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# **CONFRONTING THE LIES THAT PROTECT RACIST HATE SPEECH: Towards Honest Hate Speech Laws in New Zealand and the United States**

Dylan Asafo

## ABSTRACT

This Article provides a comparative critique of hate speech jurisprudence in New Zealand and the United States by building on insights from Critical Race Theory (CRT) scholars. My main argument is that neither of these liberal democracies protect the right to freedom of expression/speech as they claim, but in fact dishonestly protect a right to “freedom of expression of racism” or “freedom of racist speech.” They do this by telling lies that inflate the value of free expression/speech and diminish and dismiss the harms that hate speech inflicts on marginalized groups. To move towards honest hate speech laws in both jurisdictions, I propose a communications strategy that seeks to reframe hate speech from a free speech issue to a public health issue. This is in order to push for reforms that will enable the courts to better protect people of color from the physical, mental, psychological or spiritual harms of racist hate speech.

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## INTRODUCTION

New Zealand—like Canada, the United Kingdom, Austria, France, Germany, Brazil, Switzerland, India and Israel—has a hate speech law in its human rights framework.<sup>1</sup> In comparison, there are no hate speech laws in the United States, where under current First Amendment jurisprudence, hate speech can only be regulated when it directly incites imminent criminal activity or consists of specific threats of violence targeted against a person or group.<sup>2</sup>

While it may seem from this snapshot of their respective laws alone that New Zealand is more proactive at regulating hate speech than the United States, the most recent hate speech decision by the High Court

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1. See The Human Rights Act 1993, ss 61 and 131 (N.Z.); ALEXANDER TESIS, *DESTRUCTIVE MESSAGES: HOW HATE SPEECH PAVES THE WAY FOR HARMFUL SOCIAL MOVEMENTS*, 192 (2002) (listing the various jurisdictions with hate speech laws).

2. See *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969). As racial justice scholars have noted, “First Amendment doctrine is often offered up as the quintessential example of American legal exceptionalism[.]” RALPH RICHARD BANKS ET.AL., *RACIAL JUSTICE AND LAW: CASES AND MATERIALS* 692 (2016); see also Frederick Schauer, *The Exceptional First Amendment*, in *AMERICAN EXCEPTIONALISM AND HUMAN RIGHTS* 29 (Michael Ignatieff ed., 2005). Interestingly, the situation is reversed when it comes to hate crime laws, where the US does have such laws and New Zealand does not. For example, in the US, a number of federal criminal civil rights laws prohibit violent and intimidating acts motivated by animus based on race, ethnicity, national origin, religious beliefs, gender, sexual orientation, or disability. U.S. DEP’T OF JUSTICE, *Hate Crimes—Federal Laws and Statutes*, <https://www.justice.gov/hatecrimes/laws-and-policies> [<https://perma.cc/7XA6-QZ9N>]. In contrast, New Zealand does not have any hate crime laws, but hostility on the grounds of race, colour, nationality, religion, gender identity, sexual orientation, age, or disability is considered to be an aggravating factor in sentencing. Sentencing Act 2002, s 9(1)(h) (N.Z.). While it is beyond the scope of this Article to examine the reasons for these differences, it is important to note that hate speech refers to “words or expression that encourage others to hate a group based on a protected characteristic”; while hate crimes involve “the commission of an offence, for example an assault against a person or damage to property, which is accompanied by the motive of hatred against a protected group.” NEW ZEALAND HUMAN RIGHTS COMMISSION, *KŌRERO WHAKAMAUAHARA: HATE SPEECH—AN OVERVIEW OF THE CURRENT LEGAL FRAMEWORK* 8 (2019).

of New Zealand<sup>3</sup> demonstrated a similar unwillingness to limit the right to freedom of expression (known as “freedom of speech” in the United States) when people of color advance claims of racist hate speech.

Therefore, to understand this similarity, this Article provides a comparative critique of hate speech jurisprudence in New Zealand and the United States by building on insights from Critical Race Theory (CRT), a scholarly movement that has thoroughly examined racist hate speech with a racial justice lens.<sup>4</sup> My main argument is that neither of these liberal democracies do not protect the right to freedom of expression/speech, but in fact *dishonestly* protect a right to “freedom of expression of racism” or “freedom of racist speech” by telling lies that inflate the value of free expression/speech and dismiss the harms that hate speech inflicts on marginalized groups. To move towards honest hate speech laws in both jurisdictions, I propose a communications strategy that seeks to reframe hate speech from a free speech issue to a public health issue in order to push for reforms that will enable the courts to better protect people of color from the physical, mental, psychological or spiritual harms of racist hate speech.

Part I provides an overview of hate speech jurisprudence in New Zealand and the United States. Part II draws on insights from CRT to provide a comparative critique of the frameworks in these two countries. Part III then proposes a communications strategy that reframes racist hate speech from a free speech issue to a public health issue. It is argued that this evidenced-based reframing may be capable of changing the hearts and minds of New Zealanders and Americans in order to ultimately allow for honest hate speech laws to be enacted in both countries.

## I. HATE SPEECH JURISPRUDENCE IN NEW ZEALAND AND THE UNITED STATES

### A. *Hate Speech Jurisprudence in New Zealand*

While New Zealand does not have any hate crime laws,<sup>5</sup> it does have specific hate speech laws located in sections 61 and 131 of the Human

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3. *Wall v. Fairfax New Zealand Ltd.* [2018] NZHC 104.

4. CHARLES R. LAWRENCE III ET AL., *Introduction, in WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT 7* (Charles R. Lawrence III et. al. eds., 2018) (noting that CRT scholars enter the First Amendment debate as “a pragmatic response to the urgent needs of students of color and other victims of hate speech who are daily silenced, intimidated, and subjected to severe psychological and physical trauma by racist assailants who employ words and symbols as . . . weapons of oppression and subordination”); *see also* RICHARD DELGADO AND JEAN STEFANCIC, *MUST WE DEFEND NAZIS?: HATE SPEECH, PORNOGRAPHY, AND THE NEW FIRST AMENDMENT* (1997); Richard Delgado and Jean Stefancic, *Ten Arguments Against Hate-Speech Regulation: How Valid?* 23 N. KY. L. REV. 475 (1995).

5. The absence of a hate crime law has been the subject of much debate and reform is currently being considered, which will be explained further in Part III of this Article.

Rights Act 1993 (HRA).<sup>6</sup> These provisions were enacted in accordance with New Zealand's international obligations under the International Covenant for the Elimination of Racial Discrimination (ICERD).<sup>7</sup>

Section 61 of the HRA provides a civil law remedy for racial disharmony and section 131 provides a criminal offence of inciting racial disharmony. Both provisions are subject to the right to freedom of expression provided for in section 14 of the New Zealand Bill of Rights Act 1990 (NZBORA).<sup>8</sup> Notably, sections 61 and 131 of HRA only regulate hate speech directed at the specific grounds of race, color, ethnic or national origins—and other grounds such as disability, sex, sexual orientation, religion and age are excluded.<sup>9</sup>

While there are various other laws outside the HRA that have the potential to regulate hate speech, it is beyond the scope of this Article to outline them in detail.<sup>10</sup> However, sections 61 and 131 and the jurisprudence around them will be examined further below.

6. The Human Rights Act 1993, ss 61 and 131 (N.Z.).

7. The primary obligation arises from Art. 4 of the ICERD, which requires states to make racially motivated hate speech an offence, with an explicit requirement for the criminalization of speech that applies to “all dissemination of ideas” that are racist even if they do not involve incitement to any specified harm. International Convention on the Elimination of All Forms of Racial Discrimination art. 4(a), Jan. 4, 1969, 660 U.N.T.S. 195. However, in enacting and enforcing these provisions, Art. 4 also provides that states must give “due regard to the principles embodied in the Universal Declaration of Human Rights the rights expressly set forth in article 5” which includes the right to freedom of expression. G.A. Res. 217 (III) A, Universal Declaration of Human Rights (Dec. 10, 1948); International Convention on the Elimination of All Forms of Racial Discrimination art. 4(a), Jan. 4, 1969, 660 U.N.T.S. 195 (“The right to freedom of opinion and expression”).

8. New Zealand Bill of Rights Act 1990, s 14.

9. In 2004, the Government Administration Select Committee launched an inquiry to consider, among other things, whether the scope of the hate speech provisions should be extended to cover inciting hatred against people on the grounds of their religion, gender or sexual orientation, but a report from this Committee appears to not have been completed or published. HUMAN RIGHTS COMMISSION, *supra* note 2, at 21.

10. Briefly, the 5 other potential sources of hate speech regulation are as follows: (1) The *Harmful Digital Communications Act 2015* (this Act only covers online hate speech, but contains a broader scope and lower threshold than sections 61 and 131 of the HRA. It covers “colour, race, ethnic or national origins, religion, gender, sexual orientation, or disability” and does not require the incitement of third parties but only the “denigrat[ion] [of] an individual” on a specified ground. While these provisions initially only applied to one-on-one communications, the District Court has recently interpreted the Act more broadly to include everything in the realm of cyberspace that has the capability of being published and viewed; (2) The *Films, Videos and Publications Classification Act 1993* (this allows a complaint to be made where a “publication” is deemed “objectionable” where the “publication” represents (whether directly or by implication) that members of any particular class of the public are inherently inferior to other members of the public by reason of any characteristic of members of that class, because of a characteristic that is a prohibited ground of discrimination under the HRA; (3) The *Broadcasting Act 1989* (requiring broadcasters to provide safeguards against the portrayal of persons in a manner that encourages denigration of, or discrimination against, sections of the community on account of sex, race, age,

### 1. Section 61

As the civil provision for hate speech, this section makes it unlawful for any person to publish or distribute written matter or use words in public that fulfill the following two elements:<sup>11</sup>

They are “. . . threatening, abusive, or insulting”; and

They are “likely to excite hostility against or bring into contempt any group of persons . . . on the ground of the colour, race, or ethnic or national origins of that group of persons.”

The leading case determining the scope and meaning of section 61 is *Wall v. Fairfax*.<sup>12</sup> This case concerned Fairfax’s publication of two cartoons by Al Nisbet which negatively depicted Māori and Pasifika peoples in response to the government’s plan to expand free breakfast programs in low decile schools.<sup>13</sup>

In upholding the Human Rights Review Tribunal’s decision to dismiss the claim, the High Court held that these cartoons, while objectively “offensive, were not likely to excite hostility or contempt at the level of abhorrence, delegitimation and rejection that could realistically threaten racial disharmony in New Zealand.”<sup>14</sup> The Court affirmed the Tribunal’s view that section 61 establishes a “high threshold” that “applies only to relatively egregious examples of expression which inspire enmity, extreme ill-will or are likely to result in the group being despised.”<sup>15</sup> This is based on the Court’s reading of Article 4 of the ICERD, which “requires due regard to be had to freedom of speech and by implication only targets behavior at the serious end of the spectrum” which therefore sets a high threshold that the cartoons did not meet.<sup>16</sup> Other key aspects of the Court’s reasoning will be drawn out in the critique in Part II below.

