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# FREEDOM OF EXPRESSION AND PRIVACY: AN APPROPRIATE BALANCE?

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## *ABSTRACT*

*In this paper, the current legal relationship between freedom of expression and privacy is analysed to determine whether an appropriate legal balance has been struck. Both concepts are defined and the values underlying them are determined, so that the true nature of their relationship is able to be ascertained. Such an analysis is deemed necessary due to the number of incremental advancements in protection for privacy in recent years which have affected its relationship with freedom of expression.*

*The central argument which is advanced is that the developments in the relationship which provide enhanced protection for privacy have ensured that an appropriate balance has been struck between freedom of expression and informational privacy. However, physical privacy has largely been excluded from these developments of privacy, and this means that there is currently an imbalance between freedom of expression and physical privacy. The case of* Brooker v Police *is considered as a good example of the current imbalance, and the effect of the New Zealand Bill of Rights Act 1990 on the relationship between freedom of expression and privacy.*

*Following that, suggestions for reform of the law of privacy are provided and discussed, to reach an overall conclusion that the best course of action would be to include a right to privacy in the New Zealand Bill of Rights Act 1990.*


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## *I INTRODUCTION*

It is indisputable that freedom of expression is a fundamental human right in New Zealand and in other western liberal democracies.[1] However, freedom of expression must co-exist with a variety of other legal, social and moral rights and values in order for society to function effectively.[2] At times, the desire to protect competing rights and values will result in law which abrogates the right to freedom of expression. As these laws amount to censorship, it is vital that they are enacted and applied in such a way that freedom of expression does not become unacceptably eroded. This is not an easy task. Other rights and values have also been described as fundamental,[3] so the balance to be drawn may be particularly fine.

Privacy is a right (or perhaps at this point, it is more appropriate to describe it as a value)[4] which has a competing relationship with freedom of expression under many circumstances. Historically, common law jurisdictions were reluctant to recognise that privacy is a right worthy of protection for its own sake, and have even expressly denied that there is any right to privacy at common law.[5] Consequently, there was little need to determine the correct balance between freedom of expression and privacy. However, throughout the late nineteenth and the twentieth centuries, privacy has become an increasing concern of both legislatures and judiciaries in common law jurisdictions, with the result that there is now a variety of legislation and common law causes of action which aim to protect privacy interests.

As developments in the law which protect privacy interests have necessarily had an impact on the exercise of the right to freedom of expression, a number of questions have been raised about the nature of privacy; the fundamental value or values it purports to protect; whether legal protections for privacy interests constitute appropriate limitations on the right to freedom of expression, and, if so, whether the

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[1] Andrew and Petra Butler *The New Zealand Bill of Rights Act: A Commentary* (LexisNexis NZ Limited, Wellington, 2003) 303; Living Word Distributors Ltd v Human Rights Action Group Inc (Wellington) [2000] 3 NZLR 570, para 77 (CA) Richardson P.

[2] Denise Meyerson "The Legitimate Extent of Freedom of Expression" (2002) U Toronto LJ 331, 332.

[3] Butler and Butler, above n 1, 132-133.

[4] *Wainwright v Home Office* [2003] UKHL 53, para 31 Hoffman LJ.

[5] Law Commission "Privacy Concepts and Issues: Review of the Law of Privacy Stage One" (January 2008, Wellington) para 4.1.

legal relationship between the right to freedom of expression and privacy interests has been correctly determined; and whether reform of the law needs to be undertaken in order to achieve a more appropriate balance. The purpose of this paper is to provide answers to these questions in a New Zealand context.

In order to provide comprehensive answers to the aforementioned considerations, a number of steps will need to be taken. Firstly, freedom of expression and privacy will be defined, and the values which underlie them will be explained. This step is necessary to ensure that the basis from which the following analysis will be undertaken is clear. After that, the legislation and common law which currently regulate the relationship between freedom of expression and privacy in New Zealand will be described and analysed in light of the values which underlie them, to determine whether the law achieves an appropriate balance. Special emphasis will be placed on the 2007 New Zealand Supreme Court case *Brooker v Police*[6] as it serves as a particularly good example of current uncertainties and problems in the regulation of the relationship. Finally, various proposals for reform of the law in order to address any deficiencies which are evident will be analysed. The goal of the final analysis is to provide a recommendation for appropriate reform.

## *II DEFINITIONS AND UNDERLYING VALUES OF FREEDOM OF EXPRESSION AND PRIVACY*

In this section, freedom of expression and privacy will be defined and the values which underlie each of them will be described, in order to show why their legal protection is necessary in New Zealand society today.

### *A Definition of Freedom of Expression*

At first glance, freedom of expression seems simple to define. In fact, its simplicity is deceptive, as it is generally understood to protect more than simply the

[6] [2007] 3 NZLR 91 (SC).

right of everyone to communicate what they wish to communicate to others. The ambit of freedom of expression varies depending on the jurisdiction in which the right is being called upon.[7] For this reason, it is submitted that the most appropriate way of defining freedom of expression in the New Zealand context is by recourse to its definition in the New Zealand Bill of Rights Act 1990 (BORA).

Section 14 of BORA states that "everyone has the right to freedom of expression, including the freedom to seek, receive and impart information and opinions of any kind in any form." Immediately, it is apparent that freedom of expression protects more than just the ability to communicate. It also encompasses the right to search for information and opinions and to receive the communications which others wish to express, whether those communications express information, or opinion. Butler and Butler point out that the way that freedom of expression is drafted in BORA is capable of encompassing even more than the explicit examples of acts which form part of the definition, as the word "including" denotes a non-exclusive list in accordance with orthodox statutory interpretation practice.[8,9] It is evident, therefore, that Parliament intended that the right should be interpreted in an extremely broad way.

It is also important to determine what exactly what is meant by "expression" in this definition. Expression has been described by the New Zealand Court of Appeal as being "as wide as human thought and imagination."[10] The fact that section 14 of BORA states that information and opinions "of any kind in any form" are protected within the ambit of the right suggests that this interpretation is the correct one. However, it must be noted that the New Zealand courts have not expressly interpreted "expression" in BORA, and have preferred instead to determine on a case by case basis whether or not section 14 applies to the particular situations with which they are

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[7] Grant Huscroft "The Constitutional and Cultural Underpinnings of Freedom of Expression: Lessons from the United States and Canada" (2006) 25 U Queensland LJ 181,183.
8 Butler and Butler, above n 1, 310.
9 Peter Langan *Maxwell on Interpretation of Statutes* (Sweet and Maxwell, London 1969) 270.
10 *Moonen v Film and Literature Board of Review* [2000] 2 NZLR 9, para 15 (CA) Tipping J for the Court.

presented.[11] This makes the conclusion which has been arrived at in the course of the analysis more tenuous than is preferable.

In the absence of a clear New Zealand precedent as to exactly what constitutes "expression," it has been suggested that Canadian jurisprudence on the issue is an appropriate avenue for guidance.[12] This approach is considered appropriate as the drafters of BORA were influenced by the Canadian Charter of Rights and Freedoms when they were deciding how the BORA rights ought to be articulated.[13] Canadian jurisprudence does provide further guidance in regard to the meaning of "expression." In a case which was heard by the Supreme Court of Canada, it was determined that "if the activity conveys or attempts to convey a meaning, it has expressive content and prima facie falls within the scope of the guarantee [of freedom of expression under the Charter]".[14] Again, the emphasis is on the breadth of freedom of expression. This is consistent with the other analysis which has been undertaken in this paper.

In conclusion, the right to freedom of expression in New Zealand is extremely broad, and it would appear that it encompasses any activity which is able to convey meaning or by which information or opinions are able to be obtained. It is indeed "as wide as human thought and imagination."[15]

### *B Values Underlying the Right to Freedom of Expression*

As the discussion above has shown, the right to freedom of expression is capable of applying to, and therefore protecting, an almost endless variety of expressive acts. How, then, is it possible to determine when it ought to be abrogated in favour of another interest? It is submitted that the appropriate method of determining the relative strength of an assertion of the right to freedom of expression is to compare the particular expression at issue in the circumstances in which it is

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11 Butler and Butler, above n 1, 311.
12 Butler and Butler, above n 1, 312.
13 Ministry of Justice *A Bill of Rights for New Zealand: A White Paper* (Government Publisher, Wellington, 1985) para 10.1.
14 *Irwin Toy v Attorney-General (Quebec)* [1989] 1 SCR 927, 696 (SCC) Dickson CJ.
15 *Moonen v Film and Literature Board of Review*, above n 10, para 15 Tipping J for the Court.

being undertaken to the values which underlie the right to freedom of expression. It is only those instances of expression which are consistent with the underlying values of the right to freedom of expression that are worthy of protection in a case where there is a competing consideration. If the expressive act in no way furthers the achievement of the values which underlie freedom of expression, then it ought to give way in favour of the competing interest. However, it should also be noted that in a case where freedom of expression does not further any of the values which underlie the right, but where it does not conflict with another right or value, such expression should remain protected by the right, as there is no compelling reason to abrogate it under those circumstances.

There is widespread agreement about values which underlie freedom of expression. Each of these will be described and considered in turn below.

### *1 Freedom of expression is necessary for the effective functioning of a democracy*

One of the concepts which justifies protecting a right to freedom of expression is that it is an essential component of a successful democracy.[16] This is a structural, or consequentialist justification for freedom of expression.[17] These types of justification are based on the idea that freedom of expression needs to be protected as it is necessary for the functioning of particular societal structures.[18] They contrast with rights-based justifications which argue that freedom of expression ought to be protected for its own sake.[19] Consequently, when this justification is taken into account, the value which is placed on the societal structure that freedom of expression is purported to promote in the circumstances of the case will assist in determining whether freedom of expression should preside over a competing right or value.

