RACISM, PLURALISM AND DEMOCRACY IN AUSTRALIA

Re-conceptualising racial vilification legislation

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This thesis took me many years to complete, partly because it opened my eyes to a different view of the world from that which I had held as a practising solicitor in the area of trusts and funds management. I then needed to explain these new perceptions to myself before I could put them on paper, and needed to find a new style of writing to do it in. I thank my supervisors along the way for their patience and assistance in helping me attempt this. The resulting failings are mine, not theirs: looking back on the result, I agree with my husband that I may have made a hard job of it.

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Originality Statement

I hereby declare that this submission is my own work and to the best of my knowledge it contains no materials previously published or written by another person, or substantial proportions of material which have been accepted for the award of any other degree or diploma at UNSW or any other educational institution, except where due acknowledgement is made in the thesis. Any contribution made to the research by others, with whom I have worked at UNSW or elsewhere, is explicitly acknowledged in the thesis. I also declare that the intellectual content of this thesis is the product of my own work, except to the extent that assistance from others in the project's design and conception or in style, presentation and linguistic expression is acknowledged.

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Signature

21 February 2005

Abstract

Australian debates about racial vilification legislation have been dominated by mainstream American First Amendment jurisprudence and popular American notions of 'free speech' to the exclusion of alternative Europeans models. This can be seen from notions of Australian racial vilification legislation as inconsistent with 'free speech' rights as well as the influence of some of the basic assumptions of First Amendment jurisprudence on political speech cases in the Australian High Court.

Despite the widespread existence of legislation that penalises racial vilification at State and Federal levels, there has been a rise in Australia over the past 10 years of divisive 'race' politics. Against that background, this thesis considers the scope and limits of racial vilification legislation in Australia. It is argued that First Amendment jurisprudence is inadequate in the Australian context, because it is heavily dependent upon economic metaphors, individualistic notions of identity and outdated theories of communication. It assumes that 'free speech' in terms of lack of government intervention is essential to 'democracy'. It ignores the content, context and effect of harmful speech, except in extreme cases, with the result that socially harmful speech is protected in the name of 'free speech'. This has narrowed the parameters within which racial vilification is understood and hindered the development of a broader discourse on the realities of racist harms, and the mechanisms necessary for their redress.

The author calls for the development of an Australian jurisprudence of harmful speech. Failing an Australian Bill of Rights, that jurisprudence would be grounded upon the implied constitutional right of free political speech, informed by an awareness that modern structures of public speech favour a very limited range of speech and speakers. The jurisprudence would take advantage of the insights of Critical Race Theory into the connections between racial vilification and racist behaviour, as well as the personal and social harms of racial vilification. Finally, it is argued that the concepts of human dignity and equality, which underpin European discrimination legislation and notions of justice, provide a way forward for Australian jurisprudence in this area.

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Introduction

In earlier times, when the relevant social unit was the tribe, the religious sect, a nation, or even a civilization, it was possible for the local mythology to represent all those beyond its bounds as inferior, and its own ... either as the one, the true and sanctified, or at least as the noblest and supreme. And it was in those times beneficial to the order of the group that its young should be trained to respond positively to their own system of tribal signals and negatively to all others, to reserve their love for at home and to project their hatreds outward. Today, however, we are the passengers, all, of this single spaceship Earth ... There were formerly horizons within which people lived and thought and mythologized. There are now no more horizons.

–Joseph Campbell[1]

Surely it is better, rather than wait for the impossible, to begin to push for a better society, better legal system, better political understanding, now, even if our efforts cannot withstand intense theoretical scrutiny. This does not necessarily mean that we need a grand plan for the revolution. But it does mean working in a positive, reflective, and interactive way with whatever we can.

–Margaret Davies[2]

Background – the introduction of racial vilification legislation

When I first considered writing a legal thesis I was interested in different cultural perceptions of 'justice' within a plural, multicultural society such as Australia. I soon learned that racism is a problem that has fundamental implications for both justice and democracy in any plural society. Where racism is prevalent there can be never be a real perception on the part of victim groups that society's treatment of them is egalitarian or just. As Gaudreault-DesBiens says, "how can one truly exercise one's rights and freedoms if one lives in a society that tolerates expression that denies one's equal

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1 Joseph Campbell, *Myths to Live By*, Paladin Books, New York, 1985 (first published 1972), 204.

2 Margaret Davies, *Asking the Law Question*, The Law Book Company, Sydney, 1994, 157.

dignity as a human being?"[3] Racism has negative social and economic effects on members of targetted groups, who are discouraged and intimidated through hate speech from participating in public discourse. Unless one defines democracy very narrowly as being only about the electoral process, it must be acknowledged that both the direct and indirect effects of racism have implications for the very nature of Australian democracy. Democracy should be about encouraging the participation of minority or marginalised groups in public discourse and in government. Racism, expressed through racial vilification, aims to exclude those groups.

When I first started writing about these issues, legislation against racial discrimination had been introduced at federal and state level (starting in 1968 in South Australia and 1975 federally) but encouragement of racism through 'hate speech' was not generally regulated in Australia. Racial vilification legislation existed only in NSW (1989) and the ACT (1991). The dominant Anglo-Australian perception was that racism was 'not a problem' in Australia, despite Australia's history of repression of the indigenous Aboriginal population, and the continuing effects of the earlier White Australia policy.

However, government bodies did not agree. Reports from the Human Rights and Equal Opportunity Commission's *National Inquiry into Racist Violence* (1991),[4] the Royal Commission into *Aboriginal Deaths in Custody* (1991),[5] and the Australian Law Reform Commission's report on *Multiculturalism and the Law* (1992)[6] identified the existence of racist abuse and violence against Australian migrant groups and the indigenous Aboriginal population, and called for legislation specifically targeting racist activities and racist speech.

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3 Jean-François Gaudreault-DesBiens, "From Sisyphus's Dilemma to Sisyphus's Duty? A Meditation on the Regulation of Hate Propaganda in Relation to Hate Crimes and Genocide" (2001) 46 *McGill L.J*. 1117, 1135.

4 Human Rights and Equal Opportunity Commission, *Racist Violence: Report of the National Inquiry into Racist Violence in Australia*, AGPS, Canberra, Chapter 11, 273 ff (HREOC 1991).

5 Elliott Johnston QC, *Royal Commission into Aboriginal Deaths in Custody, National Report: Overview and Recommendations*, AGPS, Canberra, 1991, 78 (recommendation 213) (Royal Commission 1991).

6 Australian Law Reform Commission, *Multiculturalism and the Law, Report No. 57*, Alken Press Pty Ltd, Smithfield, 1992, Appendix A (proposed Sections 85 ZKD and 85 ZKE).

Each of the reports identified racial vilification as a sufficiently serious problem in Australia to warrant the making of such conduct unlawful. Racist vilification and violence was no longer seen as an individual problem but as a social problem which should be on the political agenda.[7] The *National Inquiry into Racist Violence* (1991)[8] found that "Racist violence is an endemic problem for Aboriginal and Torres Strait Islander people in all Australian States and Territories."[9] It also found that "Racist violence on the basis of ethnic identity in Australia is nowhere near the level that it is in many other countries. Nonetheless it exists at a level that causes concern and it could increase in intensity and extent unless addressed."[10] In the *National Report of the Royal Commission into Aboriginal Deaths in Custody* (1991),[11] Commissioner Johnston noted that verbal abuse constituting racial vilification was a persistent feature of the systemic discrimination suffered by Aboriginal people in the criminal justice system, particularly at the point of contact with police.[12]

The Federal Labor Government's initial legislative response to these reports was the Racial Discrimination Amendment Bill 1992 (Cth) which was introduced into the House of Representatives in December 1992. The Bill proposed amendments to both the *Racial Discrimination Act 1975* (Cth) and the *Crimes Act 1914* (Cth), reflecting a preference for the combined criminal law/conciliation approach advocated by the National Inquiry into Racist Violence.

The 1992 Bill proposed that the *Racial Discrimination Act 1975* (Cth) be amended to make racial vilification unlawful and a basis for complaint to the Human Rights and Equal Opportunity Commission. Racial vilification was defined as knowingly or recklessly doing a public act which was likely to stir up hatred, serious contempt or severe ridicule against a person or a group of persons on the ground of race, colour or

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7 See generally Rob Witte, "Racist Violence: An Issue on the Political Agenda?" in Tore Björgo and Rob Witte (eds), *Racist Violence in Europe*, St Martin's Press, New York, 1993, 139.

8 HREOC (1991) Chapter 11, 273 ff.

9 HREOC (1991) 387.

10 HREOC (1991).

11 Royal Commission (1991) 78 (recommendation 213).

national or ethnic origin. The Bill also proposed the addition of two racial incitement offences to the *Crimes Act 1914* (Cth): intentionally stirring up hatred on the ground of race, colour or national or ethnic origin; and, inspiring fear that violence may be used against persons because of their race, colour or national or ethnic origin.

The Bill was circulated for public discussion and comment but when a federal election was called for March 1993, the Bill lapsed. In November 1994 a revised Bill—the Racial Hatred Bill 1994 (Cth) —was introduced into the House of Representatives. Many of its provisions, including the imposition of criminal penalties, were opposed by the then Liberal opposition and ultimately blocked by the Democrats in the Senate. The Commonwealth *Racial Hatred Act* which was finally passed in 1995[13] was much more limited in scope.

It seemed to me that the aim of introducing racial vilification legislation was a worthy one, and that the legislation in both its original and final forms did not go far enough. The legislation did not appear to understand the functions or aims of racist speech. It confused the likelihood of immediate emotional harm to the victims with the 'public order' issue of the possibility of direct retaliation by the victims against the speaker. It required a direct connection between the personal characteristics of the victim and the vilification, thus perpetuating the myth that ‘racism is simply about “race”’. It contemplated that racial vilification might be used to persuade others to adopt a racist point of view, but only proscribed speech which had effects on an immediate audience, rather than indirect effects on social standards. I made submissions to the Federal Government about these matters.[14]

It was not the best time, however, for calls to strengthen the legislation. There was considerable popular opposition in Australia to any kind of regulation of racist speech,

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12 Royal Commission (1991) 71.

13 *Racial Hatred Act 1995* (Cth), amending the *Racial Discrimination Act 1975* (Cth) by incorporating section 18C.

evidenced in editorials and letters to the papers, in Federal Parliament, and even in academic articles. Criticism of the legislation was usually expressed in terms of free speech rights and the value of 'tolerance', with reference to the First Amendment of the United States Constitution. I argued that the Democrats' view that 'we must be tolerant of intolerance' was particularly misguided in the context of racist speech which causes so much harm.[15]

State Labor governments followed over the next few years with their own legislation, although the precedent they generally followed was the NSW Act, not the federal legislation. Legislation relating to racial vilification or racial harassment now exists in all States and Territories as well as at Commonwealth level. The legislation of NSW (1989),[16] the ACT (1991),[17] South Australia (1996),[18] Tasmania (1998),[19] Queensland (2001),[20] and Victoria (2001)[21] defines racial vilification in similar terms. Generally, the legislation is conciliation-based, leading to court or tribunal hearings only when conciliation has failed or is not appropriate. South Australia provides for a statutory tort, as well as criminal penalties. The Western Australian legislation (1990), aimed at neo-Nazi posters and publications, is quite different and criminalises possession or dissemination of written or pictorial material that is 'threatening and abusive.'[22] McNamara concludes that criminal provisions and the statutory tort are virtually unused remedies.[23] The Northern Territory legislates against 'racial harassment' under its anti-

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14 See generally, Tamsin Solomon, "Problems in Drafting Legislation against Racist Activities" (1994) 1 *AJHR* 265.

15 Luke McNamara [printed as 'Macnamara'] and Tamsin Solomon, "The Commonwealth Racial Hatred Act 1995: Achievement or Disappointment?" (1996) *Adelaide Law Rev* 259. See also Colin Tatz and Tamsin Solomon, "Race Hate Bill will staunch the flow of words that kill," *Australian*, 22 March 1995, 11.

16 *Anti-discrimination Act 1977* (NSW).

17 *Discrimination Act 1991*(ACT) ss 66 and 67.

18 *Racial Vilification Act 1996* (SA).

19 *Anti-Discrimination Act* 1998 (Tas) s 19.

20 *Anti-Discrimination Act 2001* (Qld) ss 124A and 131A.

21 *Racial and Religious Tolerance Act 2001* (Vic) s 7.

22 *Criminal Code 1913* (WA) ss 76-80.

23 Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia*, Sydney Institute of Criminology Monograph Series, Sydney, 2002, 268.

discrimination legislation,[24] which has been held to include racial vilification. The scope and interpretation of the Australian legislation is discussed in Chapter 5.

Australian racial vilification legislation has become more sophisticated over the years, with the most recent legislation in Victoria and Queensland demonstrating a greater understanding of the personal and social effects of such vilification and of the often tenuous connections between the victim's 'race' and the perpetrator's behaviour. As McNamara points out, the Australian legislative landscape in relation to racial vilification has been substantially altered.[25]

Nevertheless, racism has continued in Australia and the legislation itself has been rarely used. In the March 1996 federal elections several candidates who spoke denigratingly of Aborigines and immigrants were elected, including Pauline Hanson.[26] Prime Minister Howard endorsed Hanson's right to speak in that way. The implied 'permission to be racist' given by Howard led to 'race politics,' to an increased media focus on race, and, according to anecdotal evidence, to an increase in racist incidents.[27] Unhappily the Tampa Affair, the events of September 11, 2001, the Bali bombing in 2002 and the war in Iraq in 2003 also encouraged the circulation of racist views in Australia.

