
Sticks and stones may break my bones, but names will never hurt me

PA Keane*

The following article is based on the inaugural oration delivered by Chief Justice Keane at the Inaugural Austin Asche Oration in Law and Governance at Charles Darwin University on 20 October 2011. This event was the first in an annual lecture series that honours the contribution of the Hon Austin Asche AC QC, the former Northern Territory Administrator and Chief Justice of the Northern Territory Supreme Court. In his oration, Chief Justice Keane focuses in particular on the constitutional guarantee of the right of free speech.

INTRODUCTION

I propose to take as my starting point some observations made by Justice Asche, as he then was, in a paper delivered in 1981.¹ In that paper, he adverted to the absence from Australian constitutional arrangements of the kind of broad aspirational statements guaranteeing rights of citizens found in the US Constitution. He said:

Australians are a pragmatic people. We do not insert into our State or Commonwealth constitutions those broadly-based declarations of rights known as constitutional guarantees. We prefer to fit specific legislation or specific case-law to specific problems on the Tennysonian view that – "... Freedom slowly broadens down, From precedent to precedent".

There are, of course, two schools of thought about this. I mean no disrespect to our transpacific brethren if I say no more than that it has not been established that individual freedoms or minority rights are less protected in Australia where there are virtually no constitutional guarantees than in the United States where there are many. *Chacun à son goût*. Certainly we now have laws against discrimination by race or sex. But that is the point. They are laws, not declarations, containing remedies not assertions.

This is not to denigrate such international statements [of rights] ... They are a starting point, a crystallisation of international views and a justification for action. My point about saying that Australians are pragmatic is that they would rather examine how such declarations can be translated into practical legislation than incorporate them into the esoteric nephelococcugia of a constitutional guarantee.²

Obviously I cannot let Asche J's reference to "nephelococcugia" pass without comment. I was unable to find this word in the *Oxford English Dictionary*. That is hardly surprising; the expression was coined by the world's

* Chief Justice of the Federal Court of Australia.

¹ Asche A, "The Rights of the Child" (First Vernon Collins Memorial Lecture, Melbourne, 14 October 1981) p 9.

² Asche, n 1, p 9.

first great satirist playwright, Aristophanes. In his plays, Aristophanes satirised the hubris and folly of the sophists, including his great contemporary, Socrates, who sought to unriddle the moral and political universe by a priori reasoning. Aristophanes coined the expression to describe those who engaged in these sophisticated debates as living in “cloud-cuckoo land”. So for present purposes, I think that we can proceed on the basis that Asche J, in the passage cited, was referring with opaque politeness to a constitutional “cloud-cuckoo land”.

I would like to reflect upon some questions inspired by Asche J’s suggestion that broad constitutional declarations or assertions, mediated through judicial decisions, are no more likely to provide satisfactory protection for the individual rights of which we are so conscious than the more nuanced solutions which can be provided by legislative action informed by the work of our law reform agencies.

The particular focus of my reflection is on the constitutional guarantee of the right of free speech. I will begin by referring to some decisions of ultimate courts of appeal from around the world concerning this fundamental right.

THE CASES

Let us start with the United States of America. The First Amendment to the US Constitution provides that “Congress shall make no law ... abridging the freedom of speech”.

In 2003 in *Virginia v Black*,³ the US Supreme Court held that individuals who publicly burned a cross to express racial hatred towards black Americans were engaged in a form of “lawful political speech at the core of what the First Amendment is designed to protect”.

This was a decision by a Supreme Court which some might be disposed to regard as reflecting the aberrant views of the conservative judges who constituted the majority of the court during the presidency of George W Bush. But even in an earlier time, when the court was dominated by liberal lions like Justice Thurgood Marshall, there was an absolutist streak in the First Amendment jurisprudence which seemed to privilege free speech above almost all other values.

In the 1989 case of *Florida Star v BJF*,⁴ a Florida jury awarded a rape victim \$10,000 damages for the invasion of her privacy when a newspaper, the *Florida Star*, published her name in violation of a State statute which, in order to protect the privacy of victims of rape, had prohibited such publications.

Marshall J spoke for the majority of six of the nine justices of the US Supreme Court in opining that the State law was unconstitutional because the newspaper’s right to free speech trumped the interest of the State of Florida in protecting the privacy of rape victims.

In stark contrast to the decision in *Florida Star* is the decision of the Constitutional Court of South Africa in *NM v Smith*.⁵ In that case, three individuals who were HIV positive had participated in clinical research into HIV.