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[16] Butler and Butler, above n 1, 308.
[17] Larry Alexander *Is There a Right to Freedom of Expression?* (Cambridge University Press, Cambridge, 2005) 127.
[18] Ibid.
[19] David A Strauss "Rights and the System of Freedom of Expression" (1993) U Chi Legal F 197, 198.

This justification for protecting a right to freedom of expression is fairly straight-forward. It is necessary for citizens living under a democratic government to be able to assess the performance of that government so that they are able to re-elect it or choose to elect an alternative government at the next election.[20] Consequently, freedom of expression needs to be protected to ensure that citizens are freely able to access and express information and opinions about the performance of government.

It is submitted that this is a particularly important justification for freedom of expression. Democracy is the very foundation of New Zealand society, and therefore rights and institutions which allow democracy to function are fundamental. It is further submitted that this means that there is a greater justification for protecting expressive acts which constitute political expression when it comes into conflict with a competing right or interest than there is in protecting expressive acts which are not political in character.[21] Examples of non-political expressive acts include those which are purely creative and those which are scientific. Consequently, where a determination is being made over whether freedom of expression or a conflicting right or value ought to be upheld in a particular situation, it will be useful to enquire as to whether the expressive act is political expression or not.

The submission above should be read in conjunction with the following consideration. The question of whether or not an expressive act is a political statement may not be clear-cut in all cases. For example, if the intention of the person who is performing the expressive act is to make a political statement, but it is impossible for those people who witness the expressive act to deduce that the expressive act is a political statement, should that expressive act be protected in the event of a conflict or not? Arguably, there is less justification for protecting expression under this head of justification if that expression is not able to be received by the audience. Democracy does not work in a vacuum, and so opinions which are not able to be received by their intended audience are unnecessary for the proper functioning of a democracy. As long as the person who holds those opinions is able to vote in a manner which is consistent with them, it is not necessary for the functioning of democracy for that person to be

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[20] Alexander, above n 17, 136.
[21] George Devenish "Freedom of Expression: The Marketplace of Ideas" (1995) J S Afr L 442, 444.

protected in the exercise of expressing his or her opinions. This view is supported by Strauss, who states that it is the audience which receives the expression which should be the primary consideration in analysis involving those justifications which are structural in nature, not the person who is undertaking the expressive act.[22]

Even when the consideration above of the difficulty which may occur in the course of a determination of whether an expressive act amounts to political expression or not is taken into account, it is concluded that some types of expression are a necessary conduit of the democratic state. In the vast majority of cases, it will be clear whether or not an expressive act has the character of political expression. Consequently, it is still an important consideration to be taken into account when determining whether or not an expressive act ought to be protected when it conflicts with another right or interest.

### 2 *Freedom of expression is necessary to ensure the proper functioning of the marketplace of ideas*

The marketplace of ideas theory has been posited as a justification for protecting a right to freedom of expression for centuries.[23] Like the justification which states that freedom of expression is a necessary component of a democratic society, this theory is structuralist or consequentialist in nature.

This theory for the protection of freedom of expression is based on the notion that freedom of expression is necessary to further the pursuit of truth in society.[24] It suggests that truth is only able to be ascertained if people are free to communicate their ideas, thoughts and feelings and to criticise the ideas, thoughts and feelings of others without being restricted.[25]

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[22] Strauss, above n 19, 201-202.
[23] Devenish, above n 21, 442.
[24] Butler and Butler, above n 1, 307.
[25] Alexander, above n 17, 128.

Although there are a number of criticisms of this theory, for example, that it assumes that there is such a thing as objective truth,[26] there is also obvious appeal in the argument. Human advancement depends on the achievement of "truth" in all spheres of society, and if truth is unable to be achieved, then continuing debate and reflection is necessary to determine the appropriate place short of absolute truth that a particular idea or concept should attain. Much of scholarly achievement has occurred through the process of ideas being communicated, critiqued, and revised in order to take account of the critique; and new ideas being presented which were inspired by the shortcomings in those ideas which have been expressed before. The marketplace of ideas theory effectively states that if this process is extrapolated so that it applies to society in general, that the same result will occur: through a gradual process of analysis of thought and opinion, eventually the thought or opinion which is closest to the truth will be able to preside.

In terms of analysing whether a particular expressive act should be protected by the right to freedom of expression in accordance with this theory, consideration will need to be taken of the level of that act's contribution to the marketplace of ideas. It is also possible that a hierarchy of ideas in the marketplace will need to be determined, as not all contributions to the marketplace of ideas will be equal.[27] A relatively trivial expressive act may nevertheless deserve protection if it is in conflict with another right or value if that expressive act contributes to the marketplace of ideas in a particularly important sphere of society. The most obvious example is political expression. A single protestor who wishes to peacefully demonstrate in the grounds of Parliament about virtually any political issue is (almost) always protected in doing so, despite the fact that the protest is unlikely to even be noticed by Parliamentarians and his or her presence may conflict with the Speaker's right to determine who is welcome on Parliament grounds and who is trespassing. In contrast, an expressive act which is backed up by considerable analysis and reflection may not deserve protection if it is in conflict with another right or value if that expressive act contributes to the marketplace of ideas in a relatively obscure sphere of society. An

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[26] Grant Huscroft "Freedom of Expression" in Grant Huscroft, Scott Optican, Richard Mahoney and Paul Rishworth *The New Zealand Bill of Rights Act 1990* (Oxford University Press, Melbourne, 2003) 309.

[27] Yves de Montigny "The Difficult Relationship between Freedom of Expression and Its Reasonable Limits" (1992) 55 Law and Contemp Probs 35, 50.

example is if I was to write a lengthy dissertation on my favourite character on the television programme Green Wing, and my desire to express it by getting it published was in conflict with publishing companies' rights to make decisions about only publishing material which is likely to actually be interesting to their target markets.

In conclusion, the marketplace of ideas theory is an important consideration in any determination of whether a particular expressive act should be protected by the right to freedom of expression or whether it should yield to a competing interest. However, as not all marketplaces of ideas are equally worthy of protection, consideration would have to be made of the marketplace in question in the particular circumstances of each case, and whether that marketplace is worth protecting to the detriment of a competing right or interest.

### 3 *Freedom of expression is necessary for self-fulfilment*

A further justification for protecting a right to freedom of expression is that it promotes human self-fulfilment.[28] This is an example of a "rights-based" justification, which contends that freedom of expression ought to be an end in itself,[29] rather than a means to a more fundamental end as is the case with structural or consequentialist justifications.[30] Consequently, the person who undertakes an expressive act, or the person who endeavours to receive information from an expressive act are the primary consideration in this context.

The argument that a right to freedom of expression ought to be protected to attain the goal of human self-fulfilment is predicated on the belief that undertaking expressive acts and receiving information from expressive acts committed by others enables people to achieve their full potential as members of society.[31] It is closely related to the concept of inviolate personality, that each of us has a right to pursue the

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[28] Butler and Butler, above n 1, 309.
[29] Strauss, above n 19, 198.
[30] Ibid.
[31] Butler and Butler, above n 1, 309.

courses of action which make us feel happy and fulfilled by virtue of the fact that we are all members of humankind.[32]

It is submitted that this is one of the most difficult values which underlie freedom of expression to balance against other competing rights and values. Theoretically, all people are considered to have an equal right to self-fulfilment as all people are considered to be equal. If one person wishes to fulfil themselves by undertaking an expressive act and another person wishes to fulfil themselves by refraining from being subjected to that act, then whose right ought to be preferred? As all expressive acts will involve the quest for self-fulfilment, it is perhaps more appropriate that this consideration be secondary to those already mentioned above when a determination over which of competing rights ought to be preferred in cases where it comes into question. The correct approach to take will depend on the facts of any particular case, so there is little point in undertaking any more generalised discussion about it here.

*4 Freedom of expression functions as a societal safety valve*

A final justification for protecting a right to freedom of expression is that it ensures that expressive acts which are potentially damaging to society are not made even more damaging by being driven underground.[33] Again, this is a structural argument. It relies on the assumption that people will openly express their thoughts and opinions if their ability to do so is protected and, consequently, opinion which is at the margins of that of the majority of society will not result in conspiracy and other activities which are considered damaging to society.[34]

It is difficult to see how this consideration could be included in the analysis for the determination of whether a particular expressive act ought to be protected in the event that it competes with another right or interest. Perhaps the best way of ensuring that it is given effect is to note that it demonstrates that expressive acts which involve unpopular views ought not to be given lesser protection than those which are more

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[32] Edward J Bloustein "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser" (1964) 39 NYU L Rev 962, 971.
[33] Butler and Butler, above n 1, 309.
[34] Ibid.

acceptable to society. Indeed, if only widely-accepted views were able to be protected by the right to freedom of expression, other underlying values such as the importance of self-fulfilment and of the effective functioning of the marketplace of ideas would be undermined also. This justification can therefore be seen as supplementary to those other values.

### 5 *Conclusion*

The above analysis has shown that there are a variety of values which underlie the right to freedom of expression. These values are either important for the functioning of a successful democratic society, or are important for the protection of human dignity. It is therefore easy to see why it has been considered necessary to take steps to legally protect freedom of expression. Each of the underlying values should be taken into account whenever a determination is being made over whether freedom of expression ought to be abrogated in order to protect a competing right or interest. This approach should ensure that the most important exercises of what is already considered to be a fundamental human right are able to be adequately protected in the case of a conflict, while other interests which may also be considered fundamental are able to abrogate the freedom of expression in appropriate cases.

## *C Definition of Privacy*

In order to undertake a discussion about the legal value of privacy, it is necessary to define what is meant by the term. Unlike the freedom of expression, there is no single legal definition in New Zealand which can be used to succinctly capture the essential qualities of a right to (or value of) privacy. Indeed, there has been a large amount of academic debate over what the definition of privacy ought to encompass.[35] Consequently, a number of the different suggestions for definitions will be presented here and critiqued, with the aim of arriving at an appropriate theoretical definition on which the rest of the discussion can be appropriately based.