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disability or occupation status or as a consequence of legitimate expression of religious, cultural or political beliefs); (4) The *Sentencing Act 2002* (if a criminal offence is motivated by “hostility” against an individual on the basis of their “race, colour, nationality, religion, gender identity, sexual orientation, age, or disability”; section 9(1) (h) of this Act allows the court to consider this as an aggravating factor in sentencing); and (5) The *Summary Offences Act 1981* (potentially relevant depending on the circumstances, as it contains provisions for offenses based on inciting or encouraging disorderly behavior and provisions relating to offensive behavior and language but not on any particular grounds).

11. The Human Rights Act 1993, s 61 (N.Z.) also covers material that has been broadcast by electronic communication which means the provisions can apply to the online environment.

12. [2018] NZHC 104.

13. *Id.* at [5]–[8]. The first cartoon depicted brown skinned Māori and Pasifika as obese children significantly larger than their white classmates walking with their breakfasts and quoted as saying, “Pssst, if we can get away with this, the more cash left for booze, smokes and pokies.” *Id.* at Appendix A. The second cartoon depicted a brown family (either Māori or Pasifika) as all obese, with the parents smoking and drinking beer and the father remarking “Free school food is great! Eases our poverty and puts something in you kids’ bellies!” *Id.* at Appendix B.

14. *Id.* at [94].

15. *Id.* at [56].

16. *Id.*

## 2. Section 131

As the criminal provision for hate speech, section 131 largely replicates the same two part test in section 61, but contains an additional mens rea requirement for an “intent to incite hostility or ill-will towards a specified group or bringing that group into contempt or ridicule” and imposes penalties of “a term of imprisonment not exceeding 3 months or a fine not exceeding \$7000.”<sup>17</sup> However, before a section 131 prosecution can be instituted, section 132 requires that the consent of the Attorney General be obtained.<sup>18</sup> The only prosecution under section 131 to date has been under its predecessor section (section 25 of the Race Relations Act 1977) in *King-Ansell v. Police*.<sup>19</sup> In this case, the defendant was convicted of publishing a pamphlet which incited ill-will against Jewish people on the grounds of their “ethnic” origins.<sup>20</sup> While the defense argued that Jewish people were not an “ethnic” group but a religious group outside the scope of section 25, the Court of Appeal upheld the conviction in finding that Jewish people in New Zealand did have “ethnic origins” within the meaning of the Act, even if they were a religious group for other purposes.<sup>21</sup>

### B. *Hate Speech Jurisprudence in the United States*

As mentioned above, the United States does have hate crime laws,<sup>22</sup> but does not have any statutes to regulate hate speech. This gap means that the United States is in contravention of its international obligations under ICERD.<sup>23</sup> As noted above, this gap can be explained by the U.S.

17. The Human Rights Act 1993, s 131(1) (N.Z.).

18. *Id.* at s 132.

19. *King-Ansell v. Police* [1979] 2 NZLR 531 (CA) at 531.

20. *Id.* at 532.

21. *Id.* at 537 (Woodhouse, J.); *Id.* at 542 (Richardson, J.).

22. See Civil Rights Act of 1968, Pub. L. No. 90-284, 82 Stat. 73 (making it a crime to use, or threaten to use, force to willfully interfere with any person on the grounds of color, race, religion, or national origin—including, if the person is participating in a protected activity, like public education, jury service, travel, employment or the enjoying public accommodations, or assisting another person to do so); Criminal Interference with Right to Fair Housing Act, 42 U.S.C. s 3631 (making it a crime to use, or threaten to use, force to violate housing rights due to the victim’s race, colour, religion, sex, or national origin. The grounds of familial status and disability in 1988); Damage to Religious Property, Church Arson Prevention Act, 18 U.S.C. s 247 (making it a crime to intentionally deface, damage, or destroy religious real property, or interfere with a person’s religious practice, in situations affecting interstate or foreign commerce, and also barring intentionally defacing, damaging, or destroying religious property on grounds of the race, colour, or ethnicity of property owners or possessors).

23. Lisa Herndon, *Why Is Racial Injustice Still Permitted in the United States?: An International Human Rights Perspective on the United States’ Inadequate Compliance with the International Convention on the Elimination of All Forms of Racial Discrimination*, 31 Wis. INT’L LJ 322, 344 (2013) (noting that although “Article 4 condemns all racist propaganda and organizations . . . . By not adhering to these standards, the United States lessens the CERD’s effectiveness and sends the message that it does not take its treaty obligations seriously”).

Supreme Court's First Amendment jurisprudence, which has consistently affirmed that the courts will only regulate hate speech if it incites imminent harm or consists of specific threats of violence targeted against a person or group.

One leading case<sup>24</sup> is *Brandenburg v. Ohio*,<sup>25</sup> in which the U.S. Supreme Court protected a Ku Klux Klan member's hateful and disparaging speech at a rally directed towards African Americans, holding that such speech could only be limited if it posed an "imminent" danger of inciting violence.<sup>26</sup> The Court ruled that a state can only forbid or exclude advocacy that is "directed to inciting imminent lawless action and is likely to incite or produce such action."<sup>27</sup>

Another leading case is *Collin v. Smith*,<sup>28</sup> in which the Seventh Circuit Court of Appeals held that a set of ordinances preventing neo-Nazis from disseminating materials, and assembling in military style uniforms inciting hatred on the basis "of race, national origin, religion" on the streets of an Illinois suburb (housing a substantial Jewish population that included Holocaust survivors) was an unconstitutional breach of the neo-Nazis' First Amendment rights to free speech.<sup>29</sup> The Court reasoned that, "above all else, the First Amendment means that government

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24. The commonly cited starting point of hate speech jurisprudence in the U.S. is *Beauharnais v. Illinois*, 343 U.S. 250 (1952), in which the U.S. Supreme Court ruled to allow Illinois to prohibit hate speech as a form of group libel. However, it has been noted that "free speech doctrine has moved considerably since *Beauharnais* towards granting greater protection to speech. Thus, *Beauharnais*, which has been the subject of much criticism, is probably no longer good law." BANKS ET. AL., *supra* note 2, at 702–03.

25. *Brandenburg v. Ohio*, 395 U.S. 444, 449 (1969).

26. *Id.*

27. *Id.* Racial justice scholars have questioned whether the speech here could have also been seen as threatening violence, but this was not raised by the claimant's counsel or the Court. BANKS ET. AL., *supra* note 2, at 721 (asking " . . . didn't [the appellant] also advocate violence? What are the facts that would support an argument that the speech also advocated or threatened violence . . . The words of the participants such as "bury the n\*\*\*\*\*"?").

28. 578 F.2d 1197 (7th Cir. 1978). While the scope of this Article is limited to racist hate speech against people of color, it is assumed with caution that this standard would also be applied to people of color claiming racist hate speech on an otherwise identical set of facts. The loose distinction I draw between people of color and anti-Semitism against Jewish peoples here is premised on the fact that "94 percent, according to Pew, of Jewish peoples in America describe themselves as white in surveys. But many Jews of color—black, Asian, and even Mizrahi Jews—might identify their race in more ambiguous terms. Whiteness isn't a simple, static category that can be determined by a quick question from a pollster." See Emma Green, *Are Jews White?*, THE ATLANTIC (Dec. 5, 2016), <https://www.theatlantic.com/politics/archive/2016/12/are-jews-white/509453> [<https://perma.cc/NN3L-6HYK>]; see also, David Schraub, *White Jews: An Intersectional Approach*, 43 AJS REVIEW 379, 380 (2019) (" . . . when Jewishness—whether as a conceptual matter or as embodied in individual persons—is understood primarily as a subspecies of Whiteness, it obscures important features of Jewish experience for White and non-White Jews alike, while often accentuating or accelerating antisemitic tropes.").

29. *Collin*, 578 F.2d at 1202.



has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>30</sup> Furthermore, it stated, “if these civil rights are to remain vital for all, they must protect not only those society deems acceptable, but also those whose ideas it quite justifiably rejects and despises.”<sup>31</sup>

The need to protect the expression of racist ideas was further emphasized by the U.S. Supreme Court in *R.A.V. v City of St. Paul*, in which the majority overturned the conviction of a teenager convicted of burning a cross on the lawn of an African American family’s home.<sup>32</sup> The Court reasoned that the government cannot regulate speech as this would indicate its hostility or favoritism towards a nonproscribable message it may contain.<sup>33</sup>

In more recent years, the U.S. Supreme Court has acknowledged the offensive nature of hate speech as seen in the 2017 case of *Matal v. Tam*, but it has declined to impose broad restrictions on hate speech in the interests of First Amendment rights.<sup>34</sup> *Matal* concerned a dance-rock band’s application for federal trademark registration of the band’s name, “The Slants.” While “Slants” is widely considered to be a derogatory term for Asian peoples, the Asian-American band members claimed that they are helping to “reclaim” the term and negate its denigrating force by taking it as their band name.<sup>35</sup> The Court unanimously held that the Lanham Act’s prohibition on registering trademarks that “disparage” persons, institutions, beliefs, or national symbols with the United States Patent and Trademark Office was unconstitutional in violating the band’s First Amendment rights.<sup>36</sup> In a concurring judgment, Justice Kennedy reasoned, “a law that can be directed against speech found offensive to some portion of the public can be turned against minority and dissenting views to the detriment of all. The First Amendment does not entrust that power to the government’s benevolence. Instead, our reliance must be on the substantial safeguards of free and open discussion in a democratic society.”<sup>37</sup> Other key aspects of the judgments in these four cases will be drawn out in Part II below.

## II. CRITIQUING THE DISHONESTY IN HATE SPEECH JURISPRUDENCE WITH CRITICAL RACE THEORY

This superficial glance at how hate speech is regulated in the United States and New Zealand may lead one to believe that New Zealand is more proactive in regulating racist hate speech by having two specific

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30. *Id.*

31. *Id.* at 1210.

32. 505 U.S. 377 (1992).

33. *Id.* at 382–90.

34. 582 U.S. \_\_\_, 25 (2017).

35. *Id.* at 1.

36. *Id.*

37. *Id.* at 8 (Kennedy, J., concurring).

hate speech provisions and a range of other statutes with the potential to regulate hate speech as well. Furthermore, the 1977 *King Ansell* decision also demonstrated New Zealand's willingness to enact and apply law to impose criminal sanctions for hate speech—which sharply contrasts with the Seventh Circuit's decision in *Collin* to refuse to do so on a similar set of facts.

