Viewpoint Neutrality and Freedom of Expression in New Zealand

Bede Harris*

I Introduction

The case of *Zdrahal v Wellington City Council*,[1] taken to the High Court on review of a decision of the Planning Tribunal,[2] has already elicited academic comment.[3] This article takes a different approach to that adopted by other commentators, because although I agree that the court reached the correct result, I argue that the method by which that result was reached was flawed and, if followed, will have an unfortunate effect on case law arising under section 14 of the New Zealand Bill of Rights Act 1990.

At issue in *Zdrahal* was the right of the appellant to display two swastikas on the side of his house. One of these was three feet square and illuminated by a spotlight at night. The other was much smaller and was painted on a window pane. Complaints by the appellant's neighbours led the Wellington City Council to issue an abatement notice in terms of section 322(1) of the Resource Management Act 1991 which provides

> **322. Scope of abatement notice**-(1) An abatement notice may be served on any person by an enforcement officer-
>
> (a) Requiring that person to cease, or prohibiting that person from commencing, anything done or to be done by or on behalf of that person that, in the opinion of the enforcement officer,-
>
> (i) Contravenes or is likely to contravene this Act, and regulations, a rule in a plan, or a resource consent; or
>
> (ii) Is or is likely to be noxious, dangerous, offensive, or objectionable to such an extent that it has or is likely to have an adverse effect on the environment...

The Council's decision, upheld by the Tribunal and then by the High Court, was that the appellant's actions were "offensive" within the meaning of section 322(1)(a)(ii). It is the court's interpretation of the term "offensive", and its application of the New Zealand Bill of Rights Act, that is the subject of this article. The article begins with a discussion of the fundamental value of the concept of

* BA(Mod) (Dublin), LLB (Rhodes), DPhil (Waikato), Senior Lecturer in Law, University of Waikato.

1 [1995] 1 NZLR 700 (HC).

2 (1993) 2 NZRMA 342.

3 For an analysis of the Planning Tribunal decision see Brian Davis "Resource Management Act: Abatement of offensive things" [1993] NZLJ 373. The High Court decision was noted at [1995] BRB 31 and is commented on in Gillian Chappell and Stephen Leavy "Abatement notices" [1995] NZLJ 76, and Nicola Wheen "The Angle Grinder, the Swastika, and the Airport: Resource Management and the New Zealand Bill of Rights Act 1990" [1995] BRB 54.

viewpoint neutrality, and examines the differing weight accorded it by the courts in the United States and Canada. I then examine the court's approach in *Zdrahal* and its implications for the way in which the operational sections of the Bill of Rights are to be applied.' I then contrast the approach in *Zdrahal* with similar cases decided in the United States, before suggesting a line of reasoning that would have enabled the court to arrive at the decision it did without compromising viewpoint neutrality. Finally, I discuss the applicability of the Bill of Rights to bylaws that limit freedom of expression, and discuss why bylaws of the type in force in Wellington (which the Council could have proceeded under in this case, had it chosen to do so) are likely to be held invalid.

II Viewpoint Neutrality and Freedom of Expression

Given that *Zdrahal* raised the question of what weight should be accorded to freedom of expression, it is useful before going any further to discuss the values underlying that freedom, because only if one has done so can one properly weigh the exercise of that freedom against competing interests. Such a weighing of interests takes place when the proportionality test, developed by the Canadian courts in cases such as *R v Oakes*[4] and *Reference Re Public Service Employee Relations Act (Alta)*,[5] and adopted by the New Zealand courts in *Solicitor General v Radio New Zealand*,[6] and *Ministry of Transport v Noort*[7] respectively, is applied in interpreting section 5 of the New Zealand Bill of Rights Act. The *Public Service* case was referred to by the court in *Zdrahal* itself.

Probably the most frequently cited justification of freedom of expression is that offered by John Stuart Mill, whose *On Liberty*[8] contains a defence of freedom of expression based on a scepticism of human ability to be certain of the truth. Mill argues that freedom of expression ought not to be suppressed because to do so is tantamount to claiming infallibility.[9] According to this theory, because it is always possible that truths discovered by human reason are in fact errors

---

4 (1986) 26 DLR (4th) 200.

5 [1987] 1 SCR 313 at 373-374.

6 [1994] 1 NZLR 48 at 60-61.

7 [1992] 3 NZLR 260 at 283.

8 The edition referred to is J S Mill *J.S. Mill 'On Liberty' in Focus* John Grey and G W Smith (eds) (Routledge, 1991).

9 Thus Mill (ibid at 37) states

> ..the opinion which it is attempted to suppress by authority may possibly be true. Those who desire to oppress it, of course deny its truth; but they are not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging. To refuse a hearing to an opinion because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty. All silencing of discussion is an assumption of infallibility.

And similarly (ibid at 41) that

> To call any proposition certain while there is anyone who would deny its certainty if permitted, but who is not permitted, is to assume that we ourselves,

which, if able to be challenged, may be replaced by a new "truth",[10] one can never say with absolute certainty that one has attained truth, and thus it can never be legitimate to suppress what may (for the moment at least) appear to be "false". On the other hand, even if absolute truth is unattainable, the chances of coming close to it are maximised if there is freedom of thought, expression and inquiry.[11] This illustrates what is perhaps the greatest strength of Millian theory - that it is compatible not only with those philosophies that assert the existence of truth, but also with those that emphasise uncertainty and scepticism as to the existence of truth.[12] Indeed, one could argue that the less certain one is about either the existence or content of truth, the less justification one has for suppressing ideas. Finally, Mill stated that even assuming one does discover "the truth" about any particular matter, it does not follow that false statements are without value, as falsity brings about a "clearer perception and livelier impression of truth, produced by its collision with error".[13]

(i) *The United States approach*

Millian agnosticism is one of the major foundations of contemporary First Amendment theory in the United States, making its appearance in *Abrams v United States*[14] where, in his dissenting opinion, Holmes J made his famous statement[15] that

> ...the best test of truth is the power of the thought to get itself accepted in the competition of the market..

Of course, success in the market place will not *necessarily* lead to ascertainment of the truth[16] - a majority of people may, after hearing all points of view, choose that which is, in fact, not correct, but the market is necessary simply in order to create the *opportunity* for truth, or what *may* be truth, to be aired.[17] Furthermore, unless one claims infallibility, one must concede the pragmatic argument that if some ideas are excluded and there is even a chance that those ideas may embody the truth, their restriction diminishes the likelihood of discovering the truth.

The acceptance of Millian theory has led to the development of a three-fold distinction in First Amendment case law. Firstly, restrictions on the time, place or manner which are unrelated to the content of expression will be upheld

---

> and those who agree with us, are the judges of certainty, and judges without hearing the other side.

10 Ibid, Chapter 2. See also Frederick Schauer *Free Speech: A Philosophical Inquiry* (Cambridge University Press, 1982) 24-9.

11 Rodney Smolla *Free Speech in an Open Society* (Vintage Books, 1993) 8.

12 See for example the discussion of uncertainty in N Levit "Ethereal Torts" (1992) 61 George Washington Law Review 136 at 136-138.

13 Supra n 8 at 37.

14 250 U.S. 616 (1919).

