ONE MAN'S VULGARITY IS ANOTHER'S LYRIC: A COMPARATIVE ANALYSIS OF THE DUTY TO TOLERATE OFFENSIVE SPEECH IN CANADA, THE UNITED STATES, AND SOUTH AFRICA

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ABSTRACT

This thesis examines whether a functioning democracy's commitment to freedom of expression entails an individual duty to tolerate speech that some members of the political community find offensive. The inquiry is premised on the theory that public discourse benefits from the free exchange and competition of ideas. By analyzing judicial decisions from Canada, the United States, and South Africa in which courts have invoked a duty to tolerate offensive speech, this thesis establishes that the protection of free speech in a functioning democracy does entail such a duty. It argues that this duty plays a crucial role in protecting a robust and uninhibited public discourse by preventing the suppression of ideas by governments or individuals on the basis of the emotional reactions they may provoke in some individuals. Finally, through a comparative analysis of the approaches taken by the three jurisdictions examined, the thesis argues for the need to place reasonable limits on the duty to tolerate.

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"Speech is powerful. It can stir people to action, move them to tears of both joy and sorrow, and - as it did here - inflict great pain. On the facts before us, we cannot react to that pain by punishing the speaker. As a nation we have chosen a different course – to protect even hurtful speech on public issues to ensure that we do not stifle public debate."

U.S. Supreme Court Chief Justice Roberts
Snyder v. Phelps (2011)

INTRODUCTION[1]

In a decision that received widespread media attention last year for its constitutional recognition of the right to make an obscene gesture (i.e., the "middle finger"), the Court of Quebec declared that "offending someone […] is an integral component of one's freedom of expression".[2] The court conveyed its exasperation with the fact that someone had faced criminal charges in this case for merely insulting another person in the context of "minor neighborhood trivialities", to the extent that it expressed a willingness to "take the file and throw it out the window".[3] Notwithstanding the court's firm stance on the issue, the view that freedom of expression entails a right to express offensive ideas is far from trivial and is increasingly contested around the world.[4] In the United States, the opinion that controversial speakers should be prevented from expressing hurtful or discriminatory ideas on college campuses is gaining momentum.[5] In South Africa, a new hate speech bill that allows for sweeping restrictions on speech which causes "substantial emotional, psychological, physical, social or economic detriment" is currently making its way through the legislative process.[6] In Canada, an administrative tribunal recently faulted the national public broadcaster for failing to warn listeners before referring on air to the title of a book containing the n-word.[7]

Contemporary debates about freedom of expression often focus on the rights of speakers and whether their speech falls within a protected sphere. Yet, in the last decades, the

[1] This thesis was written in fulfillment of the requirements for the Master of Laws (LL.M.) in Comparative Constitutional Law at Central European University, Vienna. Although the author is a lawyer with the Quebec Regional Office of the Department of Justice Canada, the opinions expressed in this text are those of the author and in no way represent those of the Department of Justice Canada.
[2] *R. v. Epstein*, 2023 QCCQ 630, para 169.
[3] Ibid, paras 168-169 and 174.
[4] Ibid.; Holmes, Oliver, "*Giving the middle finger is a God-given right*", The Guardian, 10 Mar. 2023.
[5] First Amendment Watch at NYU, "Free Speech Controversies on College Campuses", 18 Jan. 2023..
[6] Department of Justice and Constitutional Development of South Africa, "The Prevention and combating of Hate Crimes and Hate Speech Bill" Justice.gov.za; Business Tech. "New Laws to Make Hate Speech a Crime in South Africa – Including on Twitter, WhatsApp and Other Social Media", Businesstech.co.za, 2023.
[7] Gollom, Mark. "CBC/Radio-Canada Apologizes for Using N-Word, but Says CRTC "Overstepped" Authority" CBC, 13 July 2022; Canadian Radio-television and Telecommunications Commission, Decision CRTC 2022-175; Of note, this decision was overturned on June 8th, 2023 in *Société Radio-Canada v. Canada*, 2023 FCA 131.

highest courts of several jurisdictions have stated that individuals have a duty to tolerate the speech of others in matters involving offensive expression. A recent example is the case of *Ward v. Quebec*, in which the Supreme Court of Canada issued a sharply divided ruling over a comedian's highly controversial "disgraceful", "nasty", and "repugnant" jokes about a young disabled public figure.[8] The comedian claimed he had sought to call attention to the "public's uncritical reverence for certain sacred cows" in Quebec society.[9] While the Court found it necessary to express its disapproval of the remarks, it upheld the comedian's right to make them despite the hurt they had caused.[10] Although they disagreed on the implications of that statement, both the majority and the minority justices agreed that true freedom of expression "does not truly begin until it gives rise to a duty to tolerate what other people say".[11] This statement sets the stage for the focus of my thesis, which examines whether a functioning democracy's commitment to free speech entails an individual duty to tolerate speech that some members of the political community find offensive.

It is my contention that the protection of freedom of expression in a functioning democracy does entail such a duty, and that this duty plays a crucial role in protecting a robust and uninhibited public discourse by preventing the suppression or exclusion of ideas and perspectives on the basis of the emotional reactions they can provoke in certain individuals. Restricting speech on the basis of its offensiveness would run the risk of leading to subjective content-based discrimination since, in the apt ad oft-quoted words of U.S. Supreme Court Justice Harlan penned in 1971, "one man's vulgarity is another's lyric". I do not claim that the duty to tolerate is an autonomous legal concept with its own jurisprudential test. Rather, the duty is an idea that has been invoked by courts both to define the scope of free speech protection

[8] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, paras 108 and 218.
[9] Ibid, para 207.
[10] Ibid., paras 82, 86, 107 and 114.
[11] Ibid., para 60.

in a way that extends it to offensive speech and, in the context of the limitation analysis, to reject interests that purport to justify restrictions on free speech based on the emotional reaction of certain individuals to the speech of others. First, I argue that a duty to tolerate offensive speech can contribute to preventing governments from excluding certain ideas from public discourse under the guise of protecting the feelings of a segment of the public. I show that in jurisdictions where it has been recognized, the duty has successfully been invoked by courts to curtail such attempts from public authorities. Second, I contend that a duty to tolerate can also help ensure that individuals cannot successfully invoke their own feelings or reactions to justify restrictions on the speech of others. I point to several examples showing that courts have relied on the duty to tolerate to dismiss claims by individuals who argued that the fact that they were offended justified restricting the free speech of others. Third, I suggest that reasonable boundaries should be set for the duty to tolerate, in light of a comparative analysis of the approaches taken by the three jurisdictions examined in this thesis.

To support these arguments, I examine the Supreme Court of Canada's decision in *Ward v. Quebec*, as well as several decisions from the United States and South Africa in which courts have invoked a duty to tolerate. I focus on offensive speech that does not rise to the higher threshold of hate speech. The latter is only addressed when necessary to explain the outcome of the cases discussed and the limits of the duty at issue. In order to limit the scope of the inquiry, the unique features of online speech are not covered in this work. Similarly, although I share some reflections on the appropriate limits of the duty to tolerate in the last chapter, this thesis does not pretend to offer a complete answer to this complex question. The selection of Canada, South Africa, and the United States as comparators is based on their shared characteristics relevant to the research question, as well as the fact that their courts have recognized a duty to tolerate speech. These three states, despite their different histories, are functioning democracies, follow the common law legal tradition, and protect freedom of

expression at the constitutional level. Free speech and press indexes also show that they have competitive media markets with independent journalism and robust public discourse.[12] My choice of case selection is thus consistent with Ran Hirschl's "most similar cases" approach.[13]

In the first chapter, I review the existing literature and theories on speech tolerance. In the second chapter, I explore the significance of tolerance in Canadian free speech jurisprudence and provide a comprehensive analysis of the *Ward v. Quebec* decision. In the third chapter, I rely on cases from the United States and South Africa to demonstrate that the duty to tolerate can protect public discourse by preventing certain ideas or perspectives from being suppressed. I explain how the duty has prevented public authorities from interfering with ideas or perspectives that they had determined to be offensive to some individuals. I then rely on other examples from the same jurisdictions to show how the duty has been relied on by courts to curtail attempts made by private individuals or organizations to invoke their own subjective feelings or reactions to restrict the expression of others. In the fourth chapter, I offer some comparative reflections on the duty to tolerate in light of the cases discussed, in order to discuss what the limits of the duty should be.

[12] Reporters Without Borders, World Press Freedom Index, 2022, see Canada, South Africa, and United States; Article 19, The Global Expression Report 2022, p. 19.
[13] R. Hirschl, "Case Selection and Research Design in Comparative Constitutional Studies", in R. Hirschl, Comparative Matters: The Renaissance of Comparative Constitutional Law, 2014, OUP, p. 242 and 245-246.

CHAPTER 1: THEORETICAL PERSPECTIVES ON THE TOLERANCE OF OFFENSIVE SPEECH

In this chapter, I explore the origins of the notion of tolerance and its meaning, and I discuss how the view that individuals should tolerate offensive speech is increasingly becoming a minority position around the world. I then provide a brief overview of the major theories of speech tolerance that scholars have advanced. Lastly, I explain how this thesis contributes to the existing literature on the tolerance of offensive speech.

1.1 Origins, Meaning, and Decline of Tolerance of Offensive Speech

Historically, the concept of tolerance, or toleration, can be traced back to the antiquity, where it was referenced in the works of certain Stoics.[14] The term was originally associated with religious difference and referred to allowing people of other faiths to worship without interference, even if they held different beliefs from the majority.[15] During the Enlightenment, several thinkers, whose views had been shaped by Europe's religious wars, argued that all individuals, regardless of their social status or position, had to practice toleration and to refrain from interfering with the activities of others that conflicted with their own beliefs.[16] In 1644, John Milton claimed that the exposure to differing views was necessary to distinguish between good and evil.[17] In 1689, in his *Letter Concerning Toleration*, Locke blamed "all the bustles and wars" of his time on "the refusal of toleration by those that are of different opinions".[18] In 1859, John Stuart Mill developed the concept to encompass more than religious differences, arguing that the free competition of ideas was the best approach to promote intellectual growth

[14] Forst, Rainer. "Toleration", Stanford Encyclopedia of Philosophy, Stanford.edu, 2017.
[15] Newman, Jay, "The Idea of Religious Tolerance" Jstor.org, 2023; Perez Zagorin, "How the Idea of Religious Toleration Came to the West", Princeton University Press, 2003, p. 5–6.
[16] Siblot, Paul, "Dire la tolérance ", Université de Montpellier III (France). Praxiling, 2015, p. 56; Forst, Rainer. "Toleration", Stanford Encyclopedia of Philosophy, Stanford.edu, 2017; Forst, Rainer. "Toleration", Stanford Encyclopedia of Philosophy, Stanford.edu, 2017.
[17] Milton, John, Areopagitica (1st ed), 1644. London, p. 12.
[18] Locke, John, "A Letter Concerning Toleration and Other Writings", Mark Goldie (ed.), Liberty Fund: Indianapolis, 2010, p. 60.