However, I argue that any praise of New Zealand's jurisprudence compared to that of the United States should not be overstated but should instead be treated with deep suspicion. This is due to *Fairfax's* interpretation of New Zealand's civil hate speech provision, section 61, where the High Court applied a high threshold for a claim under section 61, in a similar fashion to how the United States courts have imposed an "imminence" requirement to deny claims of racist hate speech. In my view, this decision showed dissonance between New Zealand's willingness to enact section 61 (and other laws relevant to hate speech and antidiscrimination<sup>38</sup>) and the court's failure to effectively enforce it in *Fairfax*, highlighting a dishonesty in New Zealand's jurisprudence that warrants further interrogation.

In its more robust protection of racist free speech, I argue that a more severe dishonesty lies in the United States's hate speech jurisprudence—where as noted by CRT scholar, Mari Matsuda, there is "contradiction between First Amendment absolutism and the goals of liberty and equality."<sup>39</sup> To examine the similarities (and differences) in these dishonest approaches, this section offers a comparative critique that builds on the insights of Matsuda and other CRT scholars in order to expose how both jurisdictions tell the same lies to protect racist hate speech and harm people of color.

#### A. *The Lie of the Marketplace of Ideas and the Truth of (Sub)conscious Racism*

The courts in both jurisdictions have reasoned against regulating racist hate speech on the grounds that such regulation would unduly interfere with "the marketplace of ideas" and the closely related ideals of political debate and the search for truth in a liberal democracy.<sup>40</sup> CRT

38. See New Zealand Bill of Rights 1990, s 19; The Human Rights Act 1993, s 21.

39. See LAWRENCE III ET AL., *supra* note 4, at 9: "The connection between hate speech and violence, and loss of liberty experienced by targets of hate speech, compelled [Matsuda] to confront the contradiction between first amendment absolutism and the goals of liberty and equality."

40. This idea comes from John Stuart Mill in his seminal 1859 work, *On Liberty*, in which it is argued that suppression of ideas needs to be avoided because "the opinion which it is attempted [may] be true. Those who desire to suppress it[are] not infallible. They have no authority to decide the question for all mankind, and exclude every other person from the means of judging." JOHN STUART MILL, *ON LIBERTY* 19 (1859). Justice Holmes adopted this marketplace of ideas in pursuit of the truth rationale while dissenting in *Abrams v. United States*: "[T]he best test for truth is the power of the thought to get itself admitted in the competition of the market." 20 U.S. 616, 630 (1919) (Holmes J., dissenting).

scholar, Charles Lawrence, provides an eviscerating critique of this “marketplace of ideas” rationale that is worth including here at length:

Blacks and other people of color are equally skeptical about the absolutist argument that even the most injurious speech must remain unregulated because in an unregulated marketplace of ideas the best ideas will rise to the top and gain acceptance. Our experience tells us the opposite . . . The American marketplace of ideas was founded with the idea of the racial inferiority of nonwhites as one of its chief commodities, and ever since the market opened, racism has remained its most active item in trade . . . It trumps good ideas that contend with it in the market. It is an epidemic that distorts the marketplace of ideas and renders it dysfunctional . . .<sup>41</sup>

Lawrence’s work here usefully elucidates how this “marketplace of ideas” rationale adopted by the courts is often devoid of any power analysis between the parties and reference to the historical context of racism in the United States. As a consequence, courts fail to appreciate how the “marketplace” is “distorted” by racist ideas and how this is evident in the realities of the claimants who have suffered from its harms. Lawrence posits that the reason behind this conveniently decontextualized “marketplace” is “unconscious racism” from the judges:

Well-meaning individuals who are committed to equality without regard to race and who have demonstrated that commitment in many arenas do not recognize where the burden of persuasion has been placed in this discussion. When they do, they do not understand why . . . Unfortunately, our unconscious racism causes even those of us who are the direct victims of racism to view the first amendment as the “regular” amendment—an amendment that works for all people . . .<sup>42</sup>

While I agree with Lawrence that the judges in the U.S. cases are perpetuating racism, I argue that the courts’ analysis of “the marketplace of ideas” and other democratic ideals is so heavily imbalanced, if not blatantly empty, that their racism is not “unconscious”; but at least subconscious and even conscious. Furthermore, given that this racism is enforced with the power of the U.S. Supreme Court, it is far more pervasive and structural than the term unconscious racism implies.<sup>43</sup> For example, in *R.A.V.*, the U.S. Supreme Court emphasized its reluctance to allow content-based restrictions on speech to ensure that the government was not a “specter that . . . may effectively drive certain ideas or viewpoints from the marketplace” without any analysis on how the

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41. See CHARLES R. LAWRENCE III, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, in *WORDS THAT WOUND*, *supra* note 4.

42. LAWRENCE III, *supra* note 41, at 81.

43. Indeed, Lawrence himself has expressed regret that his earlier conceptualisations of unconscious bias mislead by individualising racism and undermining their systemic power and neutralising racial biases as normal cognitive processes that are beyond criticism. Charles R. Lawrence III, *Unconscious Racism Revisited: Reflections on the Impact and Origins of “The Id, the Ego, and Equal Protection”*, 40 *CONN. L. REV.* 931, 942 (2008).

burning of a cross on an African American family's lawn contributed to the "marketplace."<sup>44</sup> Similarly, as mentioned above, the need to protect "ideas [society] quite justifiably rejects and despises" was expressed in *Collin* and also by Justice Kennedy in *Matal* who urged that "our reliance must be on the substantial safeguards of free and open discussion in a democratic society" without feeling the need to justify the utility of the particular "discussion" to America's democracy on the facts.

In examining the *Fairfax* decisions, it is clear this suspiciously empty "marketplace" rationale in hate speech decisions is not only "American" like Lawrence observes. In *Fairfax*, the High Court approved of the Tribunal's acceptance of evidence given by the magazine editors that the cartoons were published "to enliven a very useful debate not only about the effectiveness of the Food in Schools Programme but wider issues about the realities of life in deprived communities and the depiction of Māori and Pasifika in the media."<sup>45</sup> While the Court noted that "by delegitimising a group, insulting publications can have the potential to limit that group's participation in the "market[place]," the Court was of the view that the opportunity for intermediate correction as evidenced by, "the inevitable and almost immediate "push back" that a cartoon depicting racial stereotypes will generate is exemplified by the reactions in this case."<sup>46</sup>

This "push back" refers to *Fairfax*'s evidence of political debate, which was "an online poll run during the day showed 2,600 people felt offended by the cartoon and 7,500 did not."<sup>47</sup> However, the Court was inconsistent in its treatment and assessment of poll evidence. Even though it accepted the poll evidence given by *Fairfax* to the Tribunal, it did not accept the poll evidence given by the claimant to argue that the cartoons were "likely" to incite hostility against Māori and Pasifika peoples. This poll was "conducted on television shortly after publication of the cartoons in which 77 percent of respondents answered the question 'Do the cartoons depict reality?' in the affirmative."<sup>48</sup>

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44. 505 U.S. 377, 387 (1992) (quoting *Simon & Schuster, Inc. v. Members of N.Y. St. Crime Victims Bd.*, 502 U.S. 105, 116 (1991)).

45. [2018] NZHC 104 at [98]. The Court here is affirming the Tribunal's endorsement of Lord Steyn's judgment in *R v. Secretary of State for the Home Department, Ex parte Simms*, who stated that "the right of freedom of expression in a democracy as 'the primary right: without it an effective rule of law is not possible.'" Here, Lord Steyn draws on the words of Justice Holmes' dissent in *Abrams* endorsing Mill's marketplace as quoted above. See *Wall v. Fairfax New Zealand Ltd.* [2017] NZHRRT 17 at [160] (citing [2000] 2 AC 115 (HL) at [125]–[126]).

46. [2018] NZHC 104 at [89].

47. [2017] NZHRRT 17 at [76]. As the court further elaborates, "[t]he newspaper's usual response rate for an online poll is up to 300. Significant events can generate responses of around 1,000."

48. [2018] NZHC 104 at [91]–[92]. In reasoning its rejection of this poll evidence, the Court stated: "We do not consider such a 'poll' helpful in assessing the actual effects of the cartoons. For a start, having been conducted on a self-selecting basis it was unscientific. It is impossible to say whether those who apparently thought

The Court then examined evidence given to the Tribunal on behalf of the claimants by educationalist Dr. Leonie Pihama and psychologist Dr. Raymond Nairn about the harms the cartoons would inflict on Māori and Pasifika peoples. While the Court accepted the two expert views, it quickly dismissed their influence on its ruling, concluding that the “space” within which issues can be raised and debated must be kept as broad as possible and that it is not in the wider interests of society to confine publications only to those which do not shock, offend or disturb.”<sup>49</sup> Thus, any credit that can be given to the Court for briefly considering these impacts is easily negated by their strong preoccupation with the *idea* of “debate” in the “marketplace of ideas” and their failure to engage in a consistent and balanced analysis of how valid and meaningful this “debate” actually is in protecting and advancing New Zealand’s democracy on the facts. The Court affirmed the Tribunal’s decision and held that the cartoons did not satisfy the second element of section 61 of the speech being objectively “likely to excite even persuadable people to hostility or feelings of contempt.”<sup>50</sup>

These cases demonstrate that while New Zealand judges are slightly more diligent than those in the United States in at least considering evidence of the realities of Māori and Pasifika in the “marketplace” and beyond—I argue that this is little more than window dressing that can obscure the truth that they are subconsciously or perhaps even consciously perpetuating racism.

### B. *The Lie of Tolerable Offense and the Truth of White Privilege*

The second lie that both jurisdictions tell to protect racist hate speech is that the harms that this speech inflicts on people of color can be fairly treated as incidental impacts that can and need to be tolerated for the good of society and its democratic ideals, and explicitly characterized as mere “offense.” I argue that this dishonest mischaracterization reveals not only the truth of subconscious or conscious racism by the courts. Rather, the mischaracterization also indicates a failure of both judges to appreciate and respond to the harms inflicted on people of color—failure that is rooted in their white privilege.

This indication is supported by the work of CRT scholar, Mari Matusuda, who proposes that there are three “doctrinal elements” of the law’s protection of racist hate speech.

The first element is the “limits of doctrinal imagination in creating first amendment exceptions for racist hate speech.” Here, Matsuda makes a similar point to Lawrence’s unconscious racism argument, but specifically pinpoints the “privilege” of judges as the crux of the problem:

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the cartoons reflected reality were more motivated to respond than those who did not. Nor is it clear what they understood by the ‘reality depicted’; that is whether the cartoons were thought to depict . . . poor Māori and Pasifika in particular.” No such analysis was done into the scientific rigor of Fairfax’s poll evidence.

49. *Id.* at [94].

50. *Id.* at [89].

