BONKERS AND ORS V THE POLICE: JUDGMENT OF ATHENA J IN THE HIGH COURT

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(Introduction: In this article, which takes the form of a judgment, the author takes issue with the Supreme Court's interpretation of s 4(1)(a) of the Summary Offences Act 1981 in *Morse v The Police*.[1] The Court held that the offence of behaving in an offensive manner is not complete unless the behaviour causes a disruption or disturbance to "public order". The author argues that this interpretation is based on a restricted conception of public order. Section 4(1)(a), he contends, sets out the basic rules of social engagement in proscribing behaviour that is a serious affront to the sensibilities of citizens in their interaction with one another. Whether or not the behaviour in issue is protected by the right to freedom of expression can only be determined by balancing the value of the right as exercised in the circumstances against the rights, values and interests of the person or persons who are affected by the behaviour. The author contends that this balancing exercise is either ousted or rendered otiose by the Court's decision. He points out the anomalies and inconsistencies which result.)

ATHENA J

Morse v The Police

[1] The three appellants in this appeal were convicted of behaving in an offensive manner under s 4(1)(a) of the Summary Offences Act 1981. Wiseman DCJ heard the charges in the District Court on 1 June 2011. As the circumstances of each case dif.fer, I will deal with them separately shortly. The common factor in each appeal, however, is the contention that the appellants are entitled to be acquitted on the basis of the Supreme Court's decision in *Morse v The Police*.

[2] Wiseman DCJ declined to follow that decision. He claimed that the members of the Court had not settled upon an agreed formulation for the test to be applied. Reading the judgments of a superior court, the Judge claimed, should not leave a judge at first instance feeling that he or she is the subject of a Rorschach experiment. I consider that this observation was uncalled for. Although the members of the Court differ as to the formulation of the test, the Court's approach to s 4(1)(a) is clear. The Judge was bound by the doctrine of precedent to apply the Court's interpretation - however much he may have disapproved of it.

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1 *Morse v The Police* [2011] NZSC 45.

[3] Consequently, the broad issue in each of these appeals is whether the Supreme Court's decision in *Morse* can be distinguished.

[4] The appellant in *Morse* burned a New Zealand flag as part of a protest conducted by six to nine people on Anzac Day on 25 April 2007. Over 5,000 men, women and children had gathered for the Dawn Service at the Cenotaph in Wellington to commemorate the sacrifice of the servicemen and women who had given their lives during the wars in which this country has been involved, particularly the First and Second World Wars. Ms Morse and her small group of protestors stationed themselves across the road from the Cenotaph in the grounds of the Victoria University of Wellington Law School. They are passionately opposed to the war in Afghanistan and sought to express their viewpoint in a manner designed to draw attention to the folly of that war. Ms Morse burned a flag on a pole while others blew loudly on horns to attract attention. In the still darkness of the dawn it was undoubtedly a dramatic act. It was clearly within sight and hearing of those at the Dawn Service. Some were in close proximity. A number of witnesses at the trial before Wiseman DCJ gave evidence to the effect that they were shocked at the sight of the flag being burned at a respectful and solemn commemoration of the men and women who had made the supreme sacrifice. They used terms to describe Ms Morse's action such as "really offensive" and "outrageous".

[5] Ms Morse was convicted of behaving in an offensive manner in the District Court. Her appeal to the High Court was dismissed by Miller J. An appeal to the Court of Appeal was dismissed (William Young P and Arnold J, with Glazebrook J dissenting). Ms Morse was duly granted leave to appeal to the Supreme Court and that Court unanimously allowed her appeal on 6 May 2011.

[6] As indicated, the members of the Court differ as to the wording of the test to be applied under s 4(1)(a). The offensive behaviour must cause a disruption or provoke a disruption of public order (Chief Justice),[2] or cause "directly or indirectly … a disturbance of public order" (Blanchard J),[3] or involve "a sufficient disturbance of public order" (Tipping J),[4] or must sufficiently interfere with the expectations of enjoyment and tranquility and security from "unduly disruptive behavior in public places" (McGrath J),[5] or must "have a reasonable propensity or likelihood to dissuade others from enjoying their right to use that place whether by entering upon it or remaining upon it" (Anderson J).[6] Both Tipping and McGrath JJ expressly disavow the Chief Justice's notion that the disturbance includes conduct productive of disorder to the exclusion of ordinary notions of causing offence.[7] While the wording may differ, however, all members of the Court are at one in holding that the behaviour alleged to be offensive must cause a disruption or disturbance to "public order". Section 4(1)(a) no longer applies to protect the sensibilities of persons subject to offensive behaviour, however grossly offensive that behaviour might be. As the District Court Judge had not been cognizant of this requirement and had failed to apply it, the Court held that the charge had not been properly considered having regard to the true meaning of s 4(1)(a). The conviction was quashed.

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2 At [7], [9] and [36].

3 At [60], [62], [63] and [67].

4 At [69], [70] and [71], [72].

5 At [101] and [103].

6 At [127].

7 At [69] and [102].

[7] A theme running through the judgments is the notion that the disruption or disturbance will inhibit or interfere with the use of a public place.[8] It may, for example, inhibit or interfere with the use of a public place "through intimidation, bullying or the creation of alarm or unease".[9] Hence, where members of the Court speak of the disruption or disturbance amounting to an "interference", the interference is with the use of the public place and not an interference with the sensibilities of the person or persons who are affected by the expression. Certainly, McGrath and Anderson JJ introduce the word "enjoyment" but, again, the enjoyment relates to the use of the public place.[10] However phrased, *Morse* requires an impact on public order external to the impact on the sensibilities of the person or persons affected. For convenience, I will not repeat the different formulations of the test. It will suffice to utilise the phrases "a disruption or disturbance to public order" or "the external factor".

[8] It can be anticipated that, with the passage of time, the interpretation of the external factor will be strained to accommodate cases where, on the facts, the defendant should clearly be subject to a criminal sanction. The law generally eschews absurdities. Should interference with the use of a public place eventually be watered down to embrace the notion that behaviour interferes with the use of a public place if the sensibilities of the person or persons affected are so wounded that they cannot enjoy its use, the basic premise of the Court that "public order" requires a disruption or disturbance will be undermined. The courts will have effectively reverted to the formula which the Court in *Morse* has rejected.[11]

[9] The fact I am myself strongly opposed to the wars in Iraq and Afghanistan and this country's involvement in them, although limited, is irrelevant. My opposition to those wars forms no part of the value judgement I bring to this case. My value judgement was probably revealed in the course of a friendly exchange with Mr Smart QC, who appeared on behalf of all three appellants. Whenever referring to *Morse*, Mr Smart was prone to declaim that the right to freedom of expression included the right to offend and that the servicemen and women who had sacrificed their lives in two World Wars had died in defence of that freedom. Mr Smart's rhetoric illustrates what happens when the right acquires an abstract force divorced from the value underlying the right as exercised in the circumstances of a particular case. I accept that protests may occur on Anzac Day as, indeed, they have in the past, and that they may be staged in proximity to Anzac services, including the Dawn Service. I also accept that there are situations and locations where the burning of the national flag is a valid form of protest even though there will always be those who will find it offensive, and I accept that the right to freedom of expression includes the "right" to offend. What I do not accept, and emphatically do not accept, is that the right includes the "right" to offend without responsibility or restraint.

[10] I appreciate, too, that an Anzac Dawn service may be seen by activists as a fitting occasion on which to stage a protest. The occasion can and has been used to protest against militarism and the glorification of war, against contemporary wars, such as the Vietnam War, against the rape and violence to which women are subjected in war, and to draw attention to other causes generally

8 E.g., at [3], [66], [71], [110], [117] and [127].

9 At [2], per the Chief Justice.

10 McGrath J at [101] and Anderson J at [127].

11 It can also be anticipated that commentators committed to an expansive view of the right to freedom of expression will defend *Morse* on the same ground. See below, at paragraph [42].

associated with the military. Nor will the attendance of large numbers of children at the service, as is commonly the case today, necessarily deter protestors. They may well take the view that a culture benign to militarism and war is being inculcated in the children. The validity of these perceptions, of course, is not in issue in these appeals. The point is that, if the right to free expression embraces the ability to be offensive, the line has to be drawn somewhere other than at the maintenance of "public order". Otherwise, the offensiveness will at times assume the proportions of a social ill. The right to freedom of expression, no less than any other right, must be exercised with responsibility and restraint.

[11] I also fully appreciate the frustration of protestors in attempting to obtain a full and fair report of their cause in the media. A well-constructed argument against New Zealand's participation in the wars in Iraq and Afghanistan, for example, is unlikely to get any space or time, or any adequate space or time, in the media. It is only when a protest is accompanied by a gimmick or irregular conduct that it will attract attention, and then only as a short explanation for the more reportable gimmick or irregular conduct. While I have some sympathy for the efforts of protestors to obtain a platform for their cause, neither the inadequate media response nor the resulting frustration can justify behaviour which is grossly offensive and an affront to the reasonable sensitivities and innate dignity of one's fellow citizens. Offensiveness unaccompanied by a disruption or disturbance cannot be elevated to an absolute right; the line must be drawn somewhere.

[12] I turn now to consider the individual appeals.

Bonkers v The Police

[13] Mr Bonkers, it is fair to say, has it in for the Catholic Church. It appears that some years ago, when he was a trainee-priest, Mr Bonkers was ex-communicated from the Church and has harboured a grudge ever since. His grievance appeared to centre on what he frequently described as the hypocrisy of the Church, and that claim in turn seemed to be directed at his perception that others in the Church had not been excommunicated when their "sin" had been every bit as bad as the sexual deviation which had led to his own excommunication. It is clear that Wiseman DCJ considered Mr Bonker's grievance personal and somewhat eccentric.

[14] Every weekday at a certain time a group of 30 to 40 nuns walk down the path, which the Judge, being a non-Wellingtonian, described as a "goat track", from the Nunnery where they reside on to the footpath leading to the Church where they take mass. They are a joyous throng given to much innocent chatter and laughter. Mr Bonkers staged his protest on the footpath on the opposite side of the street. Being otherwise unemployed, he repeated his protest several times a week. Mr Bonkers carries a large wooden representation of the Virgin Mary ensconced in a plastic swathe obviously intended to depict a condom. He did not pretend that this representation possessed any artistic merit whatsoever and, having inspected a photograph of it, I can confirm that not even an enthusiastic art connoisseur would be minded to describe it as a piece of modern art.[12]

[15] Wiseman DCJ held that the nuns found the representation highly offensive. Some were deeply shocked. All were visibly distressed. They regarded the representation as an affront to their

12 No question of artistic merit arises as in *Dr Glynn Thomas v Television New Zealand* [1998] NZBC 54 (28 May 1998). Nor is there any question of the exercise of the right to religion as in *Browne v Canwest TVWorks Ltd* CIV 2006 485 1611 (31 July 2007).

devout religious sensitivities. The Judge agreed and held that Mr Bonkers' protest represented a gratuitous and insensitive insult to the nuns and their deeply and sincerely held beliefs. They could, he observed, be considered the innocent victims of Mr Bonkers' grievance. Thus, Wiseman DCJ concluded that Mr Bonkers' behaviour was offensive under s 4(1)(a), and he duly convicted him and fined him $200.