in society and to discover the truth.[19] He believed that governments should not interfere with individual liberty unless this was required to prevent harm to others.[20]

For our purposes, "tolerance" refers to the idea of "showing understanding or leniency for conduct or ideas […] conflicting with one's own", as Lee C. Bollinger defines it.[21] It is, as T.M. Scanlon adds, "an attitude that is intermediate between wholehearted acceptance and unrestrained opposition".[22] From a political standpoint, tolerance can also be understood as "accepting the political rights of others, such as freedom of speech, even with respect to groups that one otherwise disagrees with or is actually afraid of".[23] Conceptually, the idea that the protection of freedom of expression entails a duty to tolerate the speech of others is related to the view that rights entail correlative duties.[24] As Onora O'Neill argues, "Rights are no more than the rhetoric of charters and manifestos unless there are correlative obligations"[25]. The word "tolerance" may also refer to a concept that goes beyond tolerating views that we find objectionable. This broader definition appears in the 1995 UNESCO *Declaration of the Principles on Tolerance* as the attitude of "respect, acceptance and appreciation of the rich diversity of our world's cultures, our forms of expression and ways of being human".[26]

Although the principle of free speech enjoys growing public support worldwide, the view that individuals should tolerate offensive speech without censorship or consequences for

[19] Mill Stuart, John, *On Liberty*. London: John W. Parker and Son, 1859, p. 101-102; Forst, Rainer. "Toleration", Stanford Encyclopedia of Philosophy, Stanford.edu, 2017; Williams, Leonard, "John Stuart Mill." Mtsu.edu, 2017.
[20] Ibid.
[21] Bollinger, Lee C, *The Tolerant Society*, Oxford University Press, 1988, p. 10.
[22] Scanlon, T. M. The Difficulty of Tolerance: Essays in Political Philosophy. Cambridge University Press, 2003, p. 187.
[23] Petersen, Michael, et al. "Freedom for All? The Strength and Limits of Political Tolerance." *British Journal of Political Science*, vol. 41, no. 3, 2011, p. 583.
[24] Hohfeld, Wesley Newcomb. "Some Fundamental Legal Conceptions as Applied in Judicial Reasoning." The Yale Law Journal, vol. 23, no. 1, 1913, p. 30-32.
[25] Onora O'Neil, "Practices of Toleration", in *Democracy and Mass Media*, published by Judith Lichtenberg, Cambridge University Press, 1990, p. 160.
[26] UN Educational, Scientific and Cultural Organisation (UNESCO), Declaration of Principles on Tolerance, 16 November 1995.

the speakers is becoming a minority position around the world.[27] According to a Pew Research Center survey conducted in 2015, a mere 35 percent of respondents from 38 countries expressed support for the right to make statements that are considered offensive to religious or minority groups.[28] In another 2015 survey conducted in the United States, a clear generational divide in the results suggests that tolerance for offensive speech is declining. Indeed, while government intervention to prevent individuals from making statements offensive to minority groups was supported by only 12% of Silent Generation Americans, 24% of Baby Boomers, and 27% of Gen Xers, that number jumped to 40% among Millennials.[29] Another Pew Research Center study conducted in 2021 also tells us that a majority of Americans believe that "people saying offensive things to others" qualifies as a "major problem" in the country.[30]

1.2 Existing Literature on the Tolerance of Offensive Speech

Contemporary scholarship has mostly focused on debating the benefits and risks of tolerating offensive speech from a theoretical or philosophical standpoint. The literature has not yet attempted to test whether the duty to tolerate offensive speech has delivered on its promises, analyzing how it has fared in practice in the jurisprudence of the jurisdictions where it was recognized. Scholars have presented different justifications for why offensive speech ought to be tolerated, while others have warned about the risks of excessive tolerance.

A first line of argument suggests that the tolerance of offensive speech is essential to a society's democratic self-government. Ian Cram argues that we should be skeptical of attempts to regulate the content of speech on the basis of offensiveness because they raise the possibility

[27] Wike, Richard, and Katie Simmons. "Global Support for Principle of Free Expression, but Opposition to Some Forms of Speech", Pew Research Center's Global Attitudes Project, 18 Nov. 2015; Wike, Richard. "Americans More Tolerant of Offensive Speech than Others in the World", Pew Research Center, 12 Oct. 2016.
[28] Ibid, p. 5.
[29] Poushter, Jacob. "40% of Millennials OK with Limiting Speech Offensive to Minorities." Pew Research Center, 20 Nov. 2015.
[30] J. Baxter Oliphant. "For Many Americans, Views of Offensive Speech Aren't Necessarily Clear-Cut." Pew Research Center, Pew Research Center, 14 Dec. 2021.

of governments seeking to exclude entirely certain ideas and views from public discourse.[31] According to him, governments could seek to selectively silence speech deemed offensive in order to silence minority or unpopular viewpoints under the guise of protecting individuals from being offended.[32] Cram further argues that offensive speech is often the "most powerful communicative style" available and that allowing the regulation of such speech would give governments overly broad powers.[33] Similarly Ronald Dworkin claims that "in a democracy, no one, […] can have a right not to be insulted or offended".[34] He explains that the role that free speech plays in protecting self-government is not limited to preventing the censorship of political speeches or editorial columns. Rather, for him, "*A community's legislation and policy are determined more by its moral and cultural environment, the mix of its people's opinions, prejudices, tastes, and attitudes*.[35] He further argues that the censorship of offensive views can undermine the democratic justification that makes people willing to obey laws, including those designed to protect those we may seek to shelter from feeling offended.[36]

A second line of argument holds that all speech, including offensive speech, should be tolerated because the free flow and competition of ideas is the best way to discover the truth and to promote the intellectual growth of society. In *Areopagitica*, Milton famously said: "*Let [truth] and Falsehood grapple; who ever knew Truth put to the worse in a free and open encounter?*".[37] Milton's belief was that in a "free and open encounter" bad arguments are unlikely to survive in the face of better ones.[38] Similarly, John Stuart Mill argued against

[31] Cram, Ian, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy', in Ivan Hare, and James Weinstein (eds), Extreme Speech and Democracy (Oxford, 2009; online edn, Oxford Academic, 1 May 2009), p. 321.
[32] Ibid, p. 322.
[33] Ibid, p. 327.
[34] 'Foreword', in Ivan Hare, and James Weinstein (eds), Extreme Speech and Democracy (Oxford, 2009; online edn, Oxford Academic, 1 May 2009).
[35] Ibid.
[36] Ibid.
[37] Milton, John, Areopagitica (1st ed), 1644. London, p. 12.
[38] Ibid.

censorship in general and asserted that the free flow of ideas was the best way to arrive at the truth.[39] While he argued that governments could interfere with people's freedoms when there was a risk of harm, this did not include speech that merely offended others.[40] On the contrary, Mill encouraged offensive speech, declaring that truth would emerge from the "rough process of struggle between combatants fighting under hostile banners".[41] In a famous 1919 dissent in *Abrams v. United*, U.S. Supreme Court Justice Holmes referred to this idea using the metaphor of a marketplace, stating "*the ultimate good desired is better reached by free trade in ideas - the best test of truth is the power of thought to get itself accepted in the competition of the market*".[42] According to this view, when public discourse is free from interference, the robust and uninhibited debate that ensues will lead to the best solutions to society's problems.[43]

A third justification for the duty to tolerate is that tolerating offensive speech serves a symbolic and educational function that improves the public's capacity for self-restraint and increases the degree of tolerance in society.[44] Lee C. Bollinger argues, in *The Tolerant Society*, that the duty's purpose is "to develop and demonstrate a social capacity to control feelings evoked by a host of social encounters".[45] According to him, all individuals have a natural impulse toward intolerance, and speech that evokes strong emotional reactions can be used to exercise individuals' capacity for self-restraint.

A fourth argument for the duty to tolerate offensive speech is grounded in the autonomy of speakers. Edwin Baker argued in his work *Human Liberty and Freedom of Speech* that the

[39] Mill Stuart, John, *On Liberty*. London: John W. Parker and Son, 1859, p. 101-102
[40] C. L. Ten (ed.), Mill's On Liberty: A Critical Guide, Cambridge University Press, 2008, p. 15.
[41] Mill and the Value of Moral Distress' (1987) 35 Pol. Studies 410; Cram, Ian, 'The Danish Cartoons, Offensive Expression, and Democratic Legitimacy', in Ivan Hare, and James Weinstein (eds), Extreme Speech and Democracy (Oxford, 2009; online edn, Oxford Academic, 1 May 2009), p. 323.
[42] *Abrams v. United States*, 250 U.S. 616 (1919), p. 630.
[43] Ingber, Stanley, "*The Marketplace of Ideas: A Legitimizing Myth*", 1984, Duke Law Journal, p. 3.
[44] Bollinger, Lee C, *The Tolerant Society*, Oxford University Press, 1988, p. 124; Rosenfeld, Michel. "Extremist Speech and the Paradox of Tolerance." Harvard Law Review, vol. 100, no. 6, 1987, p. 1471.
[45] *Ibid*.

freedom of speech protects "not a marketplace, but rather an arena of individual liberty from certain types of governmental restrictions".[46] He believed that the state and the legal order had to promote the substantive autonomy of the people.[47] For him, this implied that everyone had to be permitted "to be offensive, annoying, or challenging to dominant norms".[48] He theorized that governments should only be allowed to limit of the liberty of speakers where their actions would interfere with the similar authority or rights of others.[49]

A fifth group of scholars focus on the risks and appropriate limits of tolerating offensive and intolerant speech in a democratic society. Among them, Karl Popper posited that if we fail to safeguard a tolerant society against intolerance, tolerance will be destroyed along with the individuals who embrace it.[50] Petersen et al. point out the risks of tolerating intolerant speech, explaining that studies demonstrate that it is more difficult to convince intolerant people to become tolerant than it is to convince tolerant people to become intolerant.[51] Michael Ignatieff similarly argues for more civility and warns of the dangers of allowing the use of violent and demonizing language in politics, claiming that this type of speech could allow ill-intentioned individuals to polarize society for political gain and to influence how citizens behave toward one another.[52] He contends that free speech goes too far when it allows certain minorities to be ridiculed, insulted, and discriminated against in everyday situations.[53]

[46] Edwin Baker, Human Liberty and Freedom of Speech, Oxford University Press, 1989, p. 5.
[47] Ibid, p. 134
[48] Ibid.
[49] Edwin Baker, Autonomy and Free Speech, University of Minnesota Law School, Constitutional Commentary, Volume 27, Issue 2 (Fall 2011), p. 254
[50] Popper, Karl Raimund. The Open Society and Its Enemies. Routledge, 1945, vo. 1, n. 4 to ch. 7, p. 265.
[51] Petersen, Michael, et al. "Freedom for All? The Strength and Limits of Political Tolerance." *British Journal of Political Science*, vol. 41, no. 3, 2011, p. 582 and 585.
[52] Ignatieff, Michael. "The Politics of Enemies." *Journal of Democracy*, vol. 33 no. 4, 2022, p. 5-19.
[53] Respect and the Rules of the Road', in L. Appignanesi (ed.), Free Expression is No Offence, (London: Penguin, 2005), 128.