The limits of the lawmaking imagination of judges, legislators, and other legal insiders is . . . symptomatic of the position of privilege from which legal doctrine develops. Legal insiders cannot imagine a life disabled in a significant way by hate propaganda. This limited imagination has not affected lawmakers faced with other forms of offensive speech . . . the legal mind understands that reputational interests, which are analogized to the preferred interest in property, must be balanced against first amendment interests, it recognizes the concrete reality of what happens to people who are defamed. Their lives are changed.<sup>51</sup>

While Matsuda does not delve deeper into the racial dimensions of this “privilege,” I argue it is necessary to name it as white privilege.<sup>52</sup>

I posit that this white privilege is strongly evident in *Brandenburg*, *R.A.V.* and *Matal*, where the judges in these cases do not examine or even acknowledge the harm inflicted on the claimants and the marginalised groups they represent face. However, in *Collins*, the Seventh Circuit could not ignore these harms as one of the main arguments advanced by the people of Skokie was that the neo-Nazi’s demonstration (combined with the plan to wear and display Nazi uniforms and swastikas) would inflict psychological trauma on its many Jewish residents, some of whom were Holocaust survivors.<sup>53</sup> I argue that the Courts here show a different type of privilege, a ‘non-Jewish privilege,’<sup>54</sup> by declining to extend previous authority from the Supreme Court of Washington (that held

51. Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim’s Story*, 87 Mich. L. Rev. 2320, 2375 (1989).

52. In terms of white privilege, I adopt the most common conceptualization from Peggy McIntosh, who describes white privilege as “an invisible package of unearned assets which I can count on cashing in each day, but about which I was ‘meant’ to remain oblivious. White privilege is like an invisible weightless knapsack of special provisions, maps, passports, codebooks, visas, clothes, tools and blank checks.” Peggy McIntosh, *White Privilege: Unpacking the Invisible Knapsack*, in *PEACE & FREEDOM MAG.* 10, 10 (1989). I also adopt the formulation of white privilege from CRT scholar, Cheryl Harris, who argues that white privilege involves the possession of tangible and intangible “wages of whiteness [that] are available to all whites regardless of class position, even to those whites who are without power, money, or influence. Whiteness, the characteristic that distinguishes them from Blacks, serves as compensation even to those who lack material wealth.” Cheryl I. Harris, *Whiteness as Property*, 106 HARV. L. REV. 1707, 1759 (1993).

53. *Collin*, 578 F.2d at 1205–06.

54. Here, I tentatively suggest that people who are not Jewish possess a ‘non-Jewish privilege’ that allows them to be free of anti-Semitic discrimination and harms faced by Jewish peoples (see Green, *supra* note 28; Schraub, *supra* note 28) that is wholly distinct but somewhat analogous to white privilege. While it is beyond the scope of this Article to propose and examine this proposed concept in the depth required, for the purpose of this analysis, I briefly suggest here that non-Jewish peoples, both white and nonwhite, risk perpetuating anti-Semitism when they are not able to appreciate the pervasiveness of anti-Semitism in society. I observe that Justices Pell, Sprecher, and Wood presiding over *Collins* are not Jewish and white. Accordingly, I argue that they are not able to appreciate the harm experienced by the Jewish community comprising of Holocaust survivors—and similarly and cautiously infer that this would be the case for people of color on an otherwise identical set of facts.

that the new tort of intentional infliction of severe emotional distress could include the uttering of racial slurs) to First Amendment issues.<sup>55</sup> Accordingly, the Court ruled that the criminal penalties imposed by the ordinances constituted as unconstitutional breaches of the neo-Nazi's First Amendment rights.<sup>56</sup>

In the *Fairfax* decisions, consideration of the harms of the speech in question was more extensive, but resulted in essentially the conclusion. As noted above, the Tribunal heard expert evidence from educationalist Dr. Leonie Pihama, which included testimony about how speech like the cartoons constitute as “symbolic violence” (defined as “forms of violence imposed through symbolic mechanisms such as systems of classification, including representations which maintain stereotyped discourses”) and the need to understand the link between “racism and ill-health including psychological distress, depression and anxiety.”<sup>57</sup> In explaining how specific cartoons in question should be considered hate speech under section 61, Dr. Pihama testified that:

“ . . . [the cartoons] are based on racial stereotyping constructed through deficit thinking in respect of Māori and Pacifica. They are images and representations which are both insulting and abusive . . . Such racist portrayals within mainstream newspapers contribute to demeaning views of Māori and Pacifica which incite further negative, hostile and racist views against those communities.”<sup>58</sup>

Furthermore, the High Court noted expert evidence from psychologist Dr. Nairn who provided additional insight into the likely impact of the cartoons in inciting hostility:

The research identified media patterns and themes of anti-Māori discourse. A number of anti-Māori themes emerged including Good Māori/Bad Māori where Bad Māori are represented as poor, sick, lazy, bludgers and dishonest. The frequency and pervasiveness of these themes reflects and reproduces the generic discursive resources from which society builds and elaborates the discourses and narratives that are used to explain and understand everyday experiences. Media plays a role in producing and perpetuating dominant stereotypes. . . . the cartoons . . . are examples of dominant negative constructions of Māori and Pacifica . . . Based on [Dr. Nairn's] research he believed the cartoon representations were likely to reinforce “multiple manifestations of hostility and contemptuous behaviour towards and Māori and Pacific, including the day-to-day experiences of racism . . . .”<sup>59</sup>

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55. *Collin*, 578 F.2d at 1206 (citing *Contreras v. Crown Zellerbach, Inc.*, 88 Wash.2d 735 (1977), in which the Supreme Court of Washington refers to *Public Finance Corporation v. Davis*, 66 Ill. 2d 85 (1976) and *Knierim v. Izzo*, 22 Ill.2d 73 (1961).

56. *Id.* at 1218.

57. [2017] NZHRRT 17 at [41].

58. *Id.* at [42].

59. *Id.* at [51]–[52].

In quickly dismissing the relevance of both Dr. Pihama's and Dr. Nairn's testimonies, the predominantly white members of the High Court<sup>60</sup> used the white privilege at their disposal by essentially telling Māori and Pasifika to endure these expertly evidenced costs "in the wider interests of society to [not] confine publications only to those which do not shock, offend or disturb."<sup>61</sup>

The second element of the law's protection of racist hate speech that Matsuda identifies is the "the refusal to recognize the competing values of liberty and equality at stake in the case of hate speech." Matsuda powerfully exposes this element as a lie in the following excerpt:

Each person under that scheme is entitled to basic dignity, to nondiscrimination, and to the freedom to participate fully in society. If there is any central principle to the Bill of Rights, surely that is it. When white supremacist organizations with histories of violence have an active, protected presence in a community, that principle is sacrificed. All of our democratic institutions are tainted as a consequence.<sup>62</sup>

This "refusal" is clearly evident in the United States's hate speech jurisprudence, in which the only time Fourteenth Amendment rights were deemed important was in *Brandenburg* (when the Court found that the ordinances made against the neo-Nazi's were actually breaches of *their* Fourteenth Amendment rights).<sup>63</sup> This element is also evident in New Zealand's jurisprudence, where the Court in *Fairfax* refused to acknowledge the relevancy of a "conflict of rights" between Fairfax's right to freedom of expression under section 14 of NZBORA and the claimant's right to freedom from discrimination under section 19.<sup>64</sup> This was on the grounds section 3 of NZBORA provides that all of the rights in NZBORA are only enforceable against the three branches of government or persons or bodies performing public functions, in which the

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60. In stating "predominantly white"; I acknowledge that one of the three members of the High Court is Dr. Huhana Hickey, who is not white, but a leading Māori scholar specialising in indigenous rights and the rights of people with disabilities. Dr. Hickey is not a member of the judiciary, but a member of the Tribunal who joined High Court Justice Muir (who is white) for this particular decision, along with another Tribunal member Brian Neeson, a white, politically conservative former politician. Neither Dr. Hickey nor Neeson sat in the original Tribunal decision and no reasons were given as to why they joined Justice Muir on the High Court bench for this particular decision. However, I argue that despite Dr. Hickey joining the decision, her presence as an indigenous rights scholar of color does not negate the impact of white privilege held by the white majority on the bench (although it is noted Dr. Hickey did not dissent from the judgement). Therefore, I maintain that racist white privilege is still evident in the High Court decision.

61. [2018] NZHC 104 at [94].

62. Matsuda, *supra* note 51, at 48.

63. 395 U.S. at 448 (holding that the ordinances "impermissibly intrude[d] upon the freedoms guaranteed by the First and Fourteenth Amendments"). As scholars have noted, here, "the Court does not tell us what those guarantees are and how they are intruded upon." *BANKS ET. AL.*, *supra* note 4, at 722.

64. [2018] NZHC 104 at [32]–[38].



Court saw Fairfax is not as a “private company.”<sup>65</sup> This is despite its critical function in promoting public political debate as otherwise emphasized by the Court.

The Court’s refusal to recognize the relevancy of section 19 engages the third element of the law’s protection of racist hate speech that Matsuda identifies, which is “the refusal to view the protection of racist speech as a form of state action”:

State silence, however, is public action where the strength of the new racist groups derives from their offering legitimation and justification for other-wise socially unacceptable emotions of hate, fear, and aggression . . . Further, the law’s failure to provide recourse to persons who are demeaned by the hate messages is an effective second injury to that person. The second injury is the pain of knowing that the government provides no remedy and offers no recognition of the dehumanizing experience that victims of hate propaganda are subjected to. The government’s denial of personhood through its denial of legal recourse may be even more painful than the initial act of hatred.<sup>66</sup>

In the final paragraphs of the judgment, the Court shows an awareness of its second injury, but opts to further rub salt into the wound regardless:

“The law’s limits do not define community standards or civic responsibility. I would be disappointed if anything . . . this Court might say could be taken as indicative of what people of one race may feel at liberty to say and which people of the other are expected to brook” . . . The unanimous view of both the Tribunal and this Panel’s members that the cartoons were objectively offensive should . . . be a cause for reflection by the respondents and their respective editorial teams.<sup>67</sup>

It is in these second injuries that the right to freedom of expression is effectively transformed into a protected right to “freedom of expression of racism,” where the only obligation put on those seeking to exercise this right is to simply take a moment to “reflect” before they do. The Court apparently puts faith in the publishing community and media to not interpret their ruling as giving them the freedom to disseminate racist hate speech. However, in my view, the Court believing that it’s decision could be interpreted in any other way demonstrates that they are not only subconsciously or consciously lying to the parties in the case, it also shows that they are lying to themselves.

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65. *Id.* The Court instead made the interest in nondiscrimination only the government’s: “Notwithstanding this conclusion, in our view the government’s objective in enacting s 61 should not be minimised. It is just that we see the case as better framed in terms of a conflict between Fairfax’s right to freedom of speech and the government’s interest in protecting its citizens from harmful speech and discrimination.” *Id.* at [35].

66. Matsuda, *supra* note 51, at 2378–79.

67. [2018] NZHC 104 at [98], referring to *Awa v. Indep. News Auckland Ltd.* [1997] 3 NZLR 590 [1997] (CA) at 598 per Thomas J.