[16] All too often during the course of argument Mr Smart referred to the word "offensive" as if it included any behaviour that might give offence to any person or persons. By adopting an apparently low threshold for the term, "offensive", Mr Smart sought to attenuate the need for s 4(1)(a) to be given a restricted interpretation in order to protect the right to freedom of expression, but I am alert to the tricks of the advocate. The word "offensive" has never been interpreted by the courts in that fashion. The threshold for offensive behaviour has always been a demanding threshold, as indicated by Blanchard J in *Brooker*[13] and now the majority in *Morse*,[14] requiring the capability of wounding feelings or arousing real anger, resentment, disgust, or outrage in the minds of a reasonable person. The importance of the right to freedom of expression is recognised in this restricted definition.

[17] Mr Smart conceded that Mr Bonkers' behaviour was "offensive" as that term has been judicially defined, but submitted that Wiseman DCJ was in error in that there was no possibility of a disruption or disturbance to "public order". He pointed out that, far from approaching a disruption or disturbance, the nuns' response had been to scurry silently past with their heads bowed or cowed. One nun could be heard to weep.

[18] I also consider that Mr Bonkers' behaviour was highly offensive. I believe that it deserves to attract the opprobrium of the criminal law, albeit at the lower end of the scale of offending. While constrained by the Supreme Court's decision in *Morse*, however, I must agree with Mr Smart that the facts do not suggest that "public order", as construed by the Court, was remotely in peril of a disruption or disturbance. Indeed, I cannot think of any other group who would be less likely to cause a breach of "public order". Nor, while the content of the message Mr Bonkers conveyed was an affront to their sensitivities, did his activity interfere with their use of the footpath as pedestrians.

[19] I note that my discussion is in line with the decision of my colleague, Bonatti J, in this Court only last month. In that case a group of six to nine persons gathered outside a school to protest at the refusal of the teachers to teach creationism. They wore white robes and white pointed hoods with slits as eyeholes and presented a fearsome appearance. They carried placards indicating that the teachers and all who resisted their cause were doomed to eternal damnation. They burned a large wooden cross. The evidence indicated that the children were "terrified", "distressed", "spooked", and "agitated" at the sight of the flaming cross. The protestors were charged with behaving in an offensive manner. They were duly convicted of that offense in the District Court. Bonatti J allowed the appeal on the basis that the children were highly unlikely to cause any disruption or disturbance and, even if they did cause a disruption or disturbance, it would be in the school grounds and not in a public place. In a carefully crafted judgment he observed that, if a protestor proposes to be offensive, it would be prudent for him or her to bear the Supreme

13 *Brooker v The Police* [2007] NZSC 30 at [55].

14 At [64], per Blanchard J; n 99, per Tipping J; and [103] and [115], per McGrath J.

Court's judgment in *Morse* in mind and be offensive to children, the police, or persons of a pacifist, non-violent or non-aggressive persuasion, which he listed at some length. The learned judge did not include nuns in the list, but I assume that was an oversight.

[20] In similar vein, Bonatti J also observed that it would be prudent for a protester proposing to be offensive in a public place to be offensive to persons who were in an adjacent private property, although still within sight or hearing of that public place. The offensiveness could be gross in the extreme, but there would be no risk of a disruption or disturbance to "public order". Any disruption or disturbance, however intense, would take place in private.

[21] Mr Earnest QC, who appeared for the police, submitted, I thought faintly, that the Court's decision in *Morse* could be restricted to behaviour involving the burning of the national flag. The submission is untenable. A disruption or disturbance is required irrespective of the nature of the allegedly offensive expression. Consequently, the protestors across the road from the Anzac service in *Morse* could have burned an effigy of a New Zealand World War II soldier, or they could have dressed in Nazi uniforms and, with raised arms, shouted "Sieg Heil", and no offence would have been committed in the absence of the external factor. Nor would it have mattered if their cause had been despicable; for example, if the protest had been directed at proclaiming that God had the soldiers killed as punishment for society's tolerant attitude to homosexuality.[15]

[22] Mr Earnest also urged me to have regard to the nature of Mr Bonkers' exercise of the right to freedom of expression. It was, he said, an eccentric personal grievance and the value to be attached to it could not be equated with the value to be attached to a public protest against, say, the wars in Iraq or Afghanistan or any of the other unwinnable military ventures the West is prone to undertake. The Supreme Court has pointed out, however, that it is not prepared to enter upon the merits of a protest.[16] I consider that it is quite possible to give a weighting to a protest without judging the merits of the cause or grievance in issue. It is unrealistic not to make such an evaluation when balancing the particular exercise of the right to freedom of expression against the particular rights, values or interests of those persons who are adversely affected by the expression. A protest by an individual expressing a personal grievance, for example, is unlikely to warrant the same weighting as a public protest objecting to an issue of national importance.

[23] This point necessarily becomes moot, however, because the question whether a defendant's behaviour is in breach of s 4(1)(a) will ultimately turn on whether the expression causes or tends to cause a disruption or disturbance to "public order". That disruption or disturbance will not necessarily correspond with the nature of the protest or the value to be attributed to the exercise of the right to freedom of expression in the circumstances. In other words, the "public order" requirement applies equally to the personal grievance and public protest alike - and to every form of protest in between.

[24] The arbitrariness of the Court's decision in *Morse* is apparent from the anecdotal information Mr Earnest was pleased to provide me from the bar. It appears that an apparently respectable retired judge has participated in some eight or more protests both before and after his tenure on the Bench. Fortuitously, it seems, the world suspended protestable events while he was sitting as a Judge. This ostensible pillar of the establishment has now made it publicly known that, if the

15 Lest it be thought that such a factual situation is farfetched, see paragraph [66] below.

16 See e.g., *Brooker v The Police* above n 13, at [22]; [2007] 3 NZLR 91, at [103]-[104].

organisers of a protest which he chooses to join propose to behave in an offensive manner, he is determined to confront his fellow protestors and cause an altercation that will most certainly disrupt and disturb "public order". It seems unduly arbitrary that behaviour which would not be a breach of s 4(1)(a) because of the absence of any disruption or disturbance to "public order" immediately becomes a criminal offence under that subsection if, and as soon as, this worthy judicial pensioner joins the protest!

[25] Nevertheless, I am mindful of the serious point Mr Earnest was making. It only takes one person to cause a disruption or disturbance to "public order" and it is entirely fortuitous whether such a person is present at the scene of the offensive behaviour. Furthermore, the arbitrariness extends beyond the disposition of any particular person. The reaction of any group of people cannot be predicted. Ms Morse may well have caused a disruption or disturbance if members of the Mongrel Mob had been present and taken the view that her burning of the flag was an insufferable profanity.

[26] Finally, Mr Earnest argued that making the determinative factor the impact on "public order" would expose vulnerable individuals and sectors of the community to odious ethnic, racist, sexist, homophobic, xenophobic, anti-Christian, anti-Semitic, and anti-Islamic taunts providing no disruption or disturbance to "public order" results. I agree that it is difficult to see how vulnerable persons would be protected when the vulnerable receive no different or greater protection than members of the public generally so long as the requirement of a disruption or disturbance remains. I also note with approval his observation that it is incongruous that, as a result of the Court's expansive conception of the right to freedom of expression, individuals and minorities whose fundamental human rights the Bill of Rights seeks to protect could become the potential victims of irresponsible and unrestrained taunts exercised pursuant to that right. While I agree with Mr Earnest that nuns can be regarded as vulnerable, I cannot see my way clear to vary the requirement that the behaviour must cause a disruption or disturbance.

Righteous v The Police

[27] Mr Righteous was also convicted by Wiseman DCJ of behaving in an offensive manner. Mr Righteous is rabidly opposed to abortion. His sincerity is not in question. Mr Righteous, along with a small band of fellow anti-abortion proponents, positioned himself on private property adjacent to the public approach to an abortion clinic. He carried a placard bearing a large coloured depiction of a foetus. A large jagged knife penetrates the foetus. Blood drips from the wound. One word in large, bold type is scrawled across the bottom; it is "MURDERER". The placard is held up so that it is clearly visible to the young women approaching or leaving the clinic. At the same time Mr Righteous and his supporters shout "murderer, murderer, murderer" at any young women approaching or leaving the clinic. The young women's exposure to the placard and shouts of "murderer" are much more than fleeting.

[28] The impact on the young women was extreme. They were clearly distressed. Wiseman DCJ reported that a young woman, having had an abortion, later committed suicide. Immersed in a bath she slashed her wrists and died from loss of blood. Her counsellor and an independent psychiatrist both testified at trial that in all probability her suicide was caused by the trauma of Mr Righteous's protest and not the abortion itself. Already in a delicate emotional state facing an abortion, the placard and repeated shouts of "murderer" had led her to become deeply depressed.

[29] Mr Righteous was charged with behaving in a disorderly manner or, in the alternative, behaving in an offensive manner. On the basis of the Chief Justice's observation in *Morse* that these two offences are two sides of the same coin,[17] Wiseman DCJ dismissed the disorderly conduct charge and convicted Mr Righteous of behaving in an offensive manner.

[30] Mr Smart again submitted that there was no disruption or disturbance or even the possibility of a disruption or disturbance as required by the Court in *Morse*. As he put it, the young women approaching the clinic were too preoccupied by their pending abortion and those departing too distracted to respond in a manner that would threaten a disruption or disturbance. Their use of the public approach or access to the clinic was not impeded.

