitutional.<sup>97</sup> In *UWM* it was the subjective and illusive boundaries surrounding the concept of “demeaning”. In *Doe v University of Michigan*, the Court in dealing with a similar speech code prohibiting speech that “stigmatizes or victimizes” stated, “it was simply impossible to discern any limitation on its scope or any conceptual distinction between protected and unprotected conduct.”<sup>98</sup> The inability to draw boundaries around acceptable and unacceptable speech poses a substantial problem for religious vilification laws. Dickson CJ in *R v Keegstra* contended that the prohibition against “hatred” is limited to the most severe cases where “if exercised against members of an identifiable group, [the speech] implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment”.<sup>99</sup> The same sentiment was reflected in Victoria by Premier Bracks.<sup>100</sup> These may be good intentions, but they first require defining what falls within the sphere of severity, always leaving it as a potential question of whether “the trier dislikes or finds

<sup>92</sup> Such was the approach of three Judges of the High Court of Australia in *Coleman v Power* [2004] 209 ALR 182, 227 per Gummow and Hayne JJ, 247 per Kirby J when faced with a statute proscribing the use of insulting words in a public place. A New Zealand example of the same interpretive principle is *Hopkinson v Police* [2004] 3 NZLR 704 (HC) (applying a narrowing construction to the prohibition against destroying the New Zealand flag with the intention of dishonouring it).

<sup>93</sup> Racial and Religious Tolerance Act 2001 Preamble (Vic).

<sup>94</sup> The Racial and Religious Tolerance Act 2001 (Vic) also provides for the offence of “serious religious vilification” in s 25, isolating for special condemnation what is effectively the equivalent of imminent incitement to lawless action. Isolating in a separate section one of the traditionally excluded categories of speech would appear to indicate that the main provision (s 8) is to have a wider scope.

<sup>95</sup> *Brandenburg v State of Ohio* 395 US 444, 447 (1969).

<sup>96</sup> The majority in *R v Keegstra* was influenced to a significant degree by the 1965 report of the Special Committee on Hate Propaganda in Canada (commonly referred to as the Cohen Committee) which formed the basis for the Criminal Code provision. See, eg. *R v Keegstra*, supra note 9, 745 per Dickson CJ.

<sup>97</sup> *UWM*, supra note 86, 1178-1181.

<sup>98</sup> 721 F Supp 852, 867 (1989).

<sup>99</sup> *R v Keegstra*, supra note 9, 777 per Dickson CJ.

<sup>100</sup> Ellinson, “Exercising permissible limits on free speech” (2005) 43(3) Law Society Journal 43.

offensive the content of the accused's statements."<sup>101</sup> Chief Provincial Judge Linden in the Ontario Court stated: "People who promote hatred rarely explicitly admit that such is their intention. Thus the necessary *mens rea* must be inferred from the offending statements themselves"<sup>102</sup> — in other words, inferred from how offensive or severe they seem.

An administering body must also apply the statute as it is drafted, relying only on its words as evidence of intention.<sup>103</sup> The laws are framed in general terms — "hatred", "serious contempt", "revulsion", "severe ridicule", "insulting", (even "threatening")<sup>104</sup> — terms that equally apply to many texts that we would normally think should not be subject to such stringent legal review. In *R v Keegstra* McLachlin J cited several questionable applications of the law by administrative bodies.<sup>105</sup> Responding to the calls of interest groups, works such as Salman Rushdie's *Satanic Verses* were "stopped at the border" on the ground that they violate section 319(2) of the Criminal Code. Films may be temporarily kept out, as happened to an educational film entitled *Nelson Mandela*, or television footage seized, as happened to Phil Donaghue's interview with Bill Wilkinson, former Imperial Wizard of the Ku Klux Klan.<sup>106</sup> This should not come as a surprise. If the law is based on inciting persons to hatred against another group then literature should be the first port of call. *Mein Kampf* should certainly be purged from all libraries as should the *Protocols of Zion*. Along with *The Satanic Verses*, Philip Pullman's *His Dark Materials* trilogy or C.S. Lewis' *Chronicles of Narnia* could be scrutinised,<sup>107</sup> as could parts of Chaucer's *Canterbury Tales*<sup>108</sup> and Shakespeare's *The Merchant of Venice* for their anti-Semitic depictions. This point was expressly recognised in *Collin v Smith*.<sup>109</sup> The Court struck down a city ordinance that prohibited:<sup>110</sup>

[T]he dissemination of any materials within the Village of Skokie which promotes and incites hatred against persons by reason of their race, national origin, or religion, and is intended to do so.

<sup>101</sup> *R v Keegstra*, supra note 9, 778 per Dickson CJ, 856 per McLachlin J dissenting.

<sup>102</sup> *R v Harding* 45 OR (3d) 207, 214 (2000).

<sup>103</sup> Huscroft, "Defamation, Racial Disharmony, and Freedom of Expression" in Huscroft and Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) 171, 210. Huscroft identifies the lack of guiding criteria as one of the defects of s 131 of the Human Rights Act 1993.

<sup>104</sup> The Racial and Religious Hatred Act 2006 (UK) requires the use of "threatening" words or behaviour. The boundaries of what constitutes "threatening" remains uncertain: see Watkins, "A state of uncertainty" (2006) 156 *New Law Journal* 660.

<sup>105</sup> *R v Keegstra* supra note 9, 859 per McLachlin J dissenting.

<sup>106</sup> Braun, supra note 49, 93.