1.3 Contribution of this Work to the Existing Literature

This thesis adds to the literature by testing whether, in practice, the recognition by courts of a duty to tolerate offensive speech has protected public discourse by preventing the suppression of ideas deemed offensive to some individuals. This is done through an examination of several decisions in which the duty has been invoked by the courts of Canada, South Africa, and the United States. My analysis is premised on the perspectives of the first two theories discussed above according to which public discourse benefits from the free flow of ideas and that therefore, views should not be suppressed for being offensive, since they could contribute to the marketplace of ideas. I demonstrate that the duty to tolerate has contributed to the results of court decisions that have protected public discourse by limiting attempts from public authorities and individuals to suppress certain ideas based on their offensiveness.

CHAPTER 2: THE DUTY TO TOLERATE OFFENSIVE SPEECH IN CANADA

In this chapter, I review the role of tolerance in Canadian free speech jurisprudence prior to *Ward v. Quebec*. I analyze this ruling, highlighting the points of contention between the majority and the minority. I explain how, in this case, the duty to tolerate has prevented the exclusion of ideas from public discourse on the basis of their offensiveness. Finally, I discuss how the Court's decision may affect future free speech jurisprudence.

2.1 Tolerance and Offensive Speech Prior to *Ward v. Quebec*

While it was never articulated as directly as in *Ward v. Quebec*, the idea that living in a democratic society would entail a responsibility to tolerate offensive speech is not entirely new in Canada. This idea was both directly and implicitly referenced in several earlier decisions of the Supreme Court of Canada.[54] Since the enactment of the *Canadian Charter* in 1982, the Supreme Court has consistently emphasized the role played by tolerance in enabling the guarantee of freedom of expression provided in s. 2b).[55]

In its landmark *Irwin Toy* decision of 1989, the Court cited the *Handyside v. UK* ruling from the European Court of Human Rights in support of the idea that freedom of expression must extend to expressions that are "shocking, offensive, or disturbing,", and that tolerance of such expression is essential in a democratic society.[56] The Supreme Court also highlighted that diversity in free expression helps to create a "tolerant and welcoming environment" for both speakers and listeners.[57] These principles have since then consistently been cited by the Court in free expression cases.[58] They are consistent with the Supreme Court's freedom of religion

[54] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, p. 968-970, 976.
[55] See for example *R. v. Sharpe*, 2001 SCC 2, paras 107 and 141; *Grant v. Torstar Corp*., 2009 SCC 61, para 50.
[56] Ibid, p. 968-970; *Handyside v. The United Kingdom*, Eur. Ct. H.R. (December 7, 1976), Series A No. 24.
[57] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, p. 976.
[58] See for example: *Saskatchewan (Human Rights Commission) v. Whatcott*, 2013 SCC 11, para 50; *R. v. Sharpe*, [2001] 1 SCR 45, para. 23; *R. v. Keegstra*, [1990] 3 SCR 697, p. 729.

jurisprudence, which emphasizes the need for "mutual tolerance" in democratic societies, and the idea that "living in a community that attempts to maximize human rights invariably requires openness to and recognition of the rights of others".[59]

Additionally, the Court has held that offensive speech is protected by the Canadian Charter and that restrictions based on repugnance or offensiveness are unlikely to be justified.[60]. In *Saskatchewan (Human Rights Commission) v. Whatcott*, the Court upheld the constitutionality of a statute restricting expression which "exposes or tends to expose to hatred" but found unconstitutional the part prohibiting expression that "ridicules, belittles or otherwise affronts the dignity" of individuals.[61] The Court recognized that offensive speech can be hurtful and inspire feelings of contempt and superiority toward minority groups, but held that the mere offensiveness of speech "[could not], in itself, be sufficient to justify a limitation on expression".[62] In this case, Whatcott was held liable for distributing flyers that called for the discriminatory treatment of homosexual people but not for others in which he had implied that the classified section of a gay magazine was a means for pedophiles to advertise for potential victims. The Court held that the latter flyers were merely offensive and that they could not therefore be said to incite hatred against homosexual people.[63]

In 2009, in *GVTA v. Canadian Federation of Students*, the Supreme Court referred to the idea that tolerance of some controversial expression is necessary in a democratic society.[64] The matter centered on a group of students and a union of teachers who challenged the constitutionality of a policy by Vancouver's public transportation agency dealing with ads that could be displayed on city buses. The applicants wanted to display ads on city buses that aimed

[59] *Syndicat Northcrest v. Amselem*, [2004] 2 SCR 551, para 87.
[60] *R. v. Sharpe*, 2001 SCC 2, para 21; *Saskatchewan v. Whatcott*, 2013 SCC 11, para 50.
[61] *Saskatchewan v. Whatcott*, 2013 SCC 11, paras 3, 12, 94-95.
[62] Ibid, para 50.
[63] Ibid, paras 193 and 202.
[64] *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, [2009] 2 SCR 295.

to bring attention to certain political issues such as the environment and the funding of schools. The challenged policy prohibited political ads as well as ads deemed "likely, in light of prevailing community standards, to cause offense to any person or group of persons or create controversy".[65] The Court declared the policy unconstitutional for several reasons, including that it was not a proportionate means of reaching the objective of providing "a safe, welcoming public transit system" to users.[66] For the Court, the policy was overly broad in restricting advertisements "likely to cause offense […] or create controversy", because living in a free and democratic society meant that "citizens, including bus riders, [were] expected to *put up* with some controversy".[67] Thus, the Court's jurisprudence prior to *Ward v. Quebec* already had recognized the importance of tolerance in protecting freedom of expression and acknowledged that offensive speech was protected by the Canadian Charter.

2.2 The Duty to Tolerate What Other People Say in *Ward v. Quebec*

2.2.1 Facts of the *Ward v. Quebec* Matter

The *Ward v. Quebec* case involved a well-known professional comedian named Mike Ward who performed a stand-up routine across the province of Quebec in which he satirized several public figures whom he claimed were "sacred cows".[68] Through his comedy routine, Ward claimed he had sought to make a point about the "public's uncritical reverence" of certain public figures and to criticize the fact that certain individuals could not be made fun of because of their wealth, influence, or vulnerability.[69] One of the targets of Ward's jokes was a 10-year-old child singer named Jérémy Gabriel who was born with a disability causing malformations

[65] *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, [2009] 2 SCR 295, para 74.
[66] Ibid., paras 76-77.
[67] Ibid., para 77.
[68] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, paras 12.
[69] Ibid, para 12.

of the ears, skull, and mouth that had made him deaf.[70] He had become known to the public for his singing performances for the Pope, singer Celine Dion, and the national hockey team.[71] The case involved the Commission québécoise des droits et libertés, an independent agency responsible for upholding human rights in Quebec. The Commission acted as the opposing party to Ward following the filing of a human rights complaint by Gabriel's parents.[72]

Ward performed his stand-up routine over two hundred times across Quebec.[73] He referred to Gabriel as "*the kid with the subwoofer on his head*" and mocked the fact that he was unable to close his mouth.[74] Ward stated in his routine that even though most people thought that Gabriel could not sing, he had always stood up for him by saying: "*He's dying, let him live out his dream, he's living out a dream. His dream was to sing off-key in front of the Pope*". Ward stated that he eventually realized that Gabriel's disability was not life-threatening and expressed frustration that he had defended him for no reason. He went on to joke that, after seeing him in a swimming pool store, he had tried to "drown him", to later realize that he was "unkillable".[75] Ward also joked that he had found the name of Gabriel's disability online and that it was called "being ugly". Gabriel was still a child at the time and was bullied by classmates who heard Ward's jokes.[76]

Gabriel's parents filed a complaint against Ward under the *Quebec Charter of Rights and Freedom*, a provincial quasi-constitutional human rights statute of horizontal application which prohibits discrimination based on prohibited grounds of discrimination, including disability.[77] They claimed that Ward had infringed Gabriel's "right to full and equal recognition

[70] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, para 9.
[71] Ibid., para 120.
[72] Ibid., para 15.
[73] Ibid., para 172.
[74] Ibid., para 123.
[75] Ibid.
[76] Ibid., para 125.
[77] Ibid., para 15.

of his right to the safeguard of his dignity".[78] This required them to prove: "*(1) a distinction (2) based on a prohibited ground (3) that has the effect of nullifying or impairing the equal recognition or exercise of a human right or freedom*".[79] In first instance, the Quebec Human Rights Tribunal found that these three elements had been proven and that Ward had infringed on Gabriel's right to the equal safeguard of his dignity as Ward's comments "exceeded the limits of what a reasonable person can tolerate in the name of freedom of expression".[80] On appeal, the Quebec Court of Appeal ruled that the comments violated the Quebec Charter and that Ward's freedom of expression could not justify this infringement.[81] One dissenting justice, however, argued that the mere mention of Gabriel's disability was insufficient to establish discrimination and that the Tribunal had erred in treating freedom of expression as a defense rather than a limitation on Gabriel's rights.[82] Ward appealed to the Supreme Court, arguing some of the same grounds raised by the dissenting justice.

2.2.2 Decision of the Supreme Court of Canada

The Supreme Court was sharply divided in the case, overturning the lower courts' decisions, with five justices to four ruling in Ward's favor.[83] It found that the elements of discrimination under the Quebec Charter had not been established. Both the majority and the minority agreed that freedom of expression in a pluralistic society gives rise to a "duty to tolerate what other people say".[84] This duty was necessary to "[ensure] the development of a democratic, open and pluralistic society" and to protect free expression as a public good that

[78] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, paras 6 and 103.
[79] Ibid., para 16.
[80] Ibid., para 17.
[81] Ibid., paras 18-19.
[82] Ibid., paras 20-21.
[83] Ibid., paras 114 and 224.
[84] Ibid., paras 60 and 117.

benefits to every member of a democratic society.[85] The differences in the opinions of the majority and minority justices show that their understanding of the duty differed significantly.