15 Ibid at 624.

16 Supra n. 11 at 6.

17 Ibid at 7.

provided that they are narrowly tailored to serve a significant governmental interest and leave open adequate alternative means of communication.[18] Secondly, where the restrictions relate to the content of the expression - in other words, seek to prohibit the expression because it relates to a particular subject - then the restriction will be permitted only where the measure serves a *compelling* state interest.[19] Finally, where the restrictions seek to prohibit expression not only because of its content but also because of the *viewpoint from which that content is addressed*, the inevitable result has been a finding of unconstitutionality.[20] First Amendment case law is replete with statements by the courts that the state must be neutral as between ideas, and may therefore not censor on the basis of viewpoint.[21] Thus, to give but three examples from among many, in *West Virginia State Board of Education v Barnette*[22] Jackson J held that

> 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...

In *Texas v Johnson*,[23] Brennan J stated

> If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit expression of an idea simply because society itself finds the idea offensive or disagreeable.

Most recently this principle was reaffirmed in *Rosenberger v Rector and Visitors of the University of Virginia*,[24] where Kennedy J stated that

> It is axiomatic that the government may not regulate speech based on its substantive content or the message it conveys....Discrimination against speech because of its message is presumed to be unconstitutional....When the government targets not the subject matter but the particular views taken by speakers on a subject, the violation of the First Amendment is all the more blatant....Viewpoint discrimination is thus an egregious form of content discrimination. The government must abstain from regulating speech when the specific motivating ideology or the opinion or perspective of the speaker is the rationale for the restriction.

---

18 *Ward v Rock Against Racism* 491 U.S. 781 (1989) 791, *United States v Grace* 461 U.S. 171 (1983) 177.

19 *Perry Education Association v Perry Local Educators' Association* 460 U.S. 37 (1983) 45.

20 Although in theory a viewpoint based restriction on freedom of expression might survive constitutional scrutiny, there is no case in which this has occurred.

21 See, for example *Cornelius v NAACP Legal Defense & Education Fund* 473 U.S. 788 (1985) 806 and *Perry Education Association v Perry Local Educators' Association* 460 U.S. 37 (1983) 46 and 49 n 9.

22 319 U.S. 624 (1943) 642.

23 491 U.S. 397 (1989) 414.

24 115 S. Ct. 2510 (1995) at 2516.

Concern for the free flow of ideas has led the American courts to view with suspicion not only laws that regulate speech directly, but also those that do so incidentally in the pursuit of some other legislative aim. Thus in *United States v O'Brien,*[25] the appellant, who had been convicted under a statute that prohibited the burning of draft cards, raised the First Amendment defence that he had been engaged in symbolic speech. Although the conviction was upheld, the court stated that where conduct combines expressive and non-expressive activity, the state could not regulate the activity unless in the furtherance of a substantial interest "unrelated to the suppression of freedom of expression",[26] and that the incidental restriction on First Amendment freedoms could be no greater than was justified in order to achieve the substantial interest.[27]

(ii) *The Canadian approach*

The American concern with viewpoint neutrality contrasts starkly with the approach of the courts in Canada. In a trilogy of cases each decided by a 4-3 majority (*R v Keegstra,*[28] *R v Andrews*[29] and *Canada (Canadian Human Rights Commission) v Taylor*[30]), the Canadian Supreme Court upheld the constitutionality of provisions restricting the right to freedom of expression guaranteed by section 2 of the Canadian Charter of Rights and Freedoms. Central to the majority's reasoning in each case was a finding that the speech concerned ought to be denied constitutional protection because of the racist ideology expressed therein. Space does not permit an analysis of all three cases, but an examination of *Keegstra,* in which the validity of section 319(2) of the Canadian Criminal Code[31] (the "hate speech" provision) was challenged, serves to illustrate the line of reasoning common to all of them. In *Keegstra* the majority found that the harm occasioned by speech promoting hatred against identifiable groups was the possible "alteration of views" in the minds of recipients which might in turn lead to "discord between various cultural groups".[32] The court noted that section

---

25 391 U.S. 367 (1968).

26 In this case the maintenance of a system whereby a person could be asked to give evidence of their draft status.

27 For a discussion of *O'Brien* in the context of another New Zealand Bill of Rights case see W K Hastings "The Right to Protest Against Monarchism: Has *O'Brien* Come to New Zealand" [1995] BRB 90.

28 (1990) 61 C.C.C. (3d) 1.

29 (1991) 77 DLR (4th) 128.

30 [1991] 75 DLR (4th) 577.

31 Section 319(2) provides as follows :
319
(1) ...
(2) Every person who, by communicating statements other than in private conversation, wilfully promotes hatred against any identifiable group 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.

32 Ibid at 37e.

15 of the Charter protects the right to equality and prohibits discrimination, and that section 27 requires that the Charter be interpreted consistently with the multicultural nature of Canada.[33] It further stated that such expression threatens "the enthusiasm with which the value of equality is accepted and acted upon by society".[34]

Similarly, viewpoint discrimination was expressly articulated in a passage where the court held[35]

> The suppression of hate propaganda undoubtedly muzzles the participation of a few individuals in the democratic process, and hence detracts somewhat from free expression values, but the degree of this limitation is not substantial. I am aware that the use of strong language in political and social debate - indeed, perhaps even language intended to promote hatred - is an unavoidable part of the democratic process. Moreover I recognise that hate propaganda is expression of a type which would generally be categorized as "political", thus putatively putting it at the very heart of the principle extolling freedom of expression as vital to the democratic process. None the less, expression can work to undermine our commitment to democracy where employed to propagate ideas anathemic to democratic values. Hate propaganda works in just such a way, arguing as it does for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics. This brand of expressive activity is thus wholly inimical to the democratic aspirations of the free expression guarantee...

The fundamental flaw in the court's reasoning was the argument that because sections 15 and 27 indicated that non-discrimination and multiculturalism were fundamental values of Canadian society, it therefore followed that speech counter to those values warranted suppression. As the court held[36]

> Most importantly for the purposes of this appeal, ss. 15 and 27 represent a strong commitment to the values of equality and multiculturalism, and hence underline the great importance of Parliament's objective in prohibiting hate propaganda....The message of the expressive activity covered by s 319(2) is that members of identifiable groups are not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration. The harms caused by this message run directly counter to the values central to a free and democratic society....I thus agree with the sentiments of Cory JA who, in writing to uphold s 319(2) in *R v Andrews* (1988), 43 C.C.C. (3d) 193 at p 213...said: "Multiculturalism cannot be preserved let alone enhanced if free reign is given to the promotion of hatred against identifiable cultural groups". When the prohibition of expressive activity that promotes hatred of groups identifiable on the basis of colour, race, religion, or ethnic origin is considered in the light of s 27, the legitimacy and substantial nature of the government objective is therefore considerably strengthened.

---

[33] Ibid at 43- 45.

[34] Ibid at 45c.

[35] Ibid at 50a-d.

[36] Ibid at 43- 45.