<sup>107</sup> Pullman has been severely critical of C.S. Lewis' children's books, contending for instance that Lewis' portrayal of the people of Calormen is a thinly veiled kind of Islamophobia. See "Narnia film stirs controversy over Christianity" *New Zealand Herald* (Auckland, New Zealand, 17 October 2005). Available from <<http://www.nzherald.co.nz/search/story.cfm?story:d=00012AEC-0753-1353-803883027AF1010E>> (at 8 January 2006); Lurie, "His Dark Materials" (2005) *Guardian Unlimited* <<http://books.guardian.co.uk/print/0,,5346304-99943,00.html>>. His own children's trilogy, *His Dark Materials*, depicts all its Christian characters as knowingly evil, God as an old demented angel who eventually dies, and describes Christianity as "a very powerful and convincing mistake, that's all."

<sup>108</sup> See Tsesis, *Destructive Messages: How Hate Speech Paves the Way for Harmful Social Movements* (2002) 111 citing *The Prioress' Tale*.

<sup>109</sup> *Collins v Smith* 578 F 2d 1197 (7<sup>th</sup> Cir), cert denied, 439 US 916 (1978).

<sup>110</sup> *Ibid* 1211.

In ruling the ordinance fatally overbroad, the Court commented that it “could conceivably be applied to criminalize dissemination of *The Merchant of Venice*”.<sup>111</sup> From there it is only one more step to prohibiting Muslims from using particular verses out of the Qur’an or Christians from using verses in the Bible.<sup>112</sup> For instance, speaking to a group of Jews Jesus says, in *John 8:44*: “You belong to your father, the devil, and you want to carry out your father’s desire.”<sup>113</sup> Mr Blunkett when introducing the Racial and Religious Hatred Bill (UK) stated:<sup>114</sup>

The provisions do not make any blanket exceptions, for example, for any activity which may be presented as a religious activity or for the recitation of any passage from sacred texts. This is because, although the vast majority of such activities would not meet any part of the thresholds for this offence, in extreme circumstances it is, for example, possible to quote or misquote passages of sacred texts out of context so that they become threatening, abusive or insulting and intended or likely to stir up hatred.

Quoting *John 8:44* would therefore be permissible so long as it is done “in context”<sup>115</sup> (encompassing what we might call a non-severe manner). However this raises problems identified earlier in this article: in deciding questions of context, questions of interpretation (and therefore “truth”) are finalised, leaving discussion and use of “sacred texts” only to those who demonstrate the correct method of interpretation (the favoured scholars).

The application of the law is therefore potentially broad. Fundamentally, it is difficult to determine whether the statements made by Pastors Scot and Nalliah and Mr Harding fall within this (presumably) universally perceived sphere of severity. Furthermore, a statement such as, “All persons of religion x are filth” would (again assuming it is universally perceived as severe) bear the burden of the law when in reality such statements represent a different iteration of their more “scholarly” cousins. This second point reflects the attempt by hate speech prohibition proponents to limit the breadth of the law by distinguishing between different forms of utterances, arbitrarily demarcating categories of “high” and “low” speech. As discussed above, the Victorian Act states that a person’s motive for engaging in conduct is generally irrelevant<sup>116</sup> unless it falls within the particular exceptions of “good faith” art, academia, religion, science, or public interest —<sup>117</sup> representing a desire to impose the civility (fictional or otherwise)<sup>118</sup> of academia onto the public sphere. Matsuda in “Language as Violence” distinguishes prohibited racist hate speech from the “social pseudoscientist who posits some kind of racial inferiority theory, but does it in a scientific way”, claiming the distinguishing feature to be “the absence of the language

<sup>111</sup> Ibid 1207.

<sup>112</sup> Prohibition of biblical scriptures has already occurred in the context of homosexual vilification in Canada: see Bernstein, *You Can’t Say That!* (2003) 157 discussing the case of Hugh Owens.

<sup>113</sup> This verse was used by Mr King-Ansell along with a quotation from *Mein Kampf* (“By defending myself against the Jew, I am fighting for the work of the Lord”) in his anti-Semitic pamphlets that led to the only criminal prosecution to date under s 131 of the Human Rights Act 1993 (then s 25 of the Race Relations Act 1971): *King-Ansell v The Police* [1979] 2 NZLR 531 (CA) discussed in Hodge, “Incitement to Racial Hatred in New Zealand” (1981) 30 Int’l & Comp LQ 918.

<sup>114</sup> Blunkett, supra note 39. The Act is now limited to “threatening” words or behaviour.

<sup>115</sup> Even this may be problematic. As an application of principle it could be argued that “Jew” in the passage is interchangeable with any person who does not believe the truth of Jesus Christ, including many other religions and atheism.

<sup>116</sup> Racial and Religious Tolerance Act 2001 s 9 (Vic).

<sup>117</sup> Ibid s 11.

<sup>118</sup> See Wolfson, *Hate Speech, Sex Speech, Free Speech* (1997) 53 discussing the use of cutting and often insulting speech in academic reviews.