[31] I pause to touch upon Mr Smart's repeated assertion made in the context of this appeal that an expansive view of the right to freedom of expression is necessary to achieve what he called a "vibrant" society. No one would dispute that differences and diversity are desirable attributes of a free and democratic society. Unchecked, however, vibrancy can shade into social anarchy. At some point the line must be drawn in the interests of social harmony and cohesion. Drawing the line to proscribe language and behaviour which is grossly offensive leaves ample scope for a community to be "vibrant". Or, to make the point the other way around, if it is necessary for the law to condone grossly offensive language and behaviour, such as the devastating behaviour to the young women visiting the clinic in this appeal, it may be healthier and better all round for society to be a little less "vibrant". As has been said, in order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalisation on innocent victims.[18]

[32] Mr Earnest invited me to distinguish the present case from *Morse* on the facts and apply the dicta of Blanchard J in *Brooker*. In that case Blanchard J opined that offensive behaviour is behaviour "which is liable to cause substantial offence to persons who are potentially exposed to it". The behaviour must be capable of "wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind actually subjected to it in the circumstances in which it occurs."[19] No mention was made of the need to cause a disturbance and, indeed, the reference to the reasonable person as the arbiter of the offence would seem to preclude that caveat. In *Morse*, however, Blanchard J expressly resiled from his statement in *Brooker*, although the magnanimity of his *mea culpa* is somewhat obscured by his claim that he did not say what he appears to have said or, if he did say what he appears to have said, he was misunderstood. Notwithstanding that the learned Judge's formula was adopted and applied in the District Court, the High Court and the Court of Appeal in *Morse's* case, I am bound to apply the latest formulation of the test to be applied.

[33] Mr Ernest also argued that I could have regard to the young woman's suicide as a devastating after effect of Mr Righteous' protest. I cannot do so. The suicide was undertaken in the privacy of the young woman's home and cannot be said to have been disruptive of "public order". Although it must be accepted that this sad outcome was almost certainly caused by the brutal offensiveness to which she was subjected, the decision in *Morse* is binding on me. As harsh as it may seem, the young woman's suicide is to be disregarded.

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17 At [2].

18 *Synder v Phelps* (2011) 179 L Ed 2d 172, per Justice Alito at 195.

19 *Brooker* above n 13, at [55] and [114].

[34] Finally, Mr Earnest sought to take advantage of an anomaly. It was, he said, the sort of point that would appeal to a logical mind. Mr Earnest pointed out that behaviour which was offensive, but barely so, could cause a disruption or disturbance and be a breach of s 4(1)(a) whereas behaviour that was grossly offensive might not cause a disruption or disturbance and would not, therefore, be an offence under the subsection. In other words the determinative factor becomes the disruption or disturbance and not the intensity or level of the offensive behaviour. I must acknowledge that this submission is sound. Suddenly, the criminality contemplated by the subsection lies, not in the offensiveness of the defendant's behaviour, but in the likely public consequences of that behaviour whatever the degree of offensiveness involved.

[35] I agree with Mr Earnest that this point is one which will appeal to a logical mind. The point, however, has greater significance than that. It means that a person who has been less offensive and caused a disruption or disturbance will be convicted of a criminal offence whereas a person who has been more, and grossly, offensive but not caused a disruption or disturbance will not. What then has happened to the fundamental principle of justice that like should be treated alike?

Biggottson v The Police

[36] Mr Biggottson was convicted by Wiseman DCJ of behaving in an offensive manner as a result of a protest he staged on the marae atea (the open space in front of the meeting house) of the Treaty Grounds at Waitangi. It is accepted that the marae atea is a publicly owned area open to the public. Mr Biggottson and his cohorts staged their protest in this area during the Dawn Service on Waitangi Day. The purpose of the protest was to protest against "Māori privilege". Standing on a platform, Mr Biggottson tore up a number of copies of the Treaty of Waitangi and then proceeded to wrap fish and chips in the shredded paper. Fellow protestors chanted "one law for all" and carried placards to the same effect.

[37] In his judgment, Wiseman DCJ recounts the experts' evidence directed at the applicable tapu. There can be no doubt that Mr Biggottson's actions in wrapping fish and chips in the torn shreds of the Treaty of Waitangi was truly offensive to Māori. His protest was culturally insensitive to a degree that most people would regard as totally unacceptable in a bicultural society. The Judge observed that Mr Biggottson intended to be offensive.

[38] Yet again, however, there is no evidence that Mr Biggottson's actions caused a disruption or disturbance. Māori in the marae were appalled, angry, resentful, disgusted and outraged but were minded to continue with the service. It appears that it might have been otherwise if the protest had taken place on the marae where a confrontation would have been inevitable, but Mr Biggottson and his fellow protestors remained on the marae atea and did not inhibit access to the marae itself.

[39] In seeking to support the conviction, Mr Earnest contended that this case introduced a factor that was not present in *Morse* or in the other appeals before me. This factor, he submitted, was the cultural dimension. In a country committed to racial harmony it is important to recognise the cultural differences between this country's two peoples and to avoid gratuitously offending the indigenous people's sensitivity and pride in their culture. To allow the appeal, Mr Earnest concluded, would be to permit behaviour which would be divisive and which would damage race relations in this shared land.

[40] I regret that I am unable to find anything in *Morse* that would permit me to accept this submission. The damage to race relations cannot be avoided in the absence of a disruption or disturbance to "public order".

[41] Nor can I accept Mr Earnest's submission that *Morse* can be distinguished on the basis that the appellants in all three appeals had a "captive" audience. Counsel's submission was based on the American jurisprudence touched upon by Arnold J in the Court of Appeal[20] and Thomas J in respect of privacy in the home in *Brooker*.[21] I am sympathetic to the point. It is relevant to any balancing exercise that the right to freedom of expression is being exercised in circumstances where the person or persons affected cannot ignore or avoid the behaviour. I cannot, however, distinguish *Morse* on this ground. Just as the nuns, the women attending the abortion clinic, and Māori at the Waitangi Day Service could not ignore or avoid the behaviour of the respective appellants so, too, there was nothing those attending the Anzac Dawn Service could reasonably have done to avoid seeing Ms Morse burning the flag in the early morning darkness accompanied, as she was, by the din of the horns. The men, women and children at the service were also effectively "trapped".

[42] Mr Earnest advanced a further argument in relation to all three appeals which I have foreshadowed in paragraphs [7] and [8] above. He focused on the theme running through the judgments in *Morse* that a disruption or disturbance will inhibit or interfere with the use of a public place and submitted that the use of the footpath by the nuns, the use of the approach to the clinic by the young women, and the use of the marae atea by the protestors had been inhibited or interfered with in each case. As convenient as it would be to accept this argument, it is not possible for me to do so. In essence, Mr Earnest seeks to merge the impact of the behaviour on the sensibilities of the persons in attendance and their consequential loss of enjoyment with the prospect of a disruption or disturbance resulting from that impact. Certainly, in some cases the intensity or level of the offensiveness will make it more likely that a disruption or disturbance will occur, but in other cases, as Mr Earnest earlier submitted,[22] there will be no nexus between the intensity or level of the offensiveness and the affected persons' use of the public place. Mr Earnest's attempt to bring the impact on the sensibilities of the persons who are affected back into the Court's formulation through the back door must fail.

[43] I would also note that Mr Earnest quickly conceded in argument that this submission could not apply to Mr Biggotson's appeal. Māori were not using the marae atea and their access to the marae was not impeded. Nor did Mr Earnest have an answer to the proposition that his argument could not apply in the appeals of Mr Bonkers and Mr Righteous, respectively, if the nuns had been walking on a private path from the nunnery to the Church or the young women had approached or left the clinic on a private pathway, but within sight and hearing of the protestors. No question could then arise that their use of a public place had been inhibited or interfered with.

[44] Finally, both counsel urged me to clarify, by which they implicitly meant modify, the Court's test so as to make it easier for the constable on the beat to apply. At the time I was not particularly sympathetic to this submission as under the previous law a constable already had to

20 *Morse v R* [2010] 2 NZLR 625 at [35].

21 At [260]-[265].

22 See above, paragraphs [34] and [35].

decide whether the reasonable person, or the reasonable person as perceived by the court, would consider the behaviour in issue offensive before making an arrest. On reflection, however, I consider that counsel's submission has considerable merit. Pursuant to the majority's judgments the constable must still seek to determine whether the behaviour is offensive as defined by the Court having regard to the standard of the reasonable person. Following *Morse*, however, he or she must carry out that exercise in the context of the Court's expansive view of the right to freedom of expression. Incongruously for the constable, if he or she has decided that the behaviour is offensive, the constable must then go on to ascertain whether there has been, or is likely to be, a disruption or disturbance to "public order". In deciding that issue he or she must determine which of the five formulations of a disruption or disturbance articulated by the Court they will adopt. They must also try and assess whether the disruption or disturbance falls short of violence or the likelihood of violence (which would be covered by s 3 of the same Act). At the same time the constable must be careful to distinguish between interference with the enjoyment of the persons who are affected by the impact of the offensive behaviour on their sensibilities and the interference with their enjoyment of the use of the public place for the purpose for which it is being used. Finally, if the right to freedom of expression is not engaged on the facts, the constable is likely to be left in a quandary as to how to apply the Court's formula at all.

Brooker becomes a petard

[45] Unless the Court had been prepared to review the majority's decision in *Brooker*, its decision in *Morse* was inevitable. Having held that, to be disorderly for the purposes of s 4(1)(a), the behaviour in issue must disrupt or disturb "public order", the Court could hardly hold that the same requirement or gloss did not apply to offensive behaviour. The Court's reasoning flowed from the heading to the Part of the Act containing s 4(1) reading; "Offences Against Public Order". The offences of behaving in a disorderly manner and behaving in an offensive manner are then coupled together in the same paragraph of s 4(1) under the more specific heading; "Offensive behaviour or language". How could the requirement of a disruption or disturbance to "public order" apply to one and not the other given the Court's insistence that the subsection was directed at the maintenance of "public order"? What may have seemed like a bright idea at the time turned out not to be so bright when the Court was confronted with the charge in *Morse*.

[46] This point can be reinforced by referring to the acknowledgement by the Court that at times the offences of disorderly behaviour and offensive behaviour can and do overlap.[23] If, therefore, disruption or disturbance to "public order" was not made applicable to both forms of behaviour, the situation could exist where a defendant would be not guilty of disorderly behaviour but guilty of offensive behaviour at the same time on the same overlapping facts. Of course, generally speaking, facts may overlap and lead to an acquittal on one charge and a conviction on another. This case is different. The offences are coupled or linked together under the heading "Offences Against Public Order" and it is that heading which is the basis for the Court's requirement of a disruption or disturbance. Where the facts overlap, therefore, it would be an unacceptable anomaly to impose that requirement in the one case but not the other. In truth, the die was cast in *Brooker*.