Such a finding leaves the way open for a degree of censorship that is potentially as limitless as are the number of values identified as being fundamental to society. Ought communists, fascists or monarchists, for example, to be prohibited from expressing their ideologies because these too are inimical to the very concept of a "free and democratic society"?[37] The *Keegstra* decision raises the very serious question of how an anti-democratic dissenter is to determine which political ideas may be expressed consistently with the character of a democratic society, and how far expression may diverge from democratic orthodoxy before reaching the point at which it forfeits constitutional protection. The lesson suggested by *Keegstra* is that the boundary can be fixed no more precisely than at the point where a court believes the expression is incompatible with the values of a free and democratic society. The decision also leads to the bizarre conclusion that it is a hallmark of democracy that expression challenging democracy is not entitled to constitutional protection. By elevating the value of equality found in section 15 of the Charter to the status of one so fundamental that expression antipathetic to it was held unlawful, *Keegstra* raises the possibility that, in theory at least, a person arguing that Canada should adopt an aristocratic form of government could be silenced on the grounds that democracy is a fundamental value of Canadian society mentioned in the Charter. Furthermore, if, as *Keegstra* suggests, expression is to be proscribed simply because it seeks to persuade those exposed to it to reject a fundamental social norm, then its scope is potentially limitless. This is well illustrated by Weinstein who argues[38]

> Presently in the USA and Canada abortion is a constitutionally protected activity, but it is not inconceivable that some day a woman's choice to terminate her pregnancy will again be criminalised in both countries. If this happens, then books and films favourable to abortion rights could be banned if the government were to show that such expression was likely to lead women to have abortions. Similarly, if homosexual activity were ever again criminalised in Canada, as it is today in many parts of the USA, books and films portraying homosexual couples as having loving, healthy relationships could be banned on the theory that the "alteration of views" caused by such depictions might lead to illegal sexual conduct. What these examples show is that a rationale permitting government to outlaw expression just because it might lead to antisocial or even illegal conduct, but without showing that the speaker has directly called for others to engage in such conduct, can easily encompass speech that attempts to persuade others peacefully and legally to change the law. As such, this rationale is at war with the very essence of free expression in a democracy.

---

[37] As indeed was the case in the United States during the 1950s when the courts upheld measures that led to the imprisonment of those advocating communism - see *Dennis v United States* 341 U.S. 494 (1951).

[38] J Weinstein "An American's View of the Canadian Hate Speech Decisions" in W J Waluchow (ed) *Free Expression* (Clarendon Press, 1994) 175 at 212-213. The example of the banning of a non-sexually explicit film depicting homosexual relationships did in fact occur in Ontario in 1984 - see Lynn King "Censorship and Law Reform: Will Changing the Laws Mean a Change for the Better ?" in Varda Burstyn (ed) *Women Against Censorship* (Douglas & McIntyre, 1985) 79 at 82. The argument concerning abortion is also persuasively made by David Goldberger in "Language as Violence v Freedom of Expression: Canadian and American Perspectives on Group Defamation" (1989) 37 Buffalo Law Review 337 at 365.

Elsewhere he states that[39]

> When the government suppresses speech that denounces basic societal norms the risk is great that it is trying to control expression not because of any real danger that the expression will persuade people to violate the law or breach fundamental norms, but because government fears that the expression will persuade the people to legally *change* these laws or norms. Indeed, although he usually characterises the harm in more concrete ways, Chief Justice Dickson gives away the game when he says, "Hate propaganda seriously threatens...the *enthusiasm* with which the value of equality is accepted and acted upon by society." Justifying the suppression of speech because it makes people less enthusiastic about a fundamental norm of society is antithetical to a meaningful free speech principle. It is also a formula for a conservative society, for the boundaries of permissible public discourse would then be set by the values expressed in the constitution...
>
> (Emphasis in the original).

In contrast to the majority, the dissenting judgment delivered by McLachlin J in *Keegstra* was based on an affirmation of the impermissibility of viewpoint censorship. Central to McLachlin J's judgment was a re-affirmation of viewpoint neutrality, and a rejection of the argument that, in deciding whether expression was entitled to protection, a court should be influenced by the viewpoint contained in the expression. Thus, in addressing the argument that racist speech is to be denied protection because it contradicts the philosophy of equality underlying section 15 of the Charter, she held[40]

> The cases where this court has considered the meaning of s 2(b) have expressly rejected the suggestion that certain statements should be denied the protection of the guarantee on the basis of their content. The court has repeatedly affirmed that no matter how offensive or disagreeable the content of the expression, it cannot on that account be denied protection under s 2(b) of the Charter....The argument based on s 15 is clearly opposed to this principle, as it suggests that protection be denied expression whose content conflicts with the values underlying the s 15 guarantee.

Later she stated that it was not inconceivable that speech promoting "hatred" (the wide meaning of which is discussed below) might legitimately be uttered in the course of political debate, stating[41]

> To come within the ambit of potential prosecution under s 319(2) speech need only wilfully demean an identifiable group....Is it unimaginable that questions of public policy should involve speech of this kind? The Canadian Civil Liberties Association raises the example of a native leader making bitter comments about whites in frustration with governmental failure to recognize land claims.

---

[39] Weinstein, supra n 38 at 216.

[40] Supra n 28 at 101f-g.

[41] Ibid at 106h - 107b.

In the same vein she said that the requirement of intent to foment hatred should not save section 319(2), stating[42]

> It is argued that the requirement of "wilful promotion" eliminates from the ambit of s 319(2) statements which are made for honest purposes such as telling a perceived truth or contributing to a political or social debate. The difficulty with this argument is that those purposes are compatible with the intention (or presumed intention by reason of foreseeability) of promoting hatred. A belief that what one says about a group is true and important to political and social debate is quite compatible with and indeed may inspire an intention to promote active dislike of that group. Such a belief is equally compatible with foreseeing that promotion of such dislike may stem from one's statements. The result is that people who make statements primarily for non-nefarious reasons may be convicted of wilfully promoting hatred.

Similarly, in addressing the argument that the Canadian commitment to multiculturalism in section 27 of the Charter justified limitation of expressive rights she held that[43]

> Different people may have different ideas about what undermines multiculturalism. The issue is inherently vague and to some extent a matter of personal opinion. For example, it might be suggested that a statement that Canada should not permit immigration from a certain part of the world is inconsistent with the preservation and enhancement of multiculturalism. Is s 2(b) to be cut back to eliminate protection for such a statement, given the differing opinions one might expect on such a matter?

Although agreeing that hate speech has harmful effects on minorities[44] McLachlin J argued that by criminalising the promotion of "hatred" s 319(2) created an offence the contours of which were impermissibly overbroad and vague. The very term "hatred" covers a wide range of emotions, and this created the risk that convictions might result from speech which simply incited "active dislike" (one of the dictionary meanings for "hatred"). The risk would be particularly great in cases where expression was unpopular[45] because, realistically speaking, such expression would be more likely to be found to have been uttered with the intention of fomenting hatred.[46] The chilling effect this would have on expression would lead to even lawful speech being deterred as speakers strove to keep within the boundaries of the law,[47] to the extent that[48]

> Novelists may steer clear of controversial characterisations of ethnic characteristics, such as Shakespeare's portrayal of Shylock in "The Merchant of Venice". Scientists

42 Ibid at 118d-f.
43 Ibid at 102h - 103a.
44 Ibid at 111c-g.
45 Ibid at 117c - 118a.
46 Ibid at 118a.
47 Ibid at 113e-h.
48 Ibid at 120h - 121a.

> may well think twice before researching and publishing results of research suggesting difference between ethnic or racial groups. Given the serious consequences of criminal prosecution, it is not entirely speculative to suppose that even political debate on crucial issues such as immigration, educational language rights, foreign ownership and trade might be tempered. These matters go to the heart of traditional justifications for freedom of expression.

Finally, McLachlin J also doubted the argument that measures such as section 319 were justified by the argument that they would reduce racism, arguing that[49]

> The argument that criminal prosecutions for this kind of expression will reduce racism and foster multiculturalism depends on the assumption that some listeners are gullible enough to believe the expression if exposed to it. But if this assumption is valid, their listeners might be just as likely to believe that there must be some truth in the racist expression because the government is trying to suppress it. Theories of a grand conspiracy between government and elements of society wrongly perceived as malevolent can become all too appealing if government dignifies them by suppressing their utterance.