The justices disagreed about the relevance of Gabriel's disability and of public notoriety in explaining why he was targeted. The majority rejected the discrimination claim on the basis that Ward had not chosen Gabriel because of his disability, but because he was a public figure.[86] For them, the "mere mention" of the disability was insufficient to show that this ground was a factor in the way he was treated. Thus, the majority accepted Ward's claim that he had tried to call attention to certain "untouchable" public figures.[87] For the minority however, Ward's jokes about Gabriel were "self-evidently pejorative slurs based on his disability" that targeted aspects of his public personality that were "inextricable" from his disability.[88] In this regard, they pointed to Ward's comments about the "subwoofer" on Gabriel's head, referring to his hearing aid, and to the mockeries about his inability to close his mouth. The majority also held that the possibility of a finding of discrimination should be reduced in cases involving publicly known individuals.[89] The minority instead argued that imposing a higher standard to public figures would unfairly deny them the right to seek redress and stated that the fact that Gabriel was known to the public could not diminish his right to the safeguard of his dignity.[90]

The judges also differed on the nature of the speech that must be tolerated in the name of freedom of expression. The majority held that free expression had to be seen as a limit on the right to equal protection of one's dignity.[91] This meant that hurtful speech based on a prohibited ground was not enough to establish discrimination. Such speech had to be tolerated until it reached the threshold of "inciting others to vilify" and to "detest their humanity on the

[85] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, para 60.
[86] Ibid., para 99.
[87] Ibid., para 97.
[88] Ibid., paras 147-148.
[89] Ibid., para 89.
[90] Ibid., paras 210-214.
[91] Ibid., para 40.

basis of a prohibited ground of discrimination", or if it had "the same effects on personal dignity".[92] Here, a reasonable person would not have considered Ward's speech to reach this degree of gravity.[93] The minority refused to consider freedom of expression other than as a potential defense to a violation of Gabriel's right to respect for his dignity. They believed that nothing made "hate speech the threshold at which discriminatory comments can be actionable".[94] They stated that, while reasonable individuals "must temper their reaction" and "some excesses of language even hurtful language, [must be] tolerated" in a democratic society, the exercise of Ward's expressive rights was disproportionate to the harm caused to Gabriel, as the speech did not constitute a useful contribution to society.[95]

The majority and minority justices also held different views on the circumstances in which one could be required to tolerate offensive speech. For the majority, a crucial question was whether Ward had chosen Gabriel because of his disability and thus had a discriminatory intent when he made the remarks about Gabriel.[96] The minority instead viewed Ward's intent as "immaterial" and claimed that the issue was "the impact of Mr. Ward's comments".[97] The minority justices emphasized the harm suffered by Gabriel, noting that freedom of expression "may not be exercised in a way that is disproportionately harmful or abusive".[98] For the majority, however, the issue was whether the speech had discriminatory effects, and this evaluation could not consider the offensiveness of the speech nor the "emotional harm caused

[92] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, para 86.
[93] Ibid., para 108.
[94] Ibid., paras 155-158.
[95] Ibid., paras 216-217.
[96] Ibid., paras 97-101.
[97] Ibid., para 150.
[98] Ibid., paras 190 and 217.

to the person", as this would have ultimately been equivalent to protect a "right not to be offended", which they considered incompatible with democratic values.[99]

2.2.3 Tolerance Preventing the Suppression of Ideas in *Ward v. Quebec*

The decision in *Ward v. Quebec* shows how the duty to tolerate can contribute to protecting public discourse by ensuring that certain ideas or perspectives are not suppressed on the basis of the subjective feelings they provoke in some individuals. Indeed, in this case, the discrimination claim was largely based on the emotional pain that Ward's comments had caused Gabriel.[100] Gabriel had testified that he suffered psychological harm, questioned his self-worth, and developed suicidal thoughts as a result of the jokes made at his expense.[101] Many people in Quebec also found Ward's comedy routine offensive and believed that someone who had said such hurtful things about a disabled child had to be punished.[102] Ironically, the alleged purpose of Ward's comedy routine was to draw attention to the impossibility of making fun of certain individuals in Quebec society because of their wealth, influence, or vulnerability.[103]

However, one may feel about Ward's remarks, the fact that they were made in the context of a comedy routine, rather than as part of a political speech, does not make them any less relevant to public discourse. As Ronald Dworkin argues, "a community's legislation and policy" is determined more by the "moral and cultural environment, the mix of its people's opinions, prejudices, tastes, and attitudes" of the community than by "editorial columns" and

[99] Ibid., para 82; At para 113, the majority noted that, while Gabriel could not establish the elements of discrimination, he could have filed a claim of defamation. However, they refused to express their views on the likelihood of success of such a claim. This claim was filed and was later withdrawn on May 25, 2023.
[100] Nguyen, Michael, "*Ignoble - Dit La Mère Du Petit Jérémy*", Le Journal de Montréal, 24 Feb. 2016.
[101] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, para 117, 124 and 125.
[102] Pilon-Larose, Hugo, "Ward et Gabriel: deux lectures opposées d'un jugement controversé", La Presse, 21 July 2016 ; Le Huffington Post Québec, "*Mike Ward et Jérémy Gabriel : "Je Suis d'Accord Avec La Décision Du Juge" - François Massicotte*" HuffPost, 26 July 2016; Maranda, Étienne, "*Quand Les Paroles Ont Des Conséquences*", Nationalmagazine.ca, 2019 ; Élizabeth Lepage-Boily, "*Les Avis Tranchés Des Humoristes Dans l'Affaire Mike Ward vs Jérémy Gabriel*" Showbizz.net, 26 July 2016 ;
[103] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, para 12.

"party political broadcasts".[104] Ward's comedy routine, while offensive to some, was part of this moral and cultural environment. Therefore, in this case, the Court's recognition of a duty to tolerate preserved public discourse as it meant that Ward's views could not be silenced or excluded simply because Gabriel, his family, or the public felt offended by them.

The Court's reliance on the "duty to tolerate what other people say" helped justify why Ward could not be held liable for his speech, even though he had said "nasty and disgraceful" things.[105] As the Court explained, the perspective that free expression entails a duty to tolerate, was related to the idea that free speech serves "*to protect a public good, a benefit which respect for the right of free expression brings to all those who live in the society in which it is respected*".[106] The audience's duty perspective thus helped justify why it was in the collective interest to allow Ward's speech, emphasizing that if one wants to live in a society where one's right to free speech is respected, one must also tolerate the exercise of that right by others.

2.3 Tolerance of Offensive Speech Following *Ward v. Quebec*

The "duty to tolerate what other people say" mentioned in the Supreme Court of Canada's ruling has sparked debates in the legal community.[107] Some believe that the Court went too far in imposing positive obligations on listeners since existing safeguards for freedom of expression in Canada were already extensive.[108] They express concern that this duty could be misused in the future to justify the forced acceptance of intolerant and harmful speech.[109] Others believe that the Court's statement on the duty to tolerate is a positive development, as

[104] 'Foreword', in Ivan Hare, and James Weinstein (eds), Extreme Speech and Democracy (Oxford, 2009; online edn, Oxford Academic, 1 May 2009).
[105] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, para 108.
[106] Ibid, para 60; J. Raz, "*Free Expression and Personal Identification*" (1991), 11 Oxford J. Leg. Stud. 303, p. 305.
[107] Jacobs, Laverne. "Ward: A Missed Opportunity for the Supreme Court of Canada to Denounce Bullying of Children with Disabilities and to Promote Substantive Equality", Oxford Human Rights Hub, 2021.
[108] Laws, Jennifer, "A Duty to Tolerate? SCC on Free Expression in Ward v Quebec", TheCourt.ca, 17 Nov. 2021.
[109] Ibid.

it represents an acknowledgment that speech is inherently hurtful and provocative and that listeners must necessarily display a certain amount of tolerance for free speech to truly exist.[110] They believe that the case highlighted the risks that equality guarantees may be misused as instruments of censorship in the future.[111]

Given the Supreme Court's conclusion that speech that is merely offensive does not amount to discrimination under the Quebec Charter, the Quebec Human Rights Commission decided to close 194 human rights complaints cases, with nearly three-quarters involving racist remarks.[112] Beyond this immediate consequence, it is not yet certain how the duty invoked in the Court's decision will be applied by courts in future cases. There is no doubt however that, although this was a decision involving a private dispute under the *Quebec Charter*, the principles outlined in it will have an impact on the interpretation of the Canadian Charter.

Hogg et al. devote several pages to an analysis of the decision in their seminal work *Constitutional Law of Canada*.[113] They believe that it will be of special relevance in cases where the right to equality under the Canadian Charter conflicts with free expression, and where courts may have to distinguish between hateful and offensive speech.[114] In my view, the case will be used to support a broad view of freedom of expression and a narrow interpretation of equality rights. It is likely to be used against public authorities should they seek to restrict offensive speech that does not rise to the level of hatred, or expression that does not have the same effect on personal dignity as hatred, for the purpose of protecting equality rights.[115]

[110] Sirota, Leonid, "*Thoughts on the Supreme Court's Narrow Rejection on the Right Not to Be Offended in Ward v. Quebec*", Macdonald-Laurier Institute, 12 Nov. 2021.
[111] Ibid.
[112] Côté, Gabriel. "*Affaire Ward-Gabriel: La Commission Des Droits de La Personne Forcée de Fermer 194 Dossiers*" Le Journal de Québec, 2 Dec. 2022.
[113] Hogg, Peter W., and Wade K. Wright. Constitutional Law of Canada, 5th ed. Supp. Toronto: Thomson Reuters, 2022 (updated 2022), § 43:27.
[114] Ibid.
[115] See for example the dissent in the "n-word" case from the Canadian Radio-television and Telecommunications Commission, Decision CRTC 2022-175, which cites the *Ward v. Quebec* decision in support of the view that there is no right not to be offended in Canada.

CHAPTER 3: PROTECTING PUBLIC DISCOURSE FROM THE SUPPRESSION OF IDEAS

This chapter begins by reviewing some of the early decisions in the United States and South Africa regarding the tolerance of offensive speech. It then presents three examples from both jurisdictions that support my argument that the duty to tolerate can protect public discourse by preventing public authorities from suppressing ideas that they deem offensive to a segment of the population. Finally, it provides examples that support my claim that the duty protects public discourse from attempts by private individuals or organizations to invoke their own subjective feelings or reactions to restrict the speech of other members of society.