There is minimal Australian data quantifying the occurrence of racial vilification. Very little of the available data, says McNamara, reveals the prevalence of conduct amounting to racial vilification which does not involve violence.[28] He argues that it is likely that there would be more racial vilification than racist violence and therefore that data

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24 *Anti-Discrimination Act* (NT) s 20(1). The NT Criminal Code covers offences such as making threats (s 200) but does not require a racial connection.

25 McNamara (2002) 311.

26 There was a 23% swing towards independent candidate Pauline Hanson, disendorsed by the Liberal Party after deploring the 'privileges' given to Aborigines: see Jim McLelland, "Legislation can't change hardened hearts", *Sydney Morning Herald*, 15 April 1996, 13.

27 See Chris Cunneen, David Fraser and Stephen Tomsen (eds), *Faces of Hate: hate crime in Australia*, Hawkins Press, Leichhardt, 1997, 11 and the *Sydney Morning Herald* reports cited there, including 14 November 1996, 5.

28 McNamara (2002) 11.

concerning racist violence is likely to indicate a higher level of 'pre-violence' conduct.[29] It is also likely that racist violence is itself underreported.[30]

The impact in Australia of First Amendment notions of free speech

McNamara has pointed to tensions in Australia between the legislative proscription of racial vilification and popular adherence to the notion of unrestricted 'free speech,' basically derived from the jurisprudence surrounding the First Amendment to the Constitution of the United States. He argues that this tension has been expressed through 'free speech sensitivity,' which has limited the scope of legislation both in terms of legislative drafting and "at the point of quasi-judicial and judicial interpretation."[31] Australia does not have any legislative or explicit constitutional basis for free speech rights, as it lacks any federal Bill of Rights or any specific constitutional reference to free speech. Nonetheless, 'free speech' is seen by both conservatives and liberals, McNamara concludes, as inconsistent with racial vilification legislation, particularly with criminal penalties. This has acted as a significant brake on that legislation.[32]

The issue of restricting hate speech in a plural society without unduly limiting 'free speech' is not a new one. In Australia it has been on the political horizon for the last 30 years, certainly since in 1975 Australia reserved its ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination* in 1975 on the basis of a perceived conflict between the prohibition of racial vilification and the right to freedom of expression. Much debate and literature has been engendered about the appropriate balance in regulating expressions of racial or religious intolerance.

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29 McNamara (2002) 11-12.

30 Generally, much racist violence never gets reported to the police or the media, and often where registered is not classified as 'racist': Björgo and Witte (1993) 5. Robert Wainwright, "Majority of race victims too afraid to complain," *Sydney Morning Herald*, 10 October 2002, available at http://www.smh.com.au/articles/2002/10/10/1034061260976.html?, reported comments by Chris Puplick, President of the NSW Anti-discrimination Board, that while the Board was dealing with more than 30 formal complaints a week, it was receiving more than 40 calls a day from victims of racial vilification who were too frightened to pursue claims or could not identify their attackers.

31 McNamara (2002) 304.

32 McNamara (2002) 304.

I suggest that the 'free speech sensitivity' identified by McNamara is a direct effect of the importation of First Amendment doctrines. I argue that the interrelated political, economic, historic and even physiological assumptions of First Amendment jurisprudence about the nature of markets and the proper role of government (including that non-regulation of speech is the best and most 'natural' state of things) are unconvincing. First Amendment 'free speech' doctrines are 'self-consciously' theoretical and generally refuse to consider, let alone concede, the reality of racist harms.

Why it is essential to oppose racism and racial vilification

There are a many reasons why at this time it is particularly important to oppose racism and the spreading of racism through hate speech and racial vilification.

The first reason relates to the climate of terrorism. International terrorism is underpinned by religious fundamentalisms which use speech to encourage religious and racial prejudices. Racial vilification legislation is an important tool in restricting the reproduction of those prejudices and removing justifications for violence.

At the same time, the tendencies of governments to repress political dissent (that is: free political communication) by reference to the excuse of international terrorism must be opposed. Although in the United States advocating future violence has been held to be protected as free speech, this has not stopped the United States Federal Government from legislating against a range of people whose connection with the advocacy of violence is very tenuous.

While these issues lie outside the scope of this thesis, I trust that the principles suggested here can be applied in such wider contexts.

In the Australian context, it is particularly important to oppose racism and its spreading through hate speech or racial vilification because where racist attitudes become popular

they destroy the foundations of democracy. Racist attitudes undermine the values of equality and human dignity. Racist speech causes offence and emotional pain to those people targeted by the speaker. These are real and damaging consequences, reducing the victims' desire and ability to express themselves freely, or even to participate in education, work and public or political life.

Racist speech also has deleterious effects upon the rest of society. Racists aim to justify and encourage the exploitation, mistreatment, marginalisation and disempowerment of victim groups. Racist speech is used as a political tool to foster acceptance of inequality and unequal treatment; to silence the voices of the targeted groups (who thereby lose their own 'rights' to 'free speech'). Racist speech encourages us to feel secure by defining ourselves as Australians through excluding 'others' – whether boat people, Aborigines, criminals or the unemployed.

In doing these things, racist speech fundamentally harms our democratic processes and encourages Australians to reject the notion of an inclusive democracy. "When federal and state governments of all colours are winding back our civil liberties in the name of national security," says Chris Puplick, former President of the NSW Anti-Discrimination Board, "we stand on fragile ground in support of a national consensus upholding difference, diversity and multiculturalism."[33]

If we are to maintain a cohesive society within Australia in the face of the external stresses of terrorism and the internal stresses of anti-terrorist measures, it is essential for us to articulate and espouse an inclusive vision of democracy which rejects racism and which does not depend upon the marginalisation or dispossession of particular groups. As Joseph Campbell points out, racism is an outdated mythology that was appropriate for small tribes who remained in separate territories. For modern plural societies to retain that mythology is positively harmful.

Hannah Arendt expressed a similar concept in saying that the greatest crime is to regard any person as 'superfluous'.[34] For Arendt, the very concept of human rights inevitably flows from the fact of our common humanity. She believed that, unlike divine commands or natural law, human rights necessarily exist because of the plurality of man; because we inhabit the earth together.[35] This viewpoint also informs her theories of democracy, which have been subsequently drawn upon by more recent political philosophers in their analyses of the relationship between democracy and pluralism, as discussed in Chapter 7.

I argue that if we are to achieve an inclusive Australian democracy, we can only do this to the extent that we eradicate racism and the means through which it is implemented, being hate speech or racial vilification.

An alternative way of approaching the issue of democracy and pluralism in Australia in the context of racial vilification is to take, as the starting point in the free speech/hate speech debate, a desire to redress harm and the injustices that harm causes. The justification for redressing the harms of racial vilification must be founded on the realities of that harm. Simon argues that whereas a 'veil of ignorance' is used by Rawls to help one imagine a society which would be just for all its members, knowledge is needed to identify injustice.[36] In order to understand the harms caused by racism it is also necessary to appreciate the benefits inherent in 'whiteness'. Injustice can only be perceived through immersion in contextual detail and understanding of the realities which lead to unjust consequences. Australian courts and legislators should analyse racist behaviour and speech contextually, giving primacy to redressing harm and to the values of equality and human dignity. In this way a new Australian jurisprudence of

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33 Forward to Anti-Discrimination Board of NSW (principal author, Ruth McCausland), *Race for the Headlines*, available at http://www.agd.nsw.gov.au/adb.nsf/pages/raceheadlinesreport 2003, 6.

34 Hannah Arendt, *The Origins of Totalitarianism*, Harcourt, Brace and Company, New York, 1951, 433.

35 Arendt (1951) 437.

36 Thomas W. Simon, "A Theory of Social Injustice" in David S. Caudill and Steven Jay Gold (eds) *Radical Philosophy of Law*, Humanities Press, New Jersey, 1995, 54 at 59-60.

free communication will be established, which will go beyond the formal limitations of First Amendment jurisprudence and form an essential part of an Australian democratic vision.

Deciding how best to combat racism with legislation also requires appreciation of the differences between anti-discrimination law (which includes anti-racism law) and other kinds of law. Anti-discrimination legislation is different in that it is inherently about promoting equality. It recognises that the ideal of equality is not always realised.[37] It is different in being dependent upon context; upon time and circumstances.

Racism and discrimination occur through comparisons made by the perpetrator between themselves or their group and the victim or his group. The result of the comparisons is that the perpetrator's treatment of the victim is then worse than the treatment that the victim would otherwise have received. To be discriminated against implies that one has been treated unfairly in that the discriminator has adverted to an improper or irrelevant consideration in deciding upon his treatment of the victim.[38] These are all matters dependent upon context. Australian courts have recognised the contextual nature of equality, rejecting formal equality or formally identical treatment as the sole test for the presence of equality or the absence of discrimination.

Anti-discrimination law recognises that the *status quo* is not necessarily the best of all possible worlds: it challenges "white, male, able-bodied, heterosexist hegemony" and threatens existing structures.[39] It is not surprising that anti-discrimination and anti-racism laws are generally opposed by those who support the *status quo*.

While legislation against racial vilification must clearly be seen within the context of anti-discrimination law, racial vilification generally tends to be treated separately,

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37 Margaret Thornton, *The Liberal Promise: Anti-Discrimination Legislation in Australia*, Oxford University Press, Melbourne, 1990, see generally Introduction.

38 Thornton (1990) 2.

39 Thornton (1990) 7- 8.

divorced from its harmful and discriminatory consequences, on that basis that it is 'speech', not 'discrimination' - even where the speech advocates violence against its targets.

In Part I of this thesis, I analyse the way in which hate speech works to foster racism, and seek to understand the various harms that racism causes. In Part II, I consider the 'free speech' assumptions of First Amendment jurisprudence, the flaws in those assumptions, and touch on the different approaches taken in civil law jurisdictions. Part III considers how First Amendment jurisprudence has influenced Australian understandings of speech rights and the role of hate speech. I conclude that Australia needs to develop its own individual jurisprudence in this area.

Overview

Part I examines the Australian background to issues of 'race' and race politics, and the role that racial vilification plays in reproducing 'racism'. I analyse the dynamic concepts of 'race', racism and racial vilification, and the ways in which they are constructed and maintained through cultural pressures, social conformity and the mass media. At the same time as society reinforces racist tendencies, it plays down the importance of racism. The damage caused by racism is often invisible to those not directly affected, and this fact appears to explain how so many arguments against racial vilification regulation ignore or belittle the consequences of racist speech. To make those damages more visible, and in order to sketch the background against which First Amendment jurisprudence must be considered, this Part therefore depicts the direct and indirect harms caused by racist speech in some detail.

The problem of racism and the problem of transmission of racist ideology through speech are subtexts underpinning contemporary debates about Australian identity, Reconciliation, gang-related crime, immigration and refugees. The 'race question' and the production and maintenance of social harmony in a plural society remain ongoing concerns in the Australian context. This particular cultural and political milieu,

described in “Chapter One – The background to current discussions” is the starting point of the discussion of Australian racial vilification jurisprudence.

“Chapter Two – The trouble with ‘race’” examines theorisations of race and racism which illuminate the point that ‘racism’ is not simply about ‘race’. It considers the congruence of social and scientific concepts of race, and the ‘new’ racism which is expressed as the unfortunate but inevitable ‘clash’ of incompatible cultures. So coded are discussions about the ‘clash of cultures’ that it is hard to pin them down as racist dialogues. But the underlying pattern is the same. Joseph Campbell characterises racism as an outdated mythology – but it is a powerful and enduring belief system. Racism is about differentiation, and power relations, not logic. It involves the denial of reality. At the same time, it is an attractive ideology for its adherents, and can be used as a political tool.

In “Chapter Three – How racism is reproduced through cultural influences and extremist speech”, I consider the fundamental or background encouragements to the production of racism, being both real and imagined conflicts and fears. I also consider the ways in which they are utilised by extremists through hate propaganda and scapegoating. Racial vilification by extremists has an essentially political aim, which is to make racist behaviour socially and politically acceptable. This is achieved through untruthful communications – through defamation and myth-making. The special case of ‘Holocaust Denial’ is considered, where the inherent violence of racist behaviour is denied, and racism sanitised, through denial of the genocidal basis of the Holocaust.

“Chapter Four – Communicating Racism” discusses the role of speech and the media in the reproduction of racism and the many ways in which conformity and social encouragement lead to the perpetuation of racist attitudes at an ordinary, not an extremist, level. While the media can play a positive role in discouraging racism, all too often it encourages stereotyping and scapegoating.

"Chapter 5 – The scope of racial vilification legislation and the social experience of racism" considers how Australian legislation defines 'racial vilification,' and how Australian courts and tribunals interpret that legislation. Given our understanding of how racist speech functions, I examine the harms that racial vilification and racist behaviour cause to individual victims, targeted groups and to society as a whole, and conclude that the assumptions of harmlessness are not convincing. Racist speech causes direct hurt to those abused, even if the abuse is against their group rather than against them as individuals. Target groups and their supporters are intimidated and silenced, but at the same time the rest of society receives the repeated message that those groups are validly classified as different from 'us' and that inequality and unequal treatment are unacceptable. In doing these things, racist speech fundamentally harms our democratic processes.