This line of reasoning is supported by Hentoff, who argues that if no opportunity has been given to refute objectionable ideas, they may at some later time be assumed to be true simply because there is no record of their having been disproved in open debate,[50] and that those propagating such ideas will be provided with the argument that the truth they speak is so powerful that it has been banned.[51] The irony therefore is that a paternalistic state which suppresses views contrary to those it approves of, because it mistrusts its own citizens' capacity to evaluate "dangerous" ideas, sows doubt as to the validity of the very "truth" it will not allow to be contradicted.

III The Court's Approach in *Zdrahal*

Given the facts of *Zdrahal*, one might have thought that this case presented a golden opportunity to articulate a New Zealand approach to the issue of viewpoint neutrality. However the opportunity was missed, and it is the failure of the court to address this issue that constitutes the inadequacy of the judgment from the point of view of human rights law.

(i) *The grounds of appeal*

There were four grounds of appeal noted against the Tribunal's decision. The first, relating to whether abatement notices could be issued in relation to continuing actions, was not relevant to the Bill of Rights issue. The second and third points were that the swastikas were not objectionable or offensive in terms of section 322 or, if offensive, were not offensive to the extent that they were likely to have an adverse effect on the environment. The fourth ground of appeal

---

49 Ibid at 116b-d.

50 N Hentoff *Free Speech for Me but not for Thee* (Harper Collins, 1992) 102.

51 Ibid at 170.

was that the New Zealand Bill of Rights Act gave the appellant the right to display the swastikas. The fundamental flaw in the judgment was, I would suggest, the court's treatment of the second and third grounds of appeal as being separate from the fourth. The court stated that the test to be applied in cases where a word such as "offensive" is being interpreted is an objective one.[52] It then went on to uphold the Tribunal's finding that the display of the swastikas was offensive in the objective sense of being so to the reasonable person.[53] But while this might have disposed of a run of the mill statutory interpretation case, the fact that the case involved a challenge based on the freedom of expression provision in the Bill of Rights Act indicates that a far different approach was called for. This is because s 6 of the Bill of Rights Act mandates that, where possible, statutes be interpreted consistently with the Bill of Rights. The Tribunal's finding that the display of the swastikas was offensive was reached on the ground that *the ideology which the swastika represented* was offensive.[54] A finding that Nazi ideology is rejected by the community at large, and is in that sense offensive from an objective point of view, is hardly contestable as a matter of fact. What is contestable, given the protection afforded to freedom of expression by s 14 of the Bill of Rights, is whether the Tribunal, and then the court which upheld its finding, ought to have justified their decisions by having reference to the unpopularity of the viewpoint conveyed by the expressive activity under examination. In other words, the existence of the Bill of Rights meant that the Tribunal and the court were required to interpret the term "offensive" in light of the purposes underlying freedom of expression, and this they did not do.

(ii) *Bill of Rights methodology and the application of section 6*

In addressing the Bill of Rights question, Greig J referred to the precedent of *Ministry of Transport v Noort*.[55] The judgments in *Noort* offer slightly different approaches to the interpretation of sections 4, 5 and 6, but it is important to note that these differences relate to the order in which the operational sections are applied, rather than to the function each performs. In cases where a right has been infringed by virtue of an act performed under statutory power, Cooke P's approach[56] was to apply section 6 to enquire whether the statutory provision could bear a meaning consistent with the Bill of Rights Act. If no such interpretation were possible, the statute would take precedence by virtue of section 4, and thus the infringement of the right would stand. If, however, the statute could be interpreted consistently with the Bill of Rights Act, then section 6 required that interpretation to be adopted.[57] Richardson J's approach[58] was to

---

52 Supra n 1 at 707.
53 Ibid at 707-709.
54 Supra n 2 at 346.
55 [1992] 3 NZLR 260.
56 Ibid at 271-273.
57 This procedure, sometimes called "reading-down" the statute, is discussed in P Rishworth "Affirming the Fundamental Values of the Nation: How the Bill of Rights Act and the Human Rights Act affect New Zealand Law" in G Huscroft and P Rishworth (eds) *Rights and Freedoms* (Brooker's, 1995) 71 at 94-107.
58 Supra n 55 at 282-284.

begin by enquiring whether the infringement of rights were reasonable in terms of section 5. If reasonable, the infringement would stand. If, however, the limitation of rights was found to be unreasonable, then one would the proceed to section 6 to determine whether the statutory provision (in terms of which the infringement had occurred) would still be workable if interpreted consistently with the Bill of Rights Act. If the statute would still be workable, the infringement would be found unlawful because it would be ultra vires the statute as interpreted. However, if a consistent interpretation were not possible, then the act performed under authority of the statute would be legitimated by virtue of section 4. The first approach has the advantage of focusing initially on the issue of statutory consistency, which enables many cases to be disposed of without going into what may be a time consuming weighing of competing social values. However, one would hope that irrespective of whether the approach of Cooke P or that of Richardson J were adopted, the end result would be the same. *Zdrahal* indicates that this is not so.

In *Zdrahal*, Greig J adopted the Richardson J approach and found it necessary to take only the first step required by it, because once the infringement was found to be reasonable, there was no need to inquire whether the statute would be workable if interpreted consistently with the Bill of Rights Act. Yet it is important to recognise that the finding of reasonableness was arrived at only *after* Greig J had found the display of the swastikas to be objectionable within the meaning of section 322. This reveals a flaw in the Richardson J approach to the Bill of Rights. The application of the section 5 test will often depend upon the prior finding of a jurisdictional fact (in this case that the display fell into the statutory category of offensiveness) through the interpretation of the statute under consideration. Yet is it not true that this earlier process of interpretation of the statute under examination ought to be done in accordance with the Bill of Rights Act, just as the reasonableness inquiry is under section 5? In other words, the Richardson J approach, which postpones the section 6 inquiry as to whether the statute can be interpreted consistently with the Bill of Rights Act, will in many cases be flawed, simply because section 5 requires the court to balance the interest served by the statute on the one hand against the freedoms protected by the Bill of Rights Act on the other. However, the interests served by the statute can be determined only *after* the statute has been interpreted consistently with the Bill of Rights Act. This is required by section 6, which mandates that, where possible, a court must adopt an interpretation consistent with the Bill of Rights, failing which section 4 requires that the Act must nevertheless be applied.[59]

[59] In so far as I argue that the correct approach is to apply section 6 first, I prefer the approach adopted by Cooke P to that adopted by Richardson J. However, as is clear from Cooke P's exegesis of the operative provisions of the Bill of Rights (in *Noort* at 271-273), he saw section 5 as being used only to determine whether common law rules amount to reasonable limitations. In cases involving alleged infringements of rights caused by the exercise of statutory powers, Cooke P's view (which finds support in J Allan "The Operative Provisions - An Unholy Trinity" [1995] BRB 79) was that section 5 is of no application because where the statute under consideration cannot be interpreted consistently with the Bill of Rights, section 4 prevents section 5 being used to cut down the rights-limiting statute enacted by Parliament. Although not expressly stated, it also appears that, where the statute *can* be interpreted consistently with the

Because Greig J had separated the second and third grounds of appeal from the fourth in *Zdrahal*, he interpreted section 322 wholly without reference to the Bill of Rights Act and thus without embarking on a section 6 inquiry. As we have seen, he had, long before addressing the Bill of Rights argument, already accepted the Tribunal's finding that the term "offensive or objectionable" included within its meaning expression that was offensive *because of the viewpoint conveyed by it*. This, I would submit, was the crux of the case - as I have argued above, the values underlying freedom of expression require that at a bare minimum expression should not be suppressed on the basis of viewpoint, yet the finding of offensiveness was made without any reference to the issue of viewpoint neutrality. Two recent decisions of the United States Supreme Court involving expressive activity in the specific context of residential neighbourhoods illustrate how the principle of viewpoint neutrality should be applied in such cases.