3.1 Early Jurisprudence on the Tolerance of Offensive Speech

3.1.1 Offensive Speech in the United States Prior to the Duty to Tolerate

Prior to referring directly to a duty to tolerate offensive speech, the U.S. Supreme Court had already recognized in several cases that the First Amendment, which provides that "Congress shall make no law […] abridging the freedom of speech", prevents the government from restricting speech merely because it is offensive to certain individuals.[116] Among the most significant of these decisions, in 1969, in the case of *Street v. New York*, the U.S. Supreme Court overturned the conviction of a man who expressed his anger after learning of the shooting of a civil rights leader by burning an American flag and shouting "If they did that to Meredith, we don't need an American Flag".[117] The man was convicted under a statute that prohibited to "publicly defy […] or cast contempt upon [the flag] either by words or act".[118] The court ruled that the fact that words would be shocking to passers-by was insufficient to justify the

[116] See for example in *Street v. New York*, 394 U.S. 576 (1969) and *Cohen v. California*, 403 U.S. 15 (1971). The Court also expressed the same idea in other famous cases that followed the recognition of a duty to tolerate, such as *Texas v. Johnson*, 491 U.S. 397 (1989) and more recently in *Matal v. Tam*, 582 U.S. __ (2017).
[117] *Street v. New York*, 394 U.S. 576 (1969).
[118] Ibid, p. 578.

restriction as "any shock effect of [the] speech [had to] be attributed to the content of the ideas expressed".[119] The Court held that "the public expression of ideas [could] not be prohibited merely because the ideas are themselves offensive to some of their hearers".[120]

Similarly, in 1971, in *Cohen v. California*, the U.S. Supreme Court spoke of some of the risks that can arise from attempting to restrict speech on the basis of its offensiveness.[121] The Court overturned an individual's conviction for wearing a jacket in a courthouse that read "F*** the draft" under the *California Penal Code*, which prohibited "maliciously and willfully [disturbing] the peace or quiet of any neighborhood or person by offensive conduct".[122] The individual had worn the jacket to show his opposition to the war in Vietnam and to the military draft that was taking place at the time.[123] The Court held that the State could not make "principled distinctions" in an area so subjective and personal as "offensiveness", given that "one man's vulgarity is another's lyric".[124] According to the Court, allowing the restriction of speech of this kind would run the risk that "governments […] seize upon the censorship of particular words as a convenient guise for banning the expression of unpopular views".[125]

3.1.2 Tolerance as the Corollary of Free Expression in South Africa

In South Africa, the idea that the freedom of expression guaranteed in section 16(1) of the Constitution, entails a duty to tolerate the speech of others was mentioned by the Constitutional Court in the years that followed the promulgation of the 1996 Constitution.[126] Indeed, in *South African National Defence Union v. Minister of Defence*, a case that did not involve offensive speech, the Court found that a section of the *Defence Act* that prohibited

[119] *Street v. New York*, 394 U.S. 576 (1969), p. 578.
[120] Ibid., p. 592.
[121] *Cohen v. California*, 403 U.S. 15 (1971).
[122] Ibid., p. 16.
[123] Ibid.
[124] Ibid., p. 25.
[125] Ibid., p. 18.
[126] *South African National Defence Union v Minister of Defence* (CCT27/98) [1999] ZACC 7, para 8.

members of the armed forces to "perform any act of public protest" was unconstitutional for unjustifiably limiting the freedom of expression.[127] The Court stated that freedom of expression protected the "ability to form and express opinions […] even where those views are controversial".[128] It referred to the duty to tolerate by stating that "[t]he corollary of the freedom of expression and its related rights is tolerance by society of different views".[129] For the Court, the idea of tolerance in this context "[required] the acceptance of the public airing of disagreements and the refusal to silence unpopular views" but not "the approbation of a particular view".[130]

A few years later, in *Islamic Unity Convention v. Independent Broadcasting Authority*, the Court also endorsed the view of the European Court of Human Rights in *Handyside v. UK* that freedom of expression also extends to ideas and information that "shock, offend or disturb".[131] In this case, a Jewish organization had filed a complaint against the radio station which had hosted an interview with an author who denied the legitimacy of the State of Israel and the existence of the Holocaust. The organization had claimed that the interview violated a section of the *Code of Conduct for Broadcasting Services* that prohibited broadcasts "likely to prejudice relations between sections of the population".[132] The Constitutional Court endorsed the *Handyside* principle in support of its view that the interview was protected by freedom of expression despite the fact that it was offensive to some people. It held that the prohibition of broadcasts "likely to prejudice relations" from the *Code of Conduct for Broadcasting Services* was unconstitutional because it restricted protected speech and the restriction could not be justified under s. 36 of the Constitution.[133]

[127] *South African National Defence Union v Minister of Defence* (CCT27/98) [1999] ZACC 7, para 18.
[128] Ibid, para 8.
[129] Ibid.
[130] Ibid.
[131] *Islamic Unity Convention v. Independent Broadcasting Authority and Others* (CCT36/01) [2002] ZACC 3.
[132] Ibid, para 1.
[133] Ibid, para 26.

3.2 The Duty Protecting Public Discourse from State Interference

In this section, I show that the recognition of a duty to tolerate can serve to curtail attempts by public authorities to prevent certain views from being excluded from public discourse by presenting three decisions coming from the United States and South Africa in which a duty to tolerate was invoked.

3.2.1 *Boos v. Barry*: Signs Affecting the Dignity of Foreign Officials

In the 1988 case of *Boos v. Barry*, the U.S. Supreme Court invoked for the first time the duty of all citizens to tolerate "insulting, and even outrageous speech" to reject the government's claim that the "dignity" of officials working in foreign embassies in Washington D.C. justified a restriction on political speech.[134] The case concerned the prohibition to display signs within 500 feet of foreign embassies that could bring foreign governments into "public odium or public disrepute" from section 22-1115 of the *District of Columbia Code*.[135] The petitioners were three individuals who wanted to display signs that were critical of the governments of Nicaragua and the Soviet Union on public sidewalks within 500 feet of the embassies of these governments in Washington D.C.[136] The signs they wanted to display near the Soviet embassy read "Solidarity" and "Release Sakharov", and the ones for the Nicaraguan embassy read "Stop the Killing".[137] The petitioners challenged the constitutionality of section 22-1115, claiming that it violated their First Amendment rights.

The Court held that the section at issue interfered with the petitioners' First Amendment rights as it restricted their ability to engage in political speech to protest the policies and

[134] *Boos v. Barry*, 485 U.S. 312 (1988), p. 322.
[135] Ibid, p. 315.
[136] Ibid.
[137] Ibid.

activities of foreign governments.[138] The court also found that the section in question created a content-based restriction because the law treated "negative" speech differently since what determined whether someone had committed the offense was not whether someone had displayed signs near an embassy, but whether the signs were critical of a foreign government.[139] Pursuant to the Court's precedents, the fact that the section at issue created a content-based restriction meant that to be found constitutional, it had to meet the strict scrutiny test, and thus had to be "narrowly tailored and necessary to achieve a compelling government interest".[140]

Here, the government claimed that it had a compelling interest in protecting "the dignity of foreign diplomatic personnel" from the insult that would result from the display of signs critical of their governments.[141] The majority rejected this position by referring to the duty of all citizens to tolerate offensive speech, stating that "*[as] a general matter, […] in public debate, our own citizens must tolerate insulting, and even outrageous, speech in order to provide adequate breathing space to the freedoms protected by the First Amendment*".[142] The Court explained that an interest based on the "dignity" of certain individuals such as the one advanced by the government, was overly subjective and would have run counter to the Court's "longstanding refusal to punish speech because the speech in question may have an adverse emotional impact on the audience".[143] It held that there was no valid reason for this duty of citizens to tolerate offensive speech not to apply equally to foreign officials.[144] It thus declared the section of the District of Columbia Code unconstitutional.[145]

[138] *Boos v. Barry*, 485 U.S. 312 (1988), p. 318.
[139] Ibid.
[140] Ibid, p. 321.
[141] Ibid.
[142] Ibid, p. 315.
[143] Ibid, p. 322.
[144] Ibid, p. 322.
[145] Ibid, p. 334.

The Court's ruling in this matter illustrates that by recognizing that all citizens had a duty to tolerate "insulting, and even outrageous speech", the U.S. Supreme Court protected public discourse against an attempt by public authorities to restrict the expression of certain political views (i.e., the views that were critical of foreign governments). The duty served to justify the Court's rejection of the government's asserted "dignity" interest and thus contributed to the Court's decision to declare the provision at issue unconstitutional, which ultimately allowed the petitioners, and likely others, to contribute to public discourse.

3.2.2 *Qwelane*: Unconstitutionality of the Prohibition of Hurtful Speech

The 2021 decision of the Constitutional Court of South Africa in *Qwelane v. South African Human Rights Commission* is another example of the duty to tolerate offensive speech protecting public discourse from government limitations.[146] This time the duty contributed to the court's decision to strike down part of a section of the *Promotion of Equality and Prevention of Unfair Discrimination Act* ("Equality Act") that prohibited "hurtful" speech. Although the speech at issue, in this case, was ultimately found to constitute unprotected hate speech, the Constitutional Court's decision was a strong endorsement of the idea that the government could not ban views simply because they were offensive.

The matter involved a weekly columnist and host of a popular radio show who had published in a newspaper an article in which he described men kissing other men and holding hands in public as the "rapid degradation of values and traditions".[147] He had written that he hoped the country's constitution would be amended to prevent same-sex marriages, as it was only a question of time before "some idiot [would demand] to marry an animal".[148] He expressed support for the "stance over homosexuals" of the former president of Zimbabwe

[146] *Qwelane v South African Human Rights Commission and Another* (CCT 13/20) [2021] ZACC 22.
[147] Ibid, para 3.
[148] Ibid.

Robert Mugabe, who was known for comparing gays and lesbians to pigs and dogs.[149] Following the publication of the article, the South African Human Rights Commission brought proceedings against the columnist for having engaged in hate speech. The columnist responded by challenging the constitutionality of section 10(1) of the Equality Act, which contained the definition of hate speech, on the basis that it violated the freedom of expression.[150] The section defined hate speech as words based on prohibited grounds that showed "a clear intention to [...] be hurtful, […] be harmful or to incite harm, […] promote or propagate hatred".[151]

Ultimately, the court found that the term "hurtful" was unconstitutional, but it held that the rest of the provision was valid.[152] It referred to the duty to tolerate, stating that "[s]ociety must be exposed and be tolerant of different views, and unpopular or controversial views must never be silenced". It explained that "[e]xpressions that are merely hurtful, […] are insufficient to constitute hate speech" and that "[barring] speech that disturbs, offends and shocks" would be "an impermissible infringement of freedom of expression".[153] The Court held that the relationship between the purpose and the limitation was not proportionate because, although prohibiting such speech could potentially protect the rights of victims of hate speech, hurtful speech did not always amount to hate speech.[154] There were thus less restrictive means of reaching that objective, which the court identified as eliminating the term "hurtful" and leaving the rest of the provision valid. The Court however held that the columnist's article met the definition of hate speech under the remaining elements of s. 10(1) of the Equality Act because he had "vilified" homosexuals as animals, by comparing their sexual practices to bestiality, and attacking their dignity by arguing for the abolition of their rights and equal treatment.[155]

[149] *Qwelane v South African Human Rights Commission and Another* (CCT 13/20) [2021] ZACC 22, para 178.
[150] Ibid, para 12.
[151] Ibid, para 8.
[152] Ibid, para 144.
[153] Ibid, paras 81 and 104.
[154] Ibid, para 139.
[155] Ibid, paras 183-194.

The duty to tolerate did not go as far as permitting the columnist's speech, given that his article amounted to hate speech, but it did contribute to the Constitutional Court's decision to strike down the words of the Equality Act that restricted "hurtful" speech. The following decision shows how the duty to tolerate has been applied after *Qwelane* in a context that speech that was offensive but did not amount to hate speech.