Part II considers the social, economic and political assumptions underlying First Amendment jurisprudence, in the light of the different ways of seeing racist speech that have been developed in civil law jurisdictions and the different concepts of democracy that have been put forward in recent years. I discuss the basic concepts of First Amendment jurisprudence, and how they have been influential in Canada, England, and even Germany, despite the different constitutions of those countries. I also discuss the different rights such as equality and human dignity that can inform our understanding of the effects of racist speech. I then consider whether the arguments in favour of maximum free speech are persuasive when they are divorced from the underlying assumptions.

In the light of the Part I analyses of the nature of racism and racist speech, and the disadvantages of completely free speech, the supposed harms of legislation are reassessed. Only formal, not substantive, democracy, justice and equality are protected by a failure to legislate. The problem with arguments that do not consider the real effects of racist speech is that those effects are seen as a natural misfortune for minority groups, for which no-one is directly responsible, rather than a social injustice

perpetrated by individuals against whom governments should take action, and perpetuated by institutionalised racism that governments should eradicate.

The general trends in First American jurisprudence are discussed in "Chapter Six – The First Amendment and alternative perceptions of 'free speech,'" and the main characteristics identified: the Supreme Court's reluctance to consider the content of speech, the public/private and private/state distinctions and the speech/act distinctions. In its simplest terms, the dominant interpretation of the First Amendment prohibition on Congressional laws 'abridging the freedom of speech' is that speech must not be limited nor seen as a right which should be balanced against other rights. 'Free speech' is perceived as a single, seamless, whole - which must be protected irrespective of the harms caused by speech. Thus in the United States, the idea of legislating against racist speech is generally seen as inconsistent with the primary value of free speech and perhaps as dangerous for other reasons too, leading to a variety of other harms. In civil jurisdictions there are other ways of seeing racial vilification and free speech. Competing rights such as to have one's human dignity respected, to be treated equally and to be free to communicate, are balanced. The content of speech is very relevant. False statements are not protected and abuse of rights is taken into account.

The 'free speech/hate speech' debate about the competing rights to free speech and to be free from hate speech, including racist speech, is most intense in the United States because there is basically no legislation against hate speech. In European civil law jurisdictions, any such debate covers a much narrower ground. Regulation of racist speech has been accepted in most Western European jurisdictions for the last half-century, since the Holocaust demonstrated the appalling results of racist ideologies. Rights largely unknown to the common law, such as the right to human dignity, support the importance of the right to be free from racist speech in civil law jurisdictions. Countries such as France and Germany are more comfortable with human rights concepts generally, as well as with the notion of balancing rights such as freedom and equality contextually and not just in the abstract.

In Australia, little judicial or popular regard has been paid to European concepts of rights. The academic legal literature is sparse, although slowly increasing. However First Amendment jurisprudence, and simplistic concepts as to the primacy of free speech above other rights, have been enormously influential in Australia in popular, academic and judicial circles. This is not surprising, given that Australian jurisprudence relating to free speech is still in its infancy in comparison with the highly developed United States jurisprudence, and given the language and cultural barriers to a full understanding of rights in civil law countries. The natural tendency has been for Australians to draw upon United States First Amendment case law concerning free speech, and to be influenced by the United States idealisation of free speech as a democratic value and as a means of promoting tolerance.

This thesis supports the argument of Critical Race Theorists that a change of focus is required to achieve recognition that categories of rights and obligations which are traditional in the common law do not meet the needs of the victims of racist activities.

Unfortunately, because free speech proponents in the United States refuse to consider the content of speech, and thus the nature and extent of the harms caused by racist speech, there can be no real engagement between the different positions. In 1990 Charles Lawrence and Nadine Strossen debated the desirability of regulating racist speech in the United States. Strossen, for the American Civil Liberties Union, opposed such regulation in the name of free speech, citing the 'greater' harms that restricting speech would cause.[40] Lawrence, a Critical Race Scholar who understands the harms caused by racist expression, supported regulation.[41] In 1994 and 1995 Richard

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40 Nadine Strossen, "Regulating Racist Speech on Campus: A Modest Proposal?" (1990) *Duke L.J.* 484; reprinted in Henry Louis Gates Jr, Donald E. Lively, Robert C. Post, Nadine Strossen, Anthony P. Griffin, and William B. Rubenstein, *Speaking of Race, Speaking of Sex: Hate Speech, Civil Rights and Civil Liberties*, New York University Press, New York, 1994, 181.

41 Charles R Lawrence III, "If He Hollers Let Him Go: Regulating Racist Speech on Campus" (1990) *Duke L.J.* 431, reprinted in Mari J. Matsuda, Charles R. Lawrence III, Richard Delgado and Kimberlè Williams Crenshaw, *Words that Wound: Critical Race Theory, Assaultive Speech, and the First Amendment*, Westview Press, Boulder, 1993, 53.

Delgado[42] and john a. powell[43] (commenting on the 1990 debate) wrote hopefully of engagement between the two points of view, given the increasingly sophisticated understanding of 'what speech can do', and of the United States Supreme Court's refusal to endorse hate speech regulation being 'swept aside by history.'[44]

But since 1990, First Amendment jurisprudence has not substantively changed. While the majority of the United States Supreme Court has in *Virginia* v. *Black et al* finally recognised that a burning cross amounts to an actual threat against Afro Americans,[45] the judges made it clear that they had no intention of generally reclassifying hate speech as an immediate threat, and that the basic First Amendment doctrine of protecting all public speech regardless of its content is to be maintained.

Nor has there been any real engagement between the opponents and proponents of hate speech regulation in the United States on an academic level. It seems likely that this will always be the case[46] so long as hate speech, at least outside schools and the workplace, is classified as the proper subject of First Amendment doctrine, and 'free speech' proponents continue to argue from a purely abstract analysis of the issues, ignoring the social effects of the construction of 'whiteness'. Indeed Critical Race Theorists write despairingly of the "organized and well-funded ideological assault from the right that has been vicious and successful beyond anything we anticipated."[47]

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42 Richard Delgado, "First Amendment Formalism Is Giving Way to First Amendment Legal Realism" (1994) *Harvard Civil Rights-Civil Liberties Law Review* 169 and "Epilogue: Unfreeze the Discussion" in Laura Lederer and Richard Delgado (eds), *The Price We Pay*, Faura, Strauss and Giroux, New York, 1995, 343. See too Frederick Schauer, "The Sociology of the Hate Speech Debate" (1992) 37 *Vill. L. Rev* 805.

43 john a. powell, "Worlds Apart: Reconciling Freedom of Speech and Equality" in Lederer and Delgado (1995) 332.

44 Delgado (1995) 344.

45 538 U.S. 343, 155 L Ed 2d 535; (2003) 123 S Ct 1536; (2003) 71 USLW 4263

46 Richard Moon argues that there is no common ground because both sides argue from abstract terms. He suggests that the argument in favour of regulation rests fundamentally on the 'silencing' effect of hate speech: *The Constitutional Protection of Freedom of Expression*, University of Toronto Press, Toronto, 2000, 126.

47 Charles R. Lawrence III, "Who are we? And why are we here? Doing Critical Race Theory in hard times," in Francisco Valdes, Jerome McCristal Culp and Angela P. Harris (eds), *Crossroads, Directions, and a New Critical Race Theory*, Temple University Press, Philadelphia, 2002, xi, xiv.

> Academic faculties either ban us from their midst entirely or ensure that our numbers do not exceed one or two. Critical race theorists are seldom invited to take part in public debate. When published, our views are more ridiculed than engaged. Indeed, those who condemn our work receive more attention than we who create it.[48]

Against the different perspective of civil jurisdictions, "Chapter Seven – Problems with the 'marketplace of ideas'" considers the basis of popular 'free speech' arguments in the political assumptions of market liberalism and in a narrow view of democracy. Those assumptions do not reflect economic developments nor developments in understanding of the nature of communication and the role of the media. Different ways of seeing democracy and the implications for a plural society are touched upon. The related claims that the free market of ideas leads to truth and tolerance are examined and also found wanting.

The first part of "Chapter Eight – Free will, free speech and a healthy democracy" considers the related 'free speech' claims that free speech is essential to identity and self-realisation on a personal level and to self-government and democratic discourse on a national level. Again, these arguments do not reflect recent developments either as to the nature of democracy or the nature of identity. The arguments depend upon a fixed, monocultural notion of identity which is unworkable in a plural society. The second part of Chapter Eight considers other arguments against racial vilification legislation related to the supposed 'greater harms' that would be caused by such legislation. Finally, it considers whether there is really any such thing as 'free speech'.

Part III discusses the limits on the present legislation against racial vilification which are inherent in the legislation itself (in "Chapter Nine – The limits of present legislation") and which result from the 'free speech sensitivities' of the High Court (in "Chapter Ten – Constitutional boundaries").

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[48] Derrick A. Bell, "The Handmaid's Truth" in Valdes et al (2002) 411.

Against the 'new' racism based on incompatability of cultures or values, the existing legislation is largely helpless because it generally requires the perpetrator to have vilified the victim on the basis of the victim's race or ethnicity. This is an inappropriate test which misunderstands the subtle power relations involved in racist expressions. Legislative notions of offensiveness, incitement and hatred are discussed, and their appropriateness queried. Chapter Nine concludes that Australian legislation fails to meet the problem.

The scope of the Australian right to freedom of expression in a political context is considered in the first part of Chapter Ten, along with the various assumptions which appear to underlie the High Court's development of that right. It is argued that those assumptions are not correct and will unduly limit the development of an innovative Australian jurisprudence in the area of communications. In the second part, the issue of the constitutionality of racial vilification legislation is considered and it is concluded that the legislation is constitutional.

I conclude that the Australian talent for adopting outside influences and making them our own should be exercised as a matter of urgency in order to reconceptualise our legislation against racist expression and the influences of First Amendment jurisprudence.

Methodology and theory-testing

The methodology I use in this thesis draws upon the insights of contextual theories, including cultural studies, political, feminist[49] and critical race theories,[50] and Shklar's

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[49] See Martha Minow, *Making All the Difference: Inclusion, Exclusion, and American Law*, Cornell University Press, Ithaca and London, 1990, especially 198ff in which she describes relational themes in the work of feminists such as Carol Gilligan as follows: "(1) attention to relations between what we know and who we are and where we stand; (2) concern for relationships and wholes rather than parts; (3) interest in human connections rather than posited individual autonomy; and (4) consideration of contexts and particularities rather than of abstractions and generalities."

[50] Like Patricia Mann, I believe that the case for hate speech restrictions can be seen more clearly when one broadens the analysis to take account of sexist and homophobic speech acts as well:

analyses of liberalism and injustice. These theories and methodologies, to use Lull's words, make subjectivities and politics explicit, and take into account race, gender and class differences in comparison to traditional social science's claims of objectivity.[51] I also draw upon non-legal material, bearing in mind Margaret Davies' comment that "legal theory now unavoidably rests on an interdisciplinary approach to fundamental questions about law."[52]

Most 'free speech' proponents argue from a supposedly theoretical or philosophical liberal stance against any regulation of free speech that has the purpose of limiting racist speech, reasoning from purportedly absolute or transcendent values and principles to justify their claims. Such theoretical arguments, not being capable of proof, are also difficult to test. Everyone insists on the truth of his or her own assertions but notoriously, says Fish, what is a reason to you may be irrational to me in that it is incompatible with the principles that ground my perception and judgment.[53] One's own reasoning comes from the context in which one is situated: from one's culture and personal experiences, and from the social, economic and political assumptions that the thinker uses to justify various aspects of his reasoned arguments.[54]

It is arguable that no useful theory can avoid being 'contextual'. The word is used here to indicate theories which attempt to solve real-life problems and which 'deconstruct' opposing theories by reference to their compatibility with existing knowledge. Such contextual theories are necessarily 'political': they aim to remedy existing problems by a variety of means, including through law reform, with a view to redressing existing economic, social and legal inequalities. Contextual theories critically analyse

Patricia S. Mann, "Hate Speech, Freedom, and Discourse Ethics in the Academy" in Caudill and Gold (1995) 255 at 257, 258.

51 James Lull, *Media, communication, culture: A Global Approach*, Polity Press, Cambridge and Oxford, 1995, 111.

52 Davies (1994) v, noting also that "law retains in many ways its isolationist mentality."

53 Stanley Fish, *There's No Such Thing as Free Speech and It's a Good Thing Too*, Oxford University Press, Oxford and New York, 1994, 7.

54 See generally Jonathan Weinberg, "Broadcasting and Speech" (1993) 81 *Calif. L. Rev* 1103, 1158ff especially the references cited in footnote 265.