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[35] See, for example, Ruth Gavison "Privacy and the Limits of the Law" (1980) 89 Yale LJ 421, 437; Louis Henkin "Privacy and Autonomy" 74 Colum L Rev 1420, 1420-1421; Sidney Jourard "Some Psychological Aspects of Privacy" (1966) 31 Law & Contemp Probs 307, 318.

### 1 *Privacy as the 'right to be let alone'*

One of the earliest and most enduring definitions of privacy, described by Gavison as "often attributed – incorrectly – to Samuel Warren and Louis Brandeis",[36] is that privacy denotes the "right to be let alone."[37] This definition was actually first proposed by Justice Cooley of the Unites States Supreme Court writing extra-judicially[38] and has endured in the United States since. At first glance, the definition appears to be convincing. It is favoured by Prosser, who states, in his influential article on the right to privacy in the United States, that the only thing that the disparate situations in which a right to privacy has been successfully protected by United States courts have in common, is that they are all instances of people asking to be let alone.[39]

The appeal of the definition of privacy as the "right to be let alone" has led to its adoption by the United States Supreme Court in matters regarding the interpretation of the fourth and fourteenth amendments to the United States Constitution.[40] The Court has fashioned a right to be let alone from these two constitutional provisions and has used this right to strike down state and federal law which is inconsistent with the broad right.[41] There are many circumstances under which this right to be let alone has been invoked by the Court to strike down United States federal legislation due to unconstitutionality. The types of laws which have been struck down in this manner are extremely diverse. Examples include laws regulating the provision of contraception[42] and abortion,[43] through to laws which require parents to send their children to public schools.[44]

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[36] Gavison, above n 35, 437.
[37] Ibid.
[38] Daniel Watterson "Privacy in the Home: A Critical Evaluation of Existing Protections" (LLB(Hons) Research Paper, Victoria University of Wellington, 2007) 8.
[39] William L Prosser "Privacy" (1960) 48 Cal L Rev 383, 389.
[40] Ibid, 387.
[41] Ibid.
[42] *Griswold v Connecticut* (1965) 381 US 479, 484 Douglas J for the Court.
[43] *Roe v Wade* (1973) 410 US 113, 151-152 Blackmun J for the Court.
[44] *Pierce v. Society of Sisters* (1925) 268 US 510, 536 McReynolds J for the Court.

It is in the jurisprudence of the United States Supreme Court that the difficulties with this particular definition of privacy can be ascertained. Consider the example provided above of a law being struck down which required parents to send their children to public schools. There is no doubt that such a law would interfere in the lives of citizens, contrary to a right "to be let alone." There is also no doubt that such a law would cause offence to a number of parents who would prefer to have the option to send their children to private school. Yet the interference contemplated by the law and the offence or damage which it would cause are not those which are intuitively understood to breach a right to privacy as such. Decisions about schooling lack a quality which is usually associated with privacy. In short, decisions about schooling are not those which a person would ordinarily expect to make while they were completely shielded from the rest of society and decisions about schooling are not usually those which one would feel it was "improper" or "impolite" to enquire about. Enforcing the right to make such decisions without interference from the government as an instance of protection for a "right to privacy" is therefore problematic.

Wacks has convincingly argued that the problem with this definition of privacy is that it confuses privacy with autonomy.[45] Although the two concepts are related, share some of the same underlying values, and may overlap in some situations, they are conceptually different. An assertion of a right to autonomy is concerned with allowing people to make their own decisions for themselves in situations where there is no compelling reason for interference. An assertion of a right to privacy is both broader and, in some respects, narrower than that. Consequently, the definition of privacy as "the right to be let alone" must be dismissed as an appropriate definition on which to base legal protection of privacy.

### 2 *Privacy as the right to control over personal information*

[45] Raymond Wacks "The Poverty of Privacy" (1980) 96 LQR 73, 78.

Another popular definition of privacy, favoured by commentators such as Jourard is that privacy is the right to have control over personal information.[46] Certainly, when someone desires privacy, sometimes what is desired is the right to keep personal information pertaining to that individual from being known about by any other person. Alternatively, that person may wish to disclose the personal information to a limited number of others, without those others being able to disseminate it to the world at large. Consequently, it has been determined in many jurisdictions that there ought to be legal protection for the right of individuals to exercise that control under appropriate circumstances. A good example of this conception of privacy is the law which protects doctor/patient confidentiality. Medical matters are generally considered by society at large to constitute the personal information of the individual to which they pertain. Members of society would not ordinarily expect to be able to freely acquire information about the medical conditions of others. However, the disclosure of that information to a medical practitioner is necessary in order for a person who is suffering from an illness to be given an effective course of treatment for that illness. In order to ensure that the social understanding that the information which is expressed by the patient to the doctor remains inaccessible to others unless the patient chooses to disclose it to them, the relationship of doctor and patient is considered a fiduciary one under law. The doctor is therefore unable to act in any way in regard to the patient which is contrary to the patient's interests. Keeping medical information confidential is a tacit aspect of the relationship.

As the discussion above has demonstrated, the argument that privacy should be defined as a right to control information about oneself has practical appeal. It is certainly true that some situations where one would expect privacy will involve such considerations. There have been a wide variety of laws enacted and recognised in common law jurisdictions to protect this conception of privacy, including in New Zealand.[47] However, the obvious flaw in this definition of privacy is that it does not encompass all of the situations in which it is commonly understood that a right to

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[46] Jourard, above n 35, 307.

[47] See, for example, Privacy Act 1993; Protected Disclosures Act 2000; *Hosking v Runting* [2005] 1 NZLR 5, para 117 (CA) Gault and Blanchard JJ.

privacy would cover.[48] Moreham has demonstrated this convincingly. In her article "Privacy in the Common Law: A Doctrinal and Theoretical Analysis", she provides the following example to demonstrate that there are situations in which we would intuitively consider that a person's privacy had been violated, but which do not involve a loss of the right to control information:[49]

> X, who, having recently separated from Y after living with her for several years, trains a telescope on her [Y's] bedroom so that he can watch her getting dressed in the morning. It seems unlikely that X would obtain any significant information in this situation – X would have seen Y dressing many times before and would know what she looks like naked, what clothes she has, and how she goes about dressing in the morning.

This example makes it very clear that a right to privacy should involve more than simply legal protection which confers on individuals a level of control over their personal information. A person in Y's position who realised that she was being watched by X would feel that her privacy had been invaded by X, despite the fact that X has not acquired any new information about Y. The definition of privacy as the right to have control over personal information must therefore be discarded as it is too narrow. There are also potential situations where unwanted physical access to an individual will involve an intrusion into their privacy. For brevity, definitions of privacy which focus exclusively on this right to restrict unwanted physical access to one's person and ignore the aspect of privacy which pertains to having control over personal information will not be fully discussed here, as they suffer the same flaw as this definition.

### 3 *Privacy as the right to limit access to the "self"*

A number of theorists have submitted arguments in favour of defining privacy as a right to limit access to certain aspects of the "self."[50] Under these definitions, privacy involves a number of different situations in which it is considered socially

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[48] Edward Shils "Privacy: Its Constitution and Vicissitudes (1966) 31 Law and Contemp Probs 281, 282.

[49] Nicole Moreham "Privacy in the Common Law: A Doctrinal and Theoretical Analysis" (2005) 12 LQR 628, 649.

[50] Daniel J Solove "Conceptualizing Privacy" (2002) 90 Cal L Rev 1087, 1102.

acceptable for a person who is involved in such situations to choose to restrict the access of others. Gavison defines this right as having three separate aspects which she describes as secrecy, anonymity and solitude.[51] The secrecy aspect of privacy is concerned with suppressing personal information from others.[52] The anonymity aspect of privacy is concerned with the ability to escape the notice of others.[53] The solitude aspect is concerned with a person's ability to prevent others from being able to physically access them.[54]

Gavison's definition is an attractive one as it encompasses different common situations in which privacy is often relevant whilst simultaneously ensuring that the ambit of privacy is not defined too widely. It is also attractive as Gavison ensured that her definition of privacy is value-neutral.[55] It describes privacy without conflating the definition of privacy with the justifications for protecting it. Although this definition has been criticised by Solove as being too narrow,[56] it is submitted that in fact it is Solove's conception of privacy which is too broad. His definition includes the idea that invasions of privacy ought to include invasions into one's personal life in the form of government regulation of personal choices.[57] As has been described above in relation to the definition of privacy which equates it with "the right to be let alone," such a definition is too broad as it wrongly assumes that privacy and autonomy are coterminous.

It is submitted that, in terms of an analysis of the legal relationship between freedom of expression and privacy, the aspect of Gavison's definition of privacy which is concerned with anonymity is not required. It is quite unlikely that there would be a situation in which someone would require legal protection of just that aspect of privacy, without one of the other two aspects being relevant. A right to anonymity can be protected legally by ensuring that information about a person's identity is not able to be legally disclosed under certain circumstances, for example, when a person wants to give police information about a crime anonymously. It can

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[51] Gavison, above n 35, 428.
[52] Ibid, 429.
[53] Ibid, 432.
[54] Ibid, 433.
[55] Ibid, 425-426.
[56] Solove, above n 50, 1105.
[57] Ibid.

also be protected by ensuring that no-one has physical access to a person while they are undertaking certain activities. A good example is when people exercise their right to vote. No one is allowed physical access to them while they are in the polling booth, which means that no one is able to identify which people voted for which candidates or parties, if those people wish that information to remain anonymous.

*4 Conclusion*

It is submitted that the modified version of Gavison's definition described above is an appropriate one to adopt for the analysis into the legal relationship between privacy and freedom of expression. It is broad enough to ensure that all situations in which one intuitively feels that there is a privacy interest which ought to be given legal protection are not left out and is narrow enough to ensure that values and interests which are closely aligned to privacy, but which are not properly equated with privacy are not included. The fact that it is value-neutral is also important, as it will prevent the question of the value of privacy from being answered by the circular logic of referring to its definition.