[47] The fit, however, is no longer comfortable. While it may at a stretch be plausible to argue that disorderly behaviour is not disorderly unless it disrupts "public order", it is not credible to

23 At [16] per Elias CJ.

argue that offensive behaviour is not offensive unless it causes a disturbance to "public order".[24] Indeed, with the exception of the Chief Justice, the members of the Court hold that the behaviour in issue must meet the test of being "offensive". The problem is that there is no necessary nexus between the intensity or level of the offensiveness of the behaviour and the tendency for it to cause a disruption or disturbance.[25]

(1) The Chief Justice's judgment

[48] The reasoning of the Chief Justice and the other members of the Court diverge significantly. To the Chief Justice the critical question is whether the alleged offensive behaviour causes or tends to provoke a disruption to "public order". Other than acting as a stimulus to disorder, the offensiveness of the behaviour counts for naught. Just as in *Brooker* the right or value of Constable Croft to the privacy and seclusion of her home was irrelevant so, too, the rights, values and interests of those who gathered at the Cenotaph at dawn on Anzac Day in 2007 become irrelevant, short, that is, of a person's interest in being free from disorder in public places. Whether or not behaviour is disruptive of "public order" is to be a matter of judgment on the facts which, in the Chief Justice's view, does not usually give rise to a question of law at all.[26] The courts are to eschew balancing freedom of speech and the rights, values and interests of others present as the legislature, in enacting s 4(1)(a), has "struck the balance at preservation of public order".[27]

[49] I hold firmly to the view that the question whether or not the defendant's expression is protected by the right to freedom of expression can be only validly determined by weighing the value of the exercise of that right against the rights, values and interests of those affected by it in the circumstances of a particular case. Consequently, I cannot regard with equanimity the Chief Justice's rejection of a balancing exercise in determining the bounds of the right to freedom of expression in the circumstances in which the right is exercised. Having regard to the legislative history of the section, the manner in which it has been interpreted by the courts in the past and implicitly sanctioned by the legislature, and the terms adopted in defining the other offences in s 4(1),[28] the claim that the legislature actually intended to strike the balance in the myriad of specific factual circumstances to which the subsection could apply runs the risk of seriously agitating those of a realistic persuasion. Such an approach seemingly denies the common law tradition encapsulated by Oliver Wendell Holmes' well-known adage that "[W]here to draw the line… is the question in pretty much everything worth arguing in the law".[29]

[50] To support her approach, the Chief Justice argues that the interpretation of a criminal offence should conform to the principle that the criminal law must be certain and must be capable of ascertainment in advance.[30] Of course, it is desirable, if not essential, that this principle be observed. The more critical question, however, is what degree of precision is acceptable or possible. Of necessity, the criminal law has had to recognise that offences cannot always be defined

24 For a penetrating argument that disorderly and offensive behaviour are conceptually different, see Bree Huntley "A Study of Offensive Expression" (LLB (Hons) Seminar Paper, University of Auckland, 2009).

25 See above, paragraphs [34] and [35].

26 At [40].

27 At [3].

28 See below paragraphs [79] and [80].

29 *Irwin v Gavit* 268 US 161 at 168 (1925).

30 At [12] and [13].

with perfect precision. Resort is at times had, for example, to the objective test of the reasonable person. Thus, the killing of another person in self-defence will not be murder if the force used was reasonable in the circumstances. The law must seek to be realistic, and that means accepting that the objective test provided by reference to the reasonable person provides offences of the kind in question with the requisite degree of certainty.[31]

[51] I reiterate that I accept evaluative concepts, such as reasonableness, should be replaced by more concrete definitions of what is illegal wherever that is possible. What I wish to emphasise, however, is that it is at times not possible to be more precise. As A P Simester and W J Brookbanks state in their seminal book, *Principles of Criminal Law*,[32] this principle should not be overstated. Words such as "reasonable" are not meaningless and may provide a sufficient level of guidance when used in offending at the lower end of the scale. Sometimes, the authors acknowledge, a certain level of imprecision cannot be avoided. "Realism" is required when deciding what degree of certainty is attainable.[33]

[52] Moreover, evaluative terms such as "offensive" provide the means by which, over the passage of time, the changing values of the community can be assimilated into a statutory provision. Current community standards are injected into the law. Thus, in this case, what the reasonable person may have considered offensive in 1907 may not be considered offensive by the reasonable person in 2007, or vice versa. The Court's decision in *Morse* eliminates this inbuilt adaptability.

[53] More often than not, the telling response to those who urge an unrealistic approach to the use of evaluative terms is to ask them to proffer a more concrete definition. The difficulty, undoubtedly well known to statutory draftspersons, is at once manifest. Would it, for example, have advanced the matter if the draftsperson had defined offensive behaviour as behaviour that has the capability of wounding feelings or arousing real anger, resentment, disgust, or outrage? The definition would still have required the courts to determine what behaviour is capable of wounding feelings or arousing real anger, resentment, disgust or outrage. For that purpose it is virtually certain that the courts would have resorted to the reasonable person to provide a workable and objective standard by which to determine the level of offensiveness impermissible under the statute.

[54] Nor is it clear whether the Chief Justice is aware that, in eschewing the balancing exercise and casting out the previous law as to what is or is not offensive, she is exchanging the relative certainty of the objective test provided by the reasonable person for the greater uncertainty of the unknown and unpredictable reaction of the person or persons affected by the offensive expression. Further, as the Chief Justice holds that the reaction of those in attendance must be proportionate[34]

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31 It would seem that Parliament is more realistic in recognising that the greatest degree of precision which is acceptable or possible can turn on the criteria of reasonableness; see e.g., Crimes Act 1961, ss 52(1), 53, 55, 56(1), 59(1), 60(1) and (2), 61, 61A(1), 76(b), 86(1), 91(1), 98AA(2), 124(4)(a), 125(2), 128((2) and (3), 131B(2), 134A(1)(a), 155, 156, 150A(2), 187A(2), 202A(4), 216I(2), 216N(4), 230, 233(2), 237(2), 298A(1), 298B, 307A(1), 314D(1), 317AB(1), and 317B(7). Further, of course, the sensitive police powers of search, seizure, entry and arrest regularly turn on what is considered reasonable; see e.g., New Zealand Bill of Rights Act 1990, s 21, and Crimes Act, ss 202B(1) 224(1), 225, 312B(2)(a), 316(4) and (6), 317A(1), 317AA(1)(b) and (c), and 317B(1). Neither of these lists is exhaustive.

32 A P Simester and W J Brookbanks *Principles of Criminal Law* (3rd ed, Brookers, Wellington, 2007) at 28-29.

33 Ibid, at [28].

34 At [40].

it is, and will be, uncertain whether the reaction is, or will be, proportionate and uncertain as to the point when a response which is proportionate becomes disproportionate.

[55] In essence, the Chief Justice reduces offensive behaviour to conduct productive of disorder.[35] On this view, "disorderly" behaviour is behaviour which disrupts or tends to disrupt "public order" and "offensive" behaviour is behaviour which tends to provoke such disruption.[36] Although the Chief Justice purports to be closing the gap between disorderly and offensive behaviour, the view she adopts contains a startling break. It does not provide a threshold or test for the kind or degree of behaviour that may provoke a disruption. Thus, a person's behaviour may provoke a disruption even though there is nothing about that behaviour which is either disorderly or offensive. Largely untoward behaviour may still provoke a disruption. Moreover, the reaction of the person or persons affected may be unreasonable or disproportionate. Consequently, a hapless defendant whose behaviour may have provoked a disruption (or to have actually caused a disruption) will not be exonerated by a valid claim that the behaviour was neither "offensive" nor "disorderly".

[56] This point can be taken further. As it cannot be assumed that all behaviour that is productive of disruption should be classified as "offensive", acceptable behaviour which should be protected under the banner of the right to freedom of expression may be inhibited simply because it is or may tend to be productive of disorder. This shortcoming could possibly be rectified by introducing the standards of the reasonable person to determine whether the behaviour was productive of disruption, but the Chief Justice expressly rejects the attentions of this perdurable mortal.[37]

(2) The majority's judgments

[57] The overall approach of the majority is less rigid or definitional, but the reasoning is also unsound. The majority take the view that, in the first place, the behaviour must be offensive in the sense of being "capable of wounding feelings or arousing real anger, resentment, disgust or outrage in the mind of a reasonable person of the kind subjected to the behaviour".[38] The balancing exercise between the freedom of expression and the value of the rights, values and interests affected is undertaken in determining what is or is not tolerable in a free and democratic society. The underlying notion is that the community, in recognition of the importance of the right to freedom of expression, can be expected to tolerate offensive behaviour up to the point where it causes a disturbance to "public order". As to be expected, if the behaviour is not offensive in the terms quoted above, no offence is committed, even though "public order" may have been disturbed. If, however, the test is met so that the behaviour is offensive it will not amount to an offence unless it also results in a disturbance to "public order". It may be behaviour which no reasonable person respectful of democratic values could be reasonably expected to tolerate,[39] but tolerate it he or she must in the absence of a disturbance to "public order". What then has happened to the definition of "offensive" behaviour and the consequential balancing exercise? Any finding that the behaviour was offensive has been lost or overwhelmed by the question of "public order". As a matter of

35 At [2], [7], [33], [34], [36] and [39].

36 At [36].

37 It may also be noted, as pointed out by Tipping J, that the Chief Justice's view results in the word "offensive" having a materially different meaning from the words "offend" and "offended" in the same section. At [69].

38 See above, paragraph [16].

39 In *Morse* at [72] per Tipping J and [103] per McGrath J, and in *Brooker* at [89] per Tipping J, and [120] and [146] per McGrath J.

fact public order is either disturbed or it is not. A finding, or the inquiry preceding the finding, that the conduct in issue is offensive as judicially defined is pointless when the outcome is that it does not matter if there is no public disturbance.

[58] My Associate spotted a further flaw in the majority's reasoning. For behaviour to be disorderly it must cause a disturbance to "public order". Once that disturbance is established the alleged behaviour is disorderly. For conduct to be offensive it must also cause a disturbance to "public order", but if and when it does so it becomes disorderly behaviour. Thus, my Associate trumpeted, the Court had effectively deleted the offence of offensive behaviour from the statute book. I pointed out to my Associate that her argument assumed that any behaviour which caused a disturbance to "public order" in the sense conceived by the Court amounted to disorderly behaviour, but was forced to agree that this was not an unreasonable assumption. I have suggested to my Associate that she enroll for a law degree.

[59] I would, however, prefer a different formulation. In adhering to the "public order" test laid down in *Brooker*, the Court has conflated the two offences in s 4(1)(a) and created a mutation: the offence of behaving in a manner that causes a disruption or disturbance to public order. The Chief Justice and the majority arrive at this position by different routes, but the outcome is the same in both cases. The essential balancing exercise that would determine whether or not the offensive behaviour in issue is protected by the right to freedom of expression is eschewed altogether in the one case and, although undertaken in the other, is then rendered otiose.[40] In the process, s 5 of the Bill of Rights is seemingly ignored in the one case and denied an effective application in the other.