IV The Decisions in R.A.V. v St. Paul and Ladue v Gilleo

(i) *R.A.V. v St. Paul*

In the first of these United States decisions, *R.A.V. v St. Paul*,[60] the appellant had put a burning cross on the property of a black family in a racially-inspired act of harassment. The appellant was prosecuted under the city's hate speech ordinance rather than charged with some more obvious offence such as assault by threat of bodily harm or trespass. It was on the ground that the ordinance constituted an impermissible restriction on free speech rights protected by the First Amendment that the case reached the Supreme Court. The ordinance in question[61] punished as "disorderly conduct" the placement on public or private property of any

> symbol, object, appellation, characterisation or graffiti...which one knows or has

Bill of Rights, Cooke P, unlike Richardson J, did not consider that infringements of rights would be legitimated if reasonable. As appears from the text above, I suggest an approach which starts with section 6 and, in cases where the statute can be interpreted consistently with the Bill of Rights (and where section 4 therefore does not come into play), *then* proceeds to the section 5 inquiry used by Richardson J. In such cases section 5 is *not* used to cut down the statute under examination (something that is obviously prohibited by section 4). Rather it is used to determine whether, despite the fact that the discretion conferred by the statute is wide enough for the powers it confers to be exercisable consistently with the Bill of Rights without depriving the statute of its effect, it is nevertheless lawful to choose to exercise those powers in such a way as to infringe the Bill of Rights, because that infringement is reasonable under section 5. In other words, where a statute is consistent with the Bill of Rights, one must proceed to section 5, the reason being that that section provides an "out" for those exercising powers in such a way as to infringe the Bill of Rights - such infringements being lawful if reasonable. Support for this approach is to be found in Roy Lee and Malcolm Luey "Statutory Discretions and Powers - Making them Work through Section 5 of the Bill of Rights" (1995) 1 Human Rights Law and Practice 89.

60 12 S. Ct. 2538, 120 L. Ed. 2d 305 (1992). For a critical analysis of this case see R Abel *Speech and Respect* (Stevens & Sons, 1994) 34-36.

61 St Paul Bias Motivated Crime Ordinance s 292.02 (1990).

> reasonable grounds to know arouses anger, alarm or resentment in others on the basis of race, colour, creed, religion or gender...

The Supreme Court held that because the emotional response that the state sought to prevent was proscribed only if it related to one of a limited class of human characteristics (race, colour, creed, religion or gender) and not, for example, to political affiliation, union membership or sexual orientation, the ordinance was unconstitutional on grounds of content discrimination.[62] Furthermore, the content-based regulation was not necessary to achieve the (admittedly compelling) interest of preventing harassment of ethnic minorities, as an ordinance penalising harassment without reference to race, religion, gender *et cetera* would have achieved the same object.

The court further held that the ordinance potentially favoured one side in political debates on issues of race, colour, creed, religion *et cetera*, because whereas those who inspired anger, alarm or resentment in the minds of the racially and religious tolerant could be prosecuted under the ordinance, if the same emotions were inspired in the *intolerant*, it would be difficult to argue that the fear had been inspired "on the basis of race". On this basis the court held that[63]

> In its practical operation, moreover, the ordinance goes even beyond mere content discrimination, *to actual viewpoint discrimination*..."fighting words" that do not themselves invoke race, colour, creed, religion or gender - aspersions upon a person's mother, for example - would seemingly be usable ad libitum in the placards of those arguing in favour of racial, color etc tolerance and equality, but could not be used by that speaker's opponents. One could hold up a sign saying, for example, that all "anti-Catholic bigots" are misbegotten; but not that all "papists" are, for that would insult and provoke violence "on the basis of religion".
>
> (Emphasis added).

Of course, if a St. Paul type ordinance were applied even-handedly (that is, against both the tolerant and the intolerant), the implications for the right to engage in political protest would be alarming. As Hentoff shows,[64] interpreted in that way such an ordinance would limit the expressive rights not only of Klansmen but also of those protesting against racism, because each side arouses anger in their opponents on the basis of race. The same could be said in the case of Nazis marching through a Jewish neighbourhood[65] or of Jews displaying a Star of David (seen as a symbol of Zionism) in an Arab neighbourhood. Finally, and to re-iterate a point echoed in McLachlin J's dissenting judgment in *Keegstra*, perhaps the most persuasive reason why the ordinance merited striking down was that put forward by the minority - namely that proscribing "anger, alarm and resentment" are emotions which are quite frequently inspired in the normal

---

62 Supra n 60 at 323-325.

63 Idem.

64 Supra n 50 at 258-265.

65 Which is of course what happened in the famous Skokie case (*Collin v Smith* 578 F.2d 1197 (7th Cir. 1978) (*cert. denied* 439 US 916 (1978)) in which the courts upheld the right of American Nazis to march through a predominantly Jewish suburb in Chicago.

course of political debate.[66] Although the court did not say it, it is therefore clear that upholding such a prohibition would have effectively constitutionalised the heckler's veto.[67]

The situation would, of course, have been much different had the statute proscribed speech that inspires fear of *harm*, which is obviously a response that is not justified by reference to rights of expression. Thus, had the St. Paul ordinance penalised inspiration of fear of harm (and had it also not specified only those threats which evidenced specific kinds of prejudice) the First Amendment would not have been a bar to convicting the appellant. Indeed, as is discussed in the next paragraph, the appellant and his accomplices were subsequently convicted when charged under a statute proscribing the making of threats. As the court in *R.A.V.* stated, it would have been permissible for the city to proscribe a particular *mode* of expression (for example, expression that was threatening in manner), but what it did instead was single out a particular *viewpoint*, and this is not allowed by the First Amendment.

In contrast to *R.A.V.*, the courts have upheld the convictions of accused who engaged in cross-burning and who were prosecuted under statutes prohibiting the making of threats.[68] These statutes were upheld because they prohibited threats (rather than the inspiration of "anger, alarm or resentment" as in the case of the St. Paul statute) and, furthermore, were content-neutral in that they were not limited to threats made on any particular basis. These cases also illustrate the importance of the distinction drawn in *United States v O'Brien*[69] between measures which are aimed at a message being expressed, and those which are directed towards some *other* harm and only incidentally limit freedom

---

66 Supra n 60 at 338.

67 The Supreme Court has consistently refused to accept feared lack of restraint on the part of hearers opposed to a speaker's message as a justification for restrictions on freedom of expression, despite the fact that in *Chaplinsky v New Hampshire* 315 U.S. 568 (1942) at 571-573 the court held that expression may be proscribed if it amounts to "fighting words", defined in the statute at issue in that case as "words likely to cause an average addressee to fight". Thus in *Forsyth County v Nationalist Movement* 112 S. Ct. 2395 (1992) at 2403 the court held that speech could not be suppressed simply on the ground that it was "unpopular with bottle-throwers" and held that "[l]isteners' reaction to speech is not a content-neutral basis for regulation". Similarly, as Douglas J held in *Terminiello v Chicago* 337 U.S. 1 (1949) at 4

> A function of free speech under our system of government is to invite dispute. It may indeed best serve its purposes when it induces a condition of unrest...or even stirs people to anger.