### C. *The Transnationality of These Lies*

This comparative critique above has revealed how the courts in the United States and New Zealand both tell the same lies to protect the racist “right to freedom of expression of racism” or “freedom of racist speech.” The only difference is that courts in the United States is perhaps more blatant and unashamed in its lies, while the courts in New Zealand appears to be ashamed or in denial of the fact that they are telling them.

However, despite this key difference, it is critical to note that the fact that both New Zealand and the United States tell these lies is a reflection of the transnational character of the “right to freedom of expression of racism” or “freedom of racist speech” in liberal Western democracies today. The transnational quality of this racist right is illuminated in the Tribunal’s *Fairfax* decision, in which the Tribunal misappropriates global concerns about free speech in the “fake news,” “post-truth” Trump era to ground their reasoning for protecting Fairfax’s racist hate speech:

While the present case has as its focus the hate speech provisions in s 61 of the HRA, the principle at issue (the restrictions which can legitimately be imposed on freedom of expression) is of wider contemporary importance. We refer in particular to the emergence of strategies designed to undermine democratic processes. Such strategies include the relatively new phenomenon of creating and circulating “fake news” . . . and the Orwellian characterisation of false information as “alternative facts.” Last year Oxford Dictionaries chose as Word of the Year 2016 the adjective “post-truth,” defined as “relating or denoting circumstances in which objective facts are less influential in shaping public opinion than appeals to emotion and personal belief” . . .

Contemporary forms of attacks on . . . the functioning of democratic institutions and the free communication of information and ideas highlight the critical need for a vigilant free press and on occasion the publication of that which may offend . . . It is important the press continue to speak truth to power . . . It is against this brief survey . . . that the New Zealand domestic provisions can be addressed.<sup>68</sup>

Here, the Tribunal not only describes the wider global context in which it feels the case is taking place in, it also explains what it believes to be the most important concern the claim raises—the “attack” against freedom of speech for a “vigilant free press” in the “post-truth” Trump era.

Their judgment (as well as that of the High Court upholding it) appears to just be one of the major manifestations of this concern in New Zealand among conservatives and progressives alike. The other major manifestation was an open letter penned by 27 major New Zealand public figures in April 2017, warning that free speech is under threat in the country’s universities after the University of Auckland closed down a white supremacist student group.<sup>69</sup> The petition brought together right

68. [2017] NZHRRT 17 at [167]–[169].

69. Vernon Small, *Prominent Kiwis pen open letter saying free speech is under threat in NZ universities*, STUFF (Apr. 4, 2017), <https://www.stuff.co.nz/national/>

wing figures Don Brash and Bob Jones with “unlikely allies,” including progressive Māori and Pasifika figures such as Tariana Turia, Albert Wendt and Luamanuvao Winnie Laban.<sup>70</sup>

Of course, in the U.S., “First Amendment absolutism” has long been a reflection of and supported by the views of public commentators and figures from both sides of the political spectrum, who in the “post-truth” era maintain that regulating racist hate speech on campuses and beyond constitutes an unacceptable attack on American democracy.<sup>71</sup> Therefore, to counter the power of free speech rhetoric in both countries to protect people of color from the harms of racist hate speech, a proposal for a communications strategy that seeks to challenge these beliefs will now be explored in Part III.

### III. TOWARDS AN HONEST JURISPRUDENCE

#### A. *The Realities of Hate Speech Reform Today*

The dishonesty in both New Zealand’s and the United States’ hate speech jurisprudence can no longer be ignored and an honest approach to protecting people of color is required.

For New Zealand, this was made especially clear after the terrorist attack in Christchurch on March 15, 2019, in which a white supremacist murdered 51 Muslims at a mosque during the time of worship and livestreamed it on Facebook.<sup>72</sup> Despite widespread shock at the attack nationwide and worldwide, members of the Muslim community immediately spoke out two days afterwards about how they were “not surprised” and how they had pleaded with government officials multiple times before the attack to take action against “the rise of vitriol and the rise of the alt-right in New Zealand.”<sup>73</sup>

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politics/91132233/prominent-kiwis-pen-open-letter-saying-free-speech-is-under-threat-in-nz-universities [https://perma.cc/NR67-M7E9]. The letter argued that debates should not be suppressed because some ideas “are thought by some or even by most people to be offensive, unwise, immoral, or wrong-headed” with one of the signatories further commenting that “there was a ‘tsunami’ with universities in the UK, Australia and the United States facing huge restrictions on freedom of speech.”

70. *Id.*

71. For example, liberal commentator Greg Lukianoff and centrist commentator Jonathan Haidt have argued that claims of “microaggressions” and harm from discriminatory speech by students constitutes as “coddling” that leads to an “overprotection” that ultimately threatens the happiness, health, strength and success of these students. GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND: HOW GOOD INTENTIONS AND BAD IDEAS ARE SETTING UP A GENERATION FOR FAILURE*, 13–15 (2018). For a right-wing perspective, see HEATHER MACDONALD, *DIVERSITY DELUSION: HOW RACE AND GENDER PANDERING CORRUPT THE UNIVERSITY AND UNDERMINE OUR CULTURE* (2018).

72. Charlotte Graham-McLay et. al., *Christchurch Mosque Shootings Were Partly Streamed on Facebook*, N.Y. TIMES (Mar. 14, 2019), <https://www.nytimes.com/2019/03/14/world/asia/christchurch-shooting-new-zealand.html> [https://perma.cc/95F2-78TF].

73. Anjum Rahman, *We Warned You. We Begged. We Pled. And Now*

The Christchurch attack, and reports of further Islamophobic attacks in New Zealand in the weeks after it,<sup>74</sup> led Minister of Justice, Andrew Little, to announce that the Ministry was fast-tracking a review of the “woefully inadequate” hate speech framework and with particular consideration of whether New Zealand should make hate crimes an offence.<sup>75</sup> In a later opinion explaining the review, Minister Little noted the key causal relationship between racist and religious hate speech<sup>76</sup> and hate crimes like the Christchurch attack:

Protecting freedom of speech is crucial to our democracy and the ability of all citizens to participate meaningfully . . . But in the immediate wake of the March 15 mosque attacks, many citizens from minority ethnic and religious communities told of how opinions and statements they routinely see on social media and other public platforms make them feel threatened, unwelcome and alienated . . . Others have said *these types of statements allow a climate to develop that is tolerant of harmful discriminatory expression*.<sup>77</sup>

On March 13, 2020, Minister Little announced that a number of options for reform were now “working their way through the cabinet process” and said “the review of our hate speech laws are in the final stages. I expect there will be an announcement in a matter of weeks.”<sup>78</sup>

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*We Demand Accountability*, SPINOFF (Mar. 17, 2019), <https://thespinoff.co.nz/society/17-03-2019/we-warned-you-we-begged-we-pleaded-and-now-we-demand-accountability> [https://perma.cc/WUN5-JV2G].

74. Michelle Duff, *A Bus Driver Slammed the Door on a Muslim Girl. Three Girls Fought Back*, STUFF (Mar. 29, 2019), <https://www.stuff.co.nz/national/christchurch-shooting/111634116/a-bus-driver-slammed-the-door-on-a-muslim-girl-three-girls-fought-back> [https://perma.cc/VK45-R7AF].

75. Michelle Duff, *Hate Crime Law Review Fast-tracked Following Christchurch Mosque Shootings*, STUFF (Mar. 30, 2019), <https://www.stuff.co.nz/national/christchurch-shooting/111661809/hate-crime-law-review-fasttracked-following-christchurch-mosque-shootings> [https://perma.cc/VW9C-VXF7].

76. It is important here to note that racism and islamaphobia are closely related although distinct. See Anna Sophie Lauwers, *Is Islamophobia (Always) Racism?*, 7 CRITICAL PHIL. OF RACE 306 (2019) (arguing that “although anti-Islam bigotry is intertwined with anti-Muslim racism, the two are conceptually distinct”); NARZANIN MASSOUMI ET. AL., WHAT IS ISLAMOPHOBIA?: RACISM, SOCIAL MOVEMENTS AND THE STATE (2017) (arguing that Islamaphobia can and should be understood as a form of racism). In New Zealand, the majority of Muslims are people of color. See Colleen Ward, *Muslims in New Zealand*, WGTN: CTR. FOR APPLIED CROSS RES. (2011), <https://www.wgtn.ac.nz/cacr/research/identity/muslims-in-new-zealand> [https://perma.cc/45NE-BGHL] (noting “the majority (77%) of Muslims are overseas-born with the largest proportions identifying as Indian (29%) and members of Middle Eastern groups (21%) such as Arab, Iranian and Iraqi”).

77. Andrew Little, *Andrew Little: Hate Speech Threatens Our Right to Freedom of Speech*, NZ HERALD (Apr. 27, 2019, 4:57 PM), <https://www.nzherald.co.nz/nz/andrew-little-hate-speech-threatens-our-right-to-freedom-of-speech/2II6E7A5AZH-QRG2HM4ZQXNFA4M> [https://perma.cc/FK6N-BRXA] (emphasis added). While it has yet to be announced, it is highly likely that this reform will include expanding the hate speech and any hate crime laws to cover discrimination on the grounds of religion.

78. Collette Devlin, *Justice Minister forges ahead with hate speech laws for New Zealand*, STUFF (Mar. 13, 2019, 6:25 PM), <https://www.stuff.co.nz/national/>

However, while New Zealand appears to be taking steps to reforming hate speech, it remains uncertain whether these reforms will be effective in addressing the dishonesty in the law's protection of the "right to freedom of expression of racism" in *Fairfax* as outlined in the above analysis.

Despite this uncertainty, Minister Little's comments do acknowledge a key part of the problem—the radicalization of white supremacists online.<sup>79</sup> The terrorist responsible for the Christchurch attack had been radicalized online,<sup>80</sup> and minutes before livestreaming the attack on Facebook, they disseminated a 74-page manifesto titled *The Great Replacement* (a reference to the "Great Replacement" and "white genocide" conspiracy theories) to over 30 recipients and links were shared on Twitter and 8chan.<sup>81</sup> In showing the transnational and global power of this online radicalization, a string of four terrorist attacks took place worldwide citing the Christchurch attack and the manifesto in a mosque in Escondido, California,<sup>82</sup> synagogue in Poway, California,<sup>83</sup> Walmart in El Paso, Texas,<sup>84</sup> and a mosque in Bærum, Norway.<sup>85</sup>

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politics/120264595/justice-minister-forges-ahead-with-hate-speech-laws-for-new-zealand [https://perma.cc/55PJ-NNV5].