[60] As judges and lawyers we are fond of reiterating that no rights are absolute. That is a truism. It is impossible to say, however, that the right to freedom of expression is not absolute and at the same time refuse to acknowledge that the line must be drawn somewhere. The courts can only assess where that line should be drawn by carrying out an evaluation of the value underlying the right in the circumstances of the particular case and the rights, values or interests of those affected by the exercise of the right. The problem cannot be resolved by adopting a rigid or definitional approach or by carrying out the balancing exercise and then adding as a caveat a factual absolute.

(3) Behaviour not involving the right to freedom of expression

[61] A real problem with the Court's interpretation becomes transparent when it is extended to offensive (or disorderly) behaviour which does not form part of a protest to which the right to freedom of expression naturally lends itself. Many cases have arisen, and will yet arise, in respect of behaviour that is allegedly offensive where the right to freedom of expression is not invoked or seriously in issue. Such cases may not make the law reports but they form the bulk of the cases under s 4(1)(a) which fall for determination in the District Court. Yet, the Court's interpretation in *Morse* must be applied to these cases simply because the Court has built the requirement that the behaviour must cause a disruption or disturbance to "public order" into the interpretation of the subsection. Thus, the outcome would be exactly the same if, say, in *Bonkers* case, Mr Bonker's crusade had been the promotion of devil worship, which it is to be hoped, would be regarded as devoid of any "political" content.

40 Although, of course, under the majority's formulation the defendant does have the opportunity of arguing that the behaviour was not "offensive" even though it created a disturbance.

[62] The point can be illustrated further by referring to circumstances based on the reported facts of a charge proceeding to sentencing in the Crown Court at Newcastle in the United Kingdom at the present time. An armed gunman shot an unarmed constable in the eyes, blinding him. When the constable was entering court to give evidence against the offender's accomplices at a later date, a young woman shouted "bang, bang" behind his back (and made a gesture with her fingers as if firing a gun). The constable was deeply upset. He said that he had suffered "great distress" and "felt sick to his stomach". The young woman pleaded guilty to the public order offence of causing the constable harassment and distress.

[63] While on facts such as these it is difficult to argue that the right to freedom of expression was involved or seriously in issue, particularly as the young woman was found to be showing off to a group of her friends, the Court's insistence in *Morse* that, as a matter of interpretation, the behaviour must cause a disruption or disturbance remains extant. While the point applies with deadly force to the approach of the Chief Justice in so far as any balancing exercise is ousted in its entirety, it also applies to the approach of the majority. The majority could find on such facts that no question of the right to freedom of expression arises, but that finding would be of no consequence unless there was also a disturbance to public order.

[64] It is not clear that the Court paused to consider this point. Yet, it is a critical consideration. In 2010, for example, there were 13,537 apprehensions recorded for disorderly and offensive behaviour.[41] It may be safely assumed that only a small fraction of that number related to behaviour where the offender could plausibly claim to have been exercising his or her right to freedom of expression. The Court's interpretation in *Morse* must be applied, however, even though the behaviour arises out of nothing more than mischievousness, drunkenness, stupidity, excess of high spirits, a desire to make trouble, a nasty bent to be offensive, or any other unworthy motivation divorced from the right to freedom of expression. The Court's exclusive focus on the perceived facts of *Morse* has led it to adopt an interpretation of s 4(1) that will apply to the great bulk of charges under that subsection which have nothing or little to do with freedom of expression.

(4) The long shadow of the Supreme Court of the United States

[65] Certainly, I must acknowledge that the Court's decision in *Morse* would be acclaimed by the Supreme Court of the United States. Free speech is a near-absolute right in that jurisdiction.[42] The right not only trumps other rights and values but also overrides concerns that fall under the rubric of social harm. The protection purportedly conferred under the First Amendment allows few exceptions. For example, neo-Nazis marching through suburbs populated by Holocaust survivors

41 Statistics New Zealand; National Annual Apprehensions for the Latest Calendar Years; <http://www.stats.govt.nz/tools_and_services/tools/TableBuilder/recorded-crime-statistics/offences.aspx>.

42 Notwithstanding the First Amendment, the right to freedom speech is not completely absolute. It is curbed, for example, in respect of misleading commercial advertising. See *In re RMJ* 455 US 191 (1982) at 202-203 and *Ibanez v Fla Department of Business and Professional Regulation, Board of Accountancy* 512 US 136 (1994) at 142. There is no exception per se for commercial speech. See *Bigelow v Commonwealth of Virginia* 421 US 809 (1975); *Virginia State Pharmacy Board v Virginia Citizens Consumer Council* 425 US 778 (1976); and *Central Hudson Gas & Electric Corp v Public Service Commission* 447 US 557 (1980). Obscenity has no absolute protection; see *Miller v California* 413 US 15 (1973). Nor is child pornography protected unless the child is a "virtual' child! See *New York v Ferber* 458 US 747 (1982) and *Ashcroft v Free speech Coalition* 535 US 234 (2002). It is probable that our Films, Videos and Publications Classification Act 1993 would be struck down, certainly as being too broad, in the United States, and s 61 of the Human Rights Act 1993, relating to hate speech, would certainly be struck down.

enjoy this expansive protection.[43] The Court has recently struck down a state law seeking to regulate the sale of violent video games to children,[44] and a state law regulating videos showing cruelty to animals.[45] It has struck down a statute seeking to regulate political speech by corporations even though a corporation of itself is incapable of having an opinion or articulating speech.[46] It has also struck down a campaign finance statute providing a cap on political advertising in an attempt to create a level playing field by countering the power of money favouring wealthy candidates and backers,[47] and so the list goes on. The social harm that this country might wish to weigh in the balance when considering reasonable limits on free speech has little or no traction in that jurisdiction. Certainly, the harm to the body politic and the harmful effect on the cohesion and stability of the community if citizens are free to be grossly offensive to one another in public places counts for naught.[48]

[66] A decision of the Supreme Court of the United States of particular interest in this respect is *Snyder v Phelps*.[49] The family of a dead soldier sued the defendant for intentional affliction of emotional distress. Members of the defendant's Church had picketed the soldier's funeral service. Signs reflected the Church's view that the United States was overly tolerant of sin and that God kills American soldiers as punishment. The Supreme Court acknowledged that the Church's choice to convey its views in conjunction with the soldiers' funeral service made the expression of those views particularly hurtful to a number of people, particularly the soldiers' parents. Indeed, it held that the applicable legal term, "emotional distress", failed to adequately capture the "incalculable grief" the picket caused. Nevertheless, the Court held that the right to free speech prevailed. The picket had been conducted peacefully and the distress which it occasioned turned on the content and viewpoint of the message conveyed "rather than any interference with the funeral itself".[50] It is clear from the judgment that a law prohibiting such picketing in the vicinity of a funeral service or procession would have been struck down.

[67] The factual parallel with *Morse* is uncomfortably close. Notwithstanding that Ms Morse's action in burning the flag may have been particularly hurtful to the men, women and children gathered at the Cenotaph, it is lawful unless it interferes with the use of that public place for the service. Of course, as a Judge I am lacking in imagination. Why is it, then, that when I read the Court's decision in *Morse* I can distinctly hear the lofty strains of "The Star-Spangled Banner".

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

44 *Brown v Entertainment Merchants Association* 130 S Ct 2398 (2010).

45 *United States v Stevens* 130 S Ct 1577 (2010).

46 *Citizens United v Federal Election Commission* 558 US (2010), and see *Buckley v Valeo* 424 US 1 (1976).

47 *Buckley v Valeo*, ibid.

48 The Supreme Court also struck down a federal law prohibiting the desecration of the flag of the United States on the ground that it offended the First Amendment right to free speech. See, *United States v Eichman* 496 US 310 (1990).

49 See above, n 18. It is to be noted, however, that the Chief Justice stipulated that the Court's opinion was limited by its particular facts. The Church's picket took place 1000 feet (over 25 meters) from the church where the funeral was held, it was conducted under police supervision, it was not unruly, and there was no shouting, profanity or violence. Only the tops of the picketers' signs were visible to Mr Snyder and he did not learn what was written on them until he saw the news broadcast later that night. These facts were seen as relevant to the Court's evaluation of "what was said, where it was said and how it was said" (at 182).

50 Ibid, at 184 and 186.

A more mature perspective

[68] The anomalies and inconsistencies in the Court's decision in *Morse* emerge clearly enough from the above appeals and subsequent commentary, but may be briefly summarised.

- No matter how odious and repugnant the behaviour, and no matter how devastating the impact of the behaviour on the sensibilities of the person or persons affected by it, the behaviour will not be "offensive" within the meaning of s 4(1)(a) unless it causes a disruption or disturbance to "public order". The criminality of the offence lies not so much in the offensiveness of the defendant's behaviour as in the consequences of that behaviour.
- While the right to freedom of expression does not mean that language and behaviour must be inoffensive, the Court's decision effectively embraces a "right" to offend without responsibility or restraint, providing it does not cause a disruption or disturbance to "public order".
- Although a person or persons' enjoyment of a public place may be seriously impaired by an affront to his or her sensibilities, that impairment will be of no consequence unless the behaviour affects their use of that place. It must, by way of example, interfere with the use of a public space for, say, a religious or commemorative service.
- Notwithstanding that burning the national flag is a recognised form of protest, the Court's interpretation of s 4(1)(a) cannot be restricted to that particular form of protest. It must necessarily apply to all other forms of offensive behaviour, however obnoxious and repugnant that behaviour might be.[51]
- There is no necessary nexus between the intensity or level of the offensive behaviour and the likelihood of a disruption or disturbance to "public order". Behaviour which is barely offensive may lead to a disruption or disturbance whereas behaviour which is horribly gross may not.
- Nor is there any necessary nexus between the culpability of the offender and the likelihood of a disruption or disturbance to "public order". Genuine and well-intentioned behaviour may lead to a disruption or disturbance whereas deliberate, and even malicious, behaviour may not.
- The behaviour may be repeated many times over provided it does not cause any disruption or disturbance to "public order" on each occasion. The possibility that behaviour may eventually become offensive through sheer repetition is precluded.
- The offence of offensive behaviour is effectively removed from the statute book in that the offence will not be complete until the behaviour causes a disturbance, at which point it will almost certainly amount to disorderly behaviour.
- In substance and effect, the Court's decision conflates the offences of disorderly behaviour and offensive behaviour into one offence: the offence of behaving in a manner that causes a disruption or disturbance to "public order" (save that under the majority's formulation the behaviour must also be offensive).
- Unless such judicial qualities as logical thinking and intellectual rigour are to be discarded, the Court's interpretation requiring a disruption or disturbance must necessarily apply to the other offences in s 4(1). The subsection is then effectively emasculated.
- Whether or not offensive behaviour causes a disruption or disturbance will largely depend on the disposition of the person or persons who are affected by the behaviour. If they are of

51 See above, paragraph [21] for two odious examples of behaviour which could have been adopted by the protestors in *Morse* to attract attention to their cause.

a pacifist, non-violent or non-aggressive disposition the likelihood of a disruption or disturbance is negligible, or may be non-existent. Conversely, if they are not of that disposition the prospect of some form of disorder is higher and, in some cases, no doubt, inevitable.