## *D Values Underlying Privacy*

As with freedom of expression, it is important to identify the underlying values which provide the justification for legal protection of privacy. In a case where a right to privacy competes with freedom of expression, it is by comparing the particular circumstances in which a person argues that they should have legal protection for their privacy with the underlying values of privacy, that it is possible to determine which right ought to prevail. If the particular claim of a right to privacy is made in a situation in which the underlying values are not engaged, or are engaged only to a slight degree, then that claim ought to be subordinated to the competing claim for freedom of expression.

It will be argued in this section that the various values which are suggested by commentators to underlie privacy are all just different ways of saying the same thing: that privacy protects the value of human dignity, or inviolate personality. This

justification for protecting privacy is rights-based,[58] rather than structuralist like a number of the justifications for protecting freedom of expression.

In order to present the argument that the underlying value of privacy is the desire to protect human dignity, the following steps will be taken. Firstly, the suggestion that privacy is worth protecting as it assists in the protection of human dignity will be explained. Following that, a number of the theories which have been advanced in regard to other values underlying privacy will be described and analysed in order to show that each of them is just advancing a slightly different conception of the basic idea that privacy promotes the protection of human dignity.

*1 Protection of privacy is necessary to safeguard human dignity*

It is submitted that the underlying value of privacy is the desire to protect human dignity, or inviolate personality. The concept of human dignity is the idea that all human beings are entitled to an equal amount of basic respect from others, by virtue of the fact that we are all members of humankind.[59] It also encompasses the idea that we are required to show others that respect. It recognises the fact that all people have unique personalities made up of thoughts and feelings; and experiences and dreams; and ensures that everyone is able to retain their unique personalities as far as is consistent with their membership in society.[60]

The notion that protection of privacy is based on the underlying value of respect for human dignity is argued convincingly by Bloustein.[61] In his article "Privacy as an Aspect of Human Dignity: An Answer to Dean Prosser," he states that those commentators who are unable to see a commonality between all the instances in which we intuitively consider a privacy interest to be involved have that problem because they focus their considerations on the different kinds of harm that an intrusion upon privacy can cause, rather than the underlying interest that the right to

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[58] Alexander, above n 17, 128.
[59] Harry Kalven Jr "Privacy in Tort Law: Were Warren and Brandeis Wrong?" (1966) 31 Law and Contemp Probs 326, 326.
[60] Bloustein, above n 32, 961.
[61] Ibid, 971.

privacy protects.[62] Examples of different kinds of harm which can be caused by different types of invasions of privacy include emotional distress when someone has physical access to a person at a time when they wish to be alone;[63] and damage to reputation when someone publishes facts about a person which that person does not wish to disclose.[64] Bloustein argues that both of these harms, although quite different from each other, occur because the invader of the individual's privacy has shown disrespect for the victim's human dignity in a situation where that human dignity ought reasonably to have been respected.[65]

It is now necessary to turn to the question of how human dignity should fit into an enquiry into whether an alleged right to privacy should be given legal protection in a particular case. It is submitted that, when a person alleges that their privacy has been intruded upon by another person or the state, and that other person (or the state) argues that their intrusion ought to be allowed as it constitutes an exercise of the right to freedom of expression, an enquiry should be made into the extent to which that intrusion poses a violation of the complainant's human dignity and whether such an intrusion would be acceptable to a reasonable person.[66] If it is concluded that the intrusion would be acceptable to a reasonable person, then the right to freedom of expression ought to prevail over the competing right to privacy. In some cases, this will be easy to ascertain. In others, as freedom of expression has a number of disparate underlying values, some of which are also effectively based on a right to human dignity, the balance may need to be drawn between two people's rights to protect their human dignity. In such cases, it will be a lot more difficult to make a determination in regard to whose dignity ought to be protected at the expense of the other's.

*2 Protection of privacy promotes other underlying values*

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[62] Ibid, 970.
[63] Prosser, above n 39, 390.
[64] Ibid, 398.
[65] Bloustein, above n 32, 973.
[66] Robert C Post "The Social Foundations of Privacy: Community and Self in the Common Law Tort" (1989) 77 Cal L Rev 957, 961.

In this section, a number of other theories of the underlying values of privacy will be briefly described and analysed to show that they actually describe an aspect of human dignity.

(a) Privacy allows us to build love, trust and friendship

Fried argues that protection for privacy is necessary as it is needed in order to allow people to build love, trust and friendship.[67] Ultimately, what he is arguing is that privacy is a necessary condition for humans to be able to foster relationships with one another. It is not difficult to show that this is simply one of the aspects of human dignity. In fact, Fried effectively admits this himself, stating that his underlying values of privacy "build on a common conception of personality and its entitlements."[68]

(b) Privacy is needed in order to maintain mental health

Jourard argues that privacy is needed in order to protect the mental health of individuals.[69] In his argument, he states that when we interact in society, we are forced to conform to societal norms, forcing us to behave in ways which we may not choose to behave if we were able to make the choice.[70] Consequently, privacy is needed in order for us to behave in ways in which we feel are more consistent with our individual personalities but which we are unable to indulge in while we are in public, due to fears that we may be exiled by society for our non-conformity with the accepted norms of behaviour.[71] If privacy is not protected, then Jourard claims that both individuals and society as a whole will suffer.[72]

Again, it is not too difficult to see that the concern with mental health is an aspect of protecting human dignity. Mental health is intimately connected to one's personality, and it is the inviolate human personality that the concept of human dignity is designed to protect.

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[67] Charles Fried "Privacy" (1968) 77 Yale LJ 475, 478.
[68] Ibid.
[69] Jourard, above n 35, 308.
[70] Ibid.
[71] Ibid.
[72] Ibid, 316.

### 3 *Conclusion*

The above analysis shows that, despite arguments that privacy protects a variety of underlying interests, it in fact ultimately protects human dignity. Consequently, when someone argues that they have suffered an invasion of privacy, it will be important to consider the extent to which that invasion constitutes a violation of that person's human dignity and whether that aspect of human dignity ought to be given legal protection.

## *E Conclusion*

The preceding analysis has provided definitions of freedom of expression and of privacy which will be used for the remainder of the paper. It has been concluded that the best definition of freedom of expression in the New Zealand context is that which is enacted in BORA,[73] and that the best definition of privacy is the modified version of the definition advanced by Gavison: that privacy involves desired secrecy and solitude. This will enable a coherent discussion of the relationship of the two terms to be undertaken in later sections of the paper.

Additionally, the values which underlie freedom of expression and privacy have been explained so that it is clear why each of them is deserving of at least some measure of legal protection. There are a number of accepted underlying values of freedom of expression, including the concept that freedom of expression is vital for the successful operation of a democratic state; that freedom of expression is necessary in order to ensure the successful operation of the marketplace of ideas; that freedom of expression promotes human self-fulfilment; and that freedom of expression acts as a societal safety valve that reduces the likelihood of political conspiracies and revolutions. The only true underlying value of privacy is human dignity or the concept of the inviolate personality. It is by recourse to the underlying values of each of the rights that a balancing exercise in regard to which right should prevail in a case where they conflict will be able to be undertaken. Consequently, the values which underlie

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[73] New Zealand Bill of Rights Act 1990, s 14.

freedom of expression and privacy should form an important aspect of their legal personalities.

## *III THE CURRENT LEGAL RELATIONSHIP BETWEEN FREEDOM OF EXPRESSION AND PRIVACY*

In this section, the current legal relationship between freedom of expression and privacy will be described and analysed in light of the values that underlie the two rights in order to determine whether an appropriate legal balance has been struck between them. The central argument in this section will be that the balance is appropriate when the aspect of privacy which is concerned with secrecy or the right to have control over personal information is considered, due to a number of developments in statutory and common law. However, it will also be argued that the balance between freedom of expression and the aspect of privacy which is concerned with solitude or the right to be free from unwanted physical access is not appropriate, with freedom of expression being protected to the detriment of privacy in a number of cases in which such a balance is unjustified.

### *A Legal Protection for Freedom of Expression*

Interestingly, the history of legal protection for freedom of expression is similar to that of privacy. For a long time, freedom of expression received only indirect protection by the common law.[74] The current legal position is very different to the historical one. Although there are still few laws which directly protect freedom of expression, the right now enjoys a constitutionally important place in New Zealand law. In this section, the legal status of freedom of expression as it pertains to the legal status of privacy in New Zealand will be described.

#### *1 New Zealand Bill of Rights Act 1990*

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[74] Butler and Butler, above n 1, 305.

As has been previously mentioned, freedom of expression is one of the rights included in BORA.[75] Its inclusion in BORA ensures that freedom of expression enjoys a constitutionally important status in New Zealand. By virtue of section six of BORA, all enactments must be given a meaning by the courts which is consistent with the rights contained within BORA where such a meaning is possible. This means that the courts are required to interpret legislation in such a way that enables freedom of expression to be protected as far as is possible where that legislation is relevant to the right. It will also become apparent that the status of freedom of expression as a BORA right has meant that it has enjoyed a more protected status than rights and values which are not included in BORA.[76]

### 2 *Official Information Act 1982*

The Official Information Act 1982 (OIA) is a particularly important statute for protecting freedom of expression against competing assertions of a right to privacy. It ensures that individuals are able to freely acquire information which is held by government, due to its principle of availability.[77] Consequently, information will only be able to be withheld from an individual who wishes to access it if one of the reasons for withholding information is satisfied. There are a number of sections which regulate the circumstances under which information may be withheld.[78] One of these sections allows information to be withheld in order to protect the privacy of natural persons.[79] It should be noted, however, that if the holder of the information wishes to withhold it on the basis of protecting privacy, it may only be withheld if the interest in protecting privacy outweighs all other interests in disclosing the information.[80] Consequently, the OIA provides comprehensive protection for freedom of expression.