79. See generally The Soufan Centre, *White Supremacy Extremism: The Transnational Rise of the Violent White Supremacist Movement*, (Sept. 27, 2019), <https://thesoufancenter.org/research/white-supremacy-extremism-the-transnational-rise-of-the-violent-white-supremacist-movement> [https://perma.cc/369B-8D4B]; Ryan Scrivens et. al., *Measuring the Evolution of Radical Right-wing Posting Behaviors Online*, 41 *DEVIANT BEHAV.* 216 (2020); Joanna Schroeder, *Racists Are Recruiting. Watch Your White Sons*, N.Y. TIMES: OPINION (Oct. 12, 2019), <https://www.nytimes.com/2019/10/12/opinion/sunday/white-supremacist-recruitment.html> [https://perma.cc/G4CV-5XYX].

80. The terrorist donated 2,200 euros to Génération Identitaire, the French branch of the European white supremacist group, Generation Identity, and interacted with Austrian branch leader Martin Sellner via email between January 2018 and July 2018, offering to meet in Vienna and a linking to his YouTube channel. See Jason Wilson, *Christchurch Shooter's Links to Austrian Far Right 'More Extensive than Thought*, *GUARDIAN* (May 15, 2019), <https://www.theguardian.com/world/2019/may/16/christchurch-shooters-links-to-austrian-far-right-more-extensive-than-thought> [https://perma.cc/AC8R-XQNE].

81. Craig Timberg et. al., *The New Zealand Shooting Shows How YouTube and Facebook Spread Hate and Violent images—Yet Again*, *WASH. POST* (Mar. 15, 2019), <https://www.washingtonpost.com/technology/2019/03/15/facebook-youtube-twitter-amplified-video-christchurch-mosque-shooting> [https://perma.cc/N8KF-JPH3].

82. Andrew Johnson, *Suspect of Possible Arson Attack at Escondido Mosque Leaves Note Referencing New Zealand Terrorist Attacks*, *NBC SAN DIEGO* (Mar. 25, 2019, 6:52 PM), <https://www.nbcsandiego.com/news/local/islamic-center-escondido-mosque-epd-efd-sdso-reported-arson-unit/81831> [https://perma.cc/4JZ7-C4XP].

83. Robert Evans, *Ignore the Poway Synagogue Shooter's Manifesto: Pay Attention to 8chan's /pol/ Board*, *BELLINGCAT* (Apr. 28, 2019), <https://www.bellingcat.com/news/americas/2019/04/28/ignore-the-poway-synagogue-shooters-manifesto-pay-attention-to-8chans-pol-board> [https://perma.cc/V2Q4-WDL6].

84. Eleanor A. Roy, *'It Brings Everything Back': Christchurch Despairs over White Supremacist Attacks*, *GUARDIAN* (Aug. 14, 2019, 12:47 AM), <https://www.theguardian.com/world/2019/aug/14/it-brings-everything-back-christchurch-despairs-over-white-supremacist-attacks> [https://perma.cc/H5BL-SKGT].

85. Jason Burke, *Norway Mosque Attack Suspect 'Inspired by Christchurch and*

Even before the Christchurch attack, the rise of active hate groups in the United States was already an alarming issue, where the Southern Poverty Law Centre reported in February 2019 that 2018 was the fourth straight year of growth in the number of hate groups—a 30 percent increase roughly corresponding with Trump’s campaign and presidency.<sup>86</sup> To attempt to address this global issue, the Prime Minister of New Zealand, Jacinda Ardern, initiated an action plan that commits to involve international Heads of State, Governments and leaders from the tech sector (including Facebook, Google, YouTube and Amazon), named the *The Christchurch Call*, to eliminate terrorist and extremist content online.<sup>87</sup> *The Christchurch Call* covers a range of measures including the development of tools to prevent the upload of terrorist and violent extremist content, an increase in transparency around the removal and detection of content, and a review of the algorithms used to detect problematic material.<sup>88</sup>

This global call for action by governments and expressed commitments to regulating online radicalization via hate speech by Facebook<sup>89</sup> and Twitter<sup>90</sup> (though not Reddit<sup>91</sup> and 8chan<sup>92</sup>) show some positive signs of change. However, it remains to be seen if governments will be willing to regulate the other forms of racist hate speech that create the “climate” for white supremacist terrorism like in Fairfax and the U.S. cases critiqued above.

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*El Paso Shootings*, GUARDIAN (Aug. 11, 2019, 2:07 PM), <https://www.theguardian.com/world/2019/aug/11/norway-mosque-attack-suspect-may-have-been-inspired-by-christchurch-and-el-paso-shootings> [https://perma.cc/2C95-9QAF].

86. *Hate Groups Reach Record High*, S. POVERTY L. CTR. (Feb. 19, 2019), <https://www.splcenter.org/news/2019/02/19/hate-groups-reach-record-high> [https://perma.cc/92T9-KXH2].

87. Ministry of Foreign & Trade, *About Christchurch Call*, <https://www.christchurchcall.com/call.html> [https://perma.cc/H23H-R8PV]. Noticeably, the U.S. government has not supported the Call.

88. *Id.*

89. Billy Perrigo, *Facebook Says It’s Removing More Hate Speech Than Ever Before. But There’s a Catch*, TIME (Nov. 27, 2019), <https://time.com/5739688/facebook-hate-speech-languages> [https://perma.cc/7KWB-V3RJ]; *Community Standards—Hate Speech*, FACEBOOK, [https://www.facebook.com/communitystandards/hate\\_speech](https://www.facebook.com/communitystandards/hate_speech) [https://perma.cc/GT37-P3EE].

90. TWITTER SAFETY, *Updating Our Rules Against Hateful Conduct*, TWITTER: BLOG (Dec. 2, 2020), [https://blog.twitter.com/en\\_us/topics/company/2019/hatefulconductupdate.html](https://blog.twitter.com/en_us/topics/company/2019/hatefulconductupdate.html) [https://perma.cc/W6SX-EDQG].

91. Ali Breland, *Why Reddit Is Losing Its Battle with Online Hate*, MOTHER JONES (Aug. 27, 2019), <https://www.motherjones.com/politics/2019/08/reddit-hate-content-moderation> [https://perma.cc/DPR4-H66N]; Shoshana Wodinsky, *Reddit CEO Says It’s ‘Impossible’ to Consistently Enforce Hate Speech Rules*, VERGE (July 9, 2018), <https://www.theverge.com/2018/7/9/17550824/reddit-ceo-steve-huffman-hate-speech-moderation-nearly-impossible-leaked-chat> [https://perma.cc/Q4A2-7NYC].

92. Makena Kelly, *8chan ‘Has No Intent of Deleting Constitutionally Protected Hate Speech,’ Owner Tells Congress*, VERGE (Sept. 15, 2019), <https://www.theverge.com/2019/9/15/20850791/8chan-hate-speech-delete-jim-watkins-infinitechan-el-paso-shooting-racist-white-supremacist> [https://perma.cc/XUY5-88VP].

This regulation appears to be especially unlikely in the United States where the government has not supported *The Christchurch Call*, and the U.S. Supreme Court has become more conservative since *Matal* with the appointment of Justice Brett Kavanaugh in October 2018.<sup>93</sup> Furthermore, in March, 2019, President Trump signed an Executive Order linking colleges and university grants and other funds to how they enforce the right to “free inquiry” on their campuses, in order to give notice to “professors and power structures” seeking to prevent conservatives “from challenging rigid, far-left ideology.”<sup>94</sup>

In New Zealand, resistance to regulation appears to be weaker, especially given the current progressive Labour administration is already planning a hate speech law review and reform as explained above. However, it is not necessarily going to be smooth—where although the former leader of the conservative opposition, Simon Bridges, announced his support for Minister Little’s review, he urged for caution to avoid “crossing the line and restricting free speech.”<sup>95</sup> Furthermore, other politicians such as ACT party leader David Seymour have strongly opposed reform arguing it would “divide the country and pit groups against one other.”<sup>96</sup> Similarly, New Zealand’s Free Speech Coalition denounced Minister Little’s plan to proceed with the review and reform during COVID-19 pandemic by stating, “We are deeply concerned that Mr. Little plans to do the same with hate speech laws. Trashing freedom of speech, at a time when the country is facing a national emergency would be a disgrace.”<sup>97</sup>

With these sources of resistance in mind, the question is: how can both jurisdictions overcome these sources and other barriers that may arise to work towards a more honest framework? I argue that the key lies in building social movements aimed at shifting public opinion<sup>98</sup> in

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93. See Ian Millhiser, *What Trump Has Done to the Courts, Explained*, Vox (Sept. 29, 2020), <https://www.vox.com/policy-and-politics/2019/12/9/20962980/trump-supreme-court-federal-judges> [<https://perma.cc/G94E-WWSX>].

94. Maggie Haberman & Michael D. Shear, *Trump Signs Executive Order Protecting Free Speech on College Campuses*, N.Y. TIMES (Mar. 21, 2019), <https://www.nytimes.com/2019/03/21/us/politics/trump-free-speech-executive-order.html> [<https://perma.cc/Z95Z-4WUH>].

95. *Current Hate Speech Law ‘Very Narrow’—Justice Minister Andrew Little*, RADIO NEW ZEALAND (Apr. 3, 2019), <https://www.rnz.co.nz/news/political/386237/current-hate-speech-law-very-narrow-justice-minister-andrew-little> [<https://perma.cc/KUQ6-NE5K>].

96. *Id.*

97. FREE SPEECH COALITION, *Little Must Rule Out Using COVID-19 Distraction to Slide Through Hate Speech Laws*, SCOOP (Mar. 20, 2020), <https://www.scoop.co.nz/stories/PO2003/S00232/little-must-rule-out-using-covid-19-distraction-to-slide-through-hate-speech-laws.htm> [<https://perma.cc/28HU-MFUE>].

98. On the need to transform public opinion in order to transform the law, in particular U.S. Supreme Court jurisprudence: “To the Justices, the views of the American people seem to matter for two reasons. The first is that they give a kind of permission slip: If most people agree with what the Court wishes to do, it is less likely to risk its own prestige, or to put its own role in question, if it acts on its wishes. The second, and perhaps more fundamental reason . . . is that . . . [i]f most people have come to share a

favor of supporting reform that will protect racial and religious minorities from the harms of hate speech. As noted by Chief Executive Officer of the Ministry of Health Andrew Kibblewhite, in March 2020, the road to reforming hate speech law following the review needs to “be a slow process . . . you’ve got to think about how you shift the hearts and minds of New Zealanders and that will happen in a lot of different way . . . Legislation around hate speech that works for New Zealanders [is] absolutely important to people’s wellbeing . . .”<sup>99</sup>

Fortunately, American social justice communications organization, The Opportunity Agenda, has devised *A Communications Toolkit* to help social justice advocates build communications strategies capable of moving “hearts, minds, and policy over time . . .”<sup>100</sup>

While it is beyond the scope of this Article to devise a full communications strategy in the depth required, I suggest a possible reframing of hate speech from a free speech issue to a public health issue. I suggest this reframing to any social and racial justice groups, movements or organizations that may be interested in building hate speech reform movements to consider in their own advocacy and praxis.

