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DAMNED IF YOU DO:
Should New Zealand Criminalise or Censor Expression that Offends Islam?

LLM RESEARCH PAPER

LAWS 530: CENSORSHIP AND FREEDOM OF EXPRESSION

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Table of Contents

Abstract

This paper canvasses the relationship between the fundamental human rights of freedom of expression and freedom of religion to establish whether New Zealand should criminalise or censor expression that causes offence to the religious sensibilities of followers of Islam. It analyses the legal framework in New Zealand and in the international arena to assess whether this adequately protects Muslims from offence on the basis of their belief, while retaining other people's right to free speech.

This paper draws on a number of international examples to highlight what the repercussions can be when one person's right to free speech collides with another's right to freedom of religion. Bearing in mind these examples, this paper analyses a number of key argument in favour of allowing free speech and in favour of introducing wider censorship regimes, to establish whether these examples should have been subject to censorship and how this could apply in the New Zealand context. This paper concludes that criminalisation is not the ideal way to prevent these occurrences in future, but censorship could be an option. This paper recommends a balancing exercise is undertaken within the current New Zealand Bill of Rights framework to establish whether an item of offensive expression should or should not be subject to censorship.

Word length

The text of this paper (excluding abstract, table of contents, footnotes and bibliography) comprises approximately 8,076 words.

Subjects and Topics

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I Introduction

"Kill me, but do not mock my faith"[1]

For millennia, mankind has attempted to censor speech that blasphemes, defames or causes libel to religion. Socrates was expelled from Ancient Greece and eventually drank hemlock – causing his own death – after being charged with 'sacrilegious blasphemy' in 399 BC.[2] His pupil Plato later became a censor of materials relating to faith and religion, censoring the philosophical works of poets he considered an ideological danger.[3]

Thousands of years later, the world continues to grapple with these same issues. When are freedom of religion and freedom of expression mutually exclusive? What are the limitations of the right to freedom of expression in relation to religion? Is the state justified in censoring speech that causes offence to the sensibilities of a person's or a group's religion? Should expression that offends religion be tolerated if it is not primarily motivated by the desire to offend, but is merely a by-product of, for example, a political or social statement, satire or the creation of art?

A number of high-profile international cases recently have highlighted how important these rights are for different members of society and how, in a very small number of cases, the collision of these rights can lead to extreme violence, even death. Although New Zealand has been sheltered from this extreme violence, *Islamophobia* (where non-Muslims perceive Muslims as a threat) is rising in New Zealand, as is *Islamophobic*-type expression.[4]

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1 Old Arab proverb, quoted in: Richard Webster *A Brief History of Blasphemy: Liberalism, Censorship and the Satanic Verses* (The Orwell Press, Southwold, 1990) at 32.

2 Thomas C Brickhouse and Nicholas D Smith *The trial and execution of Socrates: sources and controversies* (Oxford University Press, Oxford, 2002).

3 Ramona A Naddaff *Exiling the Poets: the Production of Censorship in Plato's* Republic (The University of Chicago Press, Chicago, 2002).

4 Phillip Matthews "Is New Zealand discriminating against Muslims?" *The Press* (Christchurch, 6 December 2014).

This paper analyses the existing New Zealand legal framework for protecting against blasphemy as well as a United Nations Resolution on defamation of religion. Using the concepts proposed in the Resolution, this paper questions whether New Zealand would benefit from criminalising or censoring expression that offends religion, either through additions or amendments to its existing legislative framework or the creation of a new one. To understand the consequences of this type of speech at the highest end of the spectrum, this paper touches on a number of international examples. International examples are used because, to date, New Zealand has not experienced extreme retaliation for offensive speech.

Due to the potentially wide interpretation of the group of people classed as 'Islamic', this paper focuses on expression that causes offence to Islam's three most revered religious concepts, the Qur'an, Allah and the Prophet Muhammad. While it is understood that it is not possible to offend these concepts directly, it is possible to offend the religion's followers through insulting or ridiculing these concepts.

This paper concludes that while states should take steps to discourage offensive expression and censorship in some cases is warranted, criminalisation is not, as it is likely this will only compound discriminatory opinions. In lieu of a criminal framework, this paper proposes a balancing exercise be introduced within New Zealand's existing Bill of Rights context to establish whether offensive speech should be subject to censorship.

II Islam and the West

Around 1.5 billion people class themselves as 'Muslim' across the globe.[5] According the 2013 census over 46,000 of these people live in New Zealand.[6]

In recent times, the terms 'Islamic' or 'Muslim' is becoming more associated with race – mainly people of Middle Eastern origin – than it is with religion.[7] While strictly the term refers to religion, in practice *Islam* in the Middle East is not simply a religion, it is also a way of life.[8] Arguably, this wide classification makes it easier to discriminate against Muslims because the term encompasses a wider group of people, namely anyone from the Middle East. Respect for Islam as a way of life and a belief is important for its followers, meaning they are often particularly sensitive to offensive expression.[9]

Within *umma* – the Islamic community – there is often no sharp distinction between religion and the state.[10] Treason to the *faith* is analogous to the Western concept of treason to the *state*, meaning those who insult Islam through forms of expression are guilty of cultural treason.[11] This is considered as serious as treason to the state is in the West, if not more serious.[12]

External influences in the often repressed Muslim world – such as foreign social and political pressures or people who question the superiority of Islam – can incite sensibilities against that which is either unexplainable or outside a person's belief system.[13] When these views are expressed by people of different social or political groups it is often perceived as hostile and threatening, especially when the person has considerable power; the "more powerful, proximate, hostile, and unfamiliar the outsiders appear, the more threatening their actions are likely to appear."[14]

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5 Klausen Jytte *Cartoons That Shook the World* (Yale University Press, New Haven, 2009) at 85.

6 Phillip Matthews, above n x.

7 Steve Garner "The Radicalization of Muslims: Empirical Studies of Islamophobia" (2014) 41 Crit Sociol 9 at 10.

8 William T Cavanaugh *The myth of religious violence: Secular ideology and the roots of modern conflict* (Oxford University Press, New York, 2009) at 26.

9 Ron E Hassen "Blasphemy and Violence" (2011) 55 Int Stud Q 23 at 28.

10 Ali A Mazrui "*The Satanic Verses* or Satanic Novel? Moral Dilemmas of the Rushdie Affair" (1990) 15 Alternative 97 at 98.

11 At 99.

12 At 99.

13 Hassen, above n 9 at 30.

14 At 30.

III Legal Framework

A United Nations Resolution

Between 1999 and 2010 – encouraged by a number of Muslim-majority member states – different United Nations (UN) bodies enacted approximately 20 resolutions relating to defamation of religion.[15]

In 2009, the UN General Assembly passed a Resolution *Combatting Defamation of Religion.*[16] The Assembly expressed "deep concern at negative stereotyping of religions, and manifestations of intolerance and discrimination in matters of religion or belief."[17]

As it currently stands, the Resolution does not create a binding offence under international law, instead it *condemns* 'defamation of religion'.[18] While the UN has discussed the option of adding defamation of religion as a fundamental principle of international human rights law, this has not happened,[19] and most Western member-states would not support its introduction.[20]

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15 Brett G Scharffs *International Law and the Defamation of Religion Conundrum* (2013) 11 Review of Faith & International Affairs 66 at 68.

16 *Resolution Aimed at Combatting Defamation of Religion* GA Res 64/156, A/Res/64/156 (2009).

17 United Nations "Third Committee Approves Resolution Aimed at 'Combating Defamation of Religion" (press release, 12 November 2009).

18 *Resolution Aimed at Combatting Defamation of Religion*, above n 16.

19 Freedom House "New Freedom House Study Shows Blasphemy Laws a Serious Threat to Human Rights" (press release, 21 October 2010).

20 Brett G Scharffs, above n 15 at 68.

The UN Resolution stresses discrimination of any form based on religious belief is a violation of an individual's rights.[21] It further expresses deep alarm at the increasing trend towards:[22]

> … discrimination based on religion or belief, including in some national policies, laws and administrative measures that stigmatize groups of people belonging to certain religions and beliefs under a variety of pretexts relating to security and irregular immigration, thereby legitimizing discrimination against them and consequently impairing their enjoyment of the right to freedom of thought, conscience and religion and impeding their ability to observe, practise and manifest their religion freely and without fear of coercion, violence or reprisal.