- It is not clear whether the Court's interpretation would apply if people were deterred from using the public space on a future occasion. Assume for a moment, for example, that some of the people attending the Dawn Service in *Morse* had, because of their disgust at the burning of the flag, resolved not to attend the ceremony the following year. It is difficult to see how that resolve would be an interference with the use of the public area around the Cenotaph amounting to public disorder.[52]
- Offensive behaviour in a public place may have a marked, and even devastating, impact on a person or persons who are on private property but within sight or hearing of that public place. Nonetheless, no offence will be committed as that impact, and the consequences directly attributable to that impact, however harmful, do not occur in a public place.
- The Court's interpretation is necessarily applicable to the great bulk of charges under s 4(1)(a) where the right to freedom of expression is not invoked or seriously in issue.[53] The Court's expansive view of the right to freedom of expression has resulted in an unexpected advantage to the numerous offenders who do not purport to be exercising that right or who could not plausibly claim to be exercising the right.
- While it is to be hoped that the person or persons affected by offensive behaviour will remain stoically passive, the Court's interpretation provides an inbuilt incentive or motivation for such persons to intentionally cause a disruption or disturbance - or even threaten violence.
- The Court's interpretation effectively eliminates the capacity of a court to have regard to the nature of the protest, the extent of the impact of the behaviour on the sensibilities and dignity of the person or persons affected, the justification for the exercise of the right to freedom of expression, the social harm to the community arising from grossly offensive conduct, and the public policy considerations which prompted Parliament to enact the statute. In short, the balancing exercise necessary to determine where to draw the line is effectively dismantled.
- The Court's formulation fails to adequately protect vulnerable individuals and minorities from odious taunts, unless the taunt causes a disruption or disturbance to "public order".
- Notwithstanding that the Siracusa Principles expressly state that respect for social and cultural rights is part of public order, that respect will not be demonstrated unless the behaviour in question causes a disruption or disturbance.[54]
- The difficulties the Court's decision will cause the police who must enforce the law are manifest, particularly as the constable at the front line must determine which of the five formulations of the test he or she will apply, whether there has been a disruption or disturbance to "public order", whether that disruption or disturbance falls short of violence or the likelihood of violence, and whether the resulting interference is with the use of the public place as distinct from being an affront to the sensibilities of the person or persons affected.
- The tables are turned. If and when a court holds that the reaction of a person or persons who, being incensed, take offence was unreasonable and disproportionate to the expression, those

52 It may be that persons of a non-defiant or submissive disposition should be added to the list compiled by Bonatti J. See above, paragraphs [19] and [20].

53 See above, paragraphs [61]-[64].

54 Siracusa Principles on the Limitation and Derogation Provisions in the International Covenant on Civil and Political Rights UN ESCOR 41st sess UN Doc E/CN4/1985/4 (1984).

persons, whether or not they are ever charged, will be guilty of disorderly behaviour. In some circumstances such as, for example, where the affected persons resort to violence, the opprobrium or later conviction, if any, will be justified, but in other circumstances it will be harsh, and even unfair.

- The Chief Justice's opinion that the issue under s 4(1)(a) is a question of fact and that no balancing exercise is required seemingly disowns the common law method of adjudication whereby a judge has regard to a number of different and often conflicting values, interests and considerations in arriving at a decision. To reject a balancing exercise in this area of the law, as in any other, is to turn judicial decision-making upside down and inside out.[55]
- The Chief Justice's claim that Parliament has itself struck the balance in the myriad of circumstances to which the section could apply is unrealistic. Parliament clearly had no such intention and has done no such thing.
- While the Chief Justice's argument that the interpretation of a criminal offence should conform to the principle that the criminal law must be certain and capable of ascertainment in advance encapsulates an important principle, the more critical question is what degree of precision is acceptable or possible. As recognised by Parliament, many offences cannot be defined with perfect precision.[56] An objective evaluation of such phrases as "offensive" in accordance with a criterion such as reasonableness, or the standards of the reasonable person, is at times the best the law can do.
- Further, it is, and will be, uncertain whether the reaction is, or will be, proportionate and it is, and will be, uncertain at what point a response which is proportionate becomes disproportionate.
- The Chief Justice's definition of offensive behaviour as behaviour which provokes or tends to provoke a disruption means that behaviour which falls short of being offensive as judicially defined could be brought within the reach of s 4(1)(a).
- Although defining offensive behaviour and purporting to carry out a balancing exercise the majority render that exercise otiose by adding the requirement that the behaviour must cause a disturbance. This issue is a question of fact and, if a disturbance exists as a matter of fact, any finding that the behaviour was offensive as judicially defined will be of no consequence.
- The Court's conception of "public order", on which its interpretation of s 4(1)(a) is based, is a narrow and crimped conception, but more of that anon. For the moment it will suffice to say that the Court fails to acknowledge, one, that s 4(1)(a) arguably falls within the exception to the right to freedom of expression spelt out in paragraph 3 of Article 19 of the International Covenant of Civil and Political Rights and, two, that its conception of public order is at odds with the conception of public order (or ordre public) specified in that paragraph.

(1) Section 6 of the Bill of Rights

[69] This list of anomalies and inconsistencies is formidable and calls the Court's use of s 6 of the Bill of Rights into question. The section has its limits and those limits fall to be imposed by the judges. The scope of s 6 was discussed by the Court in *R v Hansen*,[57] principally by Tipping J. Relying heavily on Andrew Butler and Petra Butlers' excellent work, *The New Zealand Bill of*

55 E W Thomas *The Judicial Process: Realism, Pragmatism, Practical Reasoning and Principles* (Cambridge University Press, 2005), esp. at 270-272 and 330-331.

56 See above, n 31.

57 *R v Hansen* [2007] 3 NZLR 1.

Rights: A Commentary,[58] the learned Judge accepts that any meaning adopted pursuant to s 6 must be "fairly open and tenable".[59] The courts, it is said, must follow a "legitimate process of construction" and not use s 6 as a "concealed legislative tool". Lord Millett's phrase in the *Ghaidan v Godin-Mendoza*[60] case, "intellectually defensible", is quoted with approval.[61] As any number of my decisions illustrate, I support a robust approach to s 6, but I do not need to decide its limits in these appeals. My immediate point is that, whatever its limits, s 6 is not open-ended and any approach adopted must embrace judicial qualities such as logical thinking, intellectual rigour, reasoned argument, commonsense, and judicial discipline and restraint.

[70] Section 6 does not empower the Court to abandon these judicial qualities or any similar attributes of sound judicial reasoning. How else can the Court determine whether a possible meaning of the provision in issue is "fairly open and tenable"? I would also assert that these essential judicial qualities must include the ability to discern if and when an issue is a matter of policy which is the proper province of the people's elected representatives. Section 6 will be brought into disrepute if the attitude of the Court is perceived to be: "We will, because we can."

[71] If it were open to me to do so I would follow the judgments of the majority in the Court of Appeal. As I have not tired of pointing out, however, it is not open to me to do so. Nevertheless, while I must apply the Court's decision in *Morse* it is permissible to note my protest and, in inoffensive terms, indicate the thrust of my misgivings.

(2) The function of bills of right

[72] Bills of right are commonly perceived as charters protecting the individual who is different or the minority that is repressed in a system of majoritarian government. Such a perception, however, does not convey the full impact of bills of right or the vision of their proponents. Bills of right reflect the fundamental and enduring values of society as a whole. They comprise the basic principles by which the community wishes to interact in a representative democracy. Hence, bills of right have the capacity to be a unifying and integrating force. Carefully nurtured by the judiciary, they can be a cohesive and harmonising agent. They need not be, and should not be, the medium for division and divisiveness within the community. The consequence of this perception is that rights are to be exercised responsibly and with consideration for others.

[73] I do not suggest that the test is whether Ms Morse exercised her right to freedom of expression with proper concern and consideration for those assembled to pay their respects to the dead at the Dawn Service on Anzac Day in 2007. Rather, the test or interpretation adopted, and the necessary balancing exercise involved in applying that test, should not be immune to this wider perception of the function of a bill of rights.

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58 Andrew and Petra Butler *The New Zealand Bill of Rights: A Commentary* (LexisNexis NZ Ltd, Wellington, 2005) at [711]. See also the cases referred to by the authors in footnotes 50 to 60, at 168-169.

59 At [150].

60 *Ghaidan v Godin-Mendoza* [2004] UKHL 30.

61 At [156].

(3) The right to dignity

[74] As Aharon Barak, the past-President of the Supreme Court of Israel, has pointed out, the right to dignity is central to all human rights.[62] Human dignity is the source from which all other rights are derived.[63] It is this dignity which unites human rights into a coherent whole. The right to freedom of assembly and freedom of association, for example, serve the same end as the right to freedom of expression in preserving conditions in which human dignity is recognised and protected. Nor is respect for human dignity restricted to jurists. Ronald Dworkin, for one, has placed human dignity at the heart of his perspectives of justice, morality and political ethics. Every person is entitled to be treated with equal concern and respect.[64]

[75] Dignity is a human condition; it is not just the prerogative of those who assert a right. People, more often than not good and decent people, who are affected by someone's exercise of a right also possess dignity and are entitled to be treated with the respect and consideration that dignity merits. Everyone, in other words, is entitled to be treated with equal concern and respect, and this includes the citizens who assembled at the Cenotaph in the early hours of the morning to pay their sincere respects to the servicemen and women who put their lives at risk and paid the ultimate price. The law is enhanced by its capacity for empathy. Those attending the service deserved a greater measure of empathy than the Court allowed. The impact of the burning flag cannot be measured by the external consequences alone.

[76] The enforcement of human rights, and the exercise of the power conferred on the courts under s 6 of the Bill of Rights, will only reach full maturity when the courts develop and articulate an intelligent and intelligible conception of human dignity and recognise that dignity is the right of all persons. A person's dignity matters. It is a basic value which cannot be ignored in any discourse on rights. Being fundamental, it is appropriate and sensible that the criminal law provide a sanction against behaviour that is beyond the pale and demeans both the perpetrator and the person or persons affected.