This Act affirms the idea that freedom of expression is vital for the proper functioning of democracy. It also indirectly furthers the expansion of the marketplace of ideas, as it gives individuals access to the resources they need to form opinions and

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[75] New Zealand Bill of Rights Act 1990, s 14.
[76] *Brooker v Police*, above n 6, para 40 Elias CJ.
[77] Official Information Act 1982, s 5.
[78] Official Information Act 1982, ss 5-9.
[79] Official Information Act 1982, s 6.
[80] Official Information Act 1982, s 9.

express those opinions to other members of society. Evidently in matters which pertain to the operation of government, it has been determined that freedom of expression ought to be preferred over competing privacy interests in the majority of cases.

### *B Legal Protection for Privacy*

The biggest difference between legal protection for privacy and legal protection of freedom of expression is that there is no right to privacy included in BORA.[81] Consequently, it is unnecessary for the judiciary to interpret statutes in such a way that they are given a meaning which is consistent with a right to privacy. Where both freedom of expression and privacy are factors in the interpretation of an enactment which does not expressly protect either, judges undertaking the interpretation are only required to ensure that the interpretation which is favoured is consistent with freedom of expression. Doubt has been expressed as to whether it is open to the courts to consider rights and values which are not included in BORA when they are undertaking this exercise.[82] Consequently, it is possible that a variety of legislation will be interpreted in such a way that freedom of expression is assured to the detriment of any relevant privacy interests. In a later section of this paper, it will be argued that this effect of the decision to include freedom of expression as a BORA right while excluding a right to privacy has occurred in case law.

Although there is no right to privacy included in BORA, aspects of privacy are protected by a number of statutory, common law, and other measures. These will be explained below.

#### *1 Tort of invasion of privacy*

Like in other common law jurisdictions, a tort of invasion of privacy has now been recognised in New Zealand after a string of cases in which it was decided that

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[81] *R v Jeffries* [1994] 1 NZLR 290, 302 (CA) Richardson J; *Lange v Atkinson* [2000] 3 NZLR 385, 396 (CA) Judgment of the Court.
[82] *Brooker v Police*, above n 6, para 40 Elias CJ.

there are situations in which a privacy interest ought to be given legal protection.[83] The tort protects the secrecy limb in Gavison's definition of privacy. It allows a plaintiff injunctive relief[84] or damages,[85] depending on the circumstances of the case, if he or she is able to prove the following elements:[86]

1. The existence of facts in respect of which there is a reasonable expectation of privacy; and
2. Publicity given to those private facts that would be considered highly offensive to a reasonable person.

If the two elements are proven, the plaintiff's action will be successful, unless the defendant is able to prove that there was a legitimate public interest in the publication of the information at issue.[87]

Immediately, it is clear that the current formulation of the tort is incapable of protecting the aspect of privacy which is concerned with undesired physical access to an individual. Despite this shortcoming, it is submitted that the way the tort is formulated is an appropriate balance between a defendant's right to freedom of expression and a plaintiff's right to informational privacy for a number of reasons which will be explained below.

The first limb of the test ensures that the plaintiff is not able to use the tort to stifle the expression of the defendant in situations in which reasonable members of society would consider that no privacy interest is involved. It ensures that the vast majority of material that a defendant wants to add to the marketplace of ideas is able to enter that marketplace. For example, a magazine was able to publish photos of a celebrity's children which were taken while they were out for a walk with their

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[83] See, for example, *Tucker v Newsmedia Ownership Ltd* [1986] 2 NZLR 716 (HC); *Bradley v Wingnut Films* [1993] 1 NZLR 415 (HC); *P v D* [2000] 2 NZLR 591 (HC); *L v G* [2002] DCR 234; *Hosking v Runting*, above n 45.
[84] *Hosking v Runting*, above n 47, para 149 Gault P and Blanchard J.
[85] *L v G*, above n 83, 250 Judge Abbott.
[86] *Hosking v Runting*, above n 47, para 117 Gault P and Blanchard J.
[87] Ibid, para 129 Gault P and Blanchard J.

mother in a public street, denying the parents' assertion that publishing the photos would be an invasion of their children's privacy.[88]

The second limb ensures that it is only the most serious cases of invasion of privacy which will receive the protection of the tort. For example, it was decided that an invasion of privacy of the requisite level of seriousness had occurred in a case where a man published a photo of a woman's genitals in an adult lifestyle magazine without her consent,[89] and was denied in a case where a prominent tombstone was shown in the background of a film.[90] This ensures that human dignity is protected, but only in cases in which the vast majority of the public would think that such dignity had been violated seriously enough to warrant legal redress.

The defence of public interest is also particularly important as it ensures that, in appropriate cases, a fact situation which is able to satisfy the requirements of the tort may nevertheless fail if there is a compelling reason that the information ought to be added to the marketplace of ideas. The defence will be satisfied in cases such as those where private information about a politician which affects his or her job performance is at issue. The defence has been satisfied in the United Kingdom in respect of their analogous tort of breach of confidence where a newspaper was vindicated in its decision to publish information about the drug problems of a supermodel who had previously held herself out as a drug-free role model.[91] It is submitted that such protection is required in order to ensure that freedom of expression is able to fulfil its role of ensuring the effective operation of a democracy and to ensure that the marketplace of ideas is not inappropriately stifled. As democracy is the basis of New Zealand society, strong measures are required to ensure that it is protected and supported.

### 2 *Privacy Act 1993*

Again, this measure of protection for privacy interests is concerned with the information aspect of privacy only. It regulates the use that "agencies" (which

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[88] Ibid, para 164 Gault P and Blanchard J.
[89] *L v G*, above n 83, 250 Judge Abbott.
[90] *Bradley v Wingnut Films*, above n 83, 430 Gallen J.
[91] *Campbell v MGN Ltd* [2004] UKHL 22, para 82 Hope of Craighead LJ.

includes individuals, private companies, public companies and government institutions)[92] are able to make of personal information. It requires that agencies only obtain personal information in the course of legal activities which are necessary to one of the functions of the agent.[93] It also requires that an agency which collects personal information must keep it only for as long as is necessary,[94] and it does not use that information for any other purpose.[95]

### 3 *Harassment Act 1997*

It has been suggested that the Harassment Act 1997 is capable of providing redress for some breaches of privacy.[96] The purpose of the Act is to provide protection for people who are being subject to behaviour which amounts to harassment. It is submitted that harassment is an invasion of the human dignity of the plaintiff, as acts which would be considered to be harassment are those which are directed at the plaintiff despite the plaintiff's desire not to be subjected to those acts, even if the acts are perfectly legal. This desire to be free of the acts may take the form of desired seclusion from the defendant, the secrecy aspect of Gavison's definition of privacy. Consequently, the idea that the Harassment Act would be able to be invoked to protect some privacy interests is plausible.

The Harassment Act is extremely flexible. It allows a Court to tailor a solution to the particular conduct that is being complained of, as there are many possible acts which may amount to harassment in the appropriate circumstances. Before the court will intervene and provide relief to the plaintiff, the plaintiff must be able to show that the defendant has committed a "specified act" directed at the plaintiff on at least two occasions in a 12 month period.[97] Consequently, if someone stood on the footpath outside my house and gave me a lecture on exactly what a terrible law student they thought I was on at least two occasions after I had told them that I did not wish to communicate with them, those two acts (which, it must be remembered, are exercises

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[92] Privacy Act 1993, s 2.
[93] Privacy Act 1993, s 6.
[94] Privacy Act 1993, s 6.
[95] Privacy Act 1993, s 6.
[96] *Hosking v Runting*, above n 47, para 106 Gault P and Blanchard J.
[97] Harassment Act 1997, ss 3 & 9.

of the right to freedom of expression, protected by BORA) may amount to specified acts for the purposes of the Harassment Act. If the Court determines that it is necessary for legal intervention in a particular case, then a restraining order will be granted against the defendant.[98] As has been previously mentioned, the flexibility of the Act allows the court to tailor the solution to the situation which needs to be addressed.[99] In the example described above, the terms of the order may be that the defendant is unable to attempt to communicate with me while I am in my home. In such a case, my privacy interest in solitude, the right to be free from the defendant's unwanted intrusion upon my seclusion which occurred when she stood outside my house and said things which I could hear, would be protected. Hence, the Harassment Act is capable of protecting privacy (and its underlying value of human dignity) to some extent. The fact that it allows remedies to be tailored to the situation presented means that any remedies which are provided can be crafted in such a way that they do not intrude inappropriately on freedom of expression.

It should be noted that the Harassment Act also contains provisions which allow the most serious instances of harassment to constitute a criminal offence.[100] This provision may be able to provide enhanced protection for those who suffer from the most serious instances of privacy invasions as there is no need for the victim of the invasion to pay for a civil suit against the invader, which may be a deterrent to taking civil action for some claimants.

However, there are also problems with the protection for privacy interests which the Harassment Act is able to provide. A single invasion of privacy which takes the form of undesired physical intrusion will never be actionable under the Act, despite the fact that there are circumstances under which a reasonable person may wish to have legal redress when an undesired physical intrusion has occurred. Consequently, the Harassment Act can only be described as a partial solution to the problem of protecting physical privacy interests.

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[98] Harassment Act 1997, s 16.
[99] Harassment Act 1997, ss 19-20.
[100] Harassment Act 1997, s 8.

### 4 *Other instruments*

In addition to the instruments described above there are also a number of other codes and guidelines which include some protection for privacy. In general, these protect informational privacy only (the secrecy limb of privacy). Examples include the Credit Reporting Privacy Code, which regulates the way in which debt reporting agencies may deal with personal information which is held about individuals;[101] the four Codes of Broadcasting Practice which regulate decisions made in regard to what material is broadcast over free-to-air television,[102] pay-to-view television,[103] radio[104] and election programmes;[105] the Health Information Privacy Code 1994; and the Telecommunications Privacy Code 2003.