#### B. *Reframing Hate Speech from a Free Speech Issue to a Public Health Issue*

The *Toolkit* recommends the following 7 steps for devising a communications strategy: (1) Determine organizational goals; (2) Determine communications goals; (3) Research; (4) Framing, narrative, and message development; (5) Create an outreach strategy; (6) Integrate and implement; and (7) Implement and evaluate.<sup>101</sup> For step (1),<sup>102</sup> I tentatively suggest the broad goal to be to achieve reform hate speech frameworks so that they are honest and thus able to effectively protect people of color and religious minorities from racist and intolerant hate speech as the law failed to in *Fairfax*, the U.S. cases and terrorist attacks outlined above. For step (2),<sup>103</sup> the primary target audiences I propose for both jurisdictions are:

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moral commitment, or if the arc of history is clearly on one side, then judges are likely to pay respectful attention.” Cass R. Sunstein, *The Supreme Court Follows Public Opinion*, in *LEGAL CHANGE: LESSONS FROM AMERICA’S SOCIAL MOVEMENTS*, BRENNAN CENTER FOR JUSTICE 21, 22–23 (Jennifer Weiss-Wolf & Jeanine Plant-Chirlin eds., 2015).

99. Devlin, *supra* note 78.

100. THE OPPORTUNITY AGENDA, VISION, VALUES, AND VOICE: A COMMUNICATIONS TOOLKIT 2 (2019).

101. *Id.* at 6–8.

102. *Id.* at 6. This step states that “[a]ny communications efforts should serve overarching organizational, campaign, or movement goals. Once these larger goals are defined and understood, you can start asking questions about how communications can support them.”

103. *Id.* This step involves stating the “target audiences” for the strategy, which are “the groups and individuals whose behaviors need to change to reach the goal?” The step also involves devising “actions” and “timeline and priorities” for these audiences, which is beyond the scope of this Article to suggest.



- New Zealand: People who are politically left to center leaning liberals. This group(s) need to be targeted because they also includes the relevant decision makers, Minister Little and the Labour government led legislature.
- The United States: People who are politically right to center leaning conservatives, (typically white and wealthy) who believe freedom of speech would be under threat by the regulation of hate speech. This group(s) need to be targeted because they also includes the majority of the key decision makers in the U.S. judiciary (especially the conservative U.S. Supreme Court) and other law making institutions such as the Senate.

Regarding step (3),<sup>104</sup> it is beyond the scope of this Article to conduct the required public opinion, media and field research required. Therefore, the research outlined above will be used for the time being.

The central contribution of this Part is proposing an approach to step (4) around framing, narrative, and message development.<sup>105</sup> As this Article has made clear, hate speech has been framed in both jurisdictions as a free speech, which dishonestly ignores, obscures, and dismisses the harms of hate speech.” Therefore, as cognitive linguist and philosopher George Lakoff explains, there now needs to be an honest “reframing:”

Reframing is telling the truth as we see it—telling it forcefully, straightforwardly, articulately, with moral conviction and without hesitation . . . It is not just a matter of words, though the right words do help evoke a progressive frame: . . . Reframing requires a rewiring of the brain. That may take an investment of time, effort, and money. The conservatives have realized that . . . [t]he truth alone will not set you free. It has to be framed correctly.<sup>106</sup>

I argue that it is worth considering reframing racist hate speech as a public health issue, as this would allow the physical, mental, psychological or spiritual impacts of racist and religious hate speech (and number of deaths from recent terrorist attacks) on marginalised peoples to be contrasted with baseless and empty free speech arguments against hate speech reform. The general idea is for target audiences to be repeatedly and persuasively presented with these evidenced impacts through

104. *Id.*

105. *Id.* at 14. The Toolkit defines these key terms as follows:

“Framing is the identification of a set of values and themes within which we will present our issue. Because there are usually many ways to think about and talk about each issue we work on, it’s important to be strategic in the way we present our story to audiences . . . . Narrative refers to the set of frames we use to tell the story of a specific issue. By identifying overarching key themes and values we want our audiences to identify with an issue, we can help to ensure a level of resonance and consistency that won’t happen if we frame each sub-issue independently of a larger theme.”

*Id.*

106. George Lakoff, *Simple Framing*, ROCKRIDGE INSTITUTE 2 (Feb. 14, 2006).

the various forms of media they consume in order for them to support (or simply not oppose) the enactment of honest hate speech law reforms.

In an article for *The Guardian* on hate speech and “the right to be a bigot” in Australia, human rights lawyer Nyadol Nyuon calls for the need for this reframing as follows:

It is easy to hold a moral ground without experiencing its real-world consequences. It is dangerously simplistic to frame “hate speech” as merely about speech and to measure its consequences in terms of hurt feelings only because hate speech negatively impacts the health of its victims, and at its worst it inspires hate crimes.<sup>107</sup>

As the *Toolkit* emphasizes, the narratives, frames and messages used in this reframing will need to draw on “shared values,”<sup>108</sup> which in this case are concern for health, safety, wellbeing and the protection of life. Accordingly, the main narrative to be promoted should be that hate speech threatens the health, safety, wellbeing and lives of New Zealanders and Americans. In particular, this narrative should highlight the threat to innocent children in order to elicit widespread empathy across the political spectrums to inspire action or at least support for honest reforms.

However, it is important to note that highlighting the harmful impacts of a law on the health, wellbeing and lives of children has not always been effective, especially when weighed against constitutional rights that are deeply cherished by politically conservative groups. For example, despite the 180 school shootings from 2009–2019 (resulting in 356 fatalities),<sup>109</sup> gun control activists have been unable to overcome the robust framing of unfettered gun ownership as a Second Amendment right as affirmed in the U.S. Supreme Court’s decision in *District of Columbia v. Heller*.<sup>110</sup>

However, one major example in which evidence of the harms of discrimination on the health and wellbeing of children positively persuaded the U.S. Supreme Court is *Brown v. Board of Education*. In this case, the Court was compelled by evidence from a number of psychological

107. Nyadol Nyuon, *It’s Easy to Argue for Free Speech when It’s Not You or Your Children in the Firing Line*, *GUARDIAN* (Aug. 16, 2019), <https://www.theguardian.com/commentisfree/2019/aug/17/its-easy-to-argue-for-free-speech-when-its-not-you-or-your-children-in-the-firing-line> [<https://perma.cc/TME4-PCMG>].

108. *THE OPPORTUNITY AGENDA*, *supra* note 100, at 14.

109. *10 Years. 180 School Shootings. 365 Victims.*, *CNN* (July 2019), <https://edition.cnn.com/interactive/2019/07/us/ten-years-of-school-shootings-trnd> [<https://perma.cc/RKK6-24E5>].

110. 554 U.S. 570 (2008). As Michael Waldman has noted, the U.S. Supreme Court’s decision in *Heller* was made possible by a movement led by the National Rifle Association (NRA), comprising of a strategy to build a supporting body of legal scholarship and an extensive media communications campaign. Michael Waldman, *The Road to Heller*, in *LEGAL CHANGE: LESSONS FROM AMERICA’S SOCIAL MOVEMENTS* 53; Michael Waldman, *The Road to Heller*, in *LEGAL CHANGE: LESSONS FROM AMERICA’S SOCIAL MOVEMENTS* 21, 53, *supra* note 98.

studies showing that segregating Black children made them feel inferior and interfered with their learning.<sup>111</sup>

While neither example provides a perfect template or pathway to follow, the hate speech reform movements in the United States (and perhaps to an extent in New Zealand) can draw on the experiences of both *Heller*, *Brown* and any other relevant cases to understand the messages and communications tactics that will most effectively erode dishonest First Amendment absolutism with this reframing.

In terms of the overall legal reform both the New Zealand and United States movements need to adopt, I propose for lawyers and advocates to push for law reform that eliminates the impossibly high thresholds of being “likely to incite hostility” requirement in the New Zealand’s HRA “likely to incite hostility” and the U.S. Supreme Court’s “imminence” requirement from *Brandenburg*.

To replace these requirements, I suggest for lawyers and advocates to push for law reform that introduces an objectively assessed element or requirement for the speech in question to be “likely to cause physical, mental, psychological or spiritual harm.”<sup>112</sup> This will require the courts to consider scholarly evidence about the physical, mental, psychological or spiritual harms that hate speech has inflicted on claimants. This would impose a significant shift in focus from what both jurisdictions currently demand from claimants with their impossibly high thresholds, which is actual or a high likelihood of riots or physical violence against the targeted group due to the hate speech.

For claimants in the United States, this body of evidence can include (or build on) the findings included in a recent policy statement by the American Academy of Pediatrics (APA) released in August 2019. The APA’s statement reviewed empirical evidence which found that the “stress of being targeted by, or even just witnessing, racist words and actions can take a lifelong toll on children and adolescents.”<sup>113</sup> The APA concluded that the “evidence to support the continued negative impact of racism on health and wellbeing . . . is clear”<sup>114</sup> and urged pediatricians and other child health professionals to “be prepared to discuss and counsel families of all races on the effects of exposure to racism as victims, bystanders, and perpetrators.”<sup>115</sup> The body of evidence can also include other empirical findings that have established that “the emotional pain

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111. *Brown v. Board of Educ.*, 347 U.S. 483, 494 (1954). This included the study done Kenneth and Mamie Clark, whose found that black children from segregated environments tended to prefer white dolls over black dolls.

112. Specifically, I suggest that the U.S. movement can focus on introducing this reform in a state legislature level, which will likely be challenged as unconstitutional on First Amendment grounds in the courts.

113. Nyuon, *supra* note 107; see Maria Trent et. al., *The Impact of Racism on Child and Adolescent Health*, 144 PEDIATRICS 1 (2019).

114. Trent et. al., *supra* note 113, at 1.

115. Trent et. al., *supra* note 113, at 5.

created by experiences of racism look very similar to the patterns of brain activity caused by physical pain.”<sup>116</sup>

For claimants in New Zealand, it will be imperative for the strategy to publicize and build from the body of expert evidence given by Dr. Nairn and Dr. Pihama in *Fairfax*. Furthermore, evidence of the harms of hate speech inflicts can include (or build on) the findings from Dr. Ricci Harris, whose studies have reached very similar conclusions about the impact of racist words and actions on the health on people of color and marginalised religious minorities in the New Zealand context.<sup>117</sup> As the *Toolkit* recommends, both communications strategies should have these pediatricians/doctors, psychologists and other medical experts<sup>118</sup> speak about their research and experience in the appropriate media platforms and mediums for their respective targeted audiences. This can include having them write op-eds and letters to the editors in the appropriate magazines and publications to speak on their research as well.<sup>119</sup>

However, despite there being bodies of evidence to use and build on, there are a number of questions and concerns that arise from this proposal that each reform movement<sup>120</sup> will need to grapple with. The first question is, to what extent these reforms be effective in addressing the white privilege and unconscious racism judges (as the sources of dishonesty in present jurisprudence)? Of course, no legal standard can completely eliminate or nullify privilege and unconscious racism from legal actors—they will always be at play. The aim of these reforms

116. Yin Paradies, *Does Racism Make Us Sick?*, CONVERSATION (Aug. 8, 2016), <https://theconversation.com/does-racism-make-us-sick-63641> [<https://perma.cc/8Z5S-QU3L>]. One study found an association between self-reported experiences of racial discrimination and cardiovascular disease. See Tené T. Lewis et al., *Self-Reported Experiences of Discrimination and Cardiovascular Disease*, 8 CURRENT CARDIOVASCULAR RISK REP. 365 (2014).