³ *Virginia v Black* 583 US 343 at 365 (2003).

⁴ *Florida Star v BJF* 491 US 524 (1989).

⁵ *NM v Smith* [2007] ZACC 6.

The respondent published a book discussing those trials in which the applicants were identified as suffering from HIV. This, the applicants claimed, violated their fundamental rights to privacy, dignity and psychological integrity. The South African Constitution guarantees both the right to freedom of expression and the right to privacy.

The Constitutional Court of South Africa upheld the applicants' claim, thus allowing the claims of privacy to trump the claims of freedom of expression.

O'Regan J dissented on the basis that freedom of expression, by enabling individuals to form and share opinions, enhances human dignity to a greater extent, so it would seem, than the rights to privacy. Her Honour considered that the "close links" between freedom of expression and human dignity meant that the applicants' fundamental right to privacy and dignity could not be said to be infringed unless the respondents had acted negligently or intentionally in disclosing the names of the applicants without their consent, and that negligent or intentional conduct on their part had not been established.

While there is, no doubt, much to be said for the view of O'Regan J that even hurtful speech about private individuals should not be silenced by the state if it is published in good faith and with reasonable care to get the facts right, it has to be said that the text of the South African Constitution provides no express warrant for her Honour's prioritising of its protection of speech over privacy in this way.

In Germany, Art 5 of the German Constitution, referred to as the Basic Law, guarantees the fundamental right to free expression. In 1958, in the *Lüth-Urteil Case*,⁶ the German Federal Constitutional Court had to determine whether this right was infringed by an order of a lower court which restrained the defendant from calling for a public boycott of a film directed by Veit Harlan who had been a Nazi film director in Hitler's regime.

The Constitutional Court held that even though Art 5 of the Basic Law was directed to protecting the individual against the state, it also operated as between individuals. Article 5 was held to be the source of a private right in the defendant to attack Harlan's reputation in the course of attempting to influence public opinion. And so the restraining order was set aside.

I return now to the US, and to the recent decision of the US Supreme Court in *Snyder v Phelps*.⁷ This is the infamous "funeral picketing" case involving the Reverend Fred Phelps and his Westboro Baptist Church (Westboro) founded by the Reverend in Topeka, Kansas in 1955.

Westboro has picketed nearly 600 funerals over the past 20 years to communicate its belief that God hates the US for its tolerance of homosexuality, particularly in the US military. Westboro's picketing has also condemned the Catholic Church for scandals involving its clergy.

Reverend Phelps, along with six Westboro parishioners (all relatives of Phelps) travelled to Maryland to picket the funeral of Matthew Snyder. The picketing took place on public land, adjacent to public streets and approximately

⁶ *Lüth-Urteil* BVerfGE 7, 198 (1958).

⁷ *Snyder v Phelps* 131 S Ct 1207 (2011).

1,000 feet from the church where the funeral was held, in accordance with guidance from local law enforcement officers.

The picketers peacefully displayed their signs, which said, for example, “Thank God for Dead Soldiers”, “God Hates Fags”, “America is Doomed”, “Priests Rape Boys” and “You’re Going to Hell”, in addition to singing hymns and reciting bible verses, for 30 minutes before the funeral began.⁸ They did not yell and there was no violence associated with the picketing.

Albert Snyder, Matthew Snyder’s father, filed proceedings against Phelps in the US District Court for the District of Maryland. He alleged five state tort law claims including a claim for the intentional infliction of emotional distress, which is what we would call intentionally inflicting nervous shock. In response, Westboro moved for summary judgment contending that the church’s speech was insulated from all liability in tort by the First Amendment to the US Constitution.

The Federal District Court granted Westboro summary judgment on Snyder’s claims for defamation and publicity given to private life, concluding that Snyder could not prove the necessary elements of those torts. A trial was held on the remaining claims.

At trial, Snyder testified as to the extent and severity of his emotional injuries and distress due to Westboro’s actions. A jury found for Snyder on the intentional infliction of emotional distress, intrusion upon seclusion and civil conspiracy claims. The jury’s attitude was pretty clear: it held Westboro liable for \$2.9 million in compensatory damages and \$8 million in punitive damages.⁹

Westboro challenged the verdict as grossly excessive and sought judgment as a matter of law on the ground that the First Amendment fully protected its speech. In this respect, the District Court reduced the punitive damages award to \$2.1 million. It left the verdict otherwise intact.¹⁰

The US Court of Appeals for the Fourth Circuit reversed the decision to uphold the jury’s verdict against Reverend Phelps, holding that his statements were entitled to First Amendment protection.