The Resolution notes alarm at the rising cases of intimidation and negative projection of some religious minorities – especially Muslim minorities as a result of September 11 – that "threaten to impede their full enjoyment of human rights and fundamental freedoms".[23]

While the Resolution also condemned violence motivated by xenophobic ideas towards religious minorities,[24] this paper will not deal with this area. Instead it looks at the less tangible concepts – the ones that are not as externally obvious as violence – such as expression that 'stigmatises', 'impairs the enjoyment', and 'intimidates' to establish whether these concepts should be subject to censorship or be criminalised under New Zealand's domestic law.

Defamation of religion is not a new concept; a number of countries legislate against blasphemy or religious insult. New Zealand has existing (however, un-utilised) blasphemy laws, elaborated on below. In Saudi Arabia, the crime of blasphemy – or more specifically of defaming the Prophet Muhammad – is punishable by death.[25] In Russia, members of the punk rock band Pussy Riot were imprisoned for *hooliganism motivated by religious hatred* after singing a 'punk prayer' in a Moscow church asking the Virgin Mary to "throw Putin out".[26]

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21 *Resolution Aimed at Combatting Defamation of Religion*, above n 16 at 2.

22 At 2.

23 At 2.

24 At 2 - 3.

25 Maryam Omidi "Crime Scene" (blog post, December 2012) Index on Censorship <www.indexoncensorship.org>.

26 Omidi, above.

B Protection in domestic statute

1 Crimes Act 1961

Under section 123(1) of New Zealand's Crimes Act 1961, "[e]very one [sic] is liable to imprisonment for a term not exceeding one year who publishes any blasphemous libel."[27]

The section dictates that whether the material is blasphemous is a question of fact;[28] no one will commit a crime against this section if the expression, argument or opinion on religion is delivered "in good faith and conveyed in decent language";[29] and leave must be granted by the Attorney-General before someone is prosecuted.[30]

Section 123 is a vestige of English common law, under which prosecutions for the criminal offence of blasphemy occurred frequently until the beginning of last century.[31] In 2008, Britain and Wales' Criminal Justice and Immigration Act removed the common law offences of blasphemy and religious libel.[32] Prior to that, the last prosecution was in the 1979 case *Whitehouse v Lemon*[33], where the editor of the Gay News was prosecuted for publishing a poem describing Christ engaging in homosexual acts in explicit detail. This included describing "acts of sodomy and fellatio with the body of Christ immediately after the moment of His death."[34]

If New Zealand were to consider precedent from the United Kingdom binding, section 123 of the Crimes Act would not protect Muslims from blasphemous expression because courts have stipulated the section only applies to followers of Christianity.[35]

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27 Crimes Act 1961 at s 123(1).

28 At 123(2).

29 At s 123(3).

30 At s 123(4).

31 Peter Crane and Joanne Conaghan *The New Oxford Companion to Law* (Oxford University Press, online ed, 2009) at 'blasphemy'.

32 Criminal Justice and Immigration Act 2008 (UK) at s 79.

33 *Whitehouse v Lemon* [1979] AC 617.

34 At 618.

35 This conclusion is based on precedent from the United Kingdom, see for example: *R v Waddington* (1822) 107 ER 11, 1 B & C 26 (KB) and *R v Carlile* (1821) 1 St Tr (NS) 1033.

2 Bill of Rights

In practice, New Zealand never embraced the offence of blasphemy like the United Kingdom, and section 123 of the Crimes Act has only been used once, in 1922.[36] More commonly, situations of this kind are dealt with under the New Zealand Bill of Rights Act 1990 (NZBORA), specifically under sections 13, freedom of thought and religion[37], and 20, the right to practice religion[38]. Religious minorities are further protected from discrimination by section 19, freedom from discrimination.[39]

However, the protections offered under NZBORA and the international human rights law on which it is based, do not specifically protect against religious defamation or insult. This was confirmed by the New Zealand High Court in *Browne v CanWest TV Works Ltd*[40] where Wild J quoted a European Court of Human Rights decision to explain the scope of section 13. He stated the right to freedom of religion "does not, in terms, guarantee a right to protection of religious feelings."[41]

What it does do is protect humans and grant them freedom in the practice of their religion. It does not stipulate this practice must be free from criticism or ridicule.[42]

Under section 5, any rights may be subject to limitations if "demonstrably justified" and prescribed by law.[43] They may be further subject to section 14 NZBORA, the right to freedom of expression,[44] discussed below.

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36 *R v Glover* [1922] GLR 185.

37 New Zealand Bill of Rights Act 1990, s 13.

38 S 20.

39 S 19.

40 *Browne v CanwWest TV Works Ltd* [2008] 1 NZLR 654, (2007) 8 HRNZ 499.

41 *Otto Preminger Institut v Austria* (1994) 19 EHRR 34 (ECHR), quoted in *Browne v CanwWest TV Works Ltd*, above at [50].

42 Scharffs, above n 15 at 68.

43 New Zealand Bill of Rights Act, above n 37 at s 5.

44 S 14.

3 Balancing exercise

When a NZBORA right is subject to section 5, the Supreme Court in *Brooker v Police*[45] held that a balancing exercise must be undertaken to "assess the importance and impact of the particular rights in the circumstances."[46] The exercise requires the particular situation to be examined, giving due weight to both the conflicting interests, keeping in mind the purpose of the court is "to reach its decision through structured reasoning rather than an impressionistic process."[47]

In *Gisborne Herald Co Ltd v Solicitor-General* the court questioned whether the publication of an accused person's previous convictions in a newspaper breached the right to a fair trial.[48] The Gisborne Herald argued publication was in the public interest and therefore a manifestation of the right to freedom of expression, which overruled the fair trial right.[49] This argument was rejected by the court ruling that in cases like this, public policy – which suggests people are guaranteed a fair trial – warrants the curtailing of freedom of the expression.[50]

IV Freedom of Expression

Everyone in New Zealand has the "right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form."[51]

A Arguments in favour of freedom of expression

Three main arguments support free speech: truth, self-fulfilment and citizen participation in democracy.[52] Each argument will be analysed to understand whether speech offending Islamic sensibilities is the type of speech that should be protected from criminalisation or censorship under NZBORA.

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45 *Brooker v Police* [2007] 3 NZLR 91.

46 At [131].

47 At [132].

48 *Gisborne Herald Co Ltd v Solicitor-General* [1995] 3 NZLR 563.

49 At 317.

50 At 318.

51 New Zealand Bill of Rights Act 1993, above n 37, s 14.

52 Eric Barendt *Freedom of Speech* (Clarendon Press, Oxford, 1985) at 6.

1 Truth

This argument finds it roots in the works of utilitarian philosopher John Stuart Mill and basically suggests open discussion allowing for the discovery of truth is fundamental for a society to function appropriately.[53] If speech and expression is restricted, "society may prevent the ascertainment and publication of true facts and accurate judgment".[54]

At the beginning of the nineteenth century, Mill wrote that liberty of thought and discussion was one of the most important securities against a corrupt or tyrannical government.[55] He believed silencing even one opinion was evil and robbed the human race:[56]

> … [i]f the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.

Mill argues that while it may seem like there is some justification in censoring discussions on the basis it is incorrect or untrue, censorship further prevents the pursuit of truth.[57] Silencing discussion based on the assumption that it is incorrect, according to Mill, is an assumption of 'infallibility'.[58] Whereas history shows us many ideas we currently believe are infallible will be rejected by future ages, just as many from the past are rejected in our present age.[59]

Although written over a century ago, Mill's conclusion on this point is still relevant today. For religion, it is impossible to confirm the infallibility of a majority of claims made by all the world's different religions and, consequently, it is impossible to prove the infallibility of most critique. Much of the dialog shown to offend Muslim sensibilities has a much wider purpose than simply causing offence and it appears Mill would not support the censorship of this content as it is blocking the pursuit of truth, which in this case is the questioning of the belief and the consequences of that belief.