of hatred and persecution.”<sup>119</sup> Matsuda’s distinction taps into the familiar and unnerving image of book burning.<sup>120</sup> She cites Blackmun J in *Board of Education v Pico* for the statement “school officials may not remove books for the purpose of restricting access to the political ideas or social perspectives discussed in them”.<sup>121</sup> But where vilification laws are based on the need to remedy social alienation, inequality, breaches of personal integrity, and structural narratives of subordination then excluding “academic” texts from the scrutiny of the law is problematic. For instance, what is more sinister, creating a theory of “raceology” that advocates a voluntary programme of sterilisation for those with “deficient” genes, thus remedying the “tragedy” of the American Negroes I.Q. deficiency,<sup>122</sup> or the vitriolic statement of the bigot? Granted, the vitriolic statement has a greater immediate effect of terror, but the “academic” statement forms the structural basis that legitimises the latter. In each vitriolic statement there is the echo and evocation of its “academic” origins (“woven into a thousand scripts, stories, and roles”).<sup>123</sup> The same again applies in the context of jokes, which Mr Blunkett assures would not “of themselves” be covered by the proposed legislation.<sup>124</sup> In “Language as Violence”, Canadian commentator Barry Brown states that you can still tell as many racist jokes as you like, the law only taking effect “when you try to incite hatred”,<sup>125</sup> but jokes, like “academic” texts, form a far more insidious way of undermining a group and weaving prejudice and hatred into the public mind. Perhaps then this supports the conclusion that “academic” texts and jokes should also be explicitly acknowledged as desirably covered by vilification laws. However such a conclusion would lead to a substantial increase in censoring based on objectionable viewpoints, leaving “the government in control of all of the institutions of culture, the great censor and director of which thoughts are good for us.”<sup>126</sup> This problem could be explained in the following manner. Imagine a particularly vitriolic statement directed to a group of people on the basis of their religion (for example, “All you Jews are going to burn in hell for being Christ-killers/usurers” — unfortunately not difficult to imagine). In its propositional content the statement is supported by two inter-woven strands of intellectual thought, in effect making the statement the uneducated offspring. The most obvious is the long-standing narratives of anti-Semitism that permeate literature from Shakespeare to *Mein Kampf* and beyond. However this in itself attempts to draw its support from truth claims as interpreted in the Bible, or other more “scholarly” texts<sup>127</sup> (note that there is no distinction in this regard between what might be considered “pure” religious statements — “Christ-killers” — and statements lacking the religious quality — “usurers/filth etc”: both seek to draw moral support from the same sources). The problem therefore is this: the government as censor would be placed in the position of determining which texts support an anti-Semitic view (again raising the spectre of

<sup>119</sup> Borovoy et al, “Language as Violence v. Freedom of Expression: Canadian and American Perspectives on Group Defamation” (1988-1989) 37 Buff L Rev 337, 364 (“Language as Violence”).

<sup>120</sup> Matsuda, *supra* note 7, 2357.

<sup>121</sup> *Ibid.* *Board of Education v Pico* 457 US 853, 879 (1982) per Blackmun J.

<sup>122</sup> This is the “retrogressive evolution or dysgenics” theory of William Shockley, discussed in Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations* (1998) 119-121.

<sup>123</sup> Delgado and Yun, *supra* note 7, 882.

<sup>124</sup> Blunkett, *supra* note 39.

<sup>125</sup> “Language as Violence”, *supra* note 119, 368.

<sup>126</sup> *American Booksellers Association Inc v Hudnut* 771 F 2d 323, 329-330 (7<sup>th</sup> Cir, 1985); *affd* 475 US 1001 (1986).

<sup>127</sup> For example, York University Professor Aijaz Ahmad’s book *The Nazification of Israel and Israel’s Killing Fields*. See Braun, *supra* note 49, 102.

creating official dogmas of religious interpretation) that cannot be redeemed by artistic or other qualities. It is therefore far simpler to attempt to draw a bright line between academic and vitriolic speech, creating the implication that form is being prohibited over content, privileging one form of speaker (the more eloquent) over another.<sup>128</sup>

## VI THE QUESTION OF REMEDIES: APOSTATES FOR THE STATE AND THE CREATION OF MARTYRS

The Victorian Act provides that the Tribunal may, after upholding a complaint, order that the respondent restrain from further contravention, pay compensation to the complainant for “loss, damage or injury”, or “do anything” with a view to “redressing any loss, damage or injury suffered by the complainant”.<sup>129</sup> Empowered to do so by the Act, Judge Higgins ordered Pastors Scot and Nalliah to publish a statement on the CTFM website and in two prominent Victorian newspapers over the course of two weeks (each Saturday and Monday edition).<sup>130</sup> With the heading “Breach of Racial and Religious Tolerance Act”, the statement was to include the following.<sup>131</sup>

[The Tribunal] found the seminar was not a balanced discussion, that Pastor Scot presented the seminar in a way that was essentially hostile, demeaning and derogatory of all Muslim people, their God, their prophet Mohammed and in general Muslim beliefs and practices, that Pastor Scot was not a credible witness and that he did not act reasonably and in good faith . . . [Mr Braidich’s “Insight into Islam” publication] made no attempt to distinguish between mainstream and extremist Muslims, and incited hatred and contempt towards people who are Muslim. . . . Each of the respondents acknowledges the findings of [the Tribunal]. . . . This statement is issued by Catch the Fire Ministries Inc, Pastor Daniel Nalliah and Pastor Daniel Scot.

The four advertisements would cost an estimated total of \$68,690.<sup>132</sup> Furthermore, Judge Higgins required the Pastors provide an undertaking stating that they would not publish, distribute, or make any oral or written statements (covering also any indirect “information, suggestions and implications”) of similar content in *any* state of Australia.<sup>133</sup> The first remedy is disquieting because it implements compelled speech,

<sup>128</sup> The US Supreme Court recognised and rejected this form of speech classification essentially based on class in *Cohen v California* 403 US 15, 24-26 (1971) (“one man’s vulgarity is another’s lyric”). Although not as strong a statement (and a contrary outcome), the same sentiment is reflected in part by McCarthy J in *Police v Drummond* [1973] 2 NZLR 263, 268 (CA) in a different context, cited in *Jeffrey v Police* (1994) 11 CRNZ 507, 512 (HC): “[T]he use of four-letter words is often more indicative of poverty of vocabulary than an intention to offend, and consequently the intervention of the law in these instances should be kept to a minimum.”