(4) Public order

[77] It may be noted that the Court's interpretation of s 4(1)(a) is not simply a case where the Court is able to take advantage of the malleability of the language used in the statutory provision. The wording of s 4(1)(a) is plain and ambiguous. Rather, the Court utilises the heading to this Part of the Act, "Offences against Public Order", to impose a gloss on the section itself. That gloss, however, in turn depends on the Court's assertion that "public order" cannot or does not embrace a serious assault on the sensibilities of one citizen by another carried out in public.

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62 See Aharon Barak *The Judge in a Democracy* (Princeton University Press, New Jersey, 2006) at 85-88. See also Thomas J in *Brooker* above n 13, at [177]-[182].

63 The Preamble to the International Covenant on Civil and Political rights recognises that rights derive from the inherent dignity of the human person. The Preamble to the New Zealand Bill of Rights Act 1990 (paragraph (b)) recites that the Act is to affirm New Zealand's commitment to the Covenant.

64 Ronald Dworkin *Justice for Hedgehogs* (The Belknap Press of Harvard University Press, 2011). The title refers to a line by an ancient Greek poet Archilochus that the fox knows many things but the hedgehog knows only one thing. The value is the one big thing. Committed to the value underlying the label of a right, I must admit, although never prickly, to being a hedgehog.

[78] Thus, the Court's decision is ultimately based on a restricted conception of "public order". To the Court it means, in effect, public disorder. Certainly, the maintenance of civil and civilised standards of communication is excluded. The meaning of "public order" receives little attention from the Court. Indeed, the conception the Court adopts is not so much addressed as assumed. Had the issue been squarely addressed it may have become apparent to the Court that such a conception was incompatible with the terms of s 4(1)(a) when read in context and as a whole; that it is at odds with paragraph 3 of Article 19 of the ICCPR; that it cannot be sustained as a viable concept of public order in a civil and civilised society; that it fails to have proper regard to the justification advanced for the behaviour in question; and that it arguably intrudes upon the province of Parliament to determine that, as a matter of policy, the preservation of a minimum level of civility in the communications and behaviour of citizens in public is a desirable attribute of a free and democratic society.

(5) The statutory context

[79] The statutory context of s 4(1)(a) tells against the Court's conception. The preceding section, s 3, prohibits behaviour that is "riotous, offensive, threatening, insulting or disorderly … likely in the circumstances to cause violence against persons or property to start or continue" (emphasis added). Section 4(1) must then relate to public behaviour that falls short of violence or behaviour that is likely in the circumstances to cause violence to persons or property to start. Under the subheading; "Offensive behaviour or language", and in addition to offensive or disorderly behaviour in s 4(1)(a); the subsection proscribes addressing words to any person intending to "threaten", "alarm", "insult" or "offend" that person;[65] using any "threatening" or "insulting" words and being reckless whether any person is "alarmed" or "insulted" by those words;[66] and addressing any "indecent" or "obscene" words to any person.[67] Subsection (3) provides that, in determining whether any words are indecent or obscene, the court is to have regard to all the circumstances, "including whether the defendant had reasonable grounds for believing that the person to whom the words were addressed, or any person by whom they might be overheard, would not be offended".

[80] To read the language used in these provisions and conclude that not one is complete as an offence unless there is a disruption or disturbance to "public order" is plainly untenable. If s 4(1)(a) requires a finding that the external factor must be present because of the heading to this Part of the Act so, too, that factor must be present before the remaining offences in the section are complete. The heading, "Offences Against Public Order", is the heading to s 4(1) and not just s 4(1)(a). How, for example, can the requirement of a disruption or disturbance to "public order" be sensibly grafted on to the offence of using insulting words being reckless whether any person is insulted by those words? Again, by way of example, how can the absence of a disruption or disturbance bear on the offence of addressing words to a "person intending to threaten, alarm, insult or offend that person"?

(6) A restricted conception of public order

65 Subs (1)(b).

66 Subs (1)(c)(i).

67 Subs (1)(c)(ii)).

[81] The most critical defect in the Court's approach, however, is its strained understanding of what constitutes public order. Public order, properly conceived, does not necessitate a disruption or disturbance, or a breach of the peace, or something in the nature of a commotion, confrontation, or outcry, or interference with a person's access or use of a public place. It can include considerations of public morality directed at preserving the orderly behaviour of one citizen to another. Section 4(1) seeks to set minimum standards of public order that can be expected of the citizenry in a civil and civilised society. The various offences created by this section and enumerated above can be regarded as the basic rules of social engagement. A breach of those minimum standards can properly attract the criminal law at the lower end of the scale. The public order element of the offences is satisfied if the offending takes place in a public place or within sight or hearing of a public place.

[82] The Court therefore errs in seeking to graft on to the provision an added element requiring the intensity of the behaviour to be such as to give rise to public disorder of some kind or other which falls short of violence or the threat of violence to persons or property, which is covered by s 3. Public order, as such, is achieved by requiring citizens to behave towards one another in public in a way which, in terms of s 4(1), is not offensive, disorderly, threatening, alarming, insulting, indecent or obscene. These requirements set the bounds and reflect the mores of a civil, civilised and free and democratic society.[68]

[83] The Court's quick assumption[69] that there must be an element of public disorder present to constitute an offence under s 4(1)(a) is all the more surprising in that the issue had already been before the Court of Appeal. In *Cortorceanu v Police,*[70] which is not mentioned by the Court, the Court of Appeal, comprising Cooke P and Somers and Bisson JJ, rejected counsel's submission to that effect. Delivering the judgment of the Court, Bisson J stated that the Court "could see no occasion to import the qualification or gloss" into the section. After referring to the heading "Offences Against Public Order", it held that the subsection was a specific provision to protect any person in any public place from being addressed and thereby subjected to words which were intended to threaten, alarm, insult or offend any person. Such behaviour, the Court said, could conceivably lead to a disturbance and disorderly behaviour but it declined to import that qualification into the legislation. The section, the Court concluded, is "designed to protect persons in public

68 Parliament shared this wider perception of public order. While the heading to this part is "Offences Against Public Order", the subheading for s 3 is "Disorderly behaviour" and for s 4 "Offensive behaviour or language". The use of these subheadings makes no sense if the words "Offensive behaviour or language" mean "disorderly behaviour or language".

69 The issue was addressed by the High Court of Australia in *Coleman v Power* (2004) 220 CLR 1. Particular attention is drawn to the observations of Gleeson CJ at [9] and [10]. The Chief Justice holds that it is open to Parliament to form the view that threatening, abusive or insulting speech (the statutory language in issue) may in some circumstances constitute a serious interference with public order even though there is no intention, and no realistic possibility, that the person affected, or some other person, might respond in such a manner that a breach of the peace may occur. The learned Judge correctly observes that conduct may seriously disturb public order and affront community standards of tolerable behaviour, but by reason of the characteristics of those who engage in the behaviour, or those towards whom their conduct is aimed, or the circumstances in which the conduct occurs, there is no possibility of a forceful retaliation. His examples are telling, e.g., the mother who takes her children to play in the park and encounters threats, abuse or insults from some rowdy group is more than likely to simply leave the park.

70 *Cortorceanu v Police* CA 289/86 25 November 1987.

places from such verbal abuse and thereby to preserve public order which is the purpose of that part of the Act." (Emphasis added).[71]

[84] It is not suggested that the Supreme Court could not overrule this decision. At the time *Cortorceanu* was decided the Bill of Rights had not been enacted. The decision would have been easy to distinguish. That, however, is not the point. The point is that the Court of Appeal adopted a perception of public order which included the protection of persons in public places from threatening, alarming, insulting or offensive language or behaviour. The external factor urged by counsel was not seen to be necessary for the purpose of preserving public order. At the very least it obliged the Court in *Morse* to address the reasoning of *Cortorceanu* and explain its assumption that "public order" excludes the protection of persons in public places, or within sight of or hearing of a public place, from grossly offensive language and behaviour.

(7) The exceptions in Article 19 of the ICCPR

[85] The International Covenant on Civil and Political Rights (ICCPR) expressly recognises that the right to freedom of expression is not incompatible with this wider conception of public order. Paragraphs 2 and 3 of Article 19, read as follows:

> 2. Everyone shall have the right to freedom of expression; this right shall include freedom to seek, receive and impart information and ideas of all kinds, regardless of frontiers, either orally, in writing or in print, in the form of art, or through any other media of his choice.
>
> 3. The exercise of the rights provided for in paragraph 2 of this article carries with it special duties and responsibilities. It may therefore be subject to certain restrictions, but these shall only be such as are provided by law and are necessary:
>
> (a) For respect of the rights or reputations of others;
> (b) For the protection of national security or of public order (ordre public), or of public health or morals. (Emphasis added).

[86] The express recognition in paragraph 3 that laws providing for public morality may be a legitimate exception to the right to freedom of expression counts against the Court's expansive view of the right and its restricted conception of public order. In the first place, a restricted conception, such as that adopted by the Court, would be inconsistent with the reference to public morality. Secondly, the reference in brackets to "ordre public" cannot be reconciled with a narrow conception of public order. The fact that these words appear in brackets after the words "public order" indicates that, whatever shades of difference may attach to these expressions in international law, ordre public is not intended to have a separate and distinct meaning from the words "public order" in paragraph 3.

[87] The term "ordre public" derives from French law and, while the term is difficult to translate into English, it is understood to encompass the social and economic and other values that tie a society together. It is more than the absence of public disorder. Paragraph 22 of the Siracusa Principles defines "public order (ordre public)"as follows: [72]

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71 At 5.

72 See above, n 54. See also, Guy Goodwin-Gill "Ordre Public Considered and Developed" (1978) 94 LQR 354 at 356; UN Doc E/L 68, tabled at the Conference of Plenipotentiaries by its Executive Secretary UN Doc A/CONF 2/sr 14 July 10 at 19-20; and John P Humphrey "The International Bill of Rights: Scope and Implementation" (1976) 17 Wm & Mary L Rev 527.

> The expression "public order (*ordre public*)" as used in the Covenant may be defined as the sum of rules which ensures the functioning of society or the set of fundamental principles on which a society is founded. Respect for economic, social and cultural rights is part of public order (*ordre public*).