'philosophical' or theoretical ideals that ignore or deny context, content and consequences, in the light of knowledge of existing social conditions and behaviours. They expose the ways in which supposedly neutral, value-free and objective legal arguments actually promote a particular perspective. They argue that legal reasoning is not distinct, as a method for reaching correct results, from ethical and political analysis.[55] They question existing frames of reference used in reforming the law, uncovering underlying assumptions and deeply entrenched partialities.[56] Contextual theories acknowledge that interpretations and applications of our most basic legal and political principles are likely to change over time, sometimes quite radically, and critically analyse the tendency of legal and political philosophers to cling to economic or political paradigms that have served them in the past.[57]

As Kathleen Mahoney notes, the assumptions made in opposing legislation against racist activities are founded in an outdated – and elitist – liberal or libertarian[58] view of the world, and need re-examination in the light of current social mores and modern ideals for the multicultural societies of today. In her words: "eighteenth and nineteenth century theories that served a need that modern democracies have outgrown do not seem to be the best way to solve the problem."[59] The same principles of liberalism that were

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55 Duncan Kennedy, "Legal Education as Training for Hierarchy" in David Kairys (ed), *The Politics of Law*, Pantheon Books, New York, 1990 (revised edition), 38 at 45.

56 Regina Graycar & Jenny Morgan, *The Hidden Gender of Law*, The Federation Press, Leichhardt, 1990, 2 to 6.

57 Mann (1995) 256.

58 To call opposition to legislation against racism 'libertarian' is really to misuse that term. The relevant definition of libertarianism in Alan Bullock & Oliver Stallybrass, *Fontana Dictionary of Modern Thought*, Fontana, 1979, refers to "an extreme form of political liberalism, *hostile to all forms of social and legal discrimination between human beings* and favouring the absolutely minimal constraint by society on individual freedom of action." (my emphasis). Thus 'libertarianism' has two equally important limbs: the favouring of minimal societal constraints, and opposition to all forms of social and legal discrimination. 'Liberalism' on the other hand, has both social and free market forms.

59 Kathleen Mahoney, *Where is the Balance? Hate Vilification Legislation with Freedom of Expression*, Queensland Bureau of Ethnic Affairs, Ethnic Affairs Commission of NSW, Woolloongabba Queensland, Ashfield NSW 1994, 20. See generally Immanuel Wallerstein, *Unthinking social science – the limits of nineteenth-century paradigms*, Polity Press and Blackwell, Cambridge, 1991 and particularly Chapter 6 at 80ff. See also Paul R. Brietzke, 'How and Why the Marketplace of Ideas Fails' (1997) 31 *Val. U. L. Rev* 951 at 955, arguing that the absolutist protection that Meiklejohn accorded to political speech as early as 1948 (in *Free*

previously interpreted as denying the rights of citizenship to women and minorities are hardly the most appropriate principles with which to address hate speech, particularly given that racial and sexual exclusions remain part of the political fabric of our society. The process of altering anti-democratic doctrinal meanings and applications has been a slow and painstaking one. The hate speech controversy is arguably the latest chapter, says Mann, in the process of questioning and redefining our notions of social justice in order to overcome the lag between evolving local perceptions of injustice and more inflexible, absolute conceptions of justice.[60] But such redefinition is possible – through knowledge.

A theory is a generalization or set of constructs, definitions and propositions that attempts to explain and predict some phenomena in a systematic manner by specifying the relationships amongst variables. As such, it is inherently contextual.[61] For a theory to be successful; that is, to enhance understanding of the relationships between different phenomena, the theory must be compatible with the observations made relative to it and with already existing knowledge. It must adequately explain the events or phenomena being studied.[62] A theory can also serve a synthesizing function,

> combining ideas and individual bits of empirical information into a set of constructs that provides for deeper understanding, broader meaning, and wider applicability. In a sense, *a theory attaches meaning to facts and places them in proper perspective*.[63]

Thus, acceptance of any theory depends upon acceptance of the principal assumptions that the theory makes about human nature, ontology, methodology, and methods of

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Speech and its relation to Self-Government) assumed an effective participatory democratic process which did not and does not exist.

60 Mann (1995) 256 and 259.

61 William Wiersma, *Research Methods in Education, An Introduction* (6th ed), Allyn and Bacon, Boston, 1995, 18 quoting F.N. Kerlinger, *Foundations of behavioral research*, Holt, Rinehart & Winston, New York, 1986, 3rd ed, 9, in the context of educational research.

62 Wiersma (1995) 19.

63 Wiersma (1995) 19 (emphasis added).

investigating phenomena.[64] Underlying those assumptions are issues of knowledge, and therefore it can be said that acceptance of any theory is not possible without acceptance of the reliability of the theorist's claims to knowledge.

The success of an acontextual theory can also be assessed in terms of the theorist's claims to knowledge, because a deliberately acontextual theory will generally identify and attach meaning to values, and place them in perspective. Acceptance of such a theory will therefore depend upon acceptance of the reliability of the theorist's claims to have attached appropriate meanings and perspectives to the identified values.

The problem with most arguments against racial vilification legislation and in favour of maximising free speech is that the arguments rely on assumptions which are unproven, rather than upon shared knowledge. These assumptions include: the harmlessness of racial vilification, the necessity of limiting incursions on free speech in order to encourage values such as truth, tolerance or democracy, or the 'greater harms' caused by racial vilification legislation such as the discouragement of valid speech about 'racial' issues. Thus Professor Chesterman says that racial vilification legislation might "significantly inhibit public discussion of a wide range of political, social and cultural issues."[65] The free speech sensitivities expressed in this statement are virtually a 'given' of liberal opposition to racial vilification legislation. The conclusion is that free speech is inappropriately restricted by legislation, and that tolerance of racist views is preferable to legislation limiting racist speech.

But purely theoretical or philosophical arguments would appear to be inadequate in addressing any aspects of law reform or anti-discrimination issues such as legislation against racist speech. What is at issue is the impact of particular behaviour upon

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64 For example, a poll of 1,524 randomly selected Americans and subsequent in depth interviews with 40 survey participants suggested that the debate on the desirability of affirmative action is shaped by divergent views about the nature, extent and existence of racial and sex discrimination: Richard Morin and Sharon Warden, "Affirmative Action Poll Divides US", *Guardian Weekly,* 2 April 1995, 20.

65 Michael Chesterman, *Freedom of Speech in Australia: A Delicate Plant,* Ashgate, London, 2000.

individuals and society, which cannot be considered purely in terms of reason without reference to observation and experience. It is not possible to reason in a purely abstract way about social issues nor to identify transcendent truths which, says Fish, probably none of us could spot anyway.[66] Where theories cannot be researched, the answers to the issues they raise are for the most part based on value judgments,[67] which are inevitably the contextual results of social and historical structures, and based on assumptions about the nature of reality. Even if one defines philosophy as a set or system of ultimate values one faces the perennial problem that it is only through context that we can posit and examine chosen values. Rational pursuit of a value-system must rest on a general notion of the nature of the world in which values are sought – that is, on observation and context.[68]

While free speech is an important value, Australians should be open to other ways of viewing that value. In many countries in Europe, and under the European Convention on Human Rights, free speech is treated as a value that needs to be moderated by other values such as equality and human dignity – with no obvious ill-effects upon the democratic structures of those countries. Speech is not so fragile as First Amendment jurisprudence might suggest. The theoretical underpinning to the concept that 'free speech' is not a primary or absolute value is the view which is more widely accepted in European philosophy (and by Critical Race theorists) than in Anglo-American philosophy, that it is not possible to have real freedom without equality. Inequality leads to the subordination of some by others, and hence diminishes the freedoms of the subordinated.

First Amendment doctrines do not provide a convincing theoretical basis for the treatment of speech, even on their own terms. They are heavily dependent on economic metaphors and assumptions about the operation of the market which are highly arguable in that context, let alone when imported into another discipline. The doctrines are

66 Fish (1994) 8.
67 Wiersma (1995) 30 and 31.

strongly influenced by notions of elite individualism, free will, and 'deliberative democracy' – all connected with the concept of 'identity' and its relationship with society and with politics. And as mentioned, First Amendment jurisprudence consistently underrates the harms caused by racist behaviour and speech. If Australian legislation is to give primacy to redressing and preventing harm, and if the Australian legal system is to be perceived as a viable system which does not condone racism or racial vilification, we must look outside the First Amendment paradigm which is based on abstract arguments, and seek a contextual involvement with the realities of racist harm. Similar arguments are put forward by Critical Race Scholars in the United States, who argue that that racist expression causes a variety of serious harms to the victim, their group, and the whole of society which are clearly seen in the divisions within American society[69] and that proscribing such harms is worth some small limitation on speech.

Grounded in the jurisprudential concerns and critical race theory touched on above, this thesis is sympathetic to the experiences of the victim in addressing racial vilification. This thesis pursues an understanding of the particularities and limitations of free speech jurisprudence through a consideration of Australian history, sociology, culture and discourse.

Conclusion

This thesis is in many ways a story about the *status quo*; about what racism is, and how it develops and reproduces itself within society through racist speech and ideas. Many people see that story as natural and inevitable; something that law cannot and should not change. But critical legal studies tell us that nothing is necessary, natural or unchangeable. There are always other ways. It is imperative that ideas such as 'free speech' and 'tolerance' be analysed and articulated rather than uncritically accepted as

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68 Fish (1994) 8.

69 As referred to by Justice Thurgood Marshall in a 1992 speech, saying: "as I look around, I see not a nation of unity but division…" – quoted in A. Leon Higginbotham Jr, *Shades of Freedom, Radical Politics and Presumptions of the American Legal Process*, Oxford University Press, New York and Oxford, 1996, xxxi.

universal values with agreed content. Following Critical Race Theory, I also propose that such deconstruction be followed by reconstruction, in which law has a primary role to play.

Limiting racist speech helps society. Restrictions upon racist speech remove a burden of fear from the victims of such speech. Restrictions thus maximise speech opportunities for victims of racism, and increase their opportunities for democratic participation. This thesis strives to give meaning to 'free speech' as a social experience to be shared by the historically disadvantaged as well as by our cultural elites.

The essential role of racial vilification in promoting racism and racist violence is one that Australian jurisprudence must explore. We need to decide what to do when the oppressive speech that we hate is neither eccentric nor unpopular, but habitual and accepted.[70] Incitements to racial or religious violence, which provide the underpinning even for international terrorism, must be addressed. To import the abstract limitations of First Amendment jurisprudence is to be diverted from the real issues.

[70] Mann (1995) 264.

Chapter 1: The background to current discussions about regulating racist speech in Australia

> *Australia does have a much better track record of tolerance and understanding of other cultures, races and religions than many other multicultural nations ... But the fact that we do have a more tolerant society should not blind people to the fact that acts of racial hatred, violence, intimidation and destruction of property do occur against individuals and groups in our society. To pretend that they do not occur is to demonstrate arrogance or ignorance ... .*[1]

Part One considers the role of racial vilification in reproducing racism. In this Chapter I sketch the cultural and political milieux that inform local understandings of race issues in the contemporary political landscape. The problems of racism and racist ideology are reflected in contemporary debates about Australian nationalism and identity, Reconciliation, historiography, gang-related crime, immigration and refugees.

This Chapter provides a general introduction to more theoretical discussions which follow, by exploring the environment within which racism occurs in Australia. Drawing on an understanding of Australian social and political events we come to appreciate the cultural assumptions that inevitably influence Australian perceptions of racial vilification legislation and jurisprudence, even though this influence may not be openly acknowledged.[2]

Australia's racist heritage

Racism in Anglo-Australian culture is the result of many influences: England's ethnocentrism and long association with slavery, the imperialism of Britain and North

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1 Garrie Gibson, *Hansard*, House of Representatives, 15 November 1994, 3348.

2 For another perspective see Andrew Jakubowicz, "White Noise: Australia's struggle with multiculturalism", in Cynthia Levine-Rasky (ed), *Working Through Whiteness: International Perspectives*, State University of New York Press, Albany, 2002, 107.

America, the competitive nature of laissez-faire economics, the values associated with capitalism and colonialism, the English class system, the way in which the prevalent forms of Christianity supported all of these, and theories of Social Darwinism and Developmentalism.[3] The long history of European antisemitism is another part of our Anglo-Australian cultural heritage.

Treatment of Aborigines

> *Very few minorities have suffered anything like the duration and extent [for Aborigines] of the gun and the whip, the neck chains and the rape, the exile to remoteness, the break-up of families, the forced removal of children, and the indefinite periods of legal wardship and minority status.*[4]

Hollinsworth notes that, like other settler-state nations, Australia has had fundamental problems in incorporating the dispossessed indigenous people into the body politic.[5] In Australia, as in the United States and Canada,[6] the indigenous people have come to be represented in popular discourse as 'foreigners' – not the 'proper' inhabitants of the land that was formerly theirs.[7] This political marginalisation was facilitated by reduction of the Aboriginal population through disease and conflict during English settlement, and the subsequent physical and social marginalisation of Aborigines through their forcible removal to reserves.

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3 These influences are described in more detail in Chapters 2 and 3.

4 Colin Tatz, *Reflections on the Politics of Remembering and Forgetting*, Centre for Comparative Genocide Studies, Macquarie University, 1995, 19.

5 Hollinsworth (1998) 2.

6 See Sherene H. Razack, "'Simple Logic': Race, the Identity Documents Rule, and the Story of a Nation Besieged and Betrayed" in Valdes et al (2002) 199 at 200.