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53 Eric Barendt, above n 52 at 8.

54 At 8.

55 John Stuart Mill *On Liberty and Other Essays* (Oxford University Press, Aylesbury, 1991) at 20.

56 At 21.

57 At 22.

58 At 23.

59 At 23.

For example, *Submission,* a short film directed by Dutch film director Theo Van Gogh and written by former Muslim, political activist and member of the Netherlands' Parliament Ayaan Hirsi Ali, focuses on the enslavement of women in the Muslim world.[60]

This film constituted a social comment about the submission of women in Islamic culture, focusing on the psychological and physical violence that can be levied against them within the home.[61] Ali's aim in making the film was to shock and she expected a large portion of the Muslim community would come down against her. She wanted to "needle people into thinking [and] confront them with dilemmas."[62] What she did not expect was that the film would incite Mohammed Bouyeri, a Muslim who was born and raised in the Netherlands, to murder and partially decapitate Van Gogh on a busy street in Amsterdam.[63]

Ali's determination to link the Qur'an with sex and sexual violence and to show the brutality of the Qur'an was considered extremely offensive,[64] offensive enough to warrant murder.

Placing to one side the threat to personal safety, when analysed in light of Mill's truth argument, this movie – while offensive to Islam – appears to be an example of the type of expression that searches for truth and therefore we should be encouraging, not censoring, it.

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60 Simon Cottee "We Need to Talk About Mohammed" (2014) 54 Brit J Crimnol 981 at 986.

61 Rachel Blumenthal "Looking for Home in the Islamic Diaspora of Ayann Hirsi Ali, Azar Nafisi, and Khanled Hoessini" (2012) 34 ASQ 250 at 250.

62 Ian Buruma *Murder in Amsterdam – the Death of Theo van Gogh and the Limits of Tolerance* (Penguin Press, New York, 2007) at 177.

63 Kimberley L Thachuk, Marion E Spike and Courtney Richardson "Home Grown Terrorist: The Threat Within" (thesis, Center for Technology and National Security Policy National Defense University, May 2008) at 18.

64 Ian Buruma, above n 62 at 180.

The 'truth' argument is also often referred to as the 'marketplace of idea'; after American Supreme Court Justice Holmes famously said in 1919, that "the best test of truth is the power of the thought to get itself accepted in the competition of the markets".[65] This could also be applied to the idea of religious offence. In the 'marketplace' of religions – for there are many – different religions need to be able to stand up against critique or offence. Rather than punishing those who ask the questions, it could be suggested that followers of Islam should welcome the opportunity to show their faith can stand up against the competition of the markets. How exactly this would occur in practice is outside the ambit of this paper.

Lectures given in 1983 and 1984 by French philosopher Michel Foucault built on Mill's idea of free expression as an instrument to find truth through analysing the ancient Greek concept of *parrhesia*, or free speech.[66] Foucault translated his ideas of freedom by interpreting the role of the speaker and truth-teller in Greek philosophy.[67] Foucault concludes that the underlying principle of truthfulness in expression was present as far back as ancient Greek and Latin practice.[68]

In Foucault's own words, the lectures did not deal with the problem of truth, "but with the problem of truth-teller or truth-telling as an activity".[69] According to Foucault:[70]

> … *Parrhesia* has the effect of (re)placing the subjective at the centre of the notion of free speech such that it coincides with the objective creating a space for *parrhesiatically* true utterances.

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65 *Abrams v United States* 250 US 616 (1919) at 630.

66 Thomas Schwarz "Ancient Frankness: Foucault's Aesthetics of Existence and the Question of Free Speech" (2000) 9 Pretext: Literary and Cultural Studies 125 at 125.

67 At 125.

68 Michel Foucault, *The Courage of Truth: the Government of Self and Others* (lecture, Berkeley University, 1 February 1984).

69 Michel Foucault, *Discourse and Truth: the Problematization of Parrhesia* (lecture, Berkeley University, November 1983) at Introduction.

70 James Ressel "The Problem of '*Free Speech*' in the Idea(l) of Freedom of Speech" (2008) 15 ELAW 168 at 175.

He argued the way people use language can be considered as the "building blocks"[71] of reality. Through using truth-telling discourse or free expression, people can communicate openly and truthfully about their opinions and ideas.[72] In essence this can be considered as a very complex defence of free speech as a mechanism for truth. Foucault goes further, suggesting discourse plays an important part in constructing our social reality and can be used as a mechanism for power; "the one who defines the world, controls it."[73]

It appears Foucault would have supported both the freedom to express religion, but, more importantly, also the right to critique and if need be, offend religion through discourse or expression. However, for this discourse to fall within Foucault's realm, it would have needed an element of truth, such as a revelation or something distinguishing the discourse from simply offensive expression for the purpose of causing offence, *Parrhesia* (truth) must be present.

2 Free speech as an aspect of self-fulfilment

This argument – the least utilitarian of the three arguments in favour of free speech – suggests restricting expression inhibits the individual growth of personality and psyche.[74] This liberal theory regards the value of autonomy as more important than the disvalue of the potential consequences of this autonomy.[75] In other words, allowing people the freedom to say what they wish is more important than the threat of what they may say with this freedom.

This theory regards human communication as essential to self-fulfilment because suppressing the speech of individuals – even if this speech offends others – is robbing people of the opportunity to participate in public discourse.[76] On the face of it, it appears that this theory would also not support criminalising or censoring speech offending Islamic sensibilities.

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71 Sara Savage and Jose Liht "Religious Speech: the Ingredients of a Binary World View" in Ivan Hare and James Weinstein *Extreme Speech and Democracy* (Oxford University Press, New York, 2009) 488 at 488.

72 At 488.

73 At 488.

74 Eric Barendt, above n 52 at 14.

75 Wojciech Sadurski *Freedom of Speech and Its Limits* (Kluwer Academic Publishers, Dordrecht, 1999) at 17.

76 Ian Cram "The Danish Cartoons, Offensive Expression, and Democratic Legitimacy" in Ivan Hare and James Weinstein *Extreme Speech and Democracy* (Oxford University Press, New York, 2009).

Professor of Philosophy Seanna Velentine Shiffin favours what she describes as the *thinker-based* foundation for freedom of speech.[77] Shiffrin argues legislation aimed at restricting free speech – such as the New Zealand blasphemy laws under section 123 of the Crimes Act 1961 and interpretations of NZBORA rights inconsistent with section 14 of that Act – inhibits an individual's self-expression by censoring or criminalising the dissemination of materials essential for the "free development and operation of a person's mind."[78] In reaching this conclusion, Shiffrin begins from the assumption that human beings have significant (although imperfect) rational, perceptual and sentient capacities and these form the core of what we value about ourselves.[79] Shiffrin concludes that if the autonomous operation of the mind is valued and treated with respect, then the mind must be left alone to operate autonomously. Speech and free speech are necessary for this autonomy and for humans to realise their foundational and central interests and, most importantly, their capacity for thought and reason.[80]

Shiffin believes for many people, thoughts will only be fully identified if made linguistically or representationally explicit:[81]

> … one cannot fully develop a complex mental world, identify its contents, evaluate them, and distinguish between those that are merely given and those one endorses, unless one has the ability to externalize bits of one's mind [through linguistic expression].

To a degree, the autonomous operation of the mind appears to be exactly what Muslims want to censor. As with the Christianity in the West a number of centuries ago, Muslims feel strongly aggrieved by expression that questions or dissents against any part of the Islamic faith, especially about the Prophet.[82] In many Muslim countries, apostasy (renouncing a part of the Islamic faith) is punishable by death.[83] Questioning beliefs appears to be exactly what expression needs to be able to do to assist self-fulfilment.

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77 Seanna Valentine Shiffrin "A thinker-based approach to freedom of speech (2011) 27 Const. Comment. 238.

78 At 287.

79 At 287.

80 At 291.

81 Shiffrin, above n 77 at 292.

82 Christopher J van der Krogt "Why is Freedom of Speech a Problem for so Many Muslims?" in Erich Kolig (ed) *Freedom of Speech and Islam* (Routledge, Dunedin, 2016) 21 at 23.