Each of these codes has been specifically enacted to ensure the proper balance between the right to freedom of expression which is able to be exercised by the body regulated by the codes and the right to privacy of the individuals about which those bodies hold information is maintained. In cases where an individual believes that one of the bodies have breached one of these privacy codes, they are able to complain to a variety of semi-autonomous agencies which have been set up to administer them. If an individual who complains does not receive a satisfactory outcome from the governing agency, they have the right to petition for a judicial review of the decision.

## *C Conclusion*

The aim of this section was to describe the different ways in which the legal balance between freedom of expression and privacy is currently being determined and to consider whether these measures are appropriate safeguards of the underlying interests. The above description and analysis have shown that, although the main protection for freedom of expression is provided by only one statute, the constitutional nature of that statute has ensured that freedom of expression has received comprehensive consideration and protection when competing interests of

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[101] Office of the Privacy Commissioner "Credit Reporting Privacy Code" (6 December 2004).
[102] Broadcasting Standards Authority "Free to Air TV Code" (1 December 2004).
[103] Broadcasting Standards Authority "Pay TV Code" (1 August 2006).
[104] Broadcasting Standards Authority "Radio Code" (1 July 2008).
[105] Broadcasting Standards Authority "Elections Programmes Code" (1 June 2008).

privacy are involved. It is submitted that protecting freedom of expression in this way is the best method of ensuring that it is able to support the functioning of successful democracy in New Zealand.

In contrast, there are a wide number of legal and quasi-legal instruments which provide protection of privacy against an interest in free expression. Those which have been described in detail appear to strike an appropriate balance between freedom of expression and privacy, when regard is had to the underlying interests of each. However, it must be noted that the vast majority of protection only applies to informational privacy. The only instrument which could expressly protect spatial privacy against a competing assertion of a right to freedom of expression is the Harassment Act 1997. It was determined in the analysis that the Harassment Act provides only partial protection of privacy at best, and no protection unless specified acts have been undertaken on more than one occasion. Consequently, it is submitted that more comprehensive protection for spatial privacy is required.

## *IV BROOKER v POLICE: AN APPROPRIATE BALANCE BETWEEN FREEDOM OF EXPRESSION AND PRIVACY?*

In this section, the Supreme Court case of *Brooker v Police* will be described and analysed. It serves as an interesting illustration of the interaction between freedom of expression and privacy under New Zealand law when the legislation at issue does not specifically aim to protect either of the interests. It will be argued that the result which was arrived at is an inappropriate balance between freedom of expression and privacy, although it is almost certainly a correct application of the current law.

### *A Facts*

Mr Brooker believed that police constable Fiona Croft had undertaken her official duties in an unlawful manner.[106] She had obtained a search warrant for the

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[106] *Brooker v Police*, above n 6, para 13 Elias CJ.

forensic examination of a vehicle believed to be on Mr Brooker's property.[107] Police arrived there to execute the warrant late one Saturday night in May 2000, but were unable to proceed as the vehicle was not at the property.[108] Even if the vehicle had been at the property, there were questions over the likelihood of obtaining evidence from it in time for the case in connection with which it was executed, as the case was scheduled to be heard on the following Monday.[109] Mr Brooker was of the opinion that the constable had acted as she did in order to harass him, rather than in faithful pursuit of her official duties.[110]

To express his opinion of the constable, on 18 March 2003 (nearly three years after the incident with the search warrant), Mr Brooker went to her house at around 9.00am.[111] He knew that she had been on night duty the previous night.[112] He knocked on her door until she answered it and made it clear that she wanted him to leave.[113] He retreated to the grass verge outside her property, where he displayed a sign which had "No more bogus warrants" written on it.[114] He also began to play his guitar and sing songs with lyrics which demonstrated his opinion of the constable's actions.[115] His songs were directed at the Constable Croft personally, with lyrics which included "No more bogus warrants, Fiona" (Constable Croft's first name) and "you don't know when to quit".[116]

Constable Croft rang the police station as soon as Mr Brooker had left her property.[117] She wished to have him removed from the vicinity of her property, which on-duty officers did by arresting Mr Brooker for loitering with intent to intimidate under s 21(1)(d) of the Summary Offences Act 1981 soon after his protest began.[118] The charge was amended at trial to one of disorderly behaviour under the same Act,

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[107] *R v Brooker* [2004] NZAR 680, para 3 William Young J for the Court.
[108] Ibid.
[109] *Brooker v Police*, above n 6, para 13 Elias CJ.
[110] Ibid.
[111] Ibid, para 14 Elias CJ.
[112] Ibid.
[113] Ibid.
[114] Ibid.
[115] Ibid.
[116] Ibid.
[117] Ibid.
[118] Ibid.

as the Judge was of the opinion that no evidence of intent to intimidate existed.[119] Mr Brooker was convicted[120] and the long process of appealing the conviction followed, culminating in the Supreme Court decision that his conviction ought to be quashed.

### *B Passage of the Case through the Courts*

Although Brooker was originally arrested for loitering with intent to intimidate,[121] the charge was amended to one of disorderly behaviour[122] when the evidence was heard in the Greymouth District Court.[123] This was due to a decision by the presiding judge that the evidence did not support the former charge.[124] He was convicted, sentenced to a $150 fine and ordered to pay court costs of $300.[125]

Brooker appealed to the High Court on the basis that the District Court judge had misapplied the law by failing to apply it consistently with his right to freedom of expression as guaranteed by law,[126] which in effect meant that the judge had not interpreted the provision under which he was charged in such a way that a definition which interfered the least with his BORA right was preferred.[127] In particular, he argued that the definition of "disorderly" favoured by the District Court judge failed in that respect.[128] His appeal was dismissed. [129] He appealed again to the Court of Appeal, which also dismissed his appeal unanimously.[130] He appealed a final time to the Supreme Court and his conviction was quashed, but only by a margin of three to two.[131] It is submitted that this illustrates the difficulties experienced by the judiciary in reconciling the tension between the right to freedom of expression and the countervailing interest in protecting privacy.

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[119] Ibid, para 17 Elias CJ.
[120] Ibid, para 18 Elias CJ.
[121] Summary Offences Act 1981, s 21(1)(d).
[122] Summary Offences Act 1981, s 4(1)(a).
[123] *Brooker v Police*, above n 6, para 17 Elias CJ.
[124] Ibid.
[125] Ibid, para 18 Elias CJ.
[126] *R v Brooker*, above n 107, para 9 William Young J for the Court.
[127] New Zealand Bill of Rights Act 1990, s 6.
[128] *Brooker v Police*, above n 6, para 20, Elias J.
[129] Ibid.
[130] *R v Brooker*, above n 107, para 32 William Young J for the Court.
[131] *Brooker v Police*, above n 6, para 289 Thomas J.

## C *Achieving the Balance: The Approaches of the Supreme Court Bench to BORA Application*

It is submitted that the various approaches to BORA application taken by members of the bench who presided in Brooker are an important aspect of the case and had a great influence on the outcome arrived at by each Justice. This also means that the relationship between freedom of expression and privacy in future cases where BORA is relevant is likely to be determined, at least in part, by the approach to BORA application chosen by the presiding judge or judges. In this section, the approach to BORA application adopted by each justice in *Brooker* will be described and analysed in order to determine the strengths and weaknesses of their approaches and the consequences of each approach for the legal relationship between freedom of expression and privacy.

### *1 Chief Justice Elias*

In her approach to BORA application, Chief Justice Elias focused on the meaning of section 4(1)(a) of the Summary Offences Act, the enactment under which Brooker was convicted. She stated that the acceptance by the courts in the previous hearings of the case of the definition of "disorderly behaviour" as being "behaviour which would be unacceptable to right-thinking members of society" was wrong, as that definition had been determined from cases decided prior to the enactment of BORA.[132] As section six of BORA requires that legislation must be given an interpretation which is consistent with the rights and freedoms contained in BORA where such an interpretation is open to the judge, she considered it necessary to revisit the definition of the term. She needed to determine whether "disorderly behaviour" could be given a meaning which was consistent with Brooker's right to freedom of expression, affirmed by section 14 of BORA.[133] She decided that, although it was possible for someone exercising freedom of expression to be in breach of section 4(1)(a) of the Summary Offences Act, and freedom of expression could therefore

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[132] *Brooker v Police*, above n 6, paras 20 and 36 Elias CJ.
[133] Ibid, para 4 Elias CJ.

potentially be abrogated under the provision, the effect of the expressive act would need to reach a level where "there is a clear danger of disruption rising far above annoyance" before the section could be rightly invoked.[134] As the circumstances of Brooker's arrest did not include any indication that Brooker's expressive act had reached the requisite level of harm, she concluded that Brooker had been wrongfully arrested and decided that his conviction ought to be quashed.[135]

Chief Justice Elias did not ignore the argument advanced by the Crown that, despite the fact that there is no explicit right to privacy in BORA, courts in other jurisdictions with no explicit right to privacy have upheld an analogous right.[136] She addressed it by stating that, she had "misgivings about whether it is open to the Courts to adjust the rights enacted by Parliament by balancing them against values not contained in the New Zealand Bill of Rights Act, such as privacy."[137] She also considered that where "the enactment being applied unmistakably identifies the value as relevant," a right or value which is not contained in BORA may be taken into account.[138] As the offence of disorderly behaviour was not drafted in such a way that it unmistakably identifies personal privacy as a relevant interest, Chief Justice Elias' had no reason to take it into account under her interpretation of the relevant law.