The Supreme Court had to decide whether the First Amendment shielded Westboro from liability to the claim for intentional infliction of emotional distress so that the jury verdict imposing tort liability should be set aside. It decided 8-1 in favour of Reverend Phelps.

Roberts CJ delivered the opinion of the majority of the court. In his view, the case turned largely on whether that speech is of public or private concern as determined by all the circumstances of the case. Roberts CJ said:

Speech deals with matters of public concern when it can “be fairly considered as relating to any matter of political, social, or other concern to the community,” [*Connick v Myers* 461 US 138] at 146, 103 S Ct 1684 [(1983)], or when it “is a subject of legitimate news interest; that is, a subject of general interest and of value and concern to the public,” [*San Diego v Roe* 543 US 77] at 83-84, 125 S Ct 521 [(2004)]. See *Cox Broadcasting Corp v Cohn*, 420 US 469, 492-494, 95 S Ct 1029,

⁸ *Snyder v Phelps* 131 S Ct 1207 at 1213 (2011).

⁹ *Snyder v Phelps* 131 S Ct 1207 at 1214 (2011).

¹⁰ *Snyder v Phelps* 131 S Ct 1207 at 1214 (2011).

43 L Ed 2d 328 (1975); *Time, Inc v Hill*, 385 US 374, 387-388, 87 S Ct 534, 17 L Ed 2d 456 (1967). The arguably “inappropriate or controversial character of a statement is irrelevant to the question whether it deals with a matter of public concern.” *Rankin v McPherson*, 483 US 378, 387, 107 S Ct 2891, 97 L Ed 2d 315 (1987).¹¹

Snyder argued that the connection with his son’s funeral made the speech a matter of private, rather than public, concern. Roberts CJ held that this did not alter the conclusion that the speech could be characterised as constituting speech on a matter of public concern.

Roberts CJ held that Westboro’s signs related to public issues. In this regard, he said that:

The “content” of Westboro’s signs plainly relates to broad issues of interest to society at large, rather than matters of “purely private concern.” [*Dun & Bradstreet Inc v Greenmoss Builders Inc* 472 US 749] at 759 [(1985)] ... While these messages [on the placards] may fall short of refined social or political commentary, the issues they highlight – the political and moral conduct of the United States and its citizens, the fate of our Nation, homosexuality in the military, and scandals involving the Catholic clergy – are matters of public import ... [E]ven if a few of the signs – such as “You’re Going to Hell” and “God Hates You” – were viewed as containing messages related to Matthew Snyder or the Snyders specifically, that would not change the fact that the overall thrust and dominant theme of Westboro’s demonstration spoke to broader public issues.¹²

Mr Snyder also argued that Westboro’s speech should not be afforded First Amendment protection because of the use of the funeral as the platform to disseminate their message to the wider public. While the court recognised that Westboro chose the funeral to increase publicity, and that its views were especially hurtful, given that they were expressed in conjunction with a funeral, Roberts CJ said that:

Westboro conducted its picketing peacefully on matters of public concern at a public place adjacent to a public street. Such space occupies a “special position in terms of First Amendment protection.” *United States v Grace*, 461 US 171, 180 (1983). “[W]e have repeatedly referred to public streets as the archetype of a traditional public forum, noting that ‘[t]ime out of mind’ public streets and sidewalks have been used for public assembly and debate.” *Frisby v Schultz*, 487 US 474, 480, 108 S Ct 2495, 101 L Ed 2d 420 (1988).

...

Simply put, the church members had the right to be where they were ... The protest was not unruly; there was no shouting, profanity, or violence.¹³

Roberts CJ went on to say:

Such speech cannot be restricted simply because it is upsetting or arouses contempt. “If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable.” *Texas v Johnson*, 491 US 397, 414, 109 S Ct 2533, 105 L Ed 2d 342 (1989). Indeed, “the point of all speech protection ... is to shield just those choices of content that in someone’s eyes are misguided, or even

¹¹ *Snyder v Phelps* 131 S Ct 1207 at 1216 (2011).

¹² *Snyder v Phelps* 131 S Ct 1207 at 1216-1217 (2011).