7 See Andrew Jakubowicz (ed), *Racism, Ethnicity and the Media*, Allen and Unwin, St Leonards, 1994, 54. In 2003 Liberal Senator Mason suggested, with some approval from the Prime Minister, that federal politicians should no longer acknowledge the traditional Aboriginal ownership of land they were visiting, but should acknowledge the contributions of white settlers: Mark Riley, "Sorry, but the PM says the culture wars are over," *Sydney Morning Herald*, 10 September 2003, 1 and 8.

It is only in relatively recent years that the treatment of Aborigines by colonists and by governments after Federation has become a matter of popular knowledge and concern.[8] While there had been decades of academic work in the area,[9] the catalyst seemed to be the publication of reports on the 'stolen generations': *Learning from the Past*[10] by the Southern Cross University in Lismore in 1994 and, in 1997, HREOC's *Bringing them Home.*[11] The increase in popular appreciation of the severity of past treatment of Aboriginal people resulted, however, in a media and government-fuelled backlash known as the 'History Wars,' which is still being played out.[12]

Scholars such as Colin Tatz and Henry Reynolds argue that Aborigines were deliberately massacred during colonial times, and that the massacres, forced assimilation and the removal of children meet international definitions of genocide.[13] This is hotly disputed, most publicly by Australian historian Keith Windschuttle, who argues that treatment of Aborigines was not as severe or as deliberate as others claim.[14]

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8 See Henry Reynolds, *Why Weren't We Told?* Viking, Ringwood, 1999. In 1988 it was possible to say that the 'quiet' in relation to the conquest of Aboriginal society was "a product of the very severity of the conquest… an active silencing of historical guilt and possible arguments about reparations": Stephen Castles, Bill Cope, Mary Kalantzis and Michael Morrissey, *Mistaken Identity: Multiculturalism and the Demise of Nationalism in Australia*, Pluto Press, Leichhardt, 1992 (1st published 1988) 1.

9 See generally Colin Tatz, *With Intent to Destroy: Reflections on Genocide*, Verso, London and New York, 2003, 92 and 100ff.

10 *Learning From the Past: Aboriginal perspectives on the effects and implications of welfare policies and practices on Aboriginal families in New South Wales*, Gungil Jindibah Centre, Southern Cross University, Lismore, NSW, 1994.

11 Human Rights and Equal Opportunity Commission, *Bringing them Home: A Guide to the Findings and Recommendations of the National Inquiry into the Separation of Aboriginal and Torres Strait Islander Children from their Families*, HREOC, Sydney, 1997, available at: http://www.austlii.edu.au/au/special/rsjproject/rsjlibrary/hreoc/stolen/

12 See Stuart Macintyre and Anna Clark (eds), *The History Wars*, Melbourne University Press, Carlton, 2003.

13 See Tatz (2003) Chapter 4 particularly 76ff and Henry Reynolds, *An Indelible Stain? The Question of Genocide in Australia's History*, 2001. Tatz (79) rejects Reynolds' argument that the partial or failed genocide of Tasmanian Aborigines was not therefore a 'genocide', given that attempted destruction of part of a people is still defined as genocide. For other considerations of the extent of violence between between whites and Aborigines, see Lyndall Ryan, *The Aboriginal Tasmanians*, Allen and Unwin, Sydney, 1996 (1st ed 1981), Raymond Evans, Kay Saunders and Kathryn Cronin, *Exclusion, Exploitation and Extermination: Race Relations in Colonial Queensland*, Australia and New Zealand Book Company, Sydney, 1975 and R.H.W. Reece, *Aborigines and colonists: Aborigines and colonial society in New South Wales in the 1830's and 1840's*, Sydney University Press, Sydney, 1974.

14 Keith Windschuttle, "The Myths of Frontier Massacres in Australian History" (3 parts: (2000) 44 (10) *Quadrant* 8, (2000) 44 (11) *Quadrant* 17 and 44 (12) *Quadrant* 6), and *The Fabrication*

Whether or not Windschuttle is correct, there is no doubt that from roughly 1836, when the Colonial Office instructed its governors to prevent Aborigines from dying out altogether, until the 1970s or 1980s, depending upon the region, Aborigines were legally controlled "physically, mentally and geographically"[15] in respect of the most minute details of their lives by repressive legislation which imposed upon them the status of inferior 'wards' of State or Territory governments.[16]

Colin Tatz has described the constant and almost insurmountable governmental restrictions of passes, of bans, of controlled income, which Aboriginals had to face until very recently in any attempt to make sporting careers.[17] He has also described the ways in which legislation intended to benefit Aborigines has often been administered with antithetic values or aims. [18]

The legal origins of the 'Stolen Generations' were in 1869 in Victoria, when the *Aboriginal Protection Act* established a 'Board for the Protection of Aborigines'. Aborigines could be told where they could live, children could be removed from their parents, and all moneys earned by Aborigines were placed under government control.[19]

The legislation initially had the effect of incarcerating 'full blood' Aborigines on missions or government reserves far from major cities or towns, without the ability to leave or to communicate with friends or family in other areas.[20] In 1886 Victorian legislation banned all 'half-castes' under 35 years old from the reserves – effectively

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of Aboriginal History, Volume I: Van Diemen's Land 1803 – 1847, Macleay Press, Sydney, 2002.

15 Colin Tatz, "Aborigines and Civil Law" in *Aborigines and the Law*, edited by Peter Hanks and Bryan Keon-Cohen, George Allen & Unwin, Sydney, 1984, 110.

16 See generally John McCorquodale, *Aborigines and the Law: a Digest*, Aboriginal Studies Press, Canberra, 1987 and Hollinsworth (1998) 94 and references cited there.

17 *Obstacle Race*, University of NSW Press, Sydney, 1995.

18 Colin Tatz's PhD thesis, *Aboriginal Administration in the Northern Territory of Australia*, Australian National University, 1964.

19 Jan Roberts, *Massacres to Mining: The Colonisation of Aboriginal Australia*, Dove Communications, Blackburn, 1981, 42.

20 Roberta B. Sykes, *Black Majority*, Hudson Publishing, Hawthorn, 1989 at 69; see also Hollinsworth (1998) 115-116, and references cited there including: Tony Austin, *I can picture the Old Home so clearly: The Commonwealth and 'Half-caste' youth in the Northern Territory*

removing many children from their families from birth.[21] Usually Aborigines were prosecuted for leaving or escaping from reserves, at least until the 1940s.[22] Aborigines with leprosy were taken to a leprosarium on Channel Island where they were kept until death.[23] Subsequently, when government policy was that 'half-castes' should be absorbed into the white community, children were taken from their families and sent to special institutions (often, ironically, in very isolated places) or to white families.[24]

Similar legislation followed in other States.[25] The 1902 Commonwealth *Franchise Act* gave all women the right to vote in federal elections but excluded 'aboriginal natives of Australia, Asia, Africa or the Islands of the Pacific except New Zealand' unless they already had the vote at State level (as stipulated in s 41 of the Constitution). The Constitution also allowed the States to retain the exclusive power of legislating in relation to Aborigines.

Between 6,000 and 10,000 children are estimated to have been taken from their parents in NSW before 1969. The rate of removal of Aboriginal children was approximately one child taken out of every five Aboriginal children, as opposed to a rate of one in 300 for the general community.[26] It was only in 1987 that legislation was passed in NSW to stop this practice and, where children were taken from their families, to make placement with Aboriginal families a priority (the *Children (Care and Protection) Act 1987*). Aboriginal people argue that even today many Aboriginal children are removed from their parents and placed with white foster parents.[27]

Both reserves and missions have been compared to prisoner of war or concentration camps, and the state in which Aborigines were forcibly held there has been described

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1911 –1939, Aboriginal Studies Press, Canberra, 1993 and Sue Maushart, *Sort of a Place like Home*, Fremantle Arts Centre Press, Fremantle, 1993.

21 Tatz (2003) 88, Hollinsworth (1998) 121, Roberts (1981) 33.

22 Roberts (1981) at 28ff.

23 Tatz (1964) at 127 to 130.

24 Tatz (2003) 90ff.

25 See list of relevant legislation in the Appendices to *the Bringing Them Home* report: HREOC (1997).

26 Debra Jopson, "The Secrets of the Shelf", *Sydney Morning Herald* 6 March 1995, 11.

as amounting to a total deprivation of human rights and basic human needs.[28] It was common in Queensland until about 1960 for police to chain Aborigines together by the neck where more than one was arrested.[29] Managers of reserves or missions had almost total discretion in imposing their authority over the Aborigines under their control, including to ban particular Aborigines from reserves (and hence permanently deprive them of any contact with their families) and to do such things as punishing Aborigines for speaking their own language[30] or separating husbands from their wives for "such crimes as non-attendance at Sunday services."[31] Managers effectively had the power of life and death:

> We had absolutely no freedoms. Even our kids were taken from us when they were little, locked in dormitories, we could only see them through the fence. Does that strike you as human? ... If the manager wanted to refuse you tucker, he could and did. He could make your whole family starve until he was good and ready to put you back on rations. If he wanted you to die, well, he didn't have to kill you himself, personally – he could just wait 'til you got sick and then stop you from seeing a doctor. They'd stop us from going to doctors, to hospitals. Even from taking sick babies to hospitals.[32]

When Aborigines were employed they were poorly paid or underpaid.[33] Often their wages were paid to protective bodies but never used for their benefit. Even when Aborigines were no longer removed to reserves, their behaviour was still restricted by

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27 Human Rights and Equal Opportunity Commission, *Moving Forward: Achieving reparations for the Stolen Generations*, Conference Papers, 15/16 August 2001, HREOC, Sydney, 2001.

28 Sykes (1989) 87 and 217 to 219.

29 Roberts (1981) at 36.

30 Sykes (1989) 218, Roberts (1981) at 43.

31 Roberts (1981) at 41.

32 Sykes (1989) 217 to 218, quoting from a personal interview. See generally Inga Clendinnen, *True Stories*, ABC Books, Sydney, 1999.

33 Hollinsworth (1998) 97 and references cited there including Charles Rowley, *The Remote Aborigines*, ANU Press, Canberra, 1971, Frank Stevens, *The Politics of Prejudice*, Alternative Publishing Co-op, Sydney, 1980, Anne McGrath, *'Born in the Cattle': Aborigines in Cattle Country*, Allen and Unwin, Sydney, 1987 and Herb Wharton, *Cattle Camp*, Queensland University Press, St Lucia, 1994.

legislation. Australian icon Namatjira was jailed for 2 months for supplying his relatives with alcohol[34] and died soon after his release.

These matters have been dealt with extensively by writers such as Hollinsworth,[35] Reynolds, Evans, and Ryan. Colin Tatz sums up the present implications of the history of Anglo-Australian treatment of Aborigines:

> … since we are fundamentally a racist society, with an appalling history that includes genocide, we are not wholly convinced about the rhetoric of rights, equality, distributive justice, and fairness. Perhaps, consciously or subconsciously, we want to preserve the right to not only to feel what we feel about Aborigines but then to act on such feelings, legitimately.[36]

Acting Race Discrimination Commissioner, Dr William Jonas, in his introduction to HREOC's 2001 report *National Consultations: Racism and Civil Society – 'I want respect and equality'* says that every community consultation with HREOC identified the indigenous people of Australia as those worst affected by racism.[37]

Treatment of immigrants

"I hate wogs"
– song by Eric Bogle

In the nineteenth century, public discussions of treatment of Aborigines and of immigration were conducted quite separately although there were many parallels in policy and practice.[38] Government policies against Asian immigration developed later

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34 The original sentence was for 6 months but the experience of imprisonment was traumatic for him. While he had obtained citizenship rights and was no longer a 'ward' whose right to alcohol was restricted, his relatives remained under wardship limits: Hollinsworth (1998) 150.

35 see generally Hollinsworth (1998) Chapters 4 and 5.

36 Colin Tatz, "Racism and Rules" (1993) 4 (2) *Polemic* 79 at 82.

37 Available at: http://www.humanrights.gov.au/racial_discrimination/consultations/consultations.html.

38 Anne Curthoys, "An uneasy conversation: the multicultural and the indigenous" in John Docker and Gerhard Fischer, *Race, Colour and Identity in Australia and New Zealand*, University of NSW Press, Sydney, 2000, 21 at 22 to 25.

than policies to eliminate or confine Aborigines. As convict transportation to NSW declined, employers sought to introduce cheap Chinese and Indian labour, although the Colonial Office was opposed to the idea on the basis that it would discourage British migration and would prevent Australia from being reserved for the 'English.'[39] Queensland farms did obtain some 'Kanaka' labour from Melanesia.[40] Camel-drivers from Afghanistan, Pakistan, and sometimes from Turkey, Egypt and Iran, were employed in major projects such as the 1870-72 overland telegraph line from Port Augusta in the south to Darwin in the north, which is why the Alice Springs to Adelaide train was called the 'Ghan'. Some married Aboriginal women.[41]

Gold discoveries in NSW, Queensland and the Northern Territory attracted more Chinese immigration, but also led to anti-Chinese riots, and restrictive legislation.[42] In the late 1880s the *Bulletin* and *Queensland Worker* sensationalised the 'yellow peril.'[43] Anti-Asian feelings largely had economic origins.[44] Chinese were forced out of the more lucrative professions such as shearing, and into food production, restaurants and laundries.[45] Indians (despite being British citizens) were restricted from jobs such as furniture making and from government contracts. All Asians were prevented from owning land or voting.[46]

The Federal *Immigration Restriction Act* of 1901 and *Naturalisation Act* of 1903 legislated for a 'white' Australia, introducing discrimination in entry, residence and citizenship requirements, resulting in a decline in Australia's Chinese population.[47] HREOC argues that the White Australia policy has had a lasting impact on the national

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39 Hollinsworth (1998) 95.