<sup>129</sup> Racial and Religious Tolerance Act 2001 s 23 (Vic). It is also interesting to note that the remedies are directed to the injury suffered by the complainant whereas the offence is inciting hatred in the audience, rather than injuring a complainant per se.

<sup>130</sup> *Islamic Council of Victoria v Catch the Fire Ministries Inc* [2005] VCAT 1159 (“*ICV v CTFM (Remedies)*”).

<sup>131</sup> *Ibid* Annexure. In granting leave to appeal, the Supreme Court of Victoria stayed the remedies imposed by Judge Higgins: See “Leave to Appeal has been granted by the Court of Appeal” (2005) Catch the Fire Ministries <<http://catchthefire.com/au/articles/home/archive/leavetoappeal.htm>> (at 8 January 2006).

<sup>132</sup> Zwart, “Pastors vow to go to jail on hate case” (23 June 2005) *The Age* <<http://www.theage.com.au/news/national/pastors-vow-to-go-to-jail-on-hate-case/2005/06/22/1119321792033.html>>.

<sup>133</sup> *ICV v CTFM (Remedies)*, supra note 130, 5.

the second remedy is problematic because it brings to the fore the effectiveness of prohibitions against speech religiously motivated.

Framed negatively, the right to freedom of expression at a bare minimum precludes both a legal prohibition against speech and a *legal requirement to speak*.<sup>134</sup> Jackson J in *West Virginia v Barnette* wrote that one cannot logically have a First Amendment right to free speech that “guards the individual’s right to speak his own mind, [but] left it open to public authorities to compel him to utter what is not in his mind.”<sup>135</sup> The compelled statement of Pastors Scot and Nalliah is troubling because it unduly impinges on their right not to speak and also what is commonly known as the forum internum — the internal forum of the mind that dictates freedom of thought, conscience and religious belief. This is enshrined in Article 18 of the ICCPR, the first half of which relevantly provides:<sup>136</sup>

- (1) Everyone shall have the right to freedom of thought, conscience and religion. This right shall include freedom to have or adopt a religion or belief of his choice . . . .
- (2) No one shall be subject to coercion which would impair his freedom to have or adopt a religion or belief of his choice.

In an article entitled “Coming Conflicts over Freedom of Religion”, Rishworth examines the problem of religious doctrine that compels discrimination prohibited under the Human Rights Act 1993.<sup>137</sup> He discusses the case of Mr Boakes,<sup>138</sup> an Exclusive Brethren whose religious beliefs included the conviction that a married woman should not work. After a number of years “wrestling with his conscience”<sup>139</sup> he dismissed the married woman that was on his acquired staff. Importantly for the present purposes, the Human Rights Commission ordered Boakes to pay damages and write an apology to his former employee. Rishworth continues by recalling *Smith v Fair Employment & Housing Commission*, where the California Court of Appeal ruled unconstitutional an order that the respondent post a notice in her apartment block declaring she had unlawfully discriminated on the grounds of marital status.<sup>140</sup> In terms fitting for the religious context, Puglia PJ said of the order: “Totalitarian governments also attempt to enforce conformity by forcing apostates to become instruments of their own abasement.”<sup>141</sup> Even assuming liability should be imposed, it is paramount that discretionary remedies are exercised in conformity with fundamental rights.<sup>142</sup> Pastors Scot and Nalliah were motivated in their seminar by their religious beliefs, no different from the discriminatory practices of Boakes or Smith. To force them into a position requiring the outward manifestation of a “conversion” to the state’s view is troubling. A similar pattern is repeated in the case

<sup>134</sup> Sumner, supra note 37, 11.

<sup>135</sup> *West Virginia v Barnette* 319 US 624, 634 (1943).

<sup>136</sup> ICCPR, supra note 13. In New Zealand the forum internum right is found in s 13 of the NZBORA 1990: “Everyone has the right to freedom of thought, conscience, religion, and belief, including the right to adopt and hold opinions without interference.” To a lesser extent freedom to manifest religious belief under s 15 of the NZBORA 1990 and the second component of art 18 are implicated in cases of religious vilification, most notably if the manifestation involves elements of teaching.

<sup>137</sup> Rishworth, “Coming Conflicts over Freedom of Religion” in Huscroft and Rishworth (eds), *Rights and Freedoms: The New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993* (1995) 225, 245-253 (“Coming Conflicts”).

<sup>138</sup> *Ibid. Proceedings Commissioner v Boakes* (13 April 1994) unreported, Complaints Review Tribunal, EOT, Decision No 1/94.

<sup>139</sup> Rishworth, “Coming Conflicts”, supra note 137, 249.

<sup>140</sup> 30 Cal App 4th 1008 (“*Smith*”). See Rishworth, “Coming Conflicts”, supra note 137, 252.

<sup>141</sup> *Smith*, supra note 140, 1021.