Furthermore, as the Illinois Supreme Court noted in one of the Skokie cases (*Village of Skokie v National Socialist Party of America* 69 Ill. 2d 605 at 616, 373 N.E. 2d 21 at 25)

> Courts have consistently refused to ban speech on the possibility of unlawful conduct by those opposed to the speaker's philosophy.

68 See for example *United States v McDermot* 29 F.3d 404 (8th Cir. 1994), *Singer v United States* 38 F.3d 1216 (6th Cir. 1994) and *United States v Hayward* 6 F.3d 1241 (7th Cir. 1993).

69 391 U.S. 367 (1968).

of expression. The courts in the threats cases concluded that the provisions under which these appellants had been convicted were of the latter type in that they punished threats of physical harm (which a line of cases affirms is not protected by the First Amendment[70]) rather than the message lying behind the threat. In *R.A.V.* on the other hand, the court was dealing with a statute which proscribed the *actus reus* of simply expressing certain ideas which inspired anger, alarm or resentment in others. This, though, is precisely the ground upon which free speech may not be proscribed. In light of the above case law it was clear that the conduct of the appellant in *R.A.V.* did indeed amount to a threat, and thus the final act in the *R.A.V.* saga was the upholding, in *United States v J.H.H.*,[71] of convictions of R.A.V. and a number of co-accused who had been re-charged, this time under provisions penalising the making of threats.

Finally, greater insight can be gained into the issue at stake in *R.A.V.* by examining this decision in the light of that reached in *Wisconsin v Mitchell*[72] in which the Supreme Court upheld a statute that imposed heavier penalties for certain criminal acts where such crimes were racially motivated. Does the fact that the motivation of the crime led to the imposition of an increased penalty mean that defendants were being punished for their viewpoint?[73] The conclusion that the court in *Mitchell* reached was that it does not. Central to the court's reconciliation of this case with *R.A.V.* was the distinction drawn between speech and conduct - *R.A.V.* involved a statute that penalised expression, whereas the Wisconsin statute penalised conduct (and in particular, crimes against persons and property). Furthermore, although the penalty enhancement provision meant that if the perpetrator was motivated by a certain point of view (race, religion, colour, disability, sexual orientation national origin or ancestry) his or her penalty would be increased, this was held to be legitimate because it lies within the competence of the legislature to enact, and the courts to apply, legislation that requires motive to be taken into account at sentencing. Most important for First Amendment purposes, however, is the fact that the decision in Mitchell is distinguishable from that in *R.A.V.* because to be convicted under the penalty enhancement statute the accused had to have performed some independently illegal act before the issue of the idea motivating the act became relevant. In *R.A.V.* however, the court was dealing with a statute which criminalised the *expression of an idea itself, even if* that idea did *not* take the form of an illegal act. Although on the particular facts of *R.A.V.* the method chosen to express the idea did happen to take the form of the criminal offence of threat or trespass, a person could still have been convicted under the statute simply for burning a cross *on their own lawn*. This reveals what is probably the most crucial difference between *Mitchell* and *R.A.V.*, which is that in *Mitchell* the court was dealing with

---

70 See *Watts v United States* 394 U.S. 705 (1969) 707, *United States v Mitchell* 463 F.2d 187 (8th Cir. 1972) 191 (*cert. denied* 410 U.S. 969 (1973)), *United States v Orozco-Santillan* 903 F.2d 1262 (9th Cir. 1990) 1265-66 and *United States v Bellrichard* 994 F.2d 1318 (8th Cir. 1993) 1321 (*cert. denied* 114 S. Ct. 337 (1993)).

71 22 F.3d 821 (8th Cir. 1994).

72 1135 S. Ct. 2194 (1993).

73 Both *R.A.V.* and *Mitchell* are analysed by Richard Delgado and David Yun in "Pressure Valves and Bloodied Chickens: An Analysis of Paternalistic Objections to Hate Speech Regulation" (1994) 82 California Law Review 871 at 874-875.

a statute that enhanced the penalty that could be imposed for a crime motivated by an idea, while in *R.A.V.* the statute penalised *the mere expression of the idea itself.* As Sunstein states[74]

> ...R.A.V and *Mitchell* are very close, and the court did not adequately explain the difference between them. Perhaps the major distinction between the two cases is that the Minnesota law in *R.A.V* covered speech as well as expressive conduct, and cross-burning is characteristically expressive - whereas the enhancement statute was directed at conduct, and many hate crimes are not intended and received as a communication on anything at all. For this reason, the enhancement penalty can perhaps be seen as a content-neutral restriction on conduct that is not ordinarily expressive, while the Minnesota law was a *content-based restriction on speech* including expressive conduct.
>
> (Emphasis added).

(ii) *Ladue v Gilleo*

The decision in *R.A.V. v St. Paul* illustrates how a restriction on freedom of expression may be found unconstitutional because it is underinclusive - that is, because it discriminates between expression on the basis of content or viewpoint, capturing disfavoured expression while leaving unregulated expression which is not disfavoured. *Ladue v Gilleo,*[75] on the other hand, illustrates how even a measure that has been carefully crafted to be content and viewpoint neutral will be found unconstitutional if it suppresses too broad a category of expression.

In *Ladue v Gilleo* the Supreme Court pronounced upon the constitutionality of an ordinance passed by the city of Ladue, Missouri, which prohibited the display of signs in residential areas. The ordinance prohibited all but a few categories of what might be called functional signs, such as those identifying a building or its residents, publicising the fact that it was for sale, alerting passers-by to hazards *et cetera.*[76] Ms. Gilleo had displayed a sign in the window of her house reading "For Peace in the Gulf" as a mark of protest against the involvement of the United States in the Gulf War, and challenged the city under the First Amendment when ordered to remove it. Although agreeing that it was legitimate for the city to regulate the display of signs in order to prevent visual clutter and aesthetic harm in residential areas,[77] and that the ordinance was content (and thus, by implication, also viewpoint) neutral,[78] the court rejected the city's argument that the ordinance therefore satisfied the requirements of a valid "time, place or manner" restriction. In particular, the court found that by prohibiting the display of signs in residential areas, the ordinance wholly foreclosed a particular medium of expression which could otherwise be used for the conveyance of political, religious and personal messages (the display of posters on lawns or in windows endorsing candidates for public office being an obvious example thereof). As

---

[74] See the analysis of *R.A.V.* and *Mitchell* in C Sunstein Demo*cracy and the Problem of Free Speech* (The Free Press, 1993) 195.

[75]. 2038 (1994).

[76] Ibid at 2041 n 6.

[77] Ibid at 2041.

[78] Ibid at 2044.

was noted in the general discussion of First Amendment case law, a restriction will be held to fall into the "time, place or manner" exception only where it leaves open other adequate means of communication. The court held that activities such as pamphlet distribution, telephone messages, bumper stickers, public speeches, hand-held signs, newspaper advertisements *et cetera* did not constitute an adequate alternative because[79]

> Displaying a sign from one's own residence often carries a message quite distinct from placing the same sign someplace else, or conveying the same text by picture or other means. Precisely because of their location, such signs provide information about the identity of the "speaker". As an early and eminent student of rhetoric observed, the identity of the speaker is an important component of many attempts to persuade. A sign advocating "Peace in the Gulf" in the lawn of a retired general or decorated war veteran may provoke a different reaction than the same sign in a 10-year-old child's bedroom...