83 At 21.

Like the argument for truth, it appears this argument does not support censorship of expression offending religious sensibilities, especially when this questions a part of the faith in an academic manner. However, when it merely intends to offend or ridicule the followers of this religion without questioning, using reason or externalising part of one's mind, it is not clear whether the argument defends it against censorship.

While not a universally held view,[84] it is the author's view that the French *Charlie Hebdo* cartoons were neither artistic nor did they make a genuine political or social statement. The magazine published a number of cartoons depicting the Prophet Muhammad in different poses considered insulting to Islam, such as a picture of Muhammed saying it is hard to be loved by imbeciles.[85]

It could be argued a piece of expression like this does not further a person's thought or ability to reason, because it does not contribute to the betterment of the academic, artistic, philosophical or other qualities of those who view it. Accordingly it does not add to a person's self-fulfilment. It is not suggested that criticism of religion should automatically be considered discriminatory, but when this criticism has no other purpose than to offend, there is a chance it should be. On this basis, one can argue censorship be allowed for expression that has only one purpose, to offend followers of the Muslim faith through offending a key aspect of their religion, such as the Prophet Muhammad.

3 Citizen participation in democracy

This utilitarian philosophical theory is fundamental in the development of twenty-first century free speech law.[86] Academics suggest that should democracy operate as intended, citizens must be given the freedom to express their opinions, especially about how the state operates.[87] Academic Dieter Grimm states that "[t]here can be no democracy without public discourse and no public discourse without freedom of speech, freedom of the media, and freedom of information".[88]

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84 Robert Chalmers "Ralph Steadman on Charlie Hebdo, the Right to Offend and Changing the World; Steadman, the satirical cartoonist extraordinaire, reflects on the Charlie Hebdo murders, in words and in art" *Newsweek* (online ed, 14 January 2015).

85 Lisa Peet "Libraries after Charlie Hebdo: confronting potential for violence, self-censorship" (2015) 140 LIBR J 12 at 12.

86 Barendt, above n 52 at 23.

87 At 21.

88 Dieter Grimm "Freedom of Speech in a Globalized World" in in Ivan Hare and James Weinstein *Extreme Speech and Democracy* (Oxford University Press, New York, 2009) at 11.

While required for all forms of democracy, freedom of speech and expression is absolutely fundamental for a state to operate as a 'direct-democracy', where some of the state's power is vested in its subjects by allowing them to be involved with the making of public policy decisions[89] and where the government's actions reflect what the people want.[90] Law Professor Robert Post suggests democracy *needs* open discussion for citizens to retain their ability to identify with the state, therefore, freedom of speech is a necessary condition for democratic legitimacy.[91]

In 2005, a cartoon depicting Muhammed with a turban in the shape of a bomb was published by Danish magazine *Jyllands-Posten* and resulted in protests across the world.[92] According to Post, the cartoon was an example of public discourse required to ensure state legitimacy:[93]

> … [i]f public policy is to be directed by an intelligently informed public opinion, and its citizens are to feel that public policy is potentially responsive their [sic] views, they must be free to express and discuss their perspectives on the matters satirized in the *Jyllands-Posten* cartoons.

Again the author does not regard the Danish cartoons as expression of artistic merit, nor consider they added anything of significance to democratic or political discourse. It could be argued, on Post's reasoning, that even if the cartoons were not politically charged, they initiated public discussion. They encouraged people to talk about the position and integration of Muslims into European society, *Islamophobia*, religious tolerance and immigration. In that sense, it is conceded the cartoons may have had some impact on democracy, because it may have encouraged people discuss important public policy decisions.

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89 Mark Gobbi "The Quest for Legitimacy: a Comparative Constitutional Study of the Origin and Role of Direct Democracy in Switzerland, California, and New Zealand" (LLM thesis at Victoria University, Wellington, 1994) at 10.

90 Richard Ekins "The Value of Representative Democracy" in Claire Charters and Dean R Knight (eds) *We the People(s), Participation in Government* (Victoria University Press, Wellington, 2011) at 29

91 Robert Post "Religion and Freedom of Speech: Portraits of Muhammad" (2007) 14 Constellations 72 at 76.

92 Peter McGraw and Joel Warner "The Danish Cartoon Crisis of 2005 and 2006" *The Huffington Post* (online ed, 25 November 2012).

93 Robert Post, above n 91 at 76.

In the Supreme Court decision *Whitney v California (No 3)* Brandeis J made what has become known as one of the strongest defences for freedom of speech, stating that the men who won independence in the United States:[94]

> … believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth; …. that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of the American government.

This statement suggests protection from censorship should be granted to speech that seeks the political truth, to ensure people are not able to become inert due to lack of information. The statement does not appear to provide protection from censorship for merely offensive expression that does not enhance public discourse.

Philosopher Alexander Meiklejohn takes another look at this, suggesting it is not so much the 'freedom to speak' that must be protected from censorship but "the freedom of those activities of thought and communication by which we 'govern'".[95] He explains that a sole action of voting is not an act of democracy, contrary to how it is often portrayed, but is merely the outward expression of a citizen's responsibility to judge how those in power are performing.[96] To undertake this responsibility, voters must be able to make a choice derived from their sane and objective judgment. For this judgment to exist, citizens must have unimpeded access to "all forms of thought and expression within the range of human communication."[97]

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94 *Whitney v California (No 3)* 274 US 347 (1925) at 375.

95 Alexander Meiklejohn "The First Amendment is Absolute" (1961) 1961 Sup Ct Rev 245 at 255.

96 Alexander Meiklejohn, above n 95 at 255.

97 At 256.

Meiklejohn stresses that to perform their role as voters, citizens must have open and free access to education; philosophy and sciences; literature and art; and public discussions on public issues. Education, he says, will cultivate the mind of a citizen so "that he shall have the wisdom, the independence, and, therefore, the dignity of a governing citizen";[98] philosophy and sciences so that they may gain "a knowledge and understanding of men";[99] and literature and the arts so citizens may be able to express themselves unimpeded in these mediums because they "lead the way toward sensitive and informed appreciation and response to the values out of which the riches of the general welfare are created".[100] Lastly, public discussion and access to information must be freely available to ensure that in a deeper sense, citizens govern the state, rather than the other way around.[101] This concept forms the basis for a direct-democracy (as mentioned above) and for wider access to public information by individuals. Meiklejohn stresses that over "our governing, they have no power. Over their governing we have sovereign power."[102]

Philosopher Jeremy Bentham (1748 – 1832) defended free speech on similar grounds to Meiklejohn, albeit a number of centuries earlier. He was the first person to "conceptualize the rule of publicity as the foundation for the doctrine of the sovereignty of public opinion."[103] A follower of utilitarianism, Bentham views free speech as the primary defender of public discussion and as a check on political authority and the legislature.[104] He regarded free speech as fundamental should citizens wish to surveil the actions of the state.

It appears academics in favour of a more direct-democracy type governance model agree that in general speech should not be censored as this prevents the dissemination of truth and the exercise of an individual's democratic right. Interestingly, academic and New Zealander Jeremy Waldron argues New Zealand politics should aspire to implement more direct-democracy policies,[105] yet he also supports the censorship of expression that affronts the dignity of sections of society.[106]

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98 At 257.

99 At 257.

100 At 257.

101 At 257.

102 At 257.

103 Slavko Splichal "Bentham, Kant, and the right to communicate" (2003) 15 Crit. Rev. 285 at 289.

104 At 290.

105 Jeremy Waldron *Law and Disagreement* (Oxford University Press, Oxford 1999) at 283.

106 At 106.

This again appears to suggest free speech should be encouraged on topics that help people voice their views on, and participate in, the democratic process; where this is not the case, it seems less likely the speech is protected from censorship. Waldron appears to go further and argues to only protect speech supporting the democratic process if it does not affront sections of society's dignity. This means all offensive speech, no matter whether it supports the democratic process or not, should be censored (this is discussed further below).

New Zealanders tend to value a more direct-democracy model of governance[107] and are also mindful not to offend minorities or appear to discriminate.[108] This suggests support for a framework in favour of free speech, but realises there are limits to this freedom and censors highly offensive expression. The next part of this paper explores where the threshold for censorship should rest.