<sup>142</sup> Rishworth, “Coming Conflicts”, supra note 137, 253.

of Mr Harding. After being denied leave to appeal to the Supreme Court of Canada, Harding resumed his sentence of two years probation and 340 hours of community service under the direction of Mohammad Ashraf, general secretary of the Islamic Society of North America in Mississauga, Ontario.<sup>143</sup> According to Harding, Ashraf has directed him to read the book *Towards Understanding Islam*, stating “it would be better if you learned about Islam”.<sup>144</sup>

Robert Cover, discussing martyrdom as a starting place for legal interpretation, quotes Elaine Scarry in arguing that the law, in its jurispathic role, is much like the torturer: “In compelling confession, the torturers compel the prisoner to record and objectify the fact that intense pain is world-destroying.”<sup>145</sup> It is this element of “world destruction” that forms the first aspect in the construction of martyrdom promoted by religious vilification laws. Requiring a statement of contrition affirming the state’s condemnation of your ideas, or a process of education designed to inculcate an unwanted system of values, constitutes the attempt to coerce an act of betrayal under the rubric of the martyr-torturer relationship. Found guilty of an offence based on ideas, the state’s use of punitive power is viewed as an attack on the ideas themselves, and consequently, “the whole style of life of which they are a part”.<sup>146</sup> In the mind of the believer, the attack on aspects of their thinking constitutes an attack on their obligation to undertake duties owed to God that are “prior to and superior in obligation to the claims of the State.”<sup>147</sup> The martyr is consequently born out of an insistence to obey the law to which they are committed, even in the face of “world-destroying pain”.<sup>148</sup> Cover cites as an example the *amicus curiae* brief of the Mennonite church in *Bob Jones University v United States*.<sup>149</sup> It states:<sup>150</sup>

[W]e always exercise ourselves to be completely law abiding. Our religious beliefs, however, are very deeply held. When these beliefs collide with the demands of society, our highest allegiance must be toward God, and we must say with men of God of the past, ‘We must obey God rather than men’, and *these are the crisis from which we would be spared*.

The narrative before the Supreme Court taps into tales of martyrdom central to the Mennonite story — 7,000 brethren put to death on the continent in the 16th century.<sup>151</sup> The same narrative construction is present when Pastors Scot and Nalliah also invoke *Acts 5:29* by vowing (as they did throughout the case) that they will continue to

<sup>143</sup> Moore, “Punishment includes Islam Indoctrination” (2002) WorldNetDaily <[http://worldnetdaily.com/news/article.asp?ARTICLE\\_ID=29483](http://worldnetdaily.com/news/article.asp?ARTICLE_ID=29483)> .

<sup>144</sup> *Ibid*. This can be contrasted with the University of Michigan’s hate speech policy in *Doe v University of Michigan*. The policy provided that compulsory class attendance at education sessions should not be imposed “in an attempt to change deeply held religious or moral convictions”: *Doe v University of Michigan* 721 F Supp 852, 857.

<sup>145</sup> Cover, “Violence and the Word” in Minow, Ryan and Sarat (eds), *Narrative, Violence, and the Law: The Essays of Robert Cover* (1992) 203, 205 (“Violence”).

<sup>146</sup> Raz, “Free Expression and Personal Identification” in Waluchow (ed), *Free Expression: Essays in Law and Philosophy* (1994) 1, 10.

<sup>147</sup> Paulsen, “God is Great, Garvey is Good: Making Sense of Religious Freedom” (1996-1997) 72 *Notre Dame L Rev* 1597, 1598. See also Laycock “Religious Liberty as Liberty” (1996) 7 *J Contem Legal Issues* 313, 326; Cumper, *supra* note 48, 311 discussing living one’s belief as a sacred duty; Noonan, “Religious Liberty at the Stake” (1998) 84 *Va L Rev* 459, 461-463 discussing the writings of Madison.

<sup>148</sup> Cover “Violence”, *supra* note 145, 207.

<sup>149</sup> 103 S Ct 2017 (1983).

<sup>150</sup> Cover, “Nomos and Narrative” in Minow, Ryan and Sarat (eds), *Narrative, Violence, and the Law: The Essays of Robert Cover* (1992) 95, 123 (“Nomos”).

<sup>151</sup> *Ibid* 122.

preach against Islam irrespective of the potential charge of contempt of Court.<sup>152</sup> As well as historical narratives of martyrdom prominent in the Christian faith,<sup>153</sup> the personal stories of Pastors Scot and Nalliah provide them with a sense of legitimacy and impetus when disobeying the law. Both Pastors have personally experienced tribulation, in Pakistan and Saudi Arabia respectively.<sup>154</sup> The tale of competing duties is familiar to the Pastors, acquiring an aspect of persecution that gives them something of a celebrity status. This forms another element in the construction of martyrdom more commonly recognised by opponents of hate speech prohibition. Raz refers to the “aura of anti-establishment heroism”.<sup>155</sup> The trial can be used as a spectacle, feeding off the image of the defendant as a martyr to generate publicity and support for their ideas as against a “privileged group, immune to criticism”.<sup>156</sup> This was exactly the case with Ernst Zundel in Canada. A photograph of Zundel walking the streets of Toronto en route to his trial with a cross strapped to his back ran in newspapers across the country,<sup>157</sup> leading him to claim that his court battle had given him “a million dollars worth of publicity”.<sup>158</sup>

Celebrity status is useful as a focal point, galvanising a community that sees its doctrines and lifestyle under attack. Again Cover writes:<sup>159</sup>

Martyrdom functions as a re-remembering when the martyr, in the act of witnessing, sacrifices herself on behalf of the normative universe which is thereby reconstituted, regenerated, or recreated.

For the martyr themselves it is much like Peter and the Apostles who “left the Sanhedrin, rejoicing because they had been counted worthy of suffering disgrace for the Name.”<sup>160</sup> Pastor Scot re-words it in the following manner: “If God will save

<sup>152</sup> See “Martyrs for freedom of speech would rather go to Jail than apologise” (2005) Catch the Fire Ministries <<http://www.catchthefire.com.au/articles/home/mediareleases.htm>> (at 8 January 2006).

<sup>153</sup> For instance, Peter’s “We must obey God rather than men” (*Acts 5:29*) was stated in response to attempts made by the Jewish Pharisees to prevent the apostles from teaching Christianity in the temple courts, a narrative that in itself is surely prominent in the minds of Pastors Scot and Nalliah.

<sup>154</sup> See supra note 16 and accompanying text.