¹³ *Snyder v Phelps* 131 S Ct 1207 at 1218-1219 (2011).

hurtful.” *Hurley v Irish-American Gay, Lesbian and Bisexual Group of Boston, Inc.*, 515 US 557, 574, 115 S Ct 2338, 132 L Ed 2d 487 (1995).¹⁴

For these reasons, the majority of the court held that the jury verdict imposing tort liability on Westboro for intentional infliction of emotional harm should be set aside.

Alito J was the sole dissident. His Honour described the reasoning of the majority as “strange”. His Honour began, notably, by saying, “[o]ur profound national commitment to free and open debate is not a license for the vicious verbal assault that occurred in this case”¹⁵ and concluded with the observation: “In order to have a society in which public issues can be openly and vigorously debated, it is not necessary to allow the brutalization of innocent victims like petitioner.”¹⁶

Alito J observed that Snyder was not a public figure but merely a father wanting to bury his son undisturbed and without interference. His Honour considered that the actions of Westboro deprived Snyder of this “elementary right”, turning the funeral into a media event and launching a verbal attack on Matthew Snyder and his family at a time of grief and “acute emotional vulnerability”. Alito J also noted the jury’s finding of fact that this has had such an affect that Snyder now suffers from “severe and lasting emotional injury”.¹⁷

Alito J described Westboro’s speech as “vicious verbal attacks that make no contribution to public debate”.¹⁸ His Honour noted that the tort of intentional infliction of emotional distress protects against such injury. Alito J concluded that:

Although the elements of the [intentional infliction of emotional distress] tort are difficult to meet, respondents long ago abandoned any effort to show that those tough standards were not satisfied here. On appeal, they chose not to contest the sufficiency of the evidence. See 580 F 3d 206, 216 (CA4 2009). They did not dispute that Mr Snyder suffered “wounds that are truly severe and incapable of healing themselves.” [*Figueiredo-Torres v Nickel* 321 Md 642] at 653, 584 A 2d, at 75 [(1991)]. Nor did they dispute that their speech was “so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.” [*Harris v Jones* 281 Md 560] at 567, 380 A 2d, at 614 [(1977)]. Instead, they maintained that the First Amendment gave them a license to engage in such conduct. They are wrong.¹⁹

Alito J went on to say that:

When grave injury is intentionally inflicted by means of an attack like the one at issue here, the First Amendment should not interfere with recovery.²⁰

¹⁴ *Snyder v Phelps* 131 S Ct 1207 at 1219 (2011).

¹⁵ *Snyder v Phelps* 131 S Ct 1207 at 1222 (2011).

¹⁶ *Snyder v Phelps* 131 S Ct 1207 at 1229 (2011).

¹⁷ *Snyder v Phelps* 131 S Ct 1207 at 1222 (2011).

¹⁸ *Snyder v Phelps* 131 S Ct 1207 at 1222 (2011).

¹⁹ *Snyder v Phelps* 131 S Ct 1207 at 1223 (2011).

²⁰ *Snyder v Phelps* 131 S Ct 1207 at 1223 (2011).

Alito J thought it relevant that Westboro intentionally inflicted injury as part of a “well-practiced strategy for attracting public attention”. His Honour explained that:

This strategy works because it is expected that respondents’ verbal assaults will wound the family and friends of the deceased and because the media is irresistibly drawn to the sight of persons who are visibly in grief. The more outrageous the funeral protest, the more publicity the Westboro Baptist Church is able to obtain. Thus, when the church recently announced its intention to picket the funeral of a 9-year-old girl killed in the shooting spree in Tucson – proclaiming that she was “better off dead” – their announcement was national news, and the church was able to obtain free air time on the radio in exchange for cancelling its protest. Similarly, in 2006, the church got air time on a talk radio show in exchange for cancelling its threatened protest at the funeral of five Amish girls killed by a crazed gunman.

In this case, respondents implemented the Westboro Baptist Church’s publicity-seeking strategy. Their press release stated that they were going “to picket the funeral of Lance Cpl Matthew A Snyder” because “God Almighty killed Lance Cpl Snyder. He died in shame, not honor – for a fag nation cursed by God ... Now in Hell – sine die.” Supp App in No 08-1026 (CA4), p 158a. This announcement guaranteed that Matthew’s funeral would be transformed into a raucous media event and began the wounding process. It is well known that anticipation may heighten the effect of a painful event.²¹

Alito J went on to say that:

While commentary on the Catholic Church or the United States military constitutes speech on matters of public concern, speech regarding Matthew Snyder’s purely private conduct does not.²²

IS THE PRICE TOO HIGH?