B Free speech and its limits

While most theorists agree freedom of speech is not an absolute and untouchable right, many grappled with where exactly the right to free speech ends, especially when one person's right to free speech interferes with someone else's fundamental right, such as the right to freedom of religion.[109]

1 Speech that impedes others' free choice

Philosopher Immanuel Kant (1724 - 1804) suggests individual freedom or autonomy should not be interfered with unless it hinders the freedom of another.[110] "I ought never to act except in such a way that I could also will that my maxim should become a universal law", is the categorical imperative by which Kant reasons every person should live their life.[111] Categorical imperatives should bind one's actions no matter what their desires, in contrast to hypothetical imperatives which one should only obey if it suits their desire.[112] Breaking a categorical imperative is both immoral and unreasonable.[113]

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107 Gobbi, above n 89 at 16.

108 Raymond Miller (ed) *New Zealand Government & Politics* (3rd ed, Oxford University Press, Melbourne, 2006).

109 Steven Shiffrin "Freedom of Speech and Two Types of Autonomy" (2011) 27 Const. Comment. 387 at 340.

110 At 340.

111 Immanuel Kant "Groundwork of the Metaphysics of Morals" in Robert Johnson "Kant's Moral Philosophy" (June 2012) The Stanford Encyclopedia of Philosophy <www.plato.stanford.edu>.

112 Immanuel Kant, above.

113 Immanuel Kant, above.

Basically, to understand whether Kant would support censorship of religiously offensive expression, one must ask whether it would be alright for everyone to use such expression.

The concept of freedom is a "central normative and metaphysical concept" in Kant's philosophy.[114] He considers the essence of morality to be located in the exercise of free choice by human beings, so long as this does not conflict with another's ability to do the same.[115] He realises there must be limits to freedom, stating there is nothing "good without limitations except *good will*"[116].

It appears Kant would censor offensive religious expression if it conflicts with another person's exercise of free choice or if it is legally and socially unacceptable for the action to become law. Arguably, speech that offends religious sensibilities falls into neither of these categories unless it incites someone to do harm or commit crime. What if the harm caused does not have a direct causal connect to the inciting of harm, discrimination or marginalisation of the minority group targeted in the expression? For example, the harm is not caused to that group, but rather by this group themselves.

Published in 1988, *The Satanic Verses* by Salman Rushdie caused a Muslim 'panic' around the world and at the time was considered "one of the most controversial and certainly the most publicized novel in history."[117] The book was considered highly offensive to Islam because – among other things – the word *Satanic* in the book's title was considered to refer to the Qur'an (although Rushdie denied this)[118] and it discussed an often-ignored section of the Qur'an where the Prophet Muhammad agrees to the worship of Gods other than Allah if people subscribe to Islam.[119]

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114 Paul Guyer "Freedom: will, autonomy" in Will Dudley and Kristina Engelhard (eds) *Immanuel Kant: Key Concepts* (Acumen Publishing Limited, Durnham, 2011) 85 at 85.

115 At 86.

116 Immanuel Kant in Paul Guyer, above n 114 at 87.

117 Elias D Mallon *Offense and Counter-Offense* (1989) 160 America 327 at 327.

118 Ali A Mazrui, above n 10 at 111.

119 Salman Rushdie *The Satanic Verses* (Penguin Random House, London, 1988) at 111.

In February 1989, in retaliation to the book's publication, Iran's spiritual leader Ayatollah Ruhollah Khomeini issued a *fatwa* – or a call to execute – against Rushdie and anyone involved with the publication of the book.[120] Other Iranian leaders supported this and offered rewards of up to $3 million for the assassin.[121]

While Rushdie has so far not been assassinated, he has spent a lot of the past two decades in hiding and the Japanese translator of the book was murdered in 1991.[122]

In the Rushdie case and in a number of other extreme cases, including the murder of Theo Van Gogh, mentioned above, the ultimate harm caused is not to the group marginalised by the expression but to those involved with its publication.

Arguably a book is very different to a cartoon depicted on the front cover of a magazine. Magazines are hung up in the front windows of stores and on boards outside and are immediately offensive when viewed, whereas someone needs to pick a book up and read it in order to realise the offence. Moreover, it is the author's view that *the Satanic Verses* is a piece of literature with high artistic merit, so the threshold for censorship due to the offence caused should be higher.

When looked at in light of Kant's literal reasoning, it could be concluded that Rushdie's and Van Gogh's expression should be censored as it resulted in harm (to the expressor). However, these are extreme examples that turn traditional reasoning on its side, instead of censoring expression because it harms a minority group, it is censored because there is a real risk the expressor or those involved with its release could be harmed. Whether this is the type of expression Kant intended to be censored is questionable.

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120 Reid Mortensen "Blasphemy in a Secular State: a Pardonable Sin?" (1994) 17 Univ N S W Law J 409 at 414.

121 Richard Abel *Speech and Respect* (Stevens, Sons/Sweet & Maxwell, London, 1994) at 15.

122 Steven R Weisman "Japanese Translator of Rushdie Book Found Slain" *New York Times* (online ed, 13 July 1991).

Undoubtedly this expression caused harm to some Muslims; it is unfathomable that someone would commit murder as revenge for expression if this expression did not incite strong emotion within that person. In the Rushdie case it is estimated more than 100,000 people took to the streets to protest against the publication of the book;[123] again this would suggest these people were aggrieved. However, apart from against the expressors and those involved with it, the expression did not incite anyone to commit a crime, nor would it be acceptable if the action of publishing any form of offensive books, cartoons or films became criminalised.

Kant vehemently protects individual autonomy so long as it causes no harm, yet his definition of harm seems to focus more on physical rather than psychological harm. Therefore, it appears Kant would not have supported censorship of expression that offends the psyche and not body.

2 Speech that is unequal

Academic Catharine MacKinnon sees no issue with the censorship or potential criminalisation of offensive expression.[124] Of the theorists analysed for this paper, she is considered to be the most willing to use censorship when one person's freedom expression interferes with another person's rights;[125] in the current example the right to freedom of religion.

MacKinnon suggests the importance society and governments place on protecting freedom of expression dates back to the widespread Western fear of communism during the last century.[126] The era's dread of suppression by the state remains a struggle in the human mind, "the risk is that marginal, powerless, and relatively voiceless dissenter with ideas we will never hear will be crushed by governmental power".[127]

MacKinnon argues it is actually the other way around: the law of equality and the law of freedom of speech are on a "collision course",[128] in the sense that protection of free speech fails to regard social inequalities and suppresses those at the fringes of society or those with no voice.[129]

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123 Richard Abel, above n 121 at 15.

124 Catharine A MacKinnon *Only Words* (Harper Collins, London, 1994).

125 At 14

126 At 14.

127 Catharine A MacKinnon, above n 124 at 14.

128 At 51.

129 At 51.

In the New Zealand context, the Federation of the Islamic Associations of New Zealand (FIANZ) has seen growing trends of *Islamophobia* in New Zealand, especially a rise in verbal attacks.[130] It would appear this is the speech MacKinnon would censor and potentially make subject to criminal sanctions. According to MacKinnon, the current freedom-of-expression-focused model in the West only perpetuates the marginalisation of groups such as Muslim minority groups. In MacKinnon's model, the less speech these persons have, the more unequal they become,[131] whereas the more speech one has, the more dominant they become.[132]

As an alternative, MacKinnon suggests not questioning whether the right to free speech has been acceptably infringed, but whether or not the expression perpetuates the inequality of a marginalised group,[133] which *Islamophic* expression does.

3 Balancing exercise

Robert Post – who defends freedom of speech for its importance in fostering democratic legitimacy (discussed above) – suggests he would support some censorship of material that offends subordinated or oppressed groups. It could therefore be inferred he could be in favour of censoring expression that offends followers of Islam in New Zealand. However, in another journal article, Post questions whether blasphemy of religion should be censored, specifically the Danish cartoons of Muhammad.[134] In this article, Post concludes that if defamation of religion is made into an offence, the law will become "an instrument for exercising any opinion that a religious group might deem offensive."[135]

According to Post the Danish cartoons are "rather far from legally prohibited hate speech".[136] Suggesting the threshold should fall at censoring expression which constitutes 'hate speech'. While there is no legislation under international law defining what exactly "legally prohibited hate speech" is, Post analyses European Union and domestic European law and concludes it is speech causally connected to discrimination, oppression or violence.[137] This is a higher threshold than merely causing offence.