The court went on to say that displaying a residential sign facilitated political participation by those who lacked the money or time to engage in other forms of communication,[80] and that given the protection that the law has long evinced for individual liberty in the home, most citizens would be dismayed to learn that it was illegal to display a sign in their window expressing their political views.[81] This then supported the court's finding that[82]

> Although prohibitions foreclosing entire media may be completely free of content or viewpoint discrimination, the danger they pose to the freedom of speech is readily apparent - by eliminating a common means of speaking, such measures can suppress too much speech.

For this reason, the ordinance was held unconstitutional.

Where then does this leave a municipal authority that wishes to maintain aesthetic standards in residential areas? Caught between the prohibition against viewpoint discrimination and underinclusiveness found in *R.A.V.*, and the prohibition of blanket proscriptions found in *Ladue*, is there any means by which signs in residential neighbourhoods may be regulated? The court in *Ladue* suggested that the very fact that signs tend to detract from the value of properties would act as a restraint on residents who might display them, and that therefore the visual clutter that the ordinance sought to prevent might not, in fact, be as serious a problem as the city anticipated.[83] However, this argument ignores the problem caused by the resident who has no concern for property values (including the value of his or her own property), or whose concern for property values is outweighed by the satisfaction derived from making a political statement or simply from annoying neighbours. A better solution than that

79 Ibid at 2046.
80 Idem.
81 Ibid at 2047.
82 Ibid at 2045.
83 Ibid at 2047.

based on laissez faire has been proposed by commentators on *Ladue*, who point out that the city's ordinance might have come within the "time, place or manner" exception had it prohibited displays of a particular size[84] or duration[85] rather than placing an outright ban on them. Thus in *Mobile Sign, Inc. v Town of Brookhaven*[86] an ordinance that limited the cumulative duration for which signs could be displayed on the same premises survived challenge under the First Amendment. Had the ordinance in *Ladue* been more specific in the "time, place or manner" regulation it imposed, it too might have been upheld.

V How Zdrahal Should Have Been Decided

(i) *Interpreting section 322*

It is now convenient to re-examine *Zdrahal* and, bearing in mind the tripartite distinction between restrictions on freedom of expression relating to viewpoint, those relating to content, and those relating only to time, place and manner, to reconsider the interpretation given to the term "offensive or objectionable" in section 322 of the Resource Management Act.

Applying First Amendment taxonomy to section 322, one sees that the court interpreted the section as empowering the Tribunal to prohibit expression which was offensive or objectionable because of the viewpoint contained therein, confirming the Tribunal's finding that the display was offensive because ordinary members of the public would find the expression of Nazi ideology offensive. Yet given that one of the most important purposes of freedom of expression is to enable people to express *precisely those ideas which the majority finds offensive* (hence the prohibition of viewpoint discrimination) this finding seems to be irreconcilable with the requirement (imposed by section 6 of the Bill of Rights Act) that section 322 be interpreted consistently with section 14 of the Bill of Rights Act.

A less objectionable approach would have been for the court to interpret section 322 as permitting content-based restrictions on freedom of expression. This would have enabled the court to find that the display of the swastikas was objectionable because ordinary members of the public would find it objectionable to have political motifs displayed in residential neighbourhoods. Such an approach would however be flawed in that it would discriminate between political and other types of expression and would, for example, outlaw the putting up of posters during political campaigns. However, it would at least have avoided the viewpoint subjectivity of the finding that the swastika was objectionable because of the ideology it represented.

The third alternative, that of interpreting section 322 as proscribing signs which were offensive or objectionable because of the time, place or manner of their

---

84 Jennifer Shields "Community aesthetics and speech regulation: City of Ladue v Gilleo" (1995) 18 Harvard Journal of Law and Public Policy 612 at 620-621.

85 See Anthony Durone and Melissa Smith "The First Amendment and private property: A sign for free speech: City of Ladue v Gilleo" (1995) 60 Missouri Law Review 415 at 442 and Mark Cordes "Sign regulation after Ladue: Examining the evolving limits of First Amendment protection" (1995) 74 Nebraska Law Review 36 at 88-89.

86 670 F. Supp. 68 (E.D.N.Y. 1987).

display, would have been the most satisfactory from a Bill of Rights point of view. The court could have adopted an approach based on considerations of time and place by finding that it is objectionable to have permanent signs, other than the purely functional, displayed in the specific locale of a residential neighbourhood. This interpretation of section 322 would have been both viewpoint and content neutral and would therefore have been consistent with section 6 of the Bill of Rights Act. Furthermore, including the duration for which a sign is displayed as a consideration governing whether the display is objectionable would have circumvented the difficulty illustrated by *Ladue v Gilleo* - under this interpretation of "offensive or objectionable" the Council would not have been able to use section 322 to issue abatement notices against all signs in residential neighbourhoods, but it could have ordered their removal if the duration of their display was unreasonable. Turning to the facts of *Zdrahal*, it is clear that the Council's decision would have been upheld if subject to "time, place and manner" scrutiny: Firstly, the swastikas had been on display for more than eight weeks when the abatement notice was issued,[87] a longer period than was reasonably necessary for the appellant to convey his views. Secondly, the display occurred in a residential neighbourhood. Finally, the larger swastika was illuminated by a spotlight at night. These factors of "time, place and manner" would, I submit, have justified the issuing of the abatement notice under a viewpoint and content neutral interpretation of section 322.

(ii) *The section 5 inquiry*

It also follows from the above that the *Zdrahal* decision can also be criticised on the ground that the court ought to have adopted a different approach when applying the proportionality element of the section 5 test relating to reasonableness. In applying the test the court held that[88]

> On the one hand there is a requirement that the expression of the appellant's ideas should stop in so far as they are embodied on the wall and on the window of his house. It is a relatively simple and inexpensive matter to achieve that result. The restriction on the appellant is slight. He is perfectly at liberty to use swastikas so long as the offensive and objectionable nature of them is not such as to adversely affect the environment. The end that is sought is to preserve and protect the environment, the enjoyment by the people in that environment of their surroundings unaffected and unimpaired by the offensive and objectionable display on the part of the appellant.

Clearly the court's application of section 5 was coloured by its prior interpretation of section 322. The court had already interpreted section 322 as permitting viewpoint-based restrictions. Given that interpretation, the court's finding that the Council's order satisfied the proportionality test implied that viewpoint-based restrictions are reasonable in a free and democratic society. Yet the first element of the proportionality test requires that there should be a rational connection between restrictions on rights and the objectives such restrictions

[87] From 15 August 1992 to 12 October 1992. Supra n 2 at 344.
[88] Supra n 1 at 711.

are designed to serve. Is there a rational connection between the objectives of the Resource Management Act and the suppression of political viewpoints? Clearly there is not, and the court ought to have found that whereas an abatement notice restricting expression because of the viewpoint expressed therein would not satisfy this element of the test, the order could have been justified by reference to the time, place or manner of the expression because, as was shown above, it is reasonable for inhabitants of a residential area not to be subject to signs (irrespective of viewpoint or content) permanently painted on the wall of a dwelling. The court could have achieved the result it did without endorsing the introduction of ideologically-based distinctions into free speech law. As it stands however, the finding in *Zdrahal* suggests that it is reasonable in a free and democratic society to restrict expression on grounds of viewpoint.