3.2.3 *Premier of Western Cape*: Insensitive Tweets on Colonialism

In the matter of *Premier of the Western Cape v. Public Protector*, the duty to tolerate was invoked by the Supreme Court of Appeal of South Africa to protect public discourse by preventing an independent governmental organization from silencing a politician whose views on colonialism were deemed offensive.[156] The case concerned a finding from the Public Protector that certain tweets posted by the Premier of the Western Cape Province Helen Zille violated the Executive Ethics Code (Ethics Code) because they were "inconsistent with the integrity of her office".[157] Zille had posted tweets after an official trip to Singapore that expressed the view that colonialism also had some positive consequences.[158] She wrote that there was "much to learn from Singapore", which had been "colonized for as long as South Africa". She claimed that Singapore was successful because, there, "parents take responsibility for children and build on valuable aspects of colonial heritage".[159] She added: "For those claiming legacy of colonialism was ONLY negative, think of our independent judiciary, transport infrastructure, piped water, etc."[160] The next day, she apologized, clarifying that while her tweet "may have come across as a defense of colonialism", but that it "was not".[161]

[156] *Premier of the Western Cape Province v. Public Protector & Another* (771/2020) [2022] ZASCA 16.
[157] Ibid.
[158] Ibid, para 3.
[159] Ibid.
[160] Ibid, para 4.
[161] Ibid, para 5.

A member of the legislature from another political party filed a formal complaint with the Public Protector, an independent oversight body established by the country's constitution to investigate "improper conduct in all state affairs".[162] The complaint alleged that the tweets violated s. 2.1(d) and 2.3(c) of the Ethics Code, which required members of provincial governments to "act in all respects in a manner consistent with the integrity of their office or government" and avoid "acting in a way that is inconsistent with their position".[163]

After an investigation, the Public Protector concluded that Zille's tweets violated the Code of Ethics and several provisions of the Constitution, including the right to dignity under section 10 and the preamble's mention that the Constitution was enacted to "heal the divisions of the past".[164] The Public Protector found that although her tweets may have been "made in the context" of Zille's freedom of expression, they were "offensive and insensitive to a section of the South African population which regarded [them] as re-opening a lot of pain and suffering to the victims of apartheid and colonialism".[165] The Public Protector held that "section 16 of the Constitution was […] not created to allow anyone, particularly those in positions of influence, to make such statements" and it held that the reactions of Twitter users to Zille's tweets demonstrated that her statements were not consistent with the integrity of her office.[166] The Public Protector stated that the tweets risked provoking reactions that could lead to racial violence.[167] It thus ordered the speaker of the legislature "to take appropriate action to hold the Premier accountable".[168] Zille challenged the Public Protector's decision up to the Supreme Court of Appeal.

[162] *Premier of the Western Cape Province v. Public Protector & Another* (771/2020) [2022] ZASCA 16, para 7.
[163] Ibid, para 8.
[164] Ibid, para 24-25.
[165] Ibid, para 10.
[166] Ibid.
[167] Ibid para 11.
[168] Ibid, para 12.

The Court sided with Zille and noted that "not every instance of harmful and/or hurtful speech will result in imminent violence".[169] It explained that although the tweets may have been insensitive, "insensitive speech still falls under the purview of protected speech".[170] The Court indicated that the fact that Zille's speech had "offended some sensibilities", was not a reason to conclude that it was not protected by the freedom of expression under section 16 of the Constitution.[171] It referred to the duty to tolerate through a quote from the *Qwelane* decision, stating that tolerance of different views was required by freedom of expression and that "our democracy [must foster] an environment that […] [is] free from censorship no matter how offensive, shocking or disturbing […] ideas may be".[172] Therefore, in light of this duty to tolerate offensive speech, the Court held that the Public Protector's finding that Zille had contravened the Code of Ethics and the Constitution because her tweets were "offensive and insensitive" was an unjustified restriction on freedom of expression.[173] It thus set aside the findings and the remedy issued by the Public Protector.

In this case, it is worth noting that a member of the legislature almost succeeded in getting a public body to sanction a political opponent for making a statement that was deemed insensitive. The duty to tolerate offensive speech contributed to the Court's decision to protect public discourse by overturning the Public Protector's finding that Zille's tweet was not constitutionally protected because it was "offensive and insensitive".

3.3 The Duty Protecting Public Discourse from Individual Interference

This section presents three examples from the United States and South Africa that support my argument that the duty to tolerate can help protect public discourse by preventing

[169] *Premier of the Western Cape Province v. Public Protector & Another* (771/2020) [2022] ZASCA 16, para 31.
[170] Ibid, para 36.
[171] Ibid.
[172] Ibid, para 37.
[173] Ibid, para 38.

private individuals or organizations from silencing or excluding certain views from public discourse by invoking their own subjective feelings or reactions to them.

3.3.1 *Madsen v. Women Health Center*: Unwanted Anti-Abortion Speech

The U.S. Supreme Court's *Madsen* case is another case in which the duty to tolerate helped prevent a private organization from suppressing polarizing and outrageous speech because of its effect on certain individuals. The case involved antiabortion demonstrators who picketed around an abortion clinic in Florida. A state court had issued an initial injunction prohibiting the demonstrators from "blocking and interfering with public access to the clinic, and from physically abusing persons entering or leaving the clinic".[174] However, some months later, the abortion clinic sought to modify the injunction because the demonstrators still affected access to the clinic and were successfully discouraging some patients to enter.[175]

The demonstrators were sometimes present in large numbers, sometimes as many as 400 around the clinic. They held signs containing statements such as "Abortionists lie to women", "She Is a Child, not a Choice", "Abortion Kills Children", and "Abortion: God Calls It Murder".[176] As vehicles approached the clinic, they often tried to hand out anti-abortion literature to the passengers.[177] Some doctors of the clinic testified that certain patients had higher anxiety and hypertension as a result of the demonstrations and thus required a stronger dose of sedation during their medical procedures, which increased the risks of complications.[178] Similarly, the patients who had to reschedule their appointment with the clinic to another date because of the demonstrators could have higher health risks because of the delay.[179]

[174] *Madsen v. Women's Health Center, Inc*., 512 U.S. 753 (1994), p. 758.
[175] Ibid.
[176] Ibid, p. 787.
[177] Ibid, p. 758.
[178] Ibid, p. 758-759.
[179] Ibid.

In light of this evidence, the state court agreed to expand the injunction. Several aspects of the expanded injunction were subsequently challenged before the U.S. Supreme Court. One of the challenged provisions of the widened injunction prohibited the demonstrators to approach any patient or potential patient of the clinic within 300 feet of the clinic "unless such person indicates a desire to communicate".[180] This effectively prevented demonstrators within the zone from attempting to convince potential patients that they should not have an abortion unless the patients or potential patients agreed to speak with them.

When the matter reached the U.S. Supreme Court, however the Court held that the provision of the injunction that prevented "all uninvited approaches of persons seeking the services of the clinic" within this zone was overbroad.[181] The Court indicated that the stated purpose of this provision of the injunction was to prevent intimidation of the clinic's patients, and that banning all uninvited approaches, even peaceful ones, was not necessary to achieve this objective.[182] The Court invoked the duty to tolerate, quoting its precedent in *Boos v. Barry*, to state that "in public debate our own citizens must tolerate insulting, and even outrageous, speech".[183] It held that the demonstrators could not be prevented from approaching patients within the 300-foot zone because some potential patients were discouraged from entering the clinic and others were more anxious during their medical procedures. [184] For this reason, the court found that the requirement that individuals give consent before being approached by others within the 300-foot zone rendered this provision of the injunction invalid.[185]

The Court's decision in this matter demonstrates that the duty to tolerate can effectively curtail attempts from private individuals and organizations to suppress or silence the views of

[180] *Madsen v. Women's Health Center, Inc*., 512 U.S. 753 (1994), p. 760.
[181] Ibid, p. 774.
[182] Ibid, p. 773.
[183] Ibid, p. 774.
[184] Ibid.
[185] Ibid.

other members of society on the basis that they find them offensive or distressing. For the Court, the fact that the patients experienced increased anxiety as a result of the demonstrators' speech was not a reason to prevent the demonstrators from participating in public discourse in the 300-foot zone around the clinic.

3.3.2 *Snyder v. Phelps*: Homophobic Political Speech

The *Snyder v. Phelps* matter from the U.S. Supreme Court provides another example of the duty to tolerate being invoked to protect public discourse against an attempt from a private individual to invoke their own feelings to justify restricting the speech of others. The ruling came in a lawsuit for intentional infliction of emotional distress brought against members of the Westboro Baptist Church by the father of a U.S. Marine killed while serving in Iraq.[186] The Westboro Church had staged a demonstration at the deceased soldier's funeral to protest the social acceptance of homosexuality in the U.S. as well as various scandals involving the Catholic clergy.[187] The demonstrators claimed that the soldier's death was God's way of communicating his hatred of U.S. tolerance of homosexuality.[188] They picketed on public land, 1,000 feet from the church where the funeral was held, holding signs that read: "God Hates Fags", "You're Going to Hell", "Thank God for Dead Soldiers", and "Priests Rape Boys".[189]

Despite having initially been awarded $11 million in damages by a jury in the trial court, the plaintiff was ultimately unsuccessful before the U.S. Supreme Court.[190] For the Court, a key question was whether the protesters' speech dealt with a matter of public or private concern, as speech related to a matter of public concern could not be a source of liability for

[186] *Snyder v. Phelps*, 562 U.S. 443 (2011).
[187] Ibid, title II.
[188] Ibid, title I - A.
[189] Ibid, title II.
[190] Ibid, title I - B.

the respondents.[191] Here, the Court was satisfied that the issues raised by the demonstrators - i.e., issues such as the inclusion of gay people in the armed forces and the controversies surrounding the catholic church - were matters of public, rather than private, concern.[192]

The Court recognized the suffering and injury caused to the plaintiff and his family by the defendants. It recognized that the decision to stage the protest in question at the deceased soldier's funeral had hurt many people, especially the deceased's father.[193] It went as far as to state that the type of claim at issue, "tort of intentional infliction of emotional distress", could not properly describe the suffering that the demonstrators had added to the plaintiff's "already incalculable grief".[194] Nevertheless, the Court found that the trial judge had improperly instructed the jury that it could find the demonstrators liable if they considered their picketing to be "outrageous".[195] It held that a standard of "outrageousness" was overly subjective and could run the risk of being misused to censor unpopular views deemed unacceptable by some members of society.[196] The Court described this risk as "unacceptable" and, quoting the *Boos v. Barry* precedent, invoked the duty of all to "*tolerate insulting, and even outrageous, speech*".[197] The Court explained that although the speech had "inflicted great pain", it could not react by punishing the speakers since the country had made the choice of protecting hurtful speech on issues of public concern to make sure that it would not "stifle public debate".[198] In light of the duty to tolerate and the fact that the protesters' speech addressed a matter of public concern, the court thus found that the father's claim had to be dismissed.