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130 Philip Mathews, above n 4.

131 Catharine A MacKinnon, above n 124 at 52.

132 At 52.

133 At 52.

134 Robert Post, above n 91.

135 Robert Post "Religion and Freedom of Speech: Portraits of Muhammad" at 80.

136 At 84.

137 At 83.

Unlike MacKinnon's blanket ban, Post suggests when the free speech of one individual inhibits the rights of another, a balancing act must be undertaken.[138] This must attempt to find a balance between the loss of the democratic liberties of the expressor and those affected.[139] For example, in suppressing A's speech, the loss of democratic legitimacy for A must be weighed against the democratic legitimacy that B loses for not suppressing that speech.[140]

For example, one would ask if suppressing the speaker's democratically legitimate freedom to verbally attacks Muslims in New Zealand outweighs the loss of democratic legitimacy for the Muslim recipient. In this case, it would appear the loss to the Muslim outweighs the loss of free speech for the expressor, because the harm caused by verbal attacks is more serious than the harm caused by not supressing them.

Post defines 'democratic legitimacy' as a governance model wherein " citizens [are] treated equally with respect to the requirements of autonomous participation in the practice of self-government."[141] Like MacKinnon, Post suggests special consideration should be given to otherwise subordinated or oppressed groups.[142]

If Post's balancing exercise is literally applied to the extreme cases mentioned above, it would appear there are grounds to censor all of it because it resulted in the loss of the expressor's life (Van Gogh) or freedom of movement (Rushdie). However, if a less literal approach is undertaken, it appears censorship is not as certain. Rushdie, for example, would lose more democratic legitimacy through censorship of his work than Muslims as a group would lose without its censorship. The Van Gogh case leads to a similar conclusion.

Post does not discuss whether artistic merit is given a higher threshold, but it appears that if merit is taken into account as part of the balancing exercise, the suppression of offensive art would lead to a greater loss of democratic legitimacy for the artist. Post's balancing exercise would be a good place to start when assessing whether expression that offends Islam should be supressed. The exercise can build on the precedent set down in *Gisborne Herald Co Ltd v Solicitor-General*.

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138 Robert Post "Democracy and Equality" (2006) 603 Annals Am. Acad. Pol. & Soc. Sci. 24.

139 At 31.

140 At 31.

141 At 31 – 32.

142 At 31 – 32.

4 Assaults on dignity

Jeremy Waldron and Anshuman Modal both suggest it is not actually the speech itself that should be the focus of censorship, but the *effect* this speech arouses in the people it targets or affects.[143] For example, the Van Gogh the film caused disgust and anger that the Qur'an was linked to sexuality.

Modal supports speech that offends, stating that offence in itself is a form of verbal violence.[144] Waldron on the other hand, stresses the importance of distinguishing between speech that causes 'offence' – as the aim of the law is not to protect people's feelings from offence[145] – and speech that affronts dignity.[146] The latter is speech that impacts on someone's status as an "equal in the community they inhabit, to their entitlement to basic justice and to the fundamentals of their reputation."[147]

Waldron is adamant the test for this must remain objective, while offence is a largely subjective concept focused on the feelings the expression causes for the person to who it is directed; an assault to someone's dignity affects their more objective standing or reputation within society.[148] Put more simply, the expression Waldron wants to protect people from is speech directed at a vulnerable person or groups of persons insulting their race, ethnicity, or religion.[149] This is similar to what Modal proposes, however, it appears Waldron wants to ensure the law is taken seriously by putting a concrete legal test in place.

On this basis it appears both academics would support New Zealand legislation censoring offence to religion. Waldron – although in principle he appears to agree with prohibiting the speech this paper is concerned with – would request the term 'assault to dignity' is used instead of the word 'offensive'.

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143 Anshuman A Modal *Islam and Controversy: The Politics of Free Speech After Rushdie* (Palgrave McMillan, published online, 2014) at 23 and Jeremy Waldron *The Harm of Hate Speech* (Havard University Press, Cambridge, 2012) at 35.

144 At 23.

145 Jeremy Waldron above, n 143 at 106.

146 At106.

147 At 106.

148 At 106 - 107.

149 Jeremy Waldron above n 143 at 37.

Waldron uses the expression 'hate speech', however, the author does not propose that this is used. As mentioned above, the commonly accepted definition for 'hate speech' is speech inciting discrimination, oppression and violence,[150] whereas the speech analysed in this paper is not this serious.

V Discussion

Temporary discussion tends to focus less on freedom of expression as a right that can achieve its three primary goals – truth, self-discovery and democratic legitimacy – and more on the right as warrant to offend, in this case, the right to ridicule another person's faith without repercussion.

Given the extensive array of people who class themselves as 'Muslim' and the relatively low threshold for causing 'offence', if New Zealand were to place a blanket ban censoring all types of expression that offends Muslims' religious sensibilities, this could create a framework covering a wide range of expression.

In lieu of such an extensive censorship regime, New Zealand could consider a different approach. In a similar vein to MacKinnon, it is proposed that instead of considering the rights – when in conflict – as mutually exclusive and trying to establish where their boundaries lie, the focus becomes on figuring out how the two can co-exist.

People often adopt a starting point of "I" (they look to themselves) for considering whether their own expression should be protected by the right to freedom of expression or not.[151] The alternative is to encourage people to start with 'you'; through analysing the fundamental human rights of others, to assess if their own expression encroaches on these.

For a legal framework, it is proposed the existing NZBORA rights are used instead of the antiquated criminal offence of 'blasphemy' under the Crimes Act 1961. While it is acknowledged NZBORA does not hold supreme law status and can be overridden by other legislation,[152] the Court of Appeal has held that where possible courts should interpret any statute as consistent with NZBORA.[153]

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150 Robert Post "Portraits of Muhammed", above n 91at 84.

151 Catharine A MacKinnon, above n 124 at 52.

152 New Zealand Bill of Rights Act 1990, above n 37.

153 *Moonen v Film & Literature Review Board* [2000] 2 NZLR 9.

It is predicted that criminalising offensive expression in New Zealand – such as the verbal attacks recorded by FIANZ – will be counterproductive in trying to prevent discrimination. There is a chance that if people who are predisposed to using offensive expression are given a criminal record for this, this will only perpetuate the discriminatory feelings and anger towards Muslims.

The suggested focus under NZBORA should be whether one person's right to freedom of expression infringes on another person's right to freedom of religion and the unimpeded practice of this. If this is found to be the case, the next step is to question whether there are legitimate grounds warranting censorship of the expression. This will be based on the balancing exercise suggested by Post and used in the one used by New Zealand's Supreme Court in *Brooker v Police.*[154]

It is suggested the balancing exercise is enacted under the *Films, Videos, and Publications Classification Act 1993* as a principle that allows for censorship of expression that offends religious sensibilities, subject to analysis of the factors outlined below.

Near the end of the 1980s, thousands of followers of Islam burnt books and protested in other ways against the publication of Salman Rushdie's novel *the Satanic Verses.*[155] At the time, it was not only those who followed the Muslim faith who protested against the publication of the book, the Archbishop of Canterbury declared that "offence to the religious beliefs of followers of Islam or any other faith is quite as wrong as is an offence to the religious beliefs of Christians".[156] Yet one could argue that a book only interferes with the freedom to exercise religion if an individual makes a deliberate choice to read it, and even then, if the book is a novel – like *the Satanic Verses* – this is a work of fiction. A book is very different to other forms of expression such as radio broadcasts or television programmes because a book requires a conscientious effort to accept the expression, whereby the others – especially radio broadcasts – are often delivered to people without their consent. Therefore, it is proposed the mode of delivering of expression is the first aspect to be taken into account as part of the balancing exercise.

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154 *Brooker v Police*, above n 45.