<sup>155</sup> Raz, supra note 146, 19. See also Hodge, supra note 113, 926.

<sup>156</sup> Hodge, supra note 113, 926 n 29. This idea of a “privileged group, immune to criticism” was evoked by CTFM in *ICV v CTFM*: see, eg, *ICV v CTFM*, supra note 11, [375]. CTFM, relatively unknown before these controversies, now has an international platform complete with a “Fighting Fund” to raise money for the Pastors’ appeal.

<sup>157</sup> Huscroft, supra note 103, 218 n 88. As Huscroft elaborates, Zundel is a neo-Nazi whose underground publications denied the existence of the Holocaust. He was charged with “spreading false news”, a provision that was later struck down by the Supreme Court of Canada as unconstitutional. Joseph Magnet also discusses the use of the trial as a means of propagating anti-Semitic ideas in Weimar Germany (which had — and vigorously enforced — hate speech prohibition). He quotes Cyril Levitt, stating, “all too often, the defendants were allowed to use the court room as a forum for the dissemination of their ideas ... [show trials] were turned by skilful Nazi attorneys ... into trials of Jewish rituals, Jewish religious texts, Jewish leaders”: Magnet, “Hate Propaganda in Canada” in Waluchow (ed) *Free Expression: Essays in Law and Philosophy* (1994) 223, 244. See also *R v Keegstra*, supra note 9, 853-854 where McLachlin J (dissenting) discusses Weimar Germany and quotes from Franz Kafka’s *The Trial*: “If you have the right eye for these things, you can see that accused men are often attractive”.

<sup>158</sup> *R v Keegstra*, supra note 9, 853 per McLachlin J dissenting. Contrast the views of Dickson CJ (769): “I stress my belief that hate propaganda legislation and trials are a means by which the values beneficial to a free and democratic society can be publicized”.

<sup>159</sup> Cover “Violence”, supra note 145, 207 n 9.

<sup>160</sup> *Acts 5:41*.

Australia by us being in jail, that's wonderful."<sup>161</sup> For the martyr's community it acts as a call to arms. Bill Muehlenberg of the Christian group Australian Family Association has said of the law and Judge Higgins' ruling: "This is real wheat versus the chaff type-stuff: who will stand up and be counted, and who will not?"<sup>162</sup>

## VII ARGUMENT FROM RELIGIOUS FREEDOM: "MY HEAVEN IS YOUR HELL"

Questioned during the hearing on whether Muslims lead moral and ethical lives, Pastor Scot stated that while he had no doubt most Muslims were peaceful and honest, "he had difficulty with the concept that they lead moral and ethical lives because those values are contrary to the moral ethical values of Christ", a point he claims to have been stressing in the seminar.<sup>163</sup> He was further asked if he believed the God of Islam to be the same as the God of Christianity and whether he believed in multi-faith prayer, rejecting both ideas.<sup>164</sup> A "Community Accord" was also admitted as evidence. The Accord was signed by various religious and ethnic groups in Victoria, endorsing a declaration to, amongst other things, "promote respect for diversity".<sup>165</sup> Judge Higgins stated: "It should be noted that the Catch the Fire Ministries or the Assembly of God is not a party to the accord."<sup>166</sup> In contrast to the charismatic Christianity of Pastors Scot and Nalliah, Professor Bouma for the ICV stated that "Australia has a norm of low temperature religion. Charismatic Christianity is as offensive to this norm as is Wahhabist Islam."<sup>167</sup> Remarkably, Professor Bouma sees this as "in line with the proposition that people who don't conform to the average are offensive",<sup>168</sup> leading me to recall Huscroft's words: "The very point of freedom of expression must be to afford protection to those whose expression lacks community approval, for theirs is the only sort of expression which requires protection."<sup>169</sup> Able to isolate charismatic Christianity as the extremist equivalent of Wahhabism, Judge Higgins is safe in concluding: "[Islam] agrees substantially with Christian beliefs save for particular events".<sup>170</sup>

In condemning the "objectionable" elements of Pastors Scot and Nalliah's speech, the Tribunal incidentally partakes in disparaging an entire religious worldview to which many adhere, sending a message of "authoritative public condemnation".<sup>171</sup> The concluding statement of Judge Higgins is troubling because it bears the hallmark of legal support for a theological position of pluralism (as distinct

<sup>161</sup> Zwartz, *supra* note 132.

<sup>162</sup> Goodenough, "Pastors Who 'Vilified' Islam Would Choose Jail Over Apology" (2005) CNS News <<http://www.cnsnews.com/ViewForeignBureaus.asp?Page=ForeignBureaus\archive\200506\FOR20050622c.html>>. Muehlenberg is evoking Jesus' *Parable of the Weeds* in *Matthew 13:24-30*.

<sup>163</sup> *ICV v CTFM*, *supra* note 11, [227].

<sup>164</sup> *Ibid* [230], [310].

<sup>165</sup> *Ibid* [311].

<sup>166</sup> *Ibid* [312].

<sup>167</sup> *Ibid* [136]. Similar comments were made by the then Home Secretary (UK) in July 2004: See Mullins, "Incitement to Hatred Against Persons on Religious Grounds' Clause in the Serious Organised Crime and Police Bill" (2005) Barnabas Fund <[http://www.barnabasfund.org/ITRHC/Mark\\_Mullins\\_presentation\\_at\\_Daniel\\_Scot\\_seminar.htm](http://www.barnabasfund.org/ITRHC/Mark_Mullins_presentation_at_Daniel_Scot_seminar.htm)>.

<sup>168</sup> *ICV v CTFM*, *supra* note 11, [146].