[191] *Snyder v. Phelps*, 562 U.S. 443 (2011).
[192] Ibid, title II.
[193] Ibid, title II.
[194] Ibid, title II.
[195] Ibid.
[196] Ibid, title II.
[197] Ibid, title II.
[198] Ibid, title IV.

The U.S. Supreme Court's decision shows that while the duty to tolerate can protect certain views from being silenced, it can also be a significant burden and have serious consequences for its bearers. Indeed, as in *Madden* and *Ward*, there was evidence that the speech in question had caused health problems for its target. Expert witnesses had testified that the soldier's father suffered from severe depression and that some of his health problems had been exacerbated by the demonstrators' protest.[199]

3.3.3 *AfriForum v. EEF*: Controversial Political Songs

The duty to tolerate was recently invoked by the Equality Court in South Africa in the case of *AfriForum vs. Economic Freedom Fighters* to support the court's decision to reject an application for an order declaring that two controversial anti-apartheid songs sung by certain members of the Economic Freedom Fighters (EFF) political party constituted hate speech.[200] The case was brought by AfriForum, a non-governmental organization dedicated to defending the rights and interests of Afrikaans-speaking communities in South Africa.[201] AfriForum claimed that the songs "Kiss the Boer" and "Call the Fire Brigade" were racist propaganda and that they encouraged racial violence in a context where white farmers were often murdered in the country.[202] AfriForum argued that the songs were directly harmful to victims of farm attacks, causing them trauma by reminding them of the attacks they had experienced.[203] It also claimed that the songs were harmful to society and democracy in general because they prevented reconciliation between the different groups that make up South African society.[204]

[199] *Snyder v. Phelps*, 562 U.S. 443 (2011), title I, B.
[200] *Afriforum v Economic Freedom Fighters and Others* (EQ 04/2020) [2022] ZAGPJHC 599, para 12.
[201] Ibid, para 11.
[202] Ibid, paras 1-2, and 80.
[203] Ibid.
[204] Ibid.

In response, the leader of the EEF had testified that the Kiss the Boer song's meaning related to the idea of "[killing] the enemy forces who are standing in between us and our freedom" and that the word "kiss" was "chosen to offend the white racist" who did not believe that black people could be permitted to kiss white people.[205] Similar songs had been the subject of a previous legal dispute between AfriForum and the current leader of the EEF, but the parties had reached a settlement in which the leader undertook to encourage the leadership of the political party he was in at the time to be more restrained in the singing of songs inspired by the country's historic struggle.[206] In the agreement, the parties had acknowledged that "certain struggle songs may be experienced as hurtful by members of minority communities".[207]

In discussing the applicable legal framework in cases involving the freedom of expression guaranteed by s. 16 of the Constitution, the Equality Court referred to the duty to tolerate, stating that freedom of expression required the "tolerance of different views by the society" and that "[d]ifficult as it may be to uphold, the society has a duty in terms of this principle to allow and be tolerant of both popular and unpopular views of its members".[208] The Court noted that it had to be "[cautious] against readily declaring unpopular, offensive or even controversial statements as hate speech".[209] It further quoted an extract of the Qwelane decision in support of the view that "in a democratic, open and broad-minded society like ours, disturbing or even shocking views are tolerated as long as they do not infringe the rights of persons or groups of persons".[210]

Applying these principles to the case in issue, the Court found that there were no grounds to prevent the singing of the songs at issue by the EEF and its members.[211] The Court

[205] *Afriforum v Economic Freedom Fighters and Others* (EQ 04/2020) [2022] ZAGPJHC 599, para 73.
[206] Ibid, para 5.
[207] Ibid.
[208] Ibid, para 91.
[209] Ibid, para 97.
[210] Ibid.
[211] *Afriforum v Economic Freedom Fighters and Others* (EQ 04/2020) [2022] ZAGPJHC 599, para 99.

accepted the EEF's evidence that the songs conveyed a political perspective about the issue of land justice and reform.[212] Thus, the Court accepted that the songs had a "political role in the public life of the state" and were " […] a tool to advance the interest of the land justice".[213] The Court explained that although they may have been "offensive and undermining of the political establishment", the songs were merely offensive and thus had to be "left to the political contestations and engagement on its message by the political role players".[214]

In this case, the duty to tolerate prevented the banning of the songs because they were deemed to be offensive, rather than hateful. The argument that they could be banned by the fact that they were harmful to the victims of the farm attacks since they reminded them of traumatic events was not accepted by the Court. The matter is currently under appeal and may lead to further developments regarding the duty to tolerate offensive speech in South Africa.

[212] Ibid, para 111.
[213] Ibid, para 105.
[214] Ibid, paras 111-112.

CHAPTER 4: COMPARATIVE PERSPECTIVES ON THE DUTY TO TOLERATE

In this chapter, I compare the approaches of Canada, South Africa, and the United States to the duty to tolerate in order to offer some reflections on its appropriate limits. I focus on the similarities and differences between the three jurisdictions along themes that were contentious between the majority and minority justices in *Ward v. Quebec*: the bearers of the duty, the circumstances in which the duty to tolerate holds, and the nature of the burden it imposes. However, this analysis does not address policy considerations, such as whether recognizing a duty to tolerate would risk encouraging extremist speech or polarizing political discourse.

4.1 The Bearers of the Duty to Tolerate

The Canadian, South African and American approaches to the duty to tolerate are similar on the issue of the bearers of the duty. In the three jurisdictions, the duty appears to be frequently invoked to be borne by vulnerable individuals, although this is not always the case. By "vulnerable" I refer to people who, because of the particular context in which they find themselves or because of their minority status, may be more exposed to the possibility of being harmed by offensive speech. In *Ward v. Quebec*, for example, the burden of the "duty to tolerate what other people say" fell on Gabriel, a disabled child public figure and thus, clearly a vulnerable member of society. In the U.S., in the case of *Snyder v Phelps*, it was a father mourning his son at his funeral who had to tolerate homophobic speech and was therefore vulnerable by virtue of the circumstance. Similarly, in *Madsen v. Women Health Center*, the bearers of the duty were women seeking healthcare services to get an abortion. In *AfriForum*, it was the victims of farm attacks who had to be reminded of what they had experience through the singing of certain controversial songs. In contrast, in *Boos v. Barry*, the duty did not have to be borne by individuals who were particularly exposed to be harmed by the speech in issue, but by foreign officials working in embassies in Washington D.C. Similarly, in the South

African case of *Premier of the Western Cape*, it was Twitter online users and the general public who had to endure Helen Zille's insensitive tweets about colonialism.

The same decisions also show that the duty has been invoked with respect to individuals who were directly targeted by offensive speech, as well as with respect to individuals who were not specifically targeted by a particular speaker, but who found the speaker's speech offensive. In *Ward v. Quebec*, Gabriel was directly targeted by Ward's comedy routine. In the U.S., in *Snyder v. Phelps*, protesters targeted a specific funeral, and in *Madsen*, they targeted a specific abortion clinic. In contrast, the foreign officials in *Boos v. Barry* were unspecified foreign officials from the embassies of the Soviet Union and Nicaragua, whose dignity could be impugned by political speech directed not at them but at the countries they represented. In *Premier of the Western Cape*, Zille's tweets did not target a specific person, but offended some of the people who read them. Similarly, while the songs sung by the EEF in *AfriForum* were aimed at Afrikaners, they did not single out specific individuals. Thus, the cases suggest that the duty to tolerate applies equally whether the offensive speech is directed at a particular individual or is simply found offensive by individuals who were not specifically targeted by it.

The three jurisdictions are also similar in that the duty to tolerate applies regardless of whether the speech in question causes emotional harm to the duty bearers. In *Ward v. Quebec*, the Supreme Court of Canada clearly stated that the emotional harm caused to listeners should not be relevant in determining whether they must tolerate the speech of others, because to hold otherwise would be tantamount to creating a "right not to be offended", which could not exist in a democratic society.[215] Therefore, the fact that Gabriel doubted his self-worth, that he began to isolate himself, and that he contemplated suicide could not affect the majority's conclusion that he had to tolerate Ward's remarks. In *Snyder v. Phelps*, the fact that the plaintiff suffered

[215] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, para 82.

severe depression and the aggravation of pre-existing medical conditions after the demonstrators protested at his son's funeral did not affect the conclusion that he had to tolerate "insulting, even outrageous speech".[216] The same is true for the women in *Madsen* who suffered increased health risks as a result of the fear created by the demonstrators around the abortion clinic where they sought services. Similarly, AfriForum's claim that victims of farm attacks would be traumatized by the EEF's singing of the offensive songs because they would be reminded of what they had been through did not change the Equality Court's decision. The fact that Zille's tweets had "clearly offended some sensibilities" in *Premier of the Western Cape*, was also deemed to be irrelevant in determining whether her speech had to be tolerated.[217]

In addition, the courts in the three jurisdictions appear to recognize that public figures can be expected to tolerate a greater degree of offensive speech. In *Ward v. Quebec*, the majority of the Supreme Court of Canada stated that there is generally less likelihood of a finding of discrimination in cases involving speech about a person known to the public. Thus, public figures, including those who are not elected to office, may be expected to tolerate a greater degree of offensive speech than other members of society.[218] While none of the examples from the United States and South Africa discussed involved a situation in which a public figure was required to bear the duty to tolerate, other decisions from the courts of these jurisdictions suggest that public figures are also likely to be required to tolerate a greater degree of offensive speech. In the *Laugh It Off Promotions* case, the Constitutional Court of South Africa expressed the view that public figures and politicians were "ripe and appropriate targets for parody and criticism".[219] Similarly, in the U.S., the Supreme Court has recognized that in

[216] *Snyder v. Phelps*, 562 U.S. 443 (2011), title II
[217] *Premier of the Western Cape Province v. Public Protector & Another*, (771/2020) [2022] ZASCA 16, para 36.
[218] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, paras 89-90.
[219] *Laugh It Off Promotions CC v. South African Breweries International*, (CCT42/04) [2005] ZACC 7, para 105.

cases involving the defamation of public figures, the latter have to meet the higher burden of proving "reckless disregard for the truth" or "actual malice" in order to prevail.[220]

4.2 The Circumstances in Which the Duty to Tolerate Holds

The duty to tolerate has been invoked in relation to different types of speech, with political and humorous speech potentially requiring more tolerance. In *Ward v. Quebec*, the fact that the duty to tolerate was invoked with regards to speech that well into the category of humour, was deemed relevant for the Court, as it noted that the expression had to be considered in its context and that here, this context was a "dark comedy show meant for an audience that had paid to hear this kind of talk".[221] On this point, the Court noted that expression that ridicules as well as "humour, whether in good or bad taste" would rarely rise to the level of speech that need not be tolerated.[222] In the U.S., in *Snyder v. Phelps*, the nature of the speech at issue was also relevant in determining whether the plaintiff had to tolerate their speech, since it was the fact that the demonstrators were considered to be addressing a matter of "public concern" that entitled their speech to "special protection" under the First Amendment.[223] The Court said that if the demonstrators' speech had been a veiled attack on the deceased soldier over a private matter, their speech would not have been entitled to the same protection.[224] In South Africa, in the case of *AfriForum v EEF*, the fact that the controversial songs were intended by the EEF to express political views on the issue of land justice and reform was also cited by the Equality Court as a relevant consideration in finding that the song "Kiss the Boer" had to be tolerated since it had a "political role in the public life of the state".[225]

[220] *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Associated Press v. Walker*, 388 US 130 (1967).
[221] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, para 105.
[222] Ibid, paras 88-89.
[223] *Snyder v. Phelps*, 562 U.S. 443 (2011), title II
[224] Ibid.
[225] Ibid, para 105.