40 Hollinsworth (1998) 96 and 108-109. The Kanakas were mainly from Vanuatu and the Solomon Islands and were sometimes kidnapped and brought to Australia to serve fixed terms of labour ('blackbirding'). This practice continued roughly from the 1860s to the 1920s.

41 Hollinsworth (1998) 105-107.

42 Curthoys (2000) 21 at 23 and Hollinsworth (1998) at 101.

43 Hollinsworth (1998) 102.

44 Rob White, "Immigration, nationalism and anti-Asian Racism" in Cunneen et al (1997) 15 at 29ff.

45 Hollinsworth (1998) 101.

46 Hollinsworth (1998) at 104.

47 Hollinsworth (1998) at 103.

social development of Australia, allowing the construction of a populist national identity which excludes and marginalises groups on the basis of ethnicity and race.[48]

Under the White Australia policy, not only were overseas blacks unable to migrate to Australia from overseas, but they were discouraged from even coming to Australia to visit.[49] That Australia was politically committed to a racist policy was emphasised by Prime Minister Billy Hughes at the Versailles peace conference. Hughes was successful in leading a movement to defeat the Japanese proposal to insert a statement supporting racial equality into the League of Nations Covenant. The White Australia policy was slightly relaxed from 1947 because of the post-war need for immigrant labour. The immigrants, like the Aborigines, were expected to assimilate.[50]

> The consensus of opinion was that, if this country was to grasp the opportunity to play an important role in the post-war period of redevelopment, Australia had to increase its population dramatically. So we embarked on a program of immigration on a scale not seen before in this country. But while there was agreement on the *need* for immigrants, there was also an attitude that we really didn't *want* them. This contradiction was supposed to be resolved by the policy of assimilation. Simply put, migrants of non-English-speaking background were expected to become like other Australians by suppressing their ethnicity and adopting the 'Australian way of life'.
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> … The children of migrants entered a world where all their experiences and their very identities were totally devalued. This was and is one of the appeals of an assimilationist policy; it puts the onus for change squarely on the

48 HREOC (2001b).
49 Sykes (1989) 8.
50 Curthoys (2000) 21 at 26.

> shoulders of the immigrant, while expecting the maintenance of the status quo from all the rest.[51]

The White Australia policy officially ended in 1966.[52]

Kane has argued that the White Australia policy reflected laudable aims: that Australia would be a unified British society, democratic and egalitarian, predominantly Christian, and would provide a high and growing standard of living for all members. Unfortunately these aims were not seen as achievable unless Australia was a predominantly white society.[53] Creating a national identity is primarily about exclusion,[54] which is what makes a nation "possible and coherent."[55] Nationalism is inherently racist where the 'other' is defined by race, because the 'other' must still be included in, and remain connected to, the nation in order to reflect the characters which are "contrary to the nation's positive, or posited, being."[56]

In the first half of the twentieth century, both immigrants and Aborigines were 'removed or contained'[57]: "one group … by confinement to reserves and fringe

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51 Frank Bassini, "Been there, done that!" in David Goodman, D.J. O'Hearn and Chris Wallace-Crabbe (eds), *Multicultural Australia, the challenges of change*, Scribe, Nerwham, Victoria, 1991, 53 at 54 and 55.

52 Curthoys (2000) 27. At this time the qualifying period for citizenship was reduced from 15 years to 5 years for non-European immigrants, the same period as for European immigrants. In the previous years both Liberal and Labor parties dropped the policy from their platforms: Hollinsworth (1998) 237-8.

53 John Kane, "Racialism and Democracy: The Legacy of White Australia" in Geoffrey Stokes (ed) *The Politics of Identity in Australia*, Cambridge University Press, Cambridge, 1997, 117 at 122.

54 See for example Higginbotham, Jr (1996) xxiii and generally in relation to the history of exclusion of blacks from all aspects of democracy in the United States; Etienne Balibar, "Racism and Nationalism" in Etienne Balibar and Immanuel Wallerstein (eds), *Race, Nation, Class: Ambiguous Identities*, Verso, London and New York, 1991 (translation of Etienne Balibar by Chris Turner) 37 at 59-60 (1991b).

55 Peter Fitzpatrick, "Nationalism as Racism" in Peter Fitzpatrick (ed), *Nationalism Racism and the Rule of Law*, Dartmouth, Aldershot, 1995, 3 at 17.

56 Fitzpatrick (1995a) at 10. As Balibar notes, this leads to the paradox of nationalism in which the aim of being 'at home' amongst 'one's own' is necessarily unachievable because of the perceived divisions within one's own society: "'Class Racism'" in Balibar and Wallerstein (1991) 204 at 215 (1991c).

57 Hollinsworth (1998) 2.

settlements, the other by immigration policies which literally excluded them."[58] In order to achieve democratic ideals for all citizens, colonial Australians saw it as necessary, says Kane, to choose between the following:

- admit a significant population of coloured peoples but deny them citizenship (as is still widely practised in Europe and elsewhere);
- admit these people and grant them citizenship (perhaps after providing them with the educational and cultural resources necessary for the acquisition of citizenship capacities); or
- avoid the whole problem by refusing to admit them in the first place (and by encouraging the departure of those already here).[59]

Generally between Federation and the end of the White Australia policy the third choice was followed – ignoring the situation of the Aborigines, who were not seen as citizens.[60]

Multiculturalism

What archaeology shows is that everyone is the descendant of an immigrant.
Dr David Clark May 2, 2000, SBS Television

While legislative improvements to the situation of Aborigines and immigrants came about during the 1950s and 1960s, partly as a result of the discourse of anti-racism that followed the Holocaust, Curthoys argues that here too, the positions of both groups

58 Curthoys (2000) 25.
59 Kane (1997) 126.
60 Curthoys (2000) 25. In Germany, some constitutional rights are available only to citizens (including freedom of assembly, freedom of association and freedom of profession) and some to all persons generally: Sabine Michalowski, and Lorna Woods, *German Constitutional Law: The protection of civil liberties*, Ashgate, Dartmouth, 1999, 69.

was seen as separate and "the two campaigns for equality and cultural respect arose in different contexts and were argued by different people."[61]

Multiculturalism[62] was adopted by the Labor Federal Government in 1973, reflecting a shift from assimilation to pluralism.[63] Curthoys identifies the developing notion that 'full' assimilation was insensitive, if not impossible, as first fully analysed in Australia in *The Migrant Presence* (1978) by Jean Martin.[64] In so far as multiculturalism was a policy for *managing the consequences of cultural diversity* in the interests of the individual and society as a whole,[65] it was validly criticised as 'white monomorality,'[66] a conservative perspective "aimed at the Anglo-Australian ruling class, reassuring them that cultural minorities will not be allowed to threaten their material superordination."[67] Multiculturalism does not overcome the concept that 'white' is normal or neutral and the ethnic is the 'other' - a concept now considered in detail through critical white studies. Multiculturalism can be criticised as maintaining the notion of artificial boundaries between groups and hence as an inadequate principle to

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61 Curthoys (2000) 26.

62 'Multicultural' is used in this thesis to describe societies which are plural and which value their pluralism, rather than attempting to reduce or eliminate it: J.W. Berry, "Multiculturalism and Psychology in Plural Societies" in L.H. Ekstrand (ed), *Ethnic Minorities and Immigrants in a Cross-Cultural Perspective*, Swets North America Inc, Berwyn, 1986, 35. Australian multiculturalism is also about access and equity: Ghassan Hage, *Against Paranoid Nationalism: Searching for Hope in a Shrinking Society*, Pluto Press, Annandale, 2003, 110 and Marian Sawer, *The Ethical State? Social liberalism in Australia*, Melbourne University Press, Carlton, 2003, 182. See generally also Ghassan Hage, *White Nation: Fantasies of White Supremacy in a Multicultural Society*, 1998.

63 Hollinsworth (1998) 244 and United Nations, *Special Rapporteur's report on Australia to the UN Commission on Human Rights* 2002, available at http://www.unchr.ch/Huridocda/Huridocda.nsf/(Symbol)/E.CN.4.2002.24.Add.1.En?Opendocument, par 35, 17.

64 Curthoys (2000) 28.

65 Department of Prime Minister and Cabinet, Office of Multicultural Affairs, *National Agenda for a Multicultural Australia: Sharing our Future*, AGPS, Canberra, July 1989, vii.

66 Jon Stratton, "Multiculturalism and the Whitening Machine, or how Australians became white" in Ghassan Hage and Rowanne Couch, *The Future of Australian Multiculturalism*, Research Institute for Humanities and Social Sciences, University of Sydney, 1998, 163.

67 Andrew Jakubowicz, discussing the 1982 Ethnic Affairs Policy Task Force booklet, *Multiculturalism for all Australians*, in "Ethnicity, multiculturalism and neo-conservatism," in Gill Bottomley and Marie de Lepervanche (eds), *Ethnicity, Class and Gender in Australia*, George Allen & Unwin, Sydney, 1984, 28 at 43. See Curthoys (2000) 30.

deal with the reality of 'cultural hybridity.'[68] Stratton agrees that multiculturalism failed to challenge the notion of insurmountable differences between different cultural groups.[69] Issues of power differentials between and within minority groups, as well as within the majority, are obscured. All cultures are viewed as equal and as internally homogeneous, class and gender structures being ignored.[70]

Multiculturalism was intended to embrace cultural pluralism at essentially a private level, not to change the key institutions of the state but to permit greater access to them.[71] Curthoys comments that multicultural discourse is notably silent as to the colonial features of current Australian life.[72] Nor has that discourse led to the rethinking of primary social values. Angela Chan has noted that there was an assumption that 'costumes, customs and cooking' (to use Sneja Gunew's phrase) could be assimilated into 'mainstream' or white society and that in other respects non-Anglo groups are '*cultura nullia*'.[73] Aborigines, with their special relationship with the land, their dispossession and institutionalisation, protested against any concept of multiculturalism which involved them being seen as one ethnic group amongst many.

Nonetheless, despite these tensions, in retrospect the policy of multiculturalism reflected a more positive attitude to difference than has been shown in Australian politics in more recent years. It also involved government and academic recognition that indigenous and ethnic community concerns were, taking into account the special concerns of Aboriginal society, part of the same spectrum.[74] Indeed in the late 1970s and early 1980s at the time of introduction of state and federal legislation against

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68 Homi K. Bhabha, "Signs Taken for Wonders" in Bill Ashcroft, Gareth Griffiths, and Helen Tiffin, *The post-colonial Studies Reader*, Routledge, London and New York, 1995, 29 at 34, Hollinsworth (1998) 247.

69 Stratton (1998b) 164-165.

70 Peta Stephenson, "'Race,' 'Whiteness' and the Australian Context" (1997) 1 (2) *Mots Pluriels* 297, available at: http://www.com.refer.org/motspluriels/MP297ps.html at footnote 15, citing de Lepervanche.

71 See Hollinsworth (1998) 246ff.

72 Curthoys (2000) 34.

73 Chan, "Playing with Words," in Hage and Couch (1998) 9ff.

74 Curthoys (2000) 29.

various forms of discrimination, there was a feeling that racism was going away, "a colonial legacy which time, education and growing liberalism would cure,"[75] and it was possible to imagine that the demise of nationalism would follow.[76] In 1989 the Federal Government launched its 'National Agenda for a Multicultural Australia' which promoted cultural diversity and social justice issues.[77]

The push for racial vilification legislation

It should be axiomatic that racial vilification is undesirable in a multicultural country like Australia.[78] But the introduction in Australia of legislation against racial vilification has been controversial and has depended upon changes in the political climate. There has not been a broad-based Australian political impetus for anti-racism legislation. While legislation against racial vilification or harassment exists at federal level and in all States and Territories except Western Australia (which does criminalise possession of racist written material), there has always been a tension between the aims of that legislation, and the culture in which it is interpreted and enforced.

Australia's ratification of the *International Convention on the Elimination of All Forms of Racial Discrimination* (ICERD) in 1975 included a reservation with respect to article 4(a)[79] relating to the prohibition of racial vilification, on the basis of a purported conflict with the right to freedom of expression protected by article 20 of the *International Covenant on Civil and Political Rights* (ICCPR).[80]

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75 Jan Pettman, "Combating Racism within the Community" in Andrew Markus and Radha Rasmussen (eds) *Prejudice in the Public Arena - Racism*, Centre for Migrant and Intercultural Studies, Monash University, Clayton, 1987, 128 at 130.