One potential weakness in Chief Justice Elias' reasoning in regard to whether or not she could consider Constable Croft's right to privacy in coming to her determination about the relevant definition of "disorderly" is that she does not make any attempt to consider the effect of section 28 of BORA. This section states that "An existing right or freedom shall not be held to be abrogated or restricted by reason only that the right or freedom is not included in this Bill of Rights or is included only in part." Potentially, this section could be interpreted to mean that judges are able to take rights into account in determining the appropriate definition of a term in a statute which are not explicitly stated by Parliament to be applicable to that right. Indeed, it seems as if section 28 would be entirely redundant unless it is to have this purpose, as courts are already required to interpret legislation consistently with that legislation's

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[134] Ibid, para 42 Elias CJ.
[135] Ibid, para 50 Elias CJ.
[136] Ibid, 95.
[137] Ibid, para 40 Elias CJ.
[138] Ibid.

own wording. Chief Justice Elias' example of being able to consider rights not in BORA in interpreting statutory provisions if those additional rights have been explicitly identified by Parliament as relevant seems redundant in itself as such wording would already have to be considered by a judge in the absence of any section in BORA stating that rights and freedoms not included in BORA should not be abrogated. It is a reasonable submission that Parliament would not have enacted section 28 unless it intended it to have some effect. That effect surely must be that judges have an ability to balance BORA rights against those which are not in BORA nor mentioned as being specifically applicable to the legislation in question when determining the appropriate definition of legislative provisions.

Even if my submission in regard to the purpose of section 28 of BORA is held to be correct, it is possible to argue that it would not affect the substance of Chief Justice Elias' interpretation of "disorderly" as privacy cannot be considered to be a right at law in New Zealand. Consequently, in effectively eroding Constable Croft's expectation of freedom from physical intrusion in her home by upholding Brooker's right to freedom of expression, there would be no section 28 breach as the expectation which was eroded by the decision was not, in fact a right. Although this was definitely true in the past, and privacy was not included as a right in BORA partially because its legal status was not far enough evolved at the time that BORA was debated and enacted, it is submitted that this position is now open to serious challenge. As has been described above, there are now a number of instruments – including those recognised by the common law, legislative instruments and quasi-legislative instruments – which have the purpose of protecting privacy. Additionally, New Zealand is a state party to the United Nations' International Covenant on Civil and Political Rights which specifically states that "no one shall be subjected to arbitrary or unlawful interference with his privacy, family, home or correspondence, nor to unlawful attacks on his honour and reputation."[139] The fact that home is included in this right is particularly pertinent to the situation in *Brooker*, as the protest took place right outside of Constable Croft's home and within her earshot. It is more difficult to deny that protection of privacy has evolved to the point that it is able to be recognized as a right in the current legislative climate. It is submitted that this denial of privacy as

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[139] International Covenant on Civil and Political Rights (19 December 1966) 999 UNTS 171, art 17(1).

a right which exists outside of BORA is no longer an appropriate interpretation of the law.

If it is concluded that privacy is in fact a right, then Chief Justice Elias would have needed to take it into account when formulating her BORA-compliant definition of "disorderly behaviour." Failure to do so would result in the abrogation of the right to privacy simply because it is not a BORA right, and this would be inconsistent with section 28. If it is concluded that privacy is not a right, then Chief Justice Elias' definition of disorderly is correct in law, even though it may prevent some people from being free from unwanted expression directed at them when they are in their homes by people who are in the street or on other publicly-accessible land. It is because of this uncertainty about the status of privacy that suggestions for reforms will be considered.

### 2 *Justice McGrath*

The approach of Justice McGrath, who came to an opposite conclusion to that of Chief Justice Elias, is in sharp contrast to Chief Justice Elias' approach. Like Chief Justice Elias, he identified that the enactment of BORA changed the legislative environment in which the offence of disorderly behaviour needed to be interpreted, and that the offence must be read consistently with the right to freedom of expression affirmed by section fourteen of BORA.[140] However, unlike Chief Justice Elias, he identified that there were two interests which conflicted with the right to freedom of expression: the interest in maintaining public order;[141] and the interest in protecting privacy.[142] After setting out the competing interests, he undertook a balancing exercise in accordance with section five of BORA to reconcile them with the right to freedom of expression.[143]

It is submitted that the balancing exercise undertaken by Justice McGrath enabled him to make a fuller consideration of all the facts of the case, and is more consistent with the overall scheme of BORA. Instead of taking the fact that Brooker

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[140] *Brooker v Police*, above n 6, para 113 McGrath J.
[141] Ibid, para 118 McGrath J.
[142] Ibid, para 122 McGrath J.
[143] Ibid, paras 130-146 McGrath J.

was exercising his right to freedom of expression when he was arrested and concluding that the meaning of the provision under which he was arrested must be read so that it does not interfere with freedom of expression as far as is possible, he was able to take into consideration the competing values and interests which were affected by Mr Brooker's decision to exercise his right to freedom of expression in the way that he did. His approach was therefore consistent with section 28, which is the major contrast between his approach and Chief Justice Elias' approach.

Justice McGrath's approach to BORA application in Brooker is correct in law if privacy is considered to be a right that ought not to be abrogated or restricted simply by reason that it is not a BORA right. If privacy does have this status, then it is able to be included in the balancing exercise to determine the BORA-compliant meaning of the legislation at issue. If it is not a right, it is difficult to determine the legal basis upon which privacy was considered by Justice McGrath to be a relevant consideration in regard to the question of the meaning of "disorderly." BORA only requires that legislation which is able to be interpreted consistently with BORA rights is given that interpretation in the event of competing potential interpretations and that rights and freedoms which are not in BORA are not abrogated by that reason only. It does not require that any identifiable interest which may be applicable in the situation is considered in the balancing exercise.

It is submitted that Justice McGrath's consideration of public order does not suffer the same problem as his consideration of privacy as an interest which should be balanced against Brooker's right to freedom of expression in order to determine whether or not Brooker's behaviour was disorderly. It should be remembered that the purpose of having an offence of disorderly behaviour is to protect public order. It is therefore possible to argue that public order becomes a relevant consideration by virtue of section five of BORA, which states that "the rights and freedoms contained in this Bill of Rights may be subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society." The job of the judge then becomes arriving at a definition of "disorderly behaviour" which strikes an appropriate balance between the importance of protecting Brooker's right to freedom of expression when he is exercising that right in the public space against the interest of the public at large in regulating the behaviour of people using public space. The

interest in public order must additionally be a reasonable limit which is demonstrably justified.

It is submitted that Justice McGrath's decision that arresting a person who is using the public space in order to express their opinion of another person who is in their own home and who does not want to receive the opinion so expressed is a demonstrably justified limitation on the freedom of expression. If a member of the public (A) is asked whether he or she thinks that another person (B) is making appropriate use of public space when B is standing right outside A's home and is providing information or an opinion directed at A, who is inside his or her home, where the information or opinion is something that A does not wish to hear, it is very unlikely that A would regard B's behaviour as an acceptable use of the public space which ought to be protected. Yet, the majority decision in *Brooker* decides that, to the contrary, the behaviour described above is an appropriate use of public space and ought not to constitute an offence if such behaviour is indulged in by any individual.

In conclusion, Justice McGrath's approach only appears to be correct in law if privacy is considered to be a right. If it is not, it is difficult to see how it can fit into the statutory scheme provided by BORA for interpretation of legislation as a relevant part of the balancing exercise. If he had not considered privacy to be a relevant element in the balancing exercise, and if instead he relied only upon the value of protecting public order as something which ought to be able to justifiably abrogate freedom of expression, then his approach would also seem to be correct in law.

### *3 Justice Blanchard*

Justice Blanchard's approach to BORA application was similar to that of Justice McGrath. He conducted the section five balancing exercise, but instead of balancing freedom of expression against public order and Constable Croft's interest in protecting her privacy, he balanced the interest in public order against the freedom of expression under the circumstances of the case. His final determination to allow the appeal and overturn Brooker's conviction rested heavily upon the facts that the protest

was of short duration and that it occurred during the daytime.[144] He stated that if the protest had been repetitive or had been of longer duration or louder, he might have come to a different conclusion.[145]

Justice Blanchard's approach is therefore correct in law, if the submission about Justice McGrath's decision which was considered above is deemed to be correct. As Justice Blanchard does not consider privacy, the correctness of his judgment does not rest on the question of whether privacy is properly considered to be a right or not.

Justice Blanchard's judgment is interesting as it takes a very practical approach to the question of whether or not Brooker was rightly arrested. He leaves it open as to whether a similar act on the part of another person, undertaken under slightly different circumstances, would reach a level at which he considered that they had begun to behave in a disorderly manner, rendering that person liable to be arrested. For example, if the police had taken an hour to come to Constable Croft's aid, rather than the 12 minutes which it took them on the facts of the case, and Brooker was still staging his protest when they arrived, it is possible that Justice Blanchard would have considered his arrest to have been warranted. If that was the case, then the decision would have been to uphold the arrest, by a margin of three to two, rather than the actual decision in the case which was to quash the arrest by a margin of three to two.

### *4 Justice Tipping*

Justice Tipping's approach to BORA interpretation was similar to that of Chief Justice Elias. Rather than using section five as a means of balancing the competing interests of freedom of expression on the one hand, and the interest in protecting public order and possibly privacy in the home on the other, he stated that the fact that Brooker was exercising a right protected by BORA meant that the type of behaviour necessary in order for it to qualify as disorderly behaviour is beyond that

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[144] Ibid, paras 69-70 Blanchard J.
[145] Ibid, para 70 Blanchard J.

which would be required if no exercise of BORA rights were involved.[146] Like Chief Justice Elias, Justice Tipping ignored section 28 entirely, and so it is unsurprising that he did not consider it necessary to include Constable Croft's right to, or interest in, her privacy in her home in his balance of relevant considerations. It is also unsurprising that he came to the conclusion that Brooker's appeal ought to be allowed.