<sup>169</sup> Huscroft, *supra* note 103, 192.

<sup>170</sup> *ICV v CTFM*, *supra* note 11, [376].

<sup>171</sup> Raz, *supra* note 146, 13.

from plurality).<sup>172</sup> Theologian Ian Markham, citing John Hicks, characterises pluralism as:<sup>173</sup>

[A] transformed outlook to different religions: no longer are we able to speak of one tradition as being true and those that disagree as false, instead we must talk of different and equally valid ways to the Real.

Again this is not to state that pluralism is wrong, it is to argue that the court is not part of the relevant interpretive community. In seemingly siding with a religious view the Tribunal discounts the fact that absolute truth claims are the norm in many people's religious thinking.<sup>174</sup> It is therefore interesting to note that conciliation and mediation are promoted as the first mechanisms of dispute resolution in Victoria.<sup>175</sup> This has the potential to represent the beguiling fantasy that the Tribunal is overseeing the settlement of disputes that are distinct and separate from views of "truth and falsehood, right and wrong, good and evil"<sup>176</sup> (or that it even has a productive role to play). Perhaps realising some of the problems raised by the *ICV v CTFM* judgment, Stuart Morris J in *Robin Fletcher v The Salvation Army Australia* stated: "[I]n my opinion, a genuine religious purpose may include the purpose of asserting that a particular religion (or, indeed, no religion) is the true way; and that any way, but the true way is false."<sup>177</sup> However, in the context of religious vilification laws, the means of expressing this view must be unobjectionable,<sup>178</sup> that is, most generally, "without using threatening, abusive or insulting behaviour that is intended or likely to stir up hatred."<sup>179</sup> Director of the Forum Against Islamophobia and Racism (UK), Samar Mashadi reflects this when she comments: "People won't be able to say that someone of a different faith is going to hell. They will have to articulate themselves in a more pleasant manner."<sup>180</sup> Again the form of speech requires pleasantry and civility. As discussed earlier, the problem with this is that behind the "pleasant" claim to absolute truth lies the same message. Amir Butler puts it succinctly:<sup>181</sup>

If we love God, then it requires us to hate idolatry. If we believe there is such a thing as goodness, then we must also recognise the presence of evil. If we believe our religion is the

<sup>172</sup> Markham *Plurality and Christian Ethics* (1994) 9. According to Markham plurality involves the problem of "different communities, with different identities, coexisting, and so raises questions of tolerance."

<sup>173</sup> *Ibid* 9-10.

<sup>174</sup> *Ibid* 175-176.

<sup>175</sup> *Robin Fletcher*, *supra* note 39, [19].

<sup>176</sup> Parkinson, "Enforcing Tolerance: Religious Vilification Laws in Australia" (Paper presented to the Eleventh Annual International Law and Religion Symposium: "Religion in the Public Sphere: Challenges and Opportunities", Brigham Young University, Utah, 5 October 2004). Available from <<http://www.iclrs.org/conference.php?Year=2004&Sort=Program>>. As well as *ICV v CTFM*, Parkinson uses *Judeh v Jewish National Fund of Australia Inc* [2003] VCAT 1254 as an example. *Judeh* involved an advertisement placed in the paper calling for Jewish persons to leave a legacy to Israel. The advertisement featured a picture of Israel that did not delineate the area of Palestine. The complainant argued that the advertisement incited hatred against Arabs by denying the existence of Palestine. As Parkinson notes: "[T]he heart of the conflict is not an advertisement but the Israeli-Palestinian disputes about a homeland for the Palestinian people."

<sup>177</sup> *Robin Fletcher*, *supra* note 39, [9].

<sup>178</sup> *R v Harding* 45 OR (3d) 207, 214, 219 (2000).

<sup>179</sup> Blunkett, *supra* note 39.

<sup>180</sup> "Incitement to Religious Hatred: The Major Areas of Concern for Free Speech", (2005) Barnabas Fund <[http://%20www.barnabasfund.org/ITRHC/ITRH\\_AREAS\\_OF\\_CONCERN.pdf](http://%20www.barnabasfund.org/ITRHC/ITRH_AREAS_OF_CONCERN.pdf)> 11.

<sup>181</sup> Butler, "Why I've changed my mind", *supra* note 69.

only way to Heaven, then we must also affirm that all other paths lead to Hell. If we believe our religion is true, then it requires us to believe others are false.

“Your religious ideology is wrong” necessarily translates into, “Your religion is evil (your temples are strongholds of Satan)<sup>182</sup> and will therefore, if persisted with, lead to the inevitable result of you and all your fellow adherents suffering an eternity of damnation.” Again, it is not enough to say that one can criticise an ideology while not insulting the person.<sup>183</sup> As Raz argues, criticism is even implied by a rival way of life and “felt by its adherents”.<sup>184</sup> In this way, the opposing religion is inevitably framed as “wolves in sheep’s clothing” because it represents danger of the highest spiritual order. The need to destroy is said to form the basis of hatred,<sup>185</sup> but it also in part fits the religious context of absolute truth claims. A person may not wish to physically eradicate someone of a different religious persuasion, but, as Bill Marshall states, “[A] believer who sees those who oppose or question her beliefs as aligned with the “powers of chaos” is likely to treat the public square as a battleground rather than as a forum for debate.”<sup>186</sup> And in this battleground it is to be expected (or hoped for in the case of religious adherents) that religious identity — never fixed — is rejected and reformed under the banner of the “true” faith.<sup>187</sup>