155 Richard Abel, above n 121 at 14.

156 Archbishop of Canterbury in Abel, above n 121 at 13.

It is the author's view that the cartoons in the Danish magazine *Jyllands-Posten* and the French magazine *Charlie Hebdo* sought to achieve only one purpose, to offend followers of Islam through ridiculing the Prophet Muhammed. While it is accepted that this view is not shared by all commentators, the cartoons do not appear to contribute significantly in any way towards democratic legitimacy through effective social or political comment, nor are they of any particular artistic merit. Should these cartoons then be protected against censorship as a legitimate goal of the right to freedom of expression? It is argued no, this is not the primary aim of the freedom. On this basis, the second consideration that should be assessed as part of the balancing exercise is whether the expression has any artistic merit. Obviously artistic merit or other merit is a subjective element, creating a legal test for this is outside the ambit of this paper.

The final consideration, which ties in with artistic merit and the question of whether the cartoons should have been subject to censorship, is to assess the expression's purpose. Similar to Foucault's reasoning on the concept of *Parrhesia*, this consideration can question whether the expressor was acting in a capacity as truth-teller or in an otherwise genuine manner.

The commonly referred to objective for protecting freedom of expression is the right should give people the freedom – among other aspects – to speak out against political regimes, promote democracy and provide social commentary. As part of the balancing exercise, it is proposed freedom of expression is given wider scope to protect offensive expression, when the expression's purpose goes beyond merely causing offence. When the offence is simply a by-product of a completely different and unrelated purpose, this should be given even more weight in opposition to censorship.

An initial list of purposes allowing higher thresholds of offensive expression could be garnered from Meiklejohn's list of qualities citizens should have access to if they are to fulfil their job as effective voters, notably, education, philosophy, sciences, literature, art and public issues.

This framework is in line with existing New Zealand legislation. Section 3(4)(c) of the *Films, Videos, and Publications Classification Act 1993* notes "the character of the publication, including any merit, value, or importance that the publication has in relation to literary, artistic, social, cultural, educational, scientific, or other matters" should be considered before deciding whether a publication is objectionable.[157] This section of the Act predominantly deals with publications that are objectionable because they depict torture, graphic violence or other offensive sexual or violent conduct.[158] However it provides evidence that New Zealand law has the scope to take into account the objective, the character and any merit of a potentially offensive expression.

Section 23(3) further states that material otherwise classed as objectionable "may be made available to particular persons or classes of persons for educational, professional, scientific, literary, artistic, or technical purposes".[159] The Court of Appeal has held that the test for section 23(3) is whether the expression should be made available for artistic purposes rather than a question of the artistic merit of the expression.[160] This factor can also be considered within the balancing framework alongside an analysis of the artistic merit.

VI Conclusion

For as long as mankind can remember, individuals have attempted to censor the speech of others when this causes offence. The question of offence to religion has resulted in a number of UN resolutions condemning defamation of religion. Muslims aggrieved by words, actions or other forms of expression that offend the Qur'an, the Prophet Muhammed or Allah, have strongly encouraged the UN to go one step further and introduce this as an offence under international law. However, at the time of writing it seems unlikely this will occur.

New Zealand prides itself on being a multicultural country and while offensive expression in this country is often self-regulated, FIANZ has noted a rise in *Islamophobic* comments in the past years. This paper concludes that, while this rise is worrying, it does not warrant the criminalisation of this type of expression under domestic law in New Zealand as this will likely cause further discrimination. In lieu of a criminal sanction, New Zealand could consider a balancing exercise within the existing Bill of Rights framework.

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157 Films, Videos, and Publications Act 1993, s 3(4)(c).

158 S 3(3)(a).

159 S 23(3).

160 *Moonen v Film and Literature Board of Review*, above n 153 at [33].

It is suggested this regulatory framework and general approach to the right to freedom of expression aims to ensure this right and the right to freedom of religion can co-exist rather than being mutually exclusive. Firstly, the general approach would encourage New Zealanders to consider other New Zealanders' fundamental right to freedom of religion when exercising their own right to freedom of expression. Secondly, if the person choses to continue with offensive expression – a balancing exercise should be undertaken to try to establish whether it ought to be safeguarded against censorship through a regulatory framework. This exercise should consider the expression's purpose, any artistic merit and the expression medium used.

BIBLIOGRAPHY

A Cases

1 New Zealand

Brooker v Police [2007] 3 NZLR 91.

Browne v CanWest TV Works Ltd [2008] 1 NZLR 654, (2007) 8 HRNZ 499.

Gisborne Herald Co Ltd v Solicitor-General [1995] 3 NZLR 563.

Moonen v Film and Literature Board of Review [1999] NZCA 329.

Simmons and CanWest Television Works Ltd [2006] NZBSA 22.

2 Europe

R v Carlile (1821) 1 St Tr (NS) 1033.

R v Glover [1922] GLR 185.

Otto Preminger Institut v Austria (1994) 19 EHRR 34 (ECHR).

Serif v Greece (1999) 9 EHRR 73 (ECHR).

R v Waddington (1822) 107 ER 11, 1 B & C 26 (KB).

Whitehouse v Lemon [1979] AC 617.

3 United States

Abrams v United States 250 US 616 (1919).

Whitney v California (No 3) 274 US 347 (1925).

B Legislation

1 New Zealand

Broadcasting Act 1989.

Crimes Act 1961.

Films, Videos, and Publications Act 1993.

New Zealand Bill of Rights Act 1990.

2 United Kingdom

Criminal Justice and Immigration Act 2008 (UK).

3 United States

United States Constitution.

C International Law Instruments

Resolution on the Universal Declaration of Human Rights GA Res 217 A, III (1948).

D Books and Chapters in Books

Richard Abel *Speech and Respect* (Stevens & Sons, London, 1994).

Eric Barendt *Freedom of Speech* (Clarendon Press, Oxford, 1985).

Heiner Bieldeldt "Privileging the *'Homo Religious'*?: Towards a Clear Conceptualization of Freedom of Religion or Belief" in Malcom D Evans, Peter Petkoff and Julian Rivers (eds) *The Changing Nature of Religious Rights under International Law* (Oxford University Press, Oxford, 2015) 12.

Thomas C Brickhouse and Nicholas D Smith *The trial and execution of Socrates: sources and controversies* (Oxford University Press, Oxford, 2002).

Ian Buruma *Murder in Amsterdam – the Death of Theo van Gogh and the Limits of Tolerance* (Penguin Press, New York, 2007).

William T Cavanaugh *The myth of religious violence: Secular ideology and the roots of modern conflict* (Oxford University Press, New York, 2009).

Ian Cram "The Danish Cartoons, Offensive Expression, and Democratic Legitimacy" in Ivan Hare and James Weinstein *Extreme Speech and Democracy* (Oxford University Press, New York, 2009) 311.

Peter Crane and Joanne Conaghan *The New Oxford Companion to Law* (Oxford University Press, online ed, 2009) at 'blasphemy'.

David Edgar *Shouting Fire: From Nanny State to Heckler's Veto: The New Censorship and How to Counter it* in Ivan Hare and James Weinstein *Extreme Speech and Democracy* (Oxford University Press, New York, 2009) 583.

Malcolm D Evans *International Law* (2nd ed, Oxford University Press, Oxford, 2006).

John Finnis *Endorsing Discrimination Between Faiths* in Ivan Hare and James Weinstein *Extreme Speech and Democracy* (Oxford University Press, New York, 2009) 430.

Charles Fried *Modern Liberty – and the limits of Government (*W. W. Norton & Company, New York, 2007).

Dieter Grimm "Freedom of Speech in a Globalized World" in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, New York, 2009).

Mary Ann Glendon "Is Religious Freedom an 'Orphaned' Right?" in Malcolm D Evans, Peter Petkoff and Julian Rivers (eds) *The Changing Nature of Religious Rights under International Law* (Oxford University Press, Oxford, 2015).

Paul Guyer "Freedom: will, autonomy" in Will Dudley and Kristina Engelhard (eds) *Immanuel Kant: Key Concepts* (Acumen Publishing Limited, Durnham, 2011) 85.