The decisions in *Virginia v Black*, *Florida Star v BJF* and *Snyder v Phelps* prompt one to ask whether the free speech protected in those cases came at too high a price in terms of other values, including the privacy and personal integrity of other individuals, and the basic civility necessary to elementary notions of community.

These cases lead one to ask whether the benefits of free speech cannot be secured without paying that price; that is to say, whether a more nuanced approach than these broad constitutional declarations would provide the benefits of free speech without the unnecessary sacrifice of other values.

At the most obvious level, one may agree with the proposition that no one has the right not to be offended by speech and that more speech, corrective speech, is a better answer to erroneous speech than intervention by the state. But even at this superficial level there is a difference between being affronted by opinions which differ from our own, and being intentionally subjected to personal harm or having our privacy invaded to provide a forum for speech.

The first thing that we all learned about the childhood mantra “Sticks and stones etc” is that it was simply not true if you were Indigenous or Muslim or gay. And one of the first things we all learned in law school is that the common

²¹ *Snyder v Phelps* 131 S Ct 1207 at 1224-1225 (2011) (footnotes omitted).

²² *Snyder v Phelps* 131 S Ct 1207 at 1226 (2011).

law has long recognised, in the torts of negligence and intentional infliction of nervous shock,²³ that aggressive speech can cause harm physically and emotionally. As we have seen, *Snyder v Phelps* is itself such a case.

And was it not unduly narrow for Marshall J in *Florida Star v BJF* to focus on the interest of the state in protecting the privacy of victims of crime, rather than the interest of the victim herself?

So far as the public benefits of free speech are concerned, is free speech truly free if it is not equally available to all? An irreducible minimum of civility is a precondition of any real public debate; otherwise there will be no equal right of free speech because those who command legal access to a bully pulpit can intimidate others. *Virginia v Black* is a classic example of such a case.

And there is the problem of judicial double standards. The US Supreme Court has consistently accepted that the First Amendment does not strike down laws prohibiting obscenity in the interests of minimum standards of public decency and order. If the right of free speech is conditional on the avoidance of obscenity, one might ask, why did the majority in *Snyder v Phelps* not consider the use of the word “fag” to be obscene?

It is tolerably clear that if Reverend Phelps held up a sign that said, “Fuck you, Snyders and your fucking dead son”, that conduct would not have been within the protection of the First Amendment and could validly be proscribed by statute. Or if instead of signs saying, “God Hates Fags”, Reverend Phelps’ sign said “God Hates Fucking Fags”.

Is it a good thing that minimum standards of civility should depend on such distinctions? Is there not a troubling inconsistency between the Supreme Court’s view of the legitimacy of the need “to maintain a decent society” which sustains an anti-obscenity law against the First Amendment, and the view that the First Amendment demands that Reverend Phelps’ conduct enjoy freedom from legal regulation?²⁴

Indeed, why not frankly acknowledge that what Reverend Phelps had to say cannot reasonably be seen as of any value as a contribution to any discussion of public interest? By what arguable, fair or reasonable view can it be seen to be a contribution of any value in the marketplace of ideas?

The cases to which I have referred show the difficulties which confront judges, even the ablest judges, when they are called upon to give effect to declarations of rights expressed in broad political terms. The difficulty is compounded where other individual rights, such as the right to reputation, the right to privacy or the right to one’s personal wellbeing and dignity, are also constitutionally guaranteed.

This latter aspect of the problem was recognised in a speech delivered at Harvard on 27 May 2010, by Justice Souter, formerly of the US Supreme Court. His Honour said:

[T]he Constitution is no simple contract, not because it uses a certain amount of open-ended language that a contract draftsman would try to avoid, but because its

²³ *Wilkinson v Downton* [1897] 2 QB 57.

²⁴ Kagan E, “Regulation of Hate Speech and Pornography After RAV” (1993) 60 *University of Chicago Law Review* 873 esp at 893-894.

language grants and guarantees many good things, and good things that compete with each other and can never all be realized, all together, all at once.

...

A choice may have to be made, not because language is vague but because the Constitution embodies the desire of the American people, like most people, to have things both ways. We want order and security, and we want liberty. And we want not only liberty but equality as well. These paired desires of ours can clash, and when they do a court is forced to choose between them, between one constitutional good and another one. The court has to decide which of our approved desires has the better claim, right here, right now, and a court has to do more than read fairly when it makes this kind of choice.²⁵

Where rights are declared in unconditional and unqualified terms then, unless we are prepared to treat one right as absolute, trumping all competing claims, there needs to be some sort of balancing of values. And if the instrument declaring rights does not state an order of priority between what are evidently all fundamental rights, how do the judges carry out this balancing process.