This approach is correct in law if privacy is not considered to be a right. If it is considered to be a right, then it would be necessary for Justice Tipping to consider privacy in his determination of the correct interpretation of "disorderly behaviour," otherwise he would be abrogating a right simply because it was not a BORA right, which would be inconsistent with section 28 of BORA.

### 5 *Justice Thomas*

Justice Thomas' approach to BORA interpretation was similar to that of Justice McGrath and he came to the same conclusion as Justice McGrath. The most noteworthy part of Justice Thomas' approach is his discussion of rights as compared to limits on rights. He noted that, in BORA, it is only limits on BORA rights that need to be demonstrably justified in terms of section five.[147] He also stated that if the justification for an act which limits a right is the protection of another right, even one which is not included in BORA, then there is no requirement that the limit be justified, as the rights should have equal footing.[148]

Justice Thomas then demonstrated why privacy should be considered a right in itself. He stated that as the right to freedom of expression is intended to protect the underlying fundamental value of human dignity and the same is true for privacy, both rights should be given an equal status.[149] Then, he applied the particular circumstances of the case to the starting point of equal protection for the rights.[150] It was therefore an

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[146] Ibid, para 91 Tipping J.
[147] Ibid, para 210 Thomas J.
[148] Ibid, para 209 Thomas J.
[149] Ibid, para 231 Thomas J.
[150] Ibid, para 243 Thomas J.

easy step for him to determine that the manner of Brooker's protest was such that his arrest was not an infringement of Brooker's freedom of expression.

Justice Thomas' decision is correct in law if privacy is considered to be a right. It is submitted that his arguments in favour of recognising privacy as a right are compelling. He points towards the recent proliferation of legal and quasi-legal protection for privacy interests, as well as New Zealand's international obligations, as evidence that there is indeed a right to privacy.

### *D Conclusion*

Most members of the Supreme Court bench in *Brooker v Police* chose to apply BORA in different ways. Different considerations impacted upon the decision arrived at by each judge. It is the author's opinion that the case was rightly decided in the Supreme Court on the basis of the current law, but that the decision which was arrived at is an inappropriate infringement on an important aspect of privacy. That aspect is the right to be free from having to hear unsought and unwanted expression of opinion whilst the hearer is in their home. This forms part of the physical aspect of the right to privacy, which has previously been described as inadequately protected by current law.

## *V POTENTIAL LAW REFORM*

This paper has aimed to convince the reader that the current legal relationship between freedom of expression and privacy is inappropriately weighted in favour of freedom of expression, in cases where one person's right to freedom of expression interferes with another person's right to physical privacy. The case of *Brooker v Police* is one particularly recent example of the problems inherent in the current legal relationship. In this section, possible ideas for reform of the law in order to arrive at a more appropriate balance will be suggested and analysed to determine their likelihood of drawing a more appropriate balance.

### *A Interpret Section 14 of BORA to Include Privacy Considerations.*

A simple suggestion for law reform which would not require the formation of any new common law action or any legislative intervention would be if the courts interpreted the right to freedom of expression affirmed by section 14 of BORA to include the right to freedom from expression. It has been suggested by Butler and Butler that the right to be free from expression is included in the BORA right.[151]

If the facts in Brooker came up again, but this time the right to freedom of expression was included as part of the right to freedom of expression, then it would be necessary for the judges to balance Brooker's right to freedom of expression with Constable Croft's right to be free from that expression (in effect her right to physical privacy in her home) in their determination of the correct interpretation of "disorderly behaviour." It is therefore possible that Chief Justice Elias particularly might have come up with a different outcome, as might Justice Tipping. If just one of them were to change their decision, then Brooker's arrest would have been upheld.

It is submitted that including the right to be free from expression in the right to freedom of expression is not the best way of protecting a physical right to privacy. It renders the right to freedom of expression largely meaningless, transforming it into some sort of right to expressive autonomy. The interests which underlie freedom of expression are not exactly the same as those which underlie privacy (although, it is accepted that they have at least one very similar underlying value in common). Consequently, including the right to be free from expression in the right to freedom of expression does little to guide judges as to the appropriate balance to be made in a particular case.

### *B Develop the Tort of Invasion of Privacy So That It Is Capable of Providing Protection against Physical Intrusions into Privacy*

Another possible way of reforming the current law so that there is greater protection for physical privacy is to extend the current tort of invasion of privacy so that it can also be utilised by plaintiffs who are faced with an unwanted intrusion into their physical privacy.

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[151] Butler and Butler, above n 1, 321.

There are a number of reasons why this suggestion is inappropriate. Firstly, it does not seem to provide an appropriate remedy for invasions into physical privacy. A person who has had their physical privacy invaded by another person is unlikely to want to have to sue that person in order to ensure that they stop what they are doing. Firstly, the claimant would have already suffered the invasion. This means that it cannot be used pro-actively to stop someone who is in the process of invading a claimant's privacy, as all action has to be taken after the fact.

It would also likely be difficult for a court to determine an appropriate level of damages, as the harm which is caused is essentially emotional or mental, rather than physical or economic.[152] In contrast, when a defendant such as a newspaper or magazine intends to publish private information about an individual, that individual may be able to get an injunction to stop the publication from occurring, thus preventing the harm,[153] or may get damages.[154] Damages in this situation are more easily calculated, as can be seen *from Douglas v Hello!*, where Hello! magazine was forced to pay damages in excess of £1 million to the owners of OK! magazine following Hello!'s publication of photos of Michael Douglas and Catherine Zeta-Jones' wedding, as the publication of the photos was considered to be in breach of confidence owed to OK! (the British version of the tort of privacy).[155] Sole publication rights to the Douglas and Zeta-Jones wedding had been sold to OK, and the owners of Hello! were aware of the deal.[156]

There is also a concern that the tort will only be utilised by claimants who are undeserving of a remedy, and are simply using it to "get back at" the defendant.[157] This argument is advanced in most cases where the damage is emotional harm rather than economic or physical harm, and apprehension of the difficulty of proving the tort by potential claimants and their lawyers has meant that such torts are seldom utilised

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[152] Kalven Jr, above n 59, 330.
[153] See, for example, *P v D*, above n 83, para 50 (HC) Nicholson J.
[154] See, for example, *L v G*, above n 83, 251 Judge T M Abbott.
[155] *Douglas and Others v Hello! Ltd and Others (No 3)* [2007] UKHL 21 paras 126-131 Hoffman LJ.
[156] Ibid.
[157] Kalven Jr, above n 59, 338.

in practice.[158] The tort of intentional infliction of emotional harm is a good example of the under-utilisation of a tort which is concerned with redressing emotional harm.

There is also a practical problem with extending the tort so that it includes redress for physical invasions of privacy. The current tort evolved from the tort of breach of confidence, which protected the claimant from having information (mostly commercial information) disclosed by another person when such a disclosure was in breach of a duty to keep it confidential.[159] It is therefore firmly focused on the informational aspect of privacy. It is unclear whether the judiciary would be willing to extend it to include physical privacy without having at least some precedent for doing so. It has been suggested that the tort of intentional infliction of emotional distress could be extended to cover physical privacy protection. This would provide a precedent base from which judges could extend the law. However, since the tort itself is so seldom utilised, it is uncertain whether any claimant would be likely to bring a case which would allow the judiciary to make any such developments, particularly when the issues described above are taken into account.

### *C Include a Right to Privacy in BORA*

Another suggestion for law reform is to include a right to privacy in BORA. It has previously been argued that the proliferation of privacy protection in New Zealand suggests that it has got to the point where it ought to be considered as a legal right. Including a right to privacy in BORA would have the advantage that it would be unambiguously included in the section five balancing exercise, wherever the right was relevant to the consideration of the legislation at issue. There would be no more problems with determining whether it ought to be considered a "right" or simply as a "value" or "interest." Also, it is submitted that inclusion of a right to privacy in BORA is appropriate to ensure that the important underlying value of human dignity is adequately protected under law. By including a right to privacy in BORA, the Legislature would be making a statement that it is a fundamental right, rather than a

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[158] Ibid.
[159] Bridget K Murphy "Developments in the Law of Invasion of Privacy in New Zealand and England" (2000-2003) 9 AULR 1031, 1042.

simple limit on actual rights. The wording of a right to privacy could be based on what is in the International Covenant on Civil and Political Rights, or it could have different wording as determined by the Legislature.

It is submitted that this is the most appropriate and likely the most effective way of addressing the problem of the current legal balance between freedom of expression and privacy. However, it should be noted that such a solution is unlikely to be quick, as it will require the will of the Legislature to make the change.

## *VI CONCLUSION*

In this paper, the current legal relationship between the right to freedom of expression and the right to privacy has been described. It has been determined that there seems to be a lack of protection for physical privacy. Protection of informational privacy, however, seems to be adequate, due to a number of common law, legislative and quasi-legislative developments over the past few decades. The lack of protection for physical privacy is a concern, as privacy protects the underlying value of human dignity or inviolate personality, concepts which are at the core of current international human rights discourse. It is because of this concept of human dignity that it seems to the author that the decision arrived at in *Brooker v Police* feels intuitively incorrect, even though it has been concluded that it is almost certainly correct in law. Consequently, it has been submitted that some type of legal reform is required in order to provide more adequate protection for privacy.

After considering a number of different options for reform, it has been suggested that the most appropriate way to ensure that physical privacy is given appropriate protection by law is to include a right to privacy in BORA. This would affirm that privacy is a constitutionally important concept, something which has already been recognised in a number of other states. It would also ensure that privacy is taken into account when the interpretation of any law in which privacy considerations are relevant is being undertaken by members of the judiciary. It is submitted that such treatment of privacy is necessary in order to prevent its gradual erosion. As privacy is a quiet right, it is very easy to overlook it. To do so would be to

undermine an important aspect of human dignity, the most fundamental human right that we have.

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