117. See generally Ricci B. Harris et al., *Racism and Health in New Zealand: Prevalence Over Time and Associations Between Recent Experience of Racism and Health and Wellbeing Measures Using National Survey Data*, 13 PLoS ONE 1 (2018); Ricci B. Harris et al., *The Pervasive Effects of Racism: Experiences of Racial Discrimination in New Zealand Over Time and Associations with Multiple Health Domains*, 74 Soc. Sci. & MED. 408 (2012).

118. THE OPPORTUNITY AGENDA, *supra* note 100, at 18. According to the *Toolkit*, experts “provide the big picture, the statistics, and studies that show how this issue affects the whole community . . . . These spokespeople (researchers, advocates, policymakers, and others) frequently offer a transition from problem to solution.” *Id.*

119. *Id.* at 34. “Op-eds are your chance to speak through the news media directly to policymakers, your constituents, and other target audiences. Papers will run op-eds from a range of sources, including experts, community voices, advocates, and those directly affected by issues.” *Id.* On letters to the editor: “Letters to the editor are a quick and effective way to weigh in on issues that media frequently cover. Often, more people read the letters page than the pages where the original article appeared . . . .” *Id.* at 36.

120. Of course, this is not to say that both movements cannot work towards reforms together given the transnational nature of the lies that protect racist hate speech. In fact, such solidarity and collaboration may prove highly beneficial and even necessary.

is to reduce the influence of these sources of dishonesty as much as possible by having judges and other legal actors be confronted with overwhelming bodies of statistics and findings from sound empirical studies to effectively counter the evidence poor, but opinion heavy narratives from free speech proponents. While the Tribunal and High Court were able to ignore such evidence in *Fairfax*, I posit that the proposed legislative amendment to HRA will make it very difficult for judges to ignore and dismiss this evidence in favor of poorly evidenced counter claims of political debate in the “marketplace of ideas” from defendants as they did in *Fairfax*.

The second question is whether this proposal will be blocked or inhibited if both sets of judiciaries read in or impose strict causation requirements between the hate speech in question and the risk of (or actual) harm alleged? I argue that the proposed reform effectively address this concern because the wording of the amendment requires judges to use their discretion to make a judgement on the *likelihood* of harm—evidence of actual harm caused by the speech (or similar form of speech) may be offered, but is not required. However, in knowing the ever present need to be skeptical of predominantly white judiciaries having such discretion (especially given the subconscious/conscious racism and white privilege revealed above), I also propose that a priority for both reform movements will be to secure funding and/or support for empirical research that can persuasively demonstrate the link between harmful impacts of specific types of racist hate speech on children of color.

The third question is whether this proposed reform can be used to the detriment of people of color and/or people from marginalized religious minorities? In other words, does it matter if the hate speech comes from a person who belongs to a marginalized racial and/or religious minority? The simple answer to this is that it all depends on the strength of the evidence of the likelihood of harm presented. For example, if the facts of *Matal* were to be decided under this new element, then the Asian American band could have their trademark application be declined and the Lanham Act be held to be constitutional if the Court is satisfied with evidence from experts that the trademarking of “The Slants” would be “likely to cause physical, mental, psychological or spiritual harm” to other Asian Americans. This will also be the case if a person from one marginalized group produces hate speech against another marginalized group. For example, if a nonwhite Muslim person burns a cross on a black family’s lawn, or if a Chinese magazine were to disseminate a cartoon that negatively portrays Māori and Pacifika peoples similar to those in *Fairfax*.

Understanding and addressing this power dynamic is likely to be more complicated for lawyers and judges than the standard dominant group versus minority group type cases. However, the ultimate goal of this reform is to better protect minorities against anyone (marginalized or nonmarginalized) who seeks to exploit that marginalization in which dominant groups are the ultimate beneficiaries of the hate in a deeply

unequal, white supremacist society. Therefore, I hope that this reliance on empirical evidence of alleged harm or likelihood of harm will support the achievement of this goal by showing how harms can persist, albeit perhaps to a lesser extent, regardless or in spite of, the racial or religious identity of the perpetrator of the hate speech.

Another key guiding principle in these types of analyses of the likelihood of harm, especially when other grounds beyond race, ethnicity and color are implicated, will be intersectionality.<sup>121</sup> The seminal work of Kimberlé Crenshaw on intersectionality in the context of potential hate speech by Black men against Black women<sup>122</sup> provides an example of the rich and nuanced analysis that will be required as evidence in these cases:

The political process involved in legal prosecution of 2 Live Crew's representational subordination of Black women does not seek to empower Black women; indeed, the racism of that process is injurious to us. The implication of this conclusion is not that Black feminists should stand in solidarity with the supporters of 2 Live Crew. The spirited defense of 2 Live Crew was no more about defending the Black community than the prosecution was about defending women. After all, Black women—whose assault is the very subject of the representation—are part of that community . . . Instead the defense primarily functions to protect the cultural and political prerogative of male rappers to be as misogynistic as they want to be. The debate over 2 Live Crew illustrates how the discursive structures of race and gender politics continue to marginalize Black women, rendering us virtually voiceless.<sup>123</sup>

Once again, the very real concern is that predominantly white and otherwise privileged judiciaries lack the ability to understand and engage in this analysis. Therefore, I highly recommend for both reform

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121. Here, Crenshaw defines intersectionality as “a transitional concept that links current concepts with their political consequences, and real world politics with postmodern insights. It can be replaced as our understanding of each category becomes more multidimensional. The basic function of intersectionality is to frame the following inquiry: How does the fact that women of color are simultaneously situated within at least two groups that are subjected to broad societal subordination bear upon problems traditionally viewed as monocausal—that is, gender discrimination or race discrimination.” Kimberlé Williams Crenshaw, *Beyond Racism and Misogyny: Black Feminism and 2 Live Crew*, in *WORDS THAT WOUND*, *supra* note 4, at 114.

122. *Id.* In this article, Crenshaw provides an intersectional analysis from a black feminist perspective on the 2 Live Crew case, in which the group's album, *As Nasty As They Wanna Be*, was ruled to be classified as obscenity, one of the few exceptions to First Amendment per the U.S. Supreme Court decision in *Miller v. California* (1973). *Id.* This led to the arrest of 2 Live Crew members for performing material from the album. In the United States Court of Appeals for the Eleventh Circuit appeal, overturning the obscenity charge, Henry Louis Gates Jr. testified on behalf of 2 Live Crew, arguing that the material actually had important roots in African American vernacular, games, and literary traditions and should be protected. Accordingly, in the article, Crenshaw grapples with the anti-Black racism in the obscenity charge and the misogynistic violence against Black women perpetuated by the material and Gates' defense of it.

123. *Id.* at 132.

movements to also support and invest in empirical research efforts that apply intersectional lenses as Crenshaw recommends. This is to help judges understand the complex intersections that need to be considered in assessing intersectional hate speech claims.

The 2 Live Crew case raises two other concerns that reformers need to be wary of when it comes to prosecuting people of color for hate speech. The first concern is the possibility of white people using these hate speech laws to claim racist hate speech by people of color against white people. While this new standard cannot prevent these claims from coming forward, I argue that the benefit of this new reform is that these claimants will struggle to find robust evidence of this harm to support such claims.<sup>124</sup>

The second concern is the likelihood that regulating hate speech could contribute to mass incarceration of people of color, especially in the United States. While it is beyond the scope of this Article to consider this concern in detail, I urge for reformers to grapple with this tension and consider how alternatives to incarceration in hate speech prosecutions of racial minorities, including but not limited to restorative justice,<sup>125</sup> antiracism education for minorities, tort based action<sup>126</sup> and of course, prison abolition<sup>127</sup>—can be advanced alongside these reforms in order to prevent the growth of the racist carceral state.

## CONCLUSION

This Article has confronted the lies that underpin current hate speech jurisprudence in New Zealand and the United States, and exposed

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124. However, this is not to say that it is impossible for researchers, psychiatrists and other experts to misappropriate this standard. Here, research and academic opinions into the concept of white fragility is essential to distinguish the stress and anxiety experienced by white people, from the psychological harms experienced by people of color from racist acts or speech. ROBIN DIANGELO, *WHITE FRAGILITY: WHY IT'S SO HARD FOR WHITE PEOPLE TO TALK ABOUT RACISM 2* (2018) (arguing that white fragility appears when white people “become highly fragile in conversations about race . . . any attempt to connect [white people] to the system of racism as unsettling and a moral offense . . . the smallest amount of racial stress is intolerable—the mere suggestion that being white has any meaning triggers a range of defensive responses. These include emotions such as anger, fear . . . withdrawal from the stress-inducing situation . . . Though white fragility is triggered by discomfort and anxiety, it is born of superiority and entitlement. White fragility is not weakness per se. In fact, it is a powerful means of white racial control and the protection of white advantage”).

125. See generally Thalia González, *The Legalization of Restorative Justice: A Fifty-State Empirical Analysis*, 5 UTAH L. REV. 1207 (2019).

126. See generally Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, in *WORDS THAT WOUND*, *supra* note 4. While an invaluable contribution to CRT scholarship in this area, it was beyond the scope of this Article to consider Delgado’s proposal in depth due to the major distinctions in tort law in the United States and New Zealand that made such consideration unworkable for the present analysis and proposal.

127. See generally Dorothy E. Roberts, *Foreword: Abolition Constitutionalism*, 133 HARV. L. REV. 1 (2019).

how these lies have transcended borders across these liberal democracies to protect the “right to freedom of expression of racism” and “the right to racist speech” respectively. The Christchurch attacks and the string of white supremacist attacks it inspired in the United States has made it clear that the need to address this dishonest jurisprudence, and the dangerous climate it creates, is greater than ever.

Accordingly, this Article proposes a communications strategy to reframe and confront hate speech from a free speech issue to a public health issue, an honest conceptualization that draws on empirical evidence to tell the real “truth” about the very real harms that racist hate speech inflicts on people of color. I hope that advocates interested in building reform movements will consider this critique and proposal, and then grapple with the various questions and concerns it raises. I believe that this further work is essential for both countries to move towards an honest jurisprudence that lives up to their mutual democratic ideals of freedom and equality for all.