VI The Council's Plan

One final question remains to be addressed. Would it make any difference to the above arguments had the Council issued an abatement notice for breach of a city plan under section 322(1)(a)(i), rather than for offensive or objectionable conduct under section 322(1)(a)(ii)? This it might have done because, as the Tribunal noted,[89] the Council had published a plan which included an Ordinance placing restrictions on signs displayed in residential areas.[90] The Ordinance permitted the permanent display of purely functional signs that denoted the name, character or purpose of premises, and restricted the size of such signs. The Ordinance contained a separate subparagraph dealing with "Temporary Signs" which, among other things, governed signs announcing local religious, educational and cultural events, and signs displayed for electioneering purposes. These categories of sign could be displayed until seven days after the holding of the advertised event or the close of an election. Nothing in the Ordinance permitted the display of political signs other than during elections, and so the appellant's sign would clearly have fallen foul of this provision.

A significant difference between issuing a notice for breach of an Ordinance rather than under the statutory discretion conferred by section 322(1)(a)(ii) arises from the fact that local Ordinances may be declared invalid on grounds of ultra vires taking the form of unreasonableness.[91] What is the relationship between the test for unreasonableness applied in administrative law and that applied under section 5 of the Bill of Rights Act? The rule of administrative law expressed in *Kruse v Johnson*[92] and adopted into New Zealand law in *McCarthy v Madden*[93] is that bylaws will be invalid for unreasonableness if

---

89 Supra n 2 at 343.

90 Ordinance 7D. 2 of the Wellington Transitional Plan.

91 Bylaws Act 1908 s 8(2). See P Joseph *Constitutional and Administrative Law in N ew Zealand* (Law Book Company, 1993) 778-780, and K Palmer *Local Government Law in New Zealand* (2nd ed, Law Book Company, 1993) 423 and 436-438.

92 [1898] 2 QB 91.

93 (1914) 33 NZLR 1251.

> ...partial and unequal in their operation as between different classes; if they were manifestly unjust; if they disclosed bad faith; [or] if they involved such oppressive or gratuitous interference with the rights of those subject to them as could find no justification in the minds of reasonable men...

The presumption is that Parliament would not have intended that the law-making power it has conferred be used to impose unreasonable restrictions. The application of the reasonableness test to a bylaw requires a balancing of the interests of the inhabitants of the area over which the bylaw applies against the interests of those whose rights the bylaw has limited.

The Bill of Rights mandates in section 6 that statutes must, where possible, be interpreted consistently with the Bill of Rights. This being the case, where section 684(1)(15) of the Local Government Act 1974 confers power upon local authorities to make bylaws

> regulating, controlling or prohibiting the display...of posters, placards, handbills, writings, pictures or devices for advertising or other purposes

this must, if possible, be interpreted as conferring on them power to enact bylaws consistent with the Bill of Rights.[94] Exercises of this law-making power in such a way as to restrict rights will, however, be valid if the restrictions on rights are reasonable in terms of section 5 of the Bill of Rights. As we have seen, section 5 requires a balancing of interests, just as does the application of the administrative law test of reasonableness.

The similarity between the tests for unreasonableness contained in *Kruse v Johnson* on the one hand and section 5 on the other indicates that the same result should be achieved whichever is applied. This means that when confronted with a bylaw that imposes an unreasonable restriction on freedoms protected by the Bill of Rights, a court could declare the bylaw invalid by virtue of the rule in *Kruse v Johnson*. Note that this would *not* constitute disregard of the section 4 prohibition against declaring enactments invalid. That section prohibits courts from invalidating or declining to apply legislation "by reason only that the provision is inconsistent" with the Bill of Rights. In the situation I have described, the bylaw would be unreasonable because it failed the section 5 test, but it would be declared invalid because *Kruse v Johnson* entitles the courts to invalidate unreasonable bylaws. In other words, the Bill of Rights has amplified the concept of unreasonableness contained in *Kruse v Johnson* to include unreasonableness in the sense of section 5 of the Bill of Rights.

As has already been argued, restrictions on freedom of expression are unreasonable where based on content or viewpoint and may be so where restrictions of time, place or manner are excessive. Although viewpoint neutral,[95] the Wellington Ordinance arguably discriminated on grounds of content in that

---

94 This argument is supported in K Palmer, supra n 91 at 440-441.

95 As indeed was noted by the Tribunal, which stated (supra n 2 at 346) that the Ordinance would have prohibited the painting of any "religious or cultural expressions or motifs" on private residences, and not just the appellant's swastikas.

signs relating to particular topics (such as politics) were subject to time-related restrictions not applicable to other categories. In addition, the time-related condition was clearly unreasonable - by permitting political signs only during election periods, the Ordinance effectively foreclosed this avenue of expression at most times. I would therefore argue that if a court were to adopt an approach that accorded due weight to freedom of expression, it would have to find an Ordinance such as Wellington's to be invalid.[96]

VI Conclusion

Zdrahal is an important case for Bill of Rights law in general, and for the law governing freedom of expression in particular. To begin with the general issue of how the Bill of Rights is applied, the court's failure to interpret section 322 of the Resource Management Act consistently with the Bill of Rights highlights why it is preferable to apply section 6 of the Bill of Rights before section 5 when statutorily-authorised action is challenged. I would therefore argue that the proper approach in cases involving statutory limitations of rights must be firstly to follow the mandate contained in section 6 - namely to interpret the section imposing the limitation consistently with the Bill of Rights Act, where this is possible. Where consistent interpretation is not possible, the statute will prevail by virtue of section 4. Where consistent interpretation is possible, the court should then embark upon the section 5 inquiry.

So far as the particular issue of statutory restrictions on freedom of expression is concerned, I have argued that the fundamental importance of viewpoint neutrality to free speech law requires that when applying section 6, a court must interpret the statute imposing restrictions as permitting only such time, place and manner restrictions as leave open adequate alternative opportunities for expression. Interpretations permitting content or viewpoint restriction should be adopted only where the language of the statute allows no other interpretation. Similarly, when the section 5 reasonable limitations test is applied, restrictions on freedom of expression ought to be found to be unreasonable when directed towards content or viewpoint, while time, place and manner restrictions ought to be reasonable in degree. I have also argued that bylaws imposing restrictions that are unreasonable in terms of section 5 can be invalidated on grounds of common law ultra vires.

Zdrahal sets an unfortunate precedent. The issue of viewpoint neutrality is central to freedom of expression, yet was not addressed in the judgment. The result was a decision which, by restricting the ambit of permissible expression to what conforms to prevailing notions of ideological acceptability, quietly

[96] It is interesting to note that on my argument, a notice issued to a resident in the position of Mr Zdrahal under the statutory discretion contained in section 322(1)(a)(ii) would be valid whereas a notice issued for breach of the Ordinance would not. This is because the facts of *Zdrahal* were such that a finding that the appellant's conduct was objectionable could have been reached with due regard not only to the place (a residential neighbourhood) and manner (use of a spotlight to illuminate the large swastika at night) but also with regard to the duration of the display (eight weeks). The Ordinance, however, prohibited political displays other than during elections, and this was unreasonable.

legitimated viewpoint censorship. As such, *Zdrahal* negates one of the essential purposes of freedom of expression, which is to serve as a shield for views which society finds intolerable. The principle at stake is expressed with particular clarity by Richards as follows[97]

> Notwithstanding the detestation of and outrage felt by the majority toward certain contents of communication, the equal liberty principle absolutely forbids the prohibition of such communication on the ground of such detestation and outrage alone. Otherwise, the [sic] liberty of expression, instead of the vigorous and potent defense of individual autonomy that it is, would be a pitifully meagre permission allowing people to communicate only in ways to which no one has any serious objection.

The ratio of *Zdrahal*, that expressive conduct will be found objectionable where it conveys a viewpoint found unreasonable by society, strikes at the heart of this principle.

---

97 Richards "Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment" 123 (1974) University of Pennsylvania Law Review 45 at 68.