The balancing process in the cases we have looked at involved the courts in balancing different values expressed so broadly that the balancing process required judges to leap into a legal space without guidance. They were required to span a chasm so broad that it divides political parties. The cases illustrate that, even the ablest judges, doing their best with these statements of broad political aspirations, struggle to span this chasm in a way that does not leave at least one side of the political divide with misgivings as to whether justice would not be better served if the abstract declarations were translated into concrete outcomes by judges with different political views.

With these questions in mind, let's spend a moment to reflect on the interests and values served by free speech. The right of free speech serves two kinds of human value: the value in the interplay of ideas affecting the community; and the value in individual self-realisation. Let us consider the first of these values.

FREEDOM OF EXCHANGE OF IDEAS

In *Abrams v United States*,²⁶ Holmes J famously declared that "the best test of truth is the power of the thought to get itself accepted in the competition of the market". I would like to take a moment to reflect on this statement. Holmes J's statement rings with the force for which this great rhetorician was famous. But if one reflects for a moment on the thinking behind rhetoric, it may not seem so compelling.

First, the view that the value of an idea can be measured simply by the number of people who accept it is attended by a number of difficulties. History does not support the view that the belief of a majority at a given point of time is the best test of truth.

Further, individual participants in the marketplace of ideas are as likely to be motivated by their own perceptions of self-interest as individual participants in

²⁵ "Text of Justice David Souter's Speech", *Harvard Gazette*, <http://www.news.harvard.edu/gazette/story/2010/05/text-of-justice-david-souters-speech> viewed 18 November 2011.

²⁶ *Abrams v United States* 250 US 616 at 630 (1919).

the market for goods. Those perceptions may be distorted by the sorts of phenomena that distort markets for goods.

We have long accepted the desirability of legislation which prohibits speech involving false advertising and misleading and deceptive conduct in trade and commerce. Purveyors of ideas may also be motivated by unreasonable greed or ill-will. And there may be a monopolist or a near monopolist in the market who can prevent equal access to the market.

When we reflect on a case like *Florida Star v BJJF*, we need to bear in mind that the US Constitution has also been held by the US Supreme Court to guarantee a right of individual privacy which also serves the important interest in individual self-realisation.

And we have to ask: how was what the *Florida Star* published in any way apt to improve the sum of useful public knowledge or improve the standard of public debate? And why were the judges unable to see that the Florida statute was protecting, not only a state interest in civility and public decency and respect towards unfortunate victims of a terrible crime, but the privacy of a victim of crime. Innocent victims should have rights too; but, of course, from the court's perspective there was only a contest between individual rights and the laws of that unlovable abstraction, the state.

And if we focus upon the public interest in the free interplay of ideas, we need to ensure that the public forum and airways are equally available to all.

The vicious scare campaign protected by the US Supreme Court in *Virginia v Black*, was calculated to intimidate its victims and was hardly apt to add one jot or tittle to public knowledge or the advancement of public debate. Indeed, it was conduct which was apt to intimidate, and thereby exclude people from public debate.

Louis Brandeis, another great American judge, often concurred with Holmes in their judgments. But Brandeis saw the First Amendment and its protection of free speech as inseparably connected with the "political duty" of "public discussion".

So conceived, the constitutional protection of free speech is not so much a matter of holding the ring between competing views, as a means of facilitating equal participation in the democracy. And in this regard, legislatures may play a wholesome, and even a necessary, role.

To put it another way, Brandeis saw the First Amendment not as a negative liberty – a freedom from any governmental restriction upon expression, but as a positive liberty directed to ensuring the engagement of the citizenry in public discussion.

The Holmesian notion of the free market in ideas lends itself more readily to the view which we have seen currently prevails in the US, namely, that the First Amendment permits little restriction – however ill-intentioned – on the speech of anyone who has a mind – and the opportunity (whether derived from money or brute incivility) – to speak.

Brandeis' view, on the other hand, lends itself more readily to the imposition by legislation of qualifications on the freedom of expression. For example, the rich and powerful who can saturate the airwaves with their self-interested views

might be subject to restrictions – where those restrictions are necessary to enhance the efficacy of political speech by the less well off.