76 Castles et al (1992).

77 Curthoys (2000) 29.

78 McNamara (2002) 1.

79 For the full text of Article 4, see Appendix 1.

80 The Committee on the Elimination of Racial Discrimination recommended in 1994 that Australia withdraw that reservation and adopt appropriate legislation: United Nations, *Report of the Committee on the Elimination of Racial Discrimination*, A/49/18 (1994) par 549 available at http://www1.umn.edu/humanrts/country/australia1994.html. It might be arguable that the enactment of the *Racial Hatred Act* 1995 (Cth) constitutes an implicit revocation of the reservation, although it is doubtful whether the legislation is sufficiently broad in its scope to constitute full compliance with article 4 (a). See generally McNamara (2002) 20 to 22.

From that time there was pressure on the part of ethnic community organisations in Australia for the creation of national racial vilification legislation. National legislation was supported by the Human Rights and Equal Opportunity Commission's *National Inquiry into Racist Violence* (1991), the *Royal Commission into Aboriginal Deaths in Custody* (1991), and the Australian Law Reform Commission's work on *Multiculturalism and the Law* (1992). Proposals to add 'incitement to racial hatred' and racial defamation provisions to the Commonwealth *Racial Discrimination Act 1975* (Cth) were considered in the early 1980s[81] but not implemented. The first racial vilification provisions were introduced in the *Anti-Discrimination (Racial Vilification) Amendment Act 1989* (NSW).[82]

While there was general agreement as to the nature and extent of the problem of racial violence (including vilification) in Australia, views as to the most appropriate form of legal intervention differed. The most extensive proposals came from the *National Inquiry into Racist Violence*. It recommended:

3. That any qualification on Australia's obligations under Article 4(a) of the Convention on the Elimination of All Forms of Racial Discrimination be removed.

4. That the Federal Parliament enact in the Federal *Crimes Act 1914* a new criminal offence of racist violence and intimidation.

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81 See Human Rights and Equal Opportunities Commission, *Proposal for Amendment to the Racial Discrimination Act to Cover Incitement to Racial Hatred and Racial Defamation, Report No. 7,* AGPS, Canberra, 1984; also R. Pettman, *Incitement to Racial Hatred: Issues and Analysis, Human Rights Commission Occasional Paper No. 1*, 1982.

82 This Act added racial vilification provisions to the *Anti-Discrimination Act 1977* (NSW) ss 20C-20D. Legislation was subsequently enacted in Western Australia (see *Criminal Code 1913* (WA) ss77-80); the ACT (*Discrimination Act 1991* (ACT) ss 66-67); Queensland (*Anti-Discrimination Act 1991* (Qld) s 126, South Australia (*Wrongs Act 1936* s 37 and *Racial Vilification Act 1996*) and Victoria (*Racial and Religious Tolerance Act 2001*).

5. That the Federal *Crimes Act* be amended to create a clearly identified offence of incitement to racist violence and racial hatred which is likely to lead to violence.

6. That the Federal *Racial Discrimination Act 1975* be amended to prohibit racist harassment.

7. That the Federal *Racial Discrimination Act* be amended to prohibit incitement of racial hostility, with civil remedies similar to those already provided for racial discrimination.

8. That Federal and State Crimes Acts be amended to enable courts to impose higher penalties where there is a racist motivation or element in the commission of the offence.[83]

The *Royal Commission into Aboriginal Deaths in Custody* recommended that "governments which have not already done so legislate to proscribe racial vilification."[84] However, the Royal Commission did not support the enactment of criminal laws, concluding that conciliation-based laws along the lines of section 20C of the NSW *Anti-Discrimination Act 1977* were preferable.[85] Similarly, in its report on *Multiculturalism and the Law* the Australian Law Reform Commission recommended that incitement of racist hatred and hostility be made unlawful, but (by majority) considered it inappropriate to create any criminal offences.[86]

It seems likely that the lack of support for criminal penalties was a result of 'free speech' sensitivities. These were foremost in the parliamentary and media debates concerning the Federal Racial Hatred Bill, where concern for 'free speech' crossed

83 (1991) 389-90.
84 Royal Commission (1991) 75.
85 Royal Commission (1991) 74-75.

party political lines and conventional left/right divides.[87] While racial vilification legislation has generally been adopted by Labor governments, the first racial vilification legislation was introduced into NSW by a Liberal government. In the Federal Parliament, Democrats were aligned with Liberals in opposition to criminal penalties for racial vilification, arguing that the legislation would effectively reduce social tolerance. Left-wing objectors argued that the 'public interest' exemption was inappropriate, given that public interest is not homogeneous, and would be used to protect the speech of key institutions and help the government avoid addressing the real causes of racism.[88]

Arguments surrounding the 1994 parliamentary debates concerning the proposed Commonwealth *Racial Hatred Act* can be roughly divided into those which deny or minimise the depth and nature of the harms of racism, and those which accept that racism is harmful to some degree, but maintain that legislation would either be ineffective, or would cause 'greater' harms such as 'chilling' otherwise lawful speech, discouraging social tolerance, or undermining democracy through increasingly repressive legislation (the 'slippery slope' argument). Alternatively, it is argued that the legislation could publicise and thus encourage racism through 'martyrdom' of those prosecuted.

Opponents of the legislation at the time generally ignored the legislation's aims of minimising the harms of racism, changing social mores and achieving a more equal society. They denied the existence and extent of such harms or recategorised them as mere 'offensiveness' or a valid part of 'political' speech.

Arguments against the federal legislation often failed to distinguish 'racial' vilification – vilification of people because of their actual or supposed differences from the

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86 (1992) par 7.47. The Law Reform Commission did support the creation of a separate offence of racist violence.

87 Similarly, see Bill Cope and Mary Kalantzis, *A Place in the Sun: Recreating the Australian Way of Life*, Harper Collins, Sydney, 2000, 8.

dominant group – from objections to such people's 'views' or 'activities'. Thus it was suggested that criticism of a group's views on such topics as immigration or Australian foreign policy could infringe the proposed Act if some incidental comment were made as to the ethnic origins of the group.[89] It was erroneously argued that opposition to an exhibition of Nazi memorabilia would be disparaging to the organisers on 'ethnic' grounds.[90] Misunderstanding of the nature of racial vilification was also shown by statements that any argument between Australians of different ethnic backgrounds would be caught by the legislation,[91] as could speech which was offensive only in 'mode' or 'delivery'.[92] It was also claimed that the Bill would prevent ethnic groups celebrating their own history and displaying their cultural symbols.[93]

Attacks on pluralism

> *Pauline's People were rural poor and fringe city poor clinging to old cultural values they insisted were still central to Australia's identity, because otherwise they felt like white trash. And white trash kicks Aborigines because it makes them feel better.*[94]

While legislation against racial discrimination and vilification was being introduced, at the same time "the still fairly fragile seventies ideas about social justice and an inclusive Australia"[95] were being eroded in the debate that centred around the anti-(Asian) immigration writings of academic Geoffrey Blainey,[96] and anti-Aboriginal

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88 Lisa Macdonald, "What's wrong with racial hatred bill", *Green Left Weekly*, 1995, vol 187, 14 at http://www.greenleft.org.au/back/1995/187/187p14.htm

89 John Forrest, *Hansard*, House of Representatives, 16 November 1995, 3429.

90 Michael Cobb, *Hansard*, House of Representatives, 15 November 1994, 3383.

91 Ian Freckleton, "Censorship and Vilification Legislation" (1994) 1 *AJHR* 327, 344.

92 Freckleton (1994) 349-50.

93 Trish Worth, *Hansard*, House of Representatives, 15 November 1994, 3375, Paul Filing, *Hansard*, House of Representatives, 16 November 1994, 3415.

94 Margo Kingston, *Off the Rails: The Pauline Hanson Trip*, Allen & Unwin, St Leonards, 1999, 213.

95 Pettman (1987) 131.

96 Geoffrey Blainey, *All for Australia*, Methuen Haynes, Sydney, 1984. See also Castles et al (1992) 128ff; Andrew Markus, *Race: John Howard and the Remaking of Australia*, Allen and Unwin, Sydney, 2001, 49 ff; Andrew Markus, "Land Rights, Immigration and Multiculturalism: the Assault from the right" in Markus and Rasmussen (1987) 21ff, especially 29 and 30 and Jan Pettman (1987) 130, 131. See also Hollinsworth (1998) Chapter 8 at 257.

comments of Hugh Morgan of Western Mining Corporation.[97] Both men were members of the conservative HR Nicholls Society,[98] and prominent in the popular backlash against the High Court's 1992 *Mabo* decision[99] with its finding in favour of limited indigenous land rights.[100]

A letter to the Editor of *The Australian* of 27 August 1993 from David English noted "an extraordinary silence in the white community, particularly the academic community, about land claims and land justice for aboriginals." "Could it be," English asked, "that lines have silently been drawn, as the educated white middle-class begins to realise that it may have to put its money where its mouth is?" In English's words:

> The recent full-page mining industry advertisements showing aboriginal land holdings or claims spreading like a virus on a map of white Australia can only remind us of Cold War domino theory scares – the red menace has become black. Strangely enough, the interest groups who may have been threatened by the global spread of communism are the same ones threatened by the idea that somebody actually owns the land and minerals they would quite like to have had free. However, what I find really offensive is the statistical claim that aboriginals already hold, or would like to hold, a percentage of land greater than their percentage presence in the Australian population.[101]

The sustained attack on Australian pluralism was given political voice by such parliamentarians as Wilson Tuckey and Graeme Campbell, and in 1996 by an independent Federal candidate for the lower house, Pauline Hanson,[102] who had

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97 See Hollinsworth (1998) 20.

98 See Markus (2001) 57ff.

99 *Mabo* v. *Queensland (No 2)* (1992) 175 CLR 1. For a general discussion see Hollinsworth (1998) 208ff.

100 See Hollinsworth (1998) 212ff.

101 David English, Head of the Department of Humanities at Victoria University of Technology, letter to *The Australian*, 27 August 1993.

102 Pauline Hanson and Graeme Campbell were both elected as independents in 1996 after being repudiated by their respective parties. They campaigned largely on racial issues: Markus (2001) 199 and generally.

originally been a Liberal party candidate but was disendorsed after making racist comments. Her simplistic nationalist stance which was reflected in the name of her party ('One Nation'), antipathy to both Aborigines and non-European immigrants[103] and conspiracy theories about 'big government' attracted voters away from the country-based National Party as well as from both Labor and Liberal Parties.

In the manner of 'new' racism, Pauline Hanson regularly denied that she was racist, claiming instead that her concerns related to "allegedly insurmountable differences in 'culture' or 'lifestyle'."[104] To the extent that she did accept the existence of different ethnic groups, she favoured assimilation, saying in her maiden parliamentary speech:

> We now have a situation where a type of reverse racism is applied to mainstream Australians by those who promote political correctness and those who control the various taxpayer funded 'industries' that flourish in our society servicing Aboriginals, multiculturalists and a host of other minority groups.

She continued: "I believe we are in danger of being swamped by Asians … a truly multicultural country can never be strong or united … ."[105]

The then new Liberal Prime Minister, John Howard, put 'race politics' on the Australian political agenda by defending Hanson's words, saying that:

> [o]ne of the great changes to come over Australia… is that people do feel able to speak a little more freely and a little more openly about [how] they feel. In a

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103 See Ien Ang, "Asians in Australia: A Contradiction in Terms?" Docker and Fischer (2000) 115 at 117 and 126.

104 See Jon Stratton, *race daze: Australia in identity crisis*, Pluto Press, Annandale, 1998 (1998a) 13-14.

105 The speech (10 September 1996, House of Representatives, *Hansard*, 3802) is quoted in full in Donald Horne, *Looking for Leadership: Australia in the Howard Years*, Viking/Penguin, Ringwood, Victoria, 2001, Exhibit B, 272 and see Marcia Langton, "Pauline as the thin edge of the wedge" 86 ff in Phillip Adams (ed), *The Retreat from Tolerance, ABC Books*, 1997 and James Jupp, *From White Australia to Woomera*, Cambridge University Press, Cambridge, 2003, 130.

> sense the pall of censorship on certain issues has been lifted. … I welcome the fact that people can now talk about certain things without living in fear of being branded a bigot or a racist.[106]

Howard was reflecting a line of argument that had been made by conservatives throughout the 1980s – though perhaps not always so openly[107] – as well as popular 'free speech' notions. But for some reason, Howard's stance proved more popular with Australian voters than had previously been the case and, as Markus says, maximised the potential for racial politics.[108]

The evolving principle of multiculturalism which has celebrated a society of diverse languages, religions and ethnic groups, is frequently rejected. Proponents of pluralism are derided as the 'multicultural industry', implying that multiculturalism is supported only for personal or political gain. This view was promoted by journalist Paul Sheehan's popular 1998 book *Among the Barbarians*[109] which mounted a "fierce attack on the 'multicultural industry'."[110] Sheehan argued that under Labor

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106 Speech to Liberal Party, Brisbane, 22 September 1996, quoted in Mary Kalantzis and Bill Cope, "Why the Race Debate Won't Go Away", *The Courier Mail*, 5 November 1996. See Peter Boyle, "Racism: The Howard-Hanson connection," No. 249 *Green Left Weekly*, 2 October 1996, 3, available at: http://www.greenleft.org.au/back/1996/249/249p3.htm and Geoff Kitney, "Johnny in Blunderland", *Sydney Morning Herald*, 11 July 1997, 19.

107 see Pettman (1987) 130-131.