Ivan Hare *Blasphemy and Incitement to Religious Hatred: Free Speech Dogma and Doctrine* in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, New York, 2009).

Klausen Jytte *Cartoons That Shook the World* (Yale University Press, New Haven, 2009).

Christopher J van der Krogt "Why is Freedom of Speech a Problem for so Many Muslims?" in Erich Kolig (ed) *Freedom of Speech and Islam* (Routledge, Dunedin, 2016) 21.

Lorenz Langer *Religious Offence and Human Rights – the Implications of Defamation of Religion* (Cambridge University Press, Cambridge, 2014).

Francis Lieber *Civil Liberty and Self-Government* (R. Clay Printers, London, 1852).

Catharine A MacKinnon *Only Words* (Harper Collins, London, 1994).

John Stuart Mill *On Liberty and Other Essays* (Oxford University Press, Aylesbury, 1991).

Ishani Maitra and Mary Kate McGowan *Speech & Harm – Controversies Over Free Speech* (Oxford University Press, Oxford, 2012).

Mari J Matsuda and others *Words that Wound* (Westview Press Inc., Summertown, 1993).

Lawrence McNamara "Blasphemy" in Peter Radan, Denise Meyerson and Rosalind F Croucher (eds) *Law and Religion* (Routledge, Abingdon, 2005).

Anshuman A Modal *Islam and Controversy: The Politics of Free Speech After Rushdie* (Palgrave McMillan, published online, 2014).

Ramona A Naddaff *Exiling the Poets: the Production of Censorship in Plato's* Republic (The University of Chicago Press, Chicago, 2002).

Marloes van Noorloos *Hate Speech Revisited* (Intersentia Ltd, Cambridge, 2011).

Peter Randan, Denise Mayerson and Rosalind F Croucher *Law and Religion* (Routledge, Abingdon, 2005).

Salman Rushdie *The Satanic Verses* (Penguin Random House, London, 1988).

Wojciech Sadurski *Freedom of Speech and Its Limits* (Kluwer Academic Publishers, Dordrecht, 1999).

Sara Savage and Jose Liht "Religious Speech: the Ingredients of a Binary World View" in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, New York, 2009) 488.

Ammon Reichman *Criminalizing Relgiously Offensive Satire: Free Speech, Human Dignity, and Comparative Law* in Ivan Hare and James Weinstein *Extreme Speech and Democracy* (Oxford University Press, New York, 2009) 332.

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

Jeremy Waldron *Law and Disagreement* (Oxford University Press, Oxford 1999).

Chris Watson and Roy Shuker *In the public good?: Censorship in New Zealand* (Dunmore Press Ltd, Palmerston North, 1998).

Richard Webster *A brief history of blasphemy: Liberalism, censorship and the satanic verses* (The Orwell Press, Southwold, 1990).

E Journal Articles

Hamid Abu-Zayd "Renewing Qur'anic Studies in the Contemporary World" in Paul Marshal and Nina Shea *Silenced: How Apostasy and Blasphemy Codes are Choking Freedom Worldwide* (Oxford University Press, New York, 2011) 289.

Carenlee Burdull and others "Experiences of Muslims in Four Western Countries Post 9/11" (2011) 26 Affilia 139.

Rachel Blumenthal "Looking for Home in the Islamic Diaspora of Ayann Hirsi Ali, Azar Nafisi, and Khanled Hoessini" (2012) 34 ASQ 250.

Simon Cottee "We Need to Talk About Mohammed" (2014) 54 Brit J Crimnol 981.

Steve Garner "The Radicalization of Muslims: Empirical Studies of Islamophobia" (2014) 41 Crit Sociol 9.

Evelyn Beatrice Hall; Burdette Kinne "Voltaire Never Said It!" (1943) 58 Mod. Lang. Notes 534.

Ron E Hassen "Blasphemy and Violence" (2011) 55 Int Stud Q 23.

Elias D Mallon "Offense and Counter-Offense" (1989) 160 America 327.

Ali A Mazrui "*The Satanic Verses* or Satanic Novel? Moral Dilemmas of the Rushdie Affair" (1990) 15 Alternative 97.

Alexander Meiklejohn "The First Amendment is Absolute" (1961) 1961 Sup Ct Rev 245.

Reid Mortensen "Blasphemy in a Secular State: a Pardonable Sin?" (1994) 17 Univ N S W Law J 409.

Lisa Peet "Libraries after Charlie Hebdo: confronting potential for violence, self-censorship" (2015) 140 LIBR J 12.

Robert Post "Democracy and Equality" (2006) 603 Annals Am. Acad. Pol. & Soc. Sci. 24.

Robert Post "Religion and Freedom of Speech: Portraits of Muhammad" (2007) 14 Constellations 72.

James Ressel "The Problem of '*Free Speech*' in the Idea(l) of Freedom of Speech" (2008) 15 ELAW 168.

Brett G Scharffs “International Law and the Defamation of Religion Conundrum” (2013) 11 Review of Faith & International Affairs 66.

Thomas Schwarz “Ancient Frankness: Foucault’s Aesthetics of Existence and the Question of Free Speech” (2000) 9 Pretext: Literary and Cultural Studies 125.

Seanna Valentine Shiffrin “A thinker-based approach to freedom of speech (2011) 27 Const. Comment. 238.

Steven Shiffrin “Freedom of Speech and Two Types of Autonomy” (2011) 27 Const. Comment. 387.

Slavko Splichal “Bentham, Kant, and the right to communicate”(2003) 15 Crit. Rev. 285.

F Internet Material

Immanuel Kant “Groundwork of the Metaphysics of Morals” in Robert Johnson “Kant’s Moral Philosophy” (June 2012) The Stanford Encyclopedia of Philosophy <www.plato.stanford.edu>.

Kevin Timpe “Free Will” (2006) Internet Encyclopedia of Philosophy <www.iep.utm.edu>.

G Other Sources

Louise Arbour “60 years, Universal Declaration of Human Rights” (Research Paper, New Zealand Human Rights Commission, 2008).

Robert Chalmers “Ralph Steadman on Charlie Hebdo, the Right to Offend and Changing the World; Steadman, the satirical cartoonist extraordinaire, reflects on the Charlie Hebdo murders, in words and in art” *Newsweek* (online ed, 14 January 2015).

Michel Foucault, *The Courage of Truth: the Government of Self and Others* (lecture, Berkeley University, 1 February 1984).

Michel Foucault, *Discourse and Truth: the Problematization of Parrhesia* (lecture, Berkeley University, November 1983) at Introduction.

Mark Gobbi “The Quest for Legitimacy: a Comparative Constitutional Study of the Origin and Role of Direct Democracy in Switzerland, California, and New Zealand” (LLM thesis, Victoria University, Wellington, 1994).

Venessa Haggie “But Names Will Never Hurt Me: extending hate speech legislation to protect gender and sexual minorities in New Zealand” (LLM Research Paper, Victoria University, Wellington, 2013).

Freedom House “New Freedom House Study Shows Blasphemy Laws a Serious Threat to Human Rights” (press release, 21 October 2010).

Gareth Johnston (ed) *The Satanic Verses Affair* (documentary, BBC, 2012).

Phillip Matthews "Is New Zealand discriminating against Muslims?" *The Press* (Christchurch, 6 December 2014).

Peter McGraw and Joel Warner "The Danish Cartoon Crisis of 2005 and 2006" *The Huffington Post* (online ed, 25 November 2012).

Maryam Omidi "Crime Scene" (blog post, December 2012) Index on Censorship <www.indexoncensorship.org>.

Kimberley L Thachuk, Marion E Spike and Courtney Richardson "Home Grown Terrorist: The Threat Within" (research paper, Center for Technology and National Security Policy National Defense University, May 2008).

United Nations "Third Committee Approves Resolution Aimed at 'Combating Defamation of Religion" (press release, 12 November 2009).

United States Commission on International Religious Freedom "USCIRF Welcomes Move Away from 'Defamation of Religions' Concept" (press release, 24 March 2011).

Steven R Weisman "Japanese Translator of Rushdie Book Found Slain" *New York Times* (online ed, 13 July 1991).