The courts in the three jurisdictions examined have invoked the duty to tolerate in a variety of contexts. In Canada, for example, in *Ward v. Quebec*, the remarks that Gabriel had to tolerate were made in the context of an artistic performance in front of a live audience, which could also be viewed online and on DVDs sold to the public.[226] On this point, the Supreme Court noted that while it had generally been reluctant to "hinder the development of arts and literature" in free expression cases, "freedom of expression [could not] give an artist […] a level of protection higher than that of other persons".[227] In *Snyder v Phelps*, the public demonstration at issue had taken place near the funeral of a deceased soldier. The Court gave considerable weight to the fact that the demonstrators had staged their protest on public land in finding that their speech deserved special protection under the First Amendment, referring to "public streets as the archetype of a traditional public forum".[228] In South Africa, in *Premier of the Western Cape*, the insensitive statements about colonialism had been posted online on Twitter at the end of an official trip to Singapore. In *AfriForum*, the controversial songs had been sung on several occasions, including in at political rallies of the EEF. In contrast to the cases from Canada and the U.S., however, the South African courts did not comment on the relevance of the particular settings in which the expression took place.

4.3 The Burden Imposed by the Duty to Tolerate

The burden imposed by the duty to tolerate offensive speech is the issue on which the three jurisdictions differ most. While the Canadian and South African approaches do not require tolerance of speech that reaches the higher threshold of hate speech, the U.S. Supreme Court recognizes no equivalent exception, as it reaffirmed in 2017 in *Matal v. Tam*.[229] In the

[226] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, para 124.
[227] Ibid., para 64.
[228] *Snyder v. Phelps*, 562 U.S. 443 (2011), title II; The Court reached a similar conclusion in *Boos v. Barry*.
[229] *Matal v. Tam*, 582 U.S. ___ (2017), title IV (J. Alito: "Speech that demeans on the basis of race, ethnicity, gender, religion, age, disability, or any other similar ground is hateful; but the proudest boast of our free speech jurisprudence is that we protect the freedom to express "the thought that we hate.")

U.S., there are limited exceptions that allow restricting certain categories of speech, such as speech directed at producing or inciting imminent lawless action or speech falling under the category of "fighting words" (i.e. likely to provoke a violent reaction from the listener).[230] However, speech cannot in principle be restricted on the basis that it is hateful. In contrast, in South Africa, s. 16(2) of the Constitution expressly provides that freedom of expression does not extend to "advocacy of hatred that is based on race, ethnicity, gender or religion, and that constitutes incitement to cause harm" and "incitement of imminent violence".[231] Moreover, in *Qwelane*, the Constitutional Court recognized that expression based on the prohibited ground of sexual orientation added by the Equality Act also does not have to be tolerated.[232] In Canada, violent expression and threats of violence are also not constitutionally protected.[233]

One significant difference between the South African and Canadian approaches regarding the burden imposed by the duty to tolerate resides in the additional exception mentioned by the Canadian Supreme Court in *Ward v. Quebec*, which speech that has "the same effects on personal dignity" as hate speech also does not have to be tolerated.[234] It is worth noting that South African jurisprudence on the duty to tolerate does not mention an equivalent exception. One point on which all three jurisdictions are similar is the fact that the duty to tolerate does not go as far as preventing claims based on defamatory statements.[235]

[230] *Brandenburg v. Ohio*, 395 U.S. 444 (1969); *Chaplinsky v. New Hampshire*, 315 U.S. 568 (1942).
[231] Constitution of the Republic of South Africa, 10 December 1996, s. 16.
[232] *Qwelane v South African Human Rights Commission and Another* (CCT 13/20) [2021] ZACC 22, paras 145-146.
[233] *Irwin Toy Ltd. v. Quebec (Attorney General)*, [1989] 1 SCR 927, p. 969-970; *Greater Vancouver Transportation Authority v. Canadian Federation of Students*, [2009] 2 SCR 295, para 28.
[234] *Ward v. Quebec (CDPDJ)*, 2021 SCC 43, para 83.
[235] Ibid., para 113; *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964); *Associated Press v. Walker*, 388 US 130 (1967); *Le Roux and Others v Dey* (CCT 45/10) [2011] ZACC 4.

4.4 Some Reflections on the Appropriate Limits of the Duty to Tolerate

To determine the appropriate limits of the duty to tolerate, we should take into account that, as we have seen, this duty may at times fall on vulnerable members of society. We should also consider that, as mentioned previously, Petersen explains that studies demonstrate that is more difficult to convince someone who is tolerant to become intolerant than it is to convince someone who is intolerant to become tolerant.[236] In light of these elements and the seriousness of the risk identified by Karl Popper in his paradox of tolerance, according to which excessive tolerance could lead to the destruction of tolerance in society along with all the individuals who embrace it, certain reasonable boundaries should be established for the duty to tolerate offensive speech.[237] Indeed, as Michael Ignatieff states, no one should be happy in a society where free speech is invoked to gratuitously offend minorities.[238]

In this regard, the Canadian and South African approaches, which recognize hate speech as the main exception to the duty to tolerate, seem more sensible than the American one. Furthermore, the additional exception provided by the Supreme Court of Canada in *Ward v. Quebec* for speech that has "the same effects on personal dignity" also seems appropriate. Although as previously mentioned, what is included in this category remains uncertain at this time, we can reasonably believe that a situation like the one from the *Snyder v. Phelps* case could fall under this exception. In this case, the demonstrators came to the soldier's funeral and made statements that could likely be viewed as inciting others to vilify and detest the humanity of homosexuals.[239] However, they were not targeting this particular soldier by claiming that he was homosexual. In fact, his family said he was not.[240] Rather, the message was that God was

[236] Petersen, Michael, et al. "Freedom for All? The Strength and Limits of Political Tolerance." *British Journal of Political Science*, vol. 41, no. 3, 2011, p. 582 and 585.
[237] Popper, Karl Raimund. The Open Society and Its Enemies. Routledge, 1945, vo. 1, n. 4 to ch. 7, p. 265.
[238] Respect and the Rules of the Road', in L. Appignanesi (ed.), Free Expression is No Offence, (London: Penguin, 2005), 128.
[239] *Snyder v. Phelps*, 562 U.S. 443 (2011), title I, A.
[240] Bears, Bill, "Justices Hear Case of Anti-Gay Protests at Military Funerals", CNN Online, October 6, 2010.

killing soldiers on the front lines because the U.S. Army tolerated homosexuals in its ranks. Had Snyder filed a human rights complaint under the *Quebec Charter*, this might not have fallen under the definition of hate speech, since the deceased or his family were not the target of the demonstrators' incitement to hatred. It is, however, reasonable to assume that their speech could have been considered to have "the same effects on personal dignity" as hate speech.

In my view, the benefits of the duty to tolerate offensive speech for public discourse are significant, but the risks for society are too great if hate speech and speech that has "the same effects on personal dignity" have to be tolerated. For this reason, I believe that, generally, the appropriate limits of the duty to tolerate should correspond to those identified by the Supreme Court of Canada in *Ward v. Quebec*. Determining with more precision these limits, however, is far more complex than assessing whether hateful speech should be tolerated or not and raises a multiplicity of questions that are outside of the scope of this thesis. As previously mentioned, this thesis does not claim to provide a complete answer to this question but only sought to sketch some of the potential boundaries of the duty to tolerate in addition to highlighting its main benefits for the quality of public discourse in society.

CONCLUSION

This thesis has attempted to demonstrate that a functioning democracy's commitment to freedom of speech inherently carries with it an individual duty to tolerate the speech of others, even when this speech is deemed offensive by some members of the political community. My analysis was premised on the theory that public discourse thrives when ideas flow freely, including those that may be considered offensive since they all potentially can contribute to the marketplace of ideas. I have shown that in recent decades, the courts of several jurisdictions have recognized that individuals have, to varying degrees, a duty to tolerate the speech of others. In Canada, the Supreme Court has invoked the concept of a "duty to tolerate what other people say" as a basis for protecting public discourse. The U.S. Supreme Court and the Constitutional Court of South Africa have invoked similar duties in a way that has prevented public authorities or individuals from suppressing ideas and perspectives that they deemed offensive to certain members of the political community. I also offered, through a comparative analysis of the approaches of the three jurisdictions examined in this thesis, some reflections on the appropriate limits of the duty to tolerate, while not providing a full answer to this complex question. I found that the Canadian approach established in *Ward v. Quebec*, which identifies hate speech and speech that has "the same effect on personal dignity" as the primary limits of the duty to tolerate, appears to strikes an appropriate balance between the rights of listeners and society's interest in protecting public discourse.

As mentioned earlier, the view that offensive speech should be tolerated is increasingly becoming a minority position around the world. In this regard, it is particularly interesting to note that the European Court of Human Rights, from which the Canadian and South African courts originally borrowed the view that freedom of expression extends to ideas that "offend, shock or disturb", appears to be on a different course than the three jurisdictions discussed in this thesis. Indeed, in several decisions over the past two decades, the Court has recognized a

somewhat opposite-sounding "duty to avoid, as far as possible, expression that is [...] gratuitously offensive to others" in matters involving religious beliefs.[241] Future work in the area of free speech duties might focus on determining whether the duty to tolerate offensive speech and the duty to avoid speech that is gratuitously offensive to others are compatible, and on trying to understand why the European Court of Human Rights and the three jurisdictions discussed in this paper seem to have gone in different directions.

Free speech cases involving offensive speech often present a complex and challenging dilemma because of the strong emotions they evoke in us. While it is natural to want protection from hurtful and intolerant speech, it is crucial that we uphold our commitment to freedom of expression. The more I have pondered these issues, the clearer it has become that regulating offensive speech is a difficult endeavor. As U.S. Supreme Court Chief Justice Harlan astutely observed, what one person considers vulgar may be considered a form of poetic expression by another. In this context, it seems wiser to me to recognize that if we truly value our freedom of speech, we must be willing to tolerate some of its inherent inconveniences.

[241] *İ.A. v. Turkey*, Application no. 42571/98, (2007) 45 EHRR 30, para 24; *E.S. v. Austria*, Application no. 38450/12, [2018] ECHR 891, para 43.

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