A legal system which enforces individual rights to free speech, without regard to civic virtues such as self-restraint and decency, may find its public space dominated by the powerful or the unreasonably anti-social, heedless of the equal rights of others. If one values civility and civilization, that is not an attractive prospect. The powerful, the anti-social and the just plain brutal can intimidate the poor, the meek and the politically inarticulate and so dominate public debate in a way which denies the right as an equal right.

To say such things is surely not to open up a vista of a brave new world of state control of the interchange of ideas.

At this point, it is useful to remind ourselves that, as a matter of legal history, neither the US Constitution, nor the Constitution of Australia, was established in a vacuum, but within the context of the common law which, among other things, regulated defamation, public incivility and the deliberate infliction of harm on others.

The common law, including its statutory adjustments, reflected a balance of interests worked out over time between the courts and the legislature in respect of the interest in free speech and the interest in preserving one's reputation or privacy or one's physical wellbeing. The balance of interests embodied in the laws of defamation rejected the understanding that any right is absolute and may be exercised *à l'outrance* without qualification or restraint.

It will not have escaped your notice that in *Snyder v Phelps*, free speech trumped a common law right, not a law made by Congress. How the US judges achieved that result is another story.

As to the second value served by free speech, the interest in self-realisation, one may ask, hopefully rhetorically, whether Reverend Phelps' interest in self-realisation as a heartless, unreasoning bully outweighs the interests of his victims.

DIGNITY AS THE FOUNDATION

Can I now turn to a suggestion that there is a deeper value underlying the values of open debate and self-realisation?

The idea of human dignity as a fundamental societal and legal value was the subject of Professor Jeremy Waldron's 2009 Oliver Wendell Holmes Lectures at Harvard.²⁷ Waldron of Oxford and Harvard has a strong claim to be regarded as one of today's most important legal philosophers.

In the Holmes Lectures, Waldron defends laws prohibiting "hate speech" on the basis that they protect the basic human dignity of each member of society. He argues that our community's commitment to universal human dignity has advanced beyond the point of debate about whether vituperative speech about sexuality, race and religion so adversely affect the basic dignity and social

²⁷ Waldron J, "2009 Oliver Wendell Holmes Lectures – Dignity and Defamation: The Visibility of Hate" (2010) 123 *Harvard Law Review* 1597 at 1645.

standing of a person, that such speech is no longer tolerable. Even if one does not agree, one must admit that in taking this stance Waldron is in respectable philosophical company.

In *The Metaphysics of Morals*,²⁸ Immanuel Kant argued that the most basic right and duty of any individual is to “assert one’s worth in relation to others” so that each individual is an end in himself or herself and not merely a means to some other end.

Kant postulated a society in which all citizens have mutual respect for each other as the most basic civil right and duty. In such a society, conduct, whether speech or otherwise, which is apt to deny mutual recognition of the equal worth of others, is not acceptable. And if it is not acceptable, then to say that it is beyond state regulation by the state is to yield to those who happen to occupy the bully pulpits.

It is interesting that in his Holmes Lectures, Waldron cites ss 18C and 18D of the *Racial Discrimination Act 1975* (Cth) as an example of striking the right balance between restricting speech and creating “a sort of ‘safe haven’ for the moderate expression of the gist of the view whose hateful or hate-inciting expression is prohibited”.²⁹

Section 18C of the *Racial Discrimination Act 1975* (Cth) makes it unlawful for a person to do an act, otherwise than in private, which is “reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate” another person “because of the race, colour, national or ethnic origin of the other person”. Exempted from that prohibition by s 18D(b) is:

anything said or done reasonably and in good faith ... in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest.

Summarising the effect of these provisions, they render unlawful, but not criminal, untrue and dishonest statements uttered in public which disparage another person on the grounds of race or sex.

In 2008, Mr Owen, an elected councillor for the Cooloola Shire Council in Gympie, was found liable under the Queensland analogue of s 18C, and ordered to pay \$12,500 compensation and to publish a written apology for affixing a bumper sticker to his car that read: “Gay rights? Under God’s law the only rights gays have is the right to die, Lev 20.13”. Waldron cites this result with approval.

In Waldron’s view, the legislation formulated by the Australian Law Reform Commission (ALRC) struck the correct policy balance between the competing values involved in the notion of human dignity. The law was right, he says, to restrict Mr Owen’s speech, because we have committed ourselves as a society to the proposition that an individual’s human dignity, in terms of his or her sexuality and personal security in that regard, should be unimpaired by what others may want to say about it.