Defining the world and one’s community with reference to a religious view also has a bearing on one more traditional rationale for freedom of expression: the fostering of political decision-making. In discussing the argument from democracy Zanghellini for instance states: “[S]elf-government, properly understood, involves a process of collective self-definition which requires freedom of (unqualified) speech.”<sup>188</sup> Speech informing the political decision-making process is necessarily wide, reflecting the freedom to receive “all information that may affect their choices in the process of collective decision making” advocated by Meiklejohn.<sup>189</sup> Against this backdrop, the potential for religious vilification laws to curtail political arguments framed from a particular religious perspective is acute. McLachlin J recognised this problem in *R v Keegstra* when she argued that the Criminal Code had the capacity to temper political debate on issues such as immigration, educational language rights, foreign ownership, and trade.<sup>190</sup> In *R v Harding* Mr Harding was motivated in part when distributing his pamphlets because of his concern over Muslim prayer being allowed in a local high school.<sup>191</sup> In *ICV v CTFM* Pastor Nalliah tapped into xenophobic political rhetoric when arguing that John Howard must “stop those [refugee] boats from coming”.<sup>192</sup> He also wrote of the danger of Muslim ideology “infiltrating” Parliament and positions of power.<sup>193</sup> These arguments may be dubious

<sup>182</sup> A statement made in the Pastors seminar: *ICV v CTFM*, supra note 11, [313].

<sup>183</sup> See above supra note 41 and accompanying text.

<sup>184</sup> Raz, supra note 146, 23.

<sup>185</sup> See, eg, “Language as Violence”, supra note 119, 369 (Brown); *R v Keegstra*, supra note 9, 777 per Dickson CJ.

<sup>186</sup> McConnell, “Five Reasons to Reject the Claim that Religious Arguments should be Excluded from Democratic Deliberation” (1999) Utah L Rev 639, 648.

<sup>187</sup> Contrast West-Newman, supra note 7, 248: “among the greatest destruction caused by hate speech is the loss or rejection of one’s own identity.”

<sup>188</sup> Zanghellini, supra note 78, 462.

<sup>189</sup> See Moses, “Hate Speech: Competing Rights to Freedom of Expression” (1996) Auckland U L Rev 185, 192.

<sup>190</sup> *R v Keegstra*, supra note 9, 860 per McLachlin J dissenting.

<sup>191</sup> *R v Harding* 45 OR (3d) 207, 216 (2000).

<sup>192</sup> *ICV v CTFM*, supra note 11, [332].

<sup>193</sup> *Ibid* [325].



assertions with little evidence and a lot of fear-mongering, but that does not detract from the fact that they touch on matters of political process: the ideologies of one's elected officials, policies of immigration, prayer in schools, and the constitutional shape of a country. It is also easy to imagine a New Zealand example. In discussing aspects of the relationship between religion and the state in New Zealand, Rishworth points to the growing practice of incorporating Māori religious expression into official occasions.<sup>194</sup> It is not too difficult to envisage an attack on such incorporation that, although completely politically motivated, makes belittling and insulting references to Māori religion. Thus while most of the argument has focused on religiously informed political speech, the New Zealand example brings within the sweep of the legislation political speech informed primarily by a political perspective. The end result is a hindrance of political speech (generally the primary focus of free speech).<sup>195</sup> In the broad sweep of religious vilification laws this very speech, informed often by a religious world view, is silenced.

### VIII CONCLUSION

Religious vilification laws attempt to draw a distinction between criticising an ideology and inciting hatred against a person, but this neglects the fundamental nature of religious belief — any attack against beliefs and doctrine is felt personally by its adherents. Consequently the court is placed in the unenviable position of deciding questions of truth in the realm of scriptural interpretation and theological argument, effectively settling questions that should be the domain of religious communities. In the debates of religious communities absolute truth claims are normal, but religious vilification laws while theoretically accepting this, attempt to proscribe the manner in which they may be voiced. The scholarly inclination towards balanced discussions and presenting all opposing arguments imposes a standard of discourse that ignores the context of these statements, made in the “battleground” of what practitioners see as a struggle of the highest spiritual order. Furthermore, the imposition of civility privileges a “high” speech discourse despite the fact that the ideational content of messages criticising religious ideology is effectively the same as its “low” speech counterpart: both instances contain propositions of damnation and hell-fire. But there is also, through the imposition of civility, an endorsement of particular world views over others: namely, the accommodating and pluralistic over the exclusive. The condemnation of statements inspired by a religious world view is felt as the condemnation of an entire lifestyle and system of thought, pitting the state against one of its communities and leading to the creation of a community of martyrs. The state is enlisted in religious arguments, becoming complicit in a process of legal silencing undertaken by rival minority groups, engaging with them in debates of truth and falsehood, good and evil. This article has argued that freedom of expression is crucial in the area of religious debate. It represents the idea that a responsible citizenry must decide these questions of faith and truth themselves. Speech is the means by which

<sup>194</sup> Rishworth “Church and State in New Zealand: The Legal Framework and Recent Developments” (Paper presented to The Eleventh Annual International Law and Religion Symposium: “Religion in the Public Sphere: Challenges and Opportunities”, Brigham Young University, Utah, 5 October 2004). Available from <<http://www.iclrs.org/conference.php?Year=2004&Sort=Program>> (“Church and State”).

<sup>195</sup> See, eg, *R v Keegstra*, supra note 9, 737 per Dickson CJ, discussing the “contextual approach” of Wilson J; Weinstein, supra note 27, 182: “[I]f there is a leitmotif in the free speech cases since [*New York Times v Sullivan* 376 US 254 (1964)] it is that restrictions of any type that are likely to interfere with robustness of public discourse are unconstitutional.”

we may offer counter-arguments to compete against characterisations that we detest, and it forms the means by which communities can create their identities, even if it is in opposition to, or at the expense of, one another.