[88] The Court's apparent neglect of paragraph 3 of Article 19 exposes it to criticism in two respects. First, as the Bill of Rights expressly affirms the ICCPR, it is inappropriate to adopt an inflated view of the right to freedom of expression without reference to the exceptions recognised in the Covenant.[73] When the exceptions in paragraph 3 are addressed, it is not necessary to view s 4(1)(a) as inimical to the right to freedom of expression. Secondly, in adopting a restricted view of public order, the Court departed from the perception of "public order (ordre public)" contained in the Covenant. Having regard to the precipitating role of the ICCPR in the Bill of Rights the significance of this departure cannot be overstated.

[89] The Court's perception of public order in *Morse* is in sharp contrast to a decision of the Conseil d'Etat in France in 1995.[74] The municipal authorities were required to enact laws to ensure, inter alia, "good order". The mayor and police enacted an order banning dwarf throwing competitions in their municipality. A dwarf was employed as the projectile to be thrown by hopeful contestants. His employers ensured that he had proper protective clothing and that appropriate precautions were taken to protect his health. Many careers were barred to the dwarf because of his size and, as a result, he was more than willing to undertake the task. The job was a source of financial security, and even fame. Notwithstanding the dwarf's support for the ban, however, the Conseil d'Etat upheld the order on the basis that to do otherwise would be an "affront to human dignity". The Court repeated the sentiment: "…respect for the dignity of the human person is one of the elements of public order".

[90] The reasoning of this internationally respected Court is pertinent in a critical respect. The decision is expressly based on the premise that respect for the dignity of the human person is a core element of public order. Public order is not confined to the external impact of the allegedly objectionable behaviour. On this basis, subjecting people who had assembled at dawn on Anzac Day to pay their solemn respects to those who have fallen in the World Wars to an act which was highly offensive in the circumstances can properly be viewed as a breach of public order.

(8) Justification for the use of the right

[91] Examining the underlying value of the right to freedom of expression in the particular circumstances of the case necessarily entails an examination of the justification for the exercise of the right. To give the particular exercise of the right the full panoply of the right to freedom of expression in the abstract without assessing it against the justification in the particular circumstances demonstrates a lack of intellectual rigour. The particular circumstances will, of course, bear on the justification as the courts move from the abstract to the particular. Thus, the three cases I have dealt with in this appeal should not serve to carve out an exception to the right to freedom of expression for crackpots, rabid zealots or bigots. Both the admirable and the detestable share the right. That does not mean, however, that all expression must be or should be given the same weighting. The courts are quite capable of assessing the particular exercise of the right against the justification for the exercise of that right.

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73 The Chief Justice refers to Article 19, but does not elaborate the significance of paragraph 3. At [37].

74 CE Ass 27 October 1995 372 Case *Commune de Morsang-sur-Orge*.

[92] Justification for the exercise of the right in the particular circumstances may be the importance in a democracy of having access to information, knowledge, and a range of opinions - good and bad - based on the assumption that the truth will achieve ascendancy; it may be the notion that no government can or should exercise the coercive power of the state unless its citizens have had the opportunity to participate in or influence governmental decisions; it may be a perceived right to influence public opinion or rally others to a cause; it may be the need to draw attention to a felt injustice; it may be the desire to contribute to a vibrant and diverse society; it may be the need to channel anger or resentment into a relatively peaceful activity and so avoid violence; or it may be some other perceived justification for the behaviour in question.[75] It may, of course, be none of these more "noble" aims but simply mischievousness, misbehavior or a bent desire to offend.[76]

[93] Once the justification is examined, however, the limits of the right, that is, where the line should be drawn in the particular circumstances, should generally emerge. On some occasions the justification for it may not be engaged at all.[77] On other occasions, the behaviour may be disproportionate to the justification. In this way, as Dworkin puts it, the case for free speech is "self-limiting". In *Brooker*, Thomas J had advanced the same concept but called it "self-adjusting".[78] In essence, the justification is an integral part of the balancing exercise which is necessary to determine where the line should be drawn.

(9) A question of policy for Parliament?

[94] Judicial discipline and restraint in the application of s 6 is also required to determine whether the proposed interpretation intrudes upon a question of policy which is the proper province of the people's elected representatives.[79] Section 4(1) embodies a legislative policy that has prevailed for many years based on the belief that the body politic is well served by a provision which proscribes extremely offensive behaviour by one citizen to another, recognises the importance of the right to freedom of expression but requires the right to be exercised with responsibility and restraint, sets the minimum rules of social engagement, and recognises the dignity of all people and not just those asserting their right to free speech.

75 Professor Rishworth has proffered three main bases justifying the right to freedom of expression. Briefly stated, they are (1) the marketplace of ideas theory, (2) the maintenance and support of democracy theory, and (3) the liberty theory. See Rishworth, Huscroft, Optican and Mahoney *The New Zealand Bill of Rights* (Oxford University Press, Melbourne, 2003) at 309-311. It would be straining to suggest that any one of these theories justified the burning of the national flag in close proximity to an Anzac Dawn Service.

76 See above, paragraph [64].

77 Dworkin, above at paragraph [74], above n 64, at 374.

78 *Brooker* above n 13, at [183]-[188]. The Chief Justice in *Morse* expressly rejects the notion that the subsection is self-adjusting at [16].

79 A striking example of a final appellate court trespassing into an area that is properly a question of public policy for Parliament is the decision of the High Court of Australia in *Australian Capital Television Pty Ltd v Commonwealth of Australia* (1992) 177 CLR 106). The legislature sought to reform the electoral process by limiting political expenditure on campaigns. Its intention was to create a more "level playing field" and negate or reduce the advantage of wealthy candidates and those having wealthy backers. While the exercise of the Court's constitutional power to strike the legislation down has been accepted, the actual decision has been widely criticised. See Sir Stephen Sedley "Human Rights: a Twenty-First Century Agenda" [1995] Public Law 386 at 393-394, reprinted in *Ashes and Sparks*: *Essays on Law and Justice* (Cambridge University Press, Cambridge, 2011) at 348; Lord Cooke of Thorndon "The Dream of an International Common Law" in Saunders (ed) *Courts of Final Jurisdiction: the Mason Court in Australia* (1996) 138 at 140; and E W Thomas, Centennial Lecture "The Relationship of Parliament and the Courts: A Tentative Thought or Two for the New Millennium" (2000) VUWLR 5 at 28-29.

[95] The question whether a matter is properly the province of Parliament is, of course, a question on which there can be divided views. It is, however, an important question, and one which should be addressed. As Andrew and Petra Butler argue, Parliament has a "role to play in the human rights enterprise" and the decision whether to apply s 6 involves a "fine constitutional balancing act".[80] In this instance, it required a deliberate decision on the part of the Court to assess the importance of the legislative policy reflected in s 4(1) against the importance of giving effect to the legislative injunction to the courts contained in s 6 to favour interpretations which serve to protect fundamental rights. The view that s 4(1)(a) represents a policy relating to public discourse and interaction which is Parliament's province to determine is certainly tenable. Such a view, as I have already stated, would recognise that the people, through their elected representatives, have the right to opt for a society which does not in its laws condone disorderly conduct or grossly offensive behaviour on the part of its citizens in public places. Although the balance is fine, I would tend to favour this view. It might be otherwise if the arguments supporting the Court's interpretation were stronger than is the case.

Conclusion

[96] To sum up, the law may influence, but it cannot dictate, the norms or standards to be observed in the course of human interaction. It cannot, by decree, mandate behaviour that is courteous, respectful and polite or banish language that is harsh, hurtful or horrid. Nor should it essay to do so. The law can, however, prescribe minimum standards of public behaviour that set the boundaries for what is tolerable in the inevitable interaction and interplay of people within the community. It can, to adopt a phrase used by Sir Stephen Sedley, "articulate and uphold the ground rules of ethical social existence."[81]

[97] Human rights are fundamental in a number of respects. They are the bedrock of a free and democratic society in protecting the oppressed individual or minority from the indifference or self-centredness of the majority. They sustain the framework and define the civil and political ends of a constitutional democracy. To some, myself included, they have the capacity to provide the rule of law with substantive content.[82] They can serve the task of ensuring that, "as a society, we are governed within a law which has internalized the notion of fundamental human rights",[83] to which might be added, a law which has internalized the notion of the equal human dignity of all people. To yet others despairing at the excesses of Western liberal individualism and its faithful bedfellow, untrammeled capitalism, and ruing the demise of the values of social democracy and loss of social cohesion, fundamental human rights and the enforcement of those rights represent the means by which to forge a more enlightened social order. Although vested with altruism and notions of justice and equality, human rights are themselves basically egocentric and thus constitute the natural antidote to unrestrained individualism. It is thought, or hoped, that the sense of justice underlying human rights will instill a wider appreciation of social justice and a more cohesive sense of community. From whatever angle they are approached, however, fundamental

80 *The New Zealand Bill of Rights: A Commentary*, above n 58, at 7.11.2, 169.

81 See Stephen Sedley, above n 79, "Human Rights", at 389-391, and *Ashes and Sparks*, at 354.

82 See Tom Bingham *The Rule of Law* (Allen Lane, London, 2010) and the author, "A Personal Tribute to Tom Bingham" (2010) *NZLawyer* 148 29 October 13 at 15.

83 Sedley, above n 79, at 389-391, and *Sparks and Ashes*, at 354.

human rights as articulated and enforced by the courts are critical in the quest for a tolerant and just world.

[98] The Supreme Court's decision in *Morse* reflects the ugly side of human rights or the enforcement of human rights. It presages a law captured by the rhetoric of the right to freedom of expression without due regard to the value underlying the particular exercise of that right; a law in which, under the guise of the right to freedom of expression, the "right" to offend can be exercised without responsibility or restraint providing it does not cause a disruption or disturbance in the nature of public disorder; a law in which an impoverished amoral concept of "public order" is judicially ordained; a law in which the right to freedom of expression trumps - or tramples upon - other rights and values which are also vital properties of a free and democratic society; a law in which any number of vulnerable individuals and minorities may be exposed to uncivil, and even odious, ethnic, racist, sexist, homophobic, xenophobic, anti-Christian, anti-Semitic, and anti-Islamic taunts providing that no public disorder results; a law in which good and decent people can be used as fodder to promote a cause or protest an action for which they are not responsible and over which they have no direct control; a law which demeans the dignity of the persons adversely affected by those asserting their right to freedom of expression in a disorderly or offensive manner; a law in which the mores or standards of society are set without regard to the reasonable expectations of citizens in a free and democratic society; and a law marked by a lack of empathy for the sensibilities, feelings and emotional frailties of people who can be deeply and genuinely affronted by language and behaviour that is beyond the pale in a civil and civilised society.

[99] As much as it goes against the grain, the appeals by Mr Bonkers, Mr Righteous and Mr Biggottson are allowed. I decline to make an order for costs.