The legislation which introduced these provisions into the *Racial Discrimination Act* in 1995 relied upon the recommendations of the ALRC’s 1992 report

²⁸ Immanuel Kant, *The Metaphysics of Morals* (Gregor MJ (trans), Cambridge University Press, 1998) p 236.

²⁹ Waldron, n 27 at 1645.

into *Multiculturalism and the Law*, the Human Rights and Equal Opportunity Commission's *National Inquiry into Racist Violence* in 1991, and the 1991 Royal Commission into Aboriginal Deaths in Custody.

These provisions have been in force now for 16 years. Their constitutional validity was upheld by the Full Court of the Federal Court eight years ago in *Toben v Jones*.³⁰

The ALRC's report had recommended making incitement to racist hatred and hostility (defined as words, whether speech or writing, and actions and gestures that promote hatred, hostility, contempt or serious ridicule of a person or group of persons on the ground of colour, race, ethnic or national background) unlawful, but not a crime (which was thought to unduly restrict freedom of speech).

The ALRC's report stated:

In the view of a majority of the Commission, freedom of expression is just one of the values the law protects in a democratic society. In a tolerant society people are entitled to be protected against serious attempts to undermine tolerance by stirring up hatred between groups. Laws prohibiting incitement of racist hatred and hostility protect the inherent dignity of the human person. In a multicultural society, values such as equality of status, tolerance of a wide variety of beliefs, respect for cultural and group identity and equal opportunity for everyone to participate in social processes must be respected and protected by the law. Laws prohibiting incitement to racist hatred and hostility indicate a commitment to tolerance, help prevent the harm caused by the spread of racism and foster harmonious social relations.³¹

The report speaks of striking a nuanced balance, as a matter of policy, and indeed practical politics, between broad values. The striking of that balance between values was given authority and legitimacy by the vote of an elected legislature. This kind of law-making discretion is not given to judges. Not to appreciate these limits on the power of judges to make such policy choices is to muddle the modern understanding of the separation of powers. Muddling the separation of powers did not matter in times past when the common law was formed: when, for example, St Thomas More served as a judge and Member of Parliament at the same time. But we take the separation of powers very seriously now. And if one does not like the restrictions imposed by legislation, one can agitate for their repeal by the legislature.

CONCLUSION

One may not agree with Waldron or Immanuel Kant. One must admit, however, that the striking of the proper balance between privacy and free speech, and the extent to which that exercise is informed by notions of human dignity and the value of truth in the marketplace of ideas, is fraught with difficulty.

One may question whether this difficulty is susceptible to satisfactory resolution by any human agency. What does appear from the examples I have cited is that it is unlikely to be capable of satisfactory resolution by judicial reasoning from broad aspirational statements to the decision of specific cases. There are too many competing policies and interests which cannot be reconciled

³⁰ *Toben v Jones* (2003) 129 FCR 515.

³¹ Australian Law Reform Commission, *Multiculturalism and the Law*, Report No 57 (1992) at [7.44].

without a more specific and nuanced articulation of the order of values which are to be vindicated. As Asche wisely observed, this articulation is not provided by the broad declarations involved in the cases we have reviewed.

And yet the striking of the balance between rights of privacy and reputation and personal integrity on the one hand, and rights of free speech on the other, is important for the very reason that we are speaking of rights.

It is meaningful to speak of rights only because the power of the state may be invoked to require one's fellow citizens to pay a price for failing to observe those rights. It is not a question of the morals or manners which one would prefer to see observed in a good society, but of the imposition by the state of sanctions for deviating from legal standards that have evolved from community sentiment – and votes.

If the justification for freedom of speech is the free trade in ideas because that is essential to democratic politics, is there a point at which speech is so unlikely to advance political debate that it is not worth protecting, having regard to the harm it does to other values? If we are concerned to encourage the free and equal engagement of our citizens in public debate, should we not seek to ensure minimum standards of civility and equality of opportunity in the public square? If all is noise and aggression or economic self-interest, how will we hear anything at all, much less what is valuable?

Legislatures, aided by law reform agencies, are better equipped to provide nuanced answers to these broad questions than judges reasoning at large from aspirational declarations. In Australia, in this field of discourse, our law reform commissions and our legislatures have sought to strike a nuanced yet stable balance between important, but competing, values. Some may find that balance acceptable; others may not. And if that balance is not acceptable, it can be changed by the legislature or by the people who can change the legislature. That is something which cannot happen in cloud-cuckoo land.