108 Markus (2001) 221. At the same time, Markus concludes that the evidence from polling and electoral data does not support the case for a recent shift in public opinion on race or immigration issues, saying that the potential for politicians to utilise race based populism has been a constant element of Australian politics over the last 20 years: 217. Jupp (2003) agrees in relation to Queensland politics: 124ff and 134. Markus notes that racial politics is a global development but the form and extent of its impact in Australia is shaped by Australia's specific circumstances: 204.

109 *Among the Barbarians*, Random House, Milsons Point, 1998 (new ed).

110 Robert Manne, "Adding more fuel to a dangerous fire", *Sydney Morning Herald*, 8 June 1998, 13. Sheehan's book, the "bible of the One Nation party", is described by columnist P.P. McGuinness "in the form most of its readers will take it":
Chapter 1. We have to let Aborigines knock each other about under tribal law. 2. Aussies are great blokes. 3. South-East Asian crisis bad. 4. The Chinese are terrible racists. 5. Aussies good, Froggies bad. 6. How Labor governs – bribing the NESBIES (non-English-speaking background). 7. Some immigrants are worse than others. 8. Multiculturalism is a con. 9. Pauline the inept victim of media beat-ups. 10. Immigrants into drugs and violent crime. 11. Migrants are rorting the social security, immigration and tax systems. 12. Migrants are rorting union elections. 13. Labor's Greeks a big part of the problem. 14. David Foster, the novelist,

governments legitimate discussion of multiculturalism, immigration and Aboriginal affairs had been stifled by the 'thought police' and that pro-immigrant writers such as Kalantzis, Castles and Cope were "hostile to the mythology of Australia's egalitarian tradition," turning "success into failure."[111] Similarly historian Keith Windschuttle argues that historians have been influenced by ideology to follow relativistic theories as a result of which they have abandoned the search for 'truth.'[112] Sections of the Australian media have been influential in the acceptance of these kind of beliefs[113] and in what Jayasuriya identifies as a popular anti-intellectualism, including

> the talk-back hosts with their cozy suburban fascism as well as a broad range of conservative social columnists, academics and writers who fulminate against feminism, multiculturalism and Aboriginal affairs.[114]

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is right about Aborigines and the Sydney Thought Police are wrong. 15. Zoologist Tim Flannery knows more about economics and Aboriginal history than any economist or historian. Stop immigration and economic growth. 16. By implication, make Tony Abbott prime minister – his green corps and peacecorps ideas can make Australia an eco-superpower (but don't let him run family planning). 17. Mabo and Wik judgments good, Native Title Act bad. Past Aboriginal policy no good, and Labor foments racism by playing the race card continually. Afterword – the Thought Police will be out to get me for all this.
"Unhappily, there is truth in every one of Sheehan's charges", says McGuinness, who then agrees that legitimate discussion of the problems of migrant and Aboriginal communities has been suppressed by 'political correctness'. P.P. McGuinness, "Manual for Elections," 28 May 1998, *Sydney Morning Herald*, 19.

111 Sheehan (1998) 34. Adrienne Millbank, "An Anti-Racism Campaign: Who Needs It?" Social Policy Group *Current Issues Brief No. 20*, 29 June 1998, available at: http://www.aph.gov.au/library/pubs/cib/1997-98/98cib20.htm)) agrees with Sheehan that the successes of One Nation, and the Liberal government's reaction against multiculturalism and indigenous peoples, have been "the inevitable result of the suppression of debate that has been the defining characteristic of Australia in the 1990s, and particularly under the Labor years." See too, Paul Sheehan, "The Politics of Embarrassment", 23 May 1998, *Sydney Morning Herald*, 5.

112 Keith Windschuttle, *The Killing of History: How Literary Critics and Social Theorists are Murdering our Past*, The Free Press, New York, 2000 (1st published 1996).

113 See Bain Attwood, "Frontier Warfare", *Australian Financial Review* 28 February 2003 *Review* 1, 8 and see generally Anti-Discrimination Board (2003).

114 Kanishka Jayasuriya, "Howard, Tampa, and the Politics of Reactionary Modernisation", paper of 7 March 2003 symposium "The Liberal Conversation" available at http://www.econ.usyd.edu.au/drawingboard/diggest/0303/jayasuriya.html and reproduced in *Sydney Morning Herald* online Webdiary 4 April 2003 at http://www.smh.com.au/cgi-bin/common/popupPrintArticle.pl? See for example Mr Justice Roderick Meagher, "Law and Free Speech" (2000) 44 (9) *Quadrant* 27.

Other journalists and social commentators disagree that there has been any suppression of debate in the wider community, noting that broadcasters and tabloid columnists have had no hesitation in exercising their usual invective and that it would be hard to point to any instance, either in the United States or Australia, where debate has actually been silenced on any social issue by 'political correctness'.[115]

Popular politics of race and identity in the Howard era

> *We know that racism appears in many forms and not always as malevolent violence. Here it poses as democratic liberalism and humanism.*[116]

Despite the myth of Australian egalitarianism, despite past federal government policies of multiculturalism, and despite its existing ethnic diversity, Australia continues to be a profoundly discriminatory and racist society at many levels.[117]

The Australian 'hierarchy of origin'[118] has always been very much part of the nature of things. It is common for working-class Australians from all backgrounds to perceive

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115 See Phillip Adams and Lee Burton, *Talkback: Emperors of Air*, Allen and Unwin, Sydney, 1997, 46 ff, Adams (1997) 23, Stratton (1998a) 22, Jupp (2003) 127 and McKenzie Wark, "Free Speech, cheap talk and the Virtual Republic" in Adams (1997) 162 at 165, citing John K. Wilson, *The Myth of Political Correctness*, Duke University Press, Durham, 1995.
Luke McNamara's 1997 report on the operation of the NSW Anti-Discrimination Board found that the majority of complaints were from Anglo-Celts, and that most of the complaints of racist vilification in the period from 1993 to 1995 were against the media – which does not seem to have been silenced: "A Profile of Racial Vilification Complaints Lodged with the NSW Anti-Discrimination Board" (1997) 2 *International Journal of Discrimination and the Law* 349.
See also Cope and Kalantzis (2000) 103 and Nathan Vass, "Pressure on Carr to act over race law" *Sydney Morning Herald*, 2 January 1997, 3. Chris Puplick, "Best Gag on Racial Abuse", *The Sydney Morning Herald*, 13 January 1997, 13 noted a rise in the number and seriousness of complaints since 1995.

116 Tatz (1995a) 39.

117 See Dr William Jonas, introduction to Human Rights and Equal Opportunity Commission, *National Consultations: Racism and Civil Society - 'I want respect and equality,'* 2001, available at http://www.humanrights.gov.au/racial_discrimination/consultations/consultations.html where he concluded that "the responses and comments we received during the consultation process clearly demonstrate an overwhelming sense that racism and related forms of intolerance are serious problems that affect many people in Australian society. The consultations indicated that racially discriminatory practices are widespread institutional in nature and practiced at all levels of society."

118 Brian Johns, "SBS: coping with a strange idea" in Goodman et al (1991) 20. See also Stratton (1998a) 206.

Aborigines as an inferior group who are unfairly advantaged through government grants and for Aborigines to recognise that they will always be pushed to the bottom of the heap.[119] Fear of competition is invoked to engender racism and direct the frustrations of the exploited employee away from the employer and against the 'others': whether 'foreigners', immigrants or poorer distinct groups within Australian society, (such as Aborigines).[120] The reality of discrimination is reflected in our language; in the many derogatory names for and jokes about immigrants and Aborigines, in the more socially acceptable use of euphemisms such as 'New Australians' or 'ethnics' as a means of separation and alienation,[121] and in more recent years, following the lead of the Federal Government, in open vilification of refugees. It is also common for immigrants to hold racist attitudes against Anglo- Australians as well as other immigrants.[122]

Distinctions between the majority and the 'other' encourage social discrimination and marginalisation, as Jurgensen says.[123] Anglo-Australians generally control the process of arriving at social identities and own the power of cultural definition. They are not 'ethnics'; their culture is separate and secure from 'multiculturalism'. They do not conceive of the possibility that they should have to change their lives or their values in any way because of multiculturalism. Jurgensen asks whether it is our intention to 'manage' generations of 'outsiders' through semantic racism and tolerance of a continuous and pervasive degree of prejudice. What we need, he says, is to replace a society based on power politics and land ownership with a society based on concern for the people, being a people of migrants.[124]

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119 Personal communication from Roberta Sykes.

120 Stephen Castles, "The racisms of globalisation" in Ellie Vasta and Stephen Castles (eds) *The Teeth are Smiling: The persistence of racism in multicultural Australia*, Allen & Unwin, St Leonards, 1996, 17 at 23, citing Wallerstein (1991a) 33.

121 See Stephen Castles and Ellie Vasta, "Introduction: Multicultural or multi-racist Australia?" in Vasta and Castles (1996) 1 at 5- 6.

122 Hage (2003) 115 – 117.

123 Manfred Jurgensen, "The politics of imagination" in Goodman et al (1991) at 20 and 26.

124 Jurgensen (1991) 26.

Unfortunately, that solution seems at present to be further from realisation than ever. At the heart of the present Liberal Federal Government's 'reactionary modernism'[125] or 'modernisation', is a nationalistic Australian identity. Australian society is perceived as essentially an 'ambivalence-free',[126] monocultural, white, colonial society,[127] despite the existence of an indigenous population and the reality of continued immigration from an enormous variety of ethnic backgrounds.[128] The politics of the new racism have obscured the degree to which racism has become accepted in Australian discourse,[129] and have enabled the past harms of racism[130] to be denied.

In the words of the UN's Special Rapporteur:

> [t]he Liberal Party of Prime Minister John Howard came to power in 1996 on the basis of a programme under which the Aboriginal question would be given secondary importance and drastic measures in relation to immigration and asylum-seekers would be proposed … in particular through the review of the land ownership rights of Aboriginals, and the reduction of financial and human resources and the elimination of education, health and housing programmes addressed to them.[131]

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125 A phrase used by Jayasuriya (2003), following J. Herf, *Reactionary Modernism: Technology, Culture and Politics in Weimar and the Third Reich*, Cambridge University Press, Cambridge, 1984.

126 See Zygmunt Bauman, *Modernity and Ambivalence*, Polity Press, Cambridge, 1991.

127 See Tatz (2003) 137 and 168 citing Winton Higgins, "Could it Happen Again? The Holocaust and the National Question," Academy of Social Sciences Workshop, "The Genocide Effect", St Paul's College, University of Sydney, 4-5 July 2001.

128 40% of the population has at least one parent born overseas: Mary Kalantzis and Bill Cope, "An opportunity to change the culture" in Adams (1997) 57 at 81.

129 Markus notes that statements about race which raised controversy in January 1996 were almost unnoticed two years later: Markus (2001) 199.

130 Hollinsworth (1998) points out that of course the past "reverberates in the lives of the living" as is clear from the continuing psychological trauma of the stolen generations: 23.

131 United Nations Special Rapporteur (2002).

Howard's refusal to criticise Hanson's comments[132] and his consistent refusal to apologise for the Australian government's past role in the permanent removal of 'stolen generations' of Aboriginal children from their parents, expressing only his 'profound regret',[133] have been seen by many as amounting to a tacit approval of racism.[134] His subsequent demonisation of asylum-seekers has confirmed his government's agenda. Not only does the Federal Government deny the harms of racism, it encourages fear of those from other countries or cultures, drawing on the links between ethnicity, identity and security forged under the White Australia policy.[135] Pursing that policy, the Liberal/National Federal Government has sent Australian soldiers to fight in Iraq without a parliamentary vote, vilifies refugees to Australia as monsters who throw their children overboard[136] (but who at the same time are validly escaping a terrorist regime in Iraq which puts out the eyes of children)[137] and detains over 3,000 people in detention centres in Australia and various Pacific

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132 His comments that her 3 year jail sentence imposed in 2003 was excessive were also seen as supporting her viewpoints: see Louise Dodson, "PM doubts on Hanson sentence," *The Age*, 23 August 2003, available at: http://www.theage.com.au/articles/2003/08/22/1061529337148.html?from=storyhs.

133 although he was happy to say 'sorry' to victims of the 2003 Canberra bushfires. See also Riley (2003). Indeed, the Prime Minister and the Minister for Aboriginal and Torres Strait Island Affairs queried the use of the term 'Stolen Generation': In April 2000, the Howard's Government's submission to a Senate inquiry into the question of compensation for Aboriginal children forcibly taken from their families was published, revealing the government view that the term 'the stolen generation' should be rejected as emotive and imprecise. This led to a 'torrent of mail' to *The Sydney Morning Herald* "with the overwhelming majority expressing their abhorrence with the Government's position": Jeni Harvie, Letters Editor, "Postscript," *Sydney Morning Herald*, 10 April 2000, 16. See Michelle Grattan, "Howard just doesn't get it", *Sydney Morning Herald*, 3 April 2000, 4, Robert Manne, "The Removalists", *Sydney Morning Herald*, 10 April 2000, 17.

134 See for example, Gracelyn Smallwood, "We have tried to talk", *Sydney Morning Herald*, 26 June 1997, 17, Tony Stephens, "Double Trouble for Howard over 'folly' on racism," *Sydney Morning Herald*, 9 July 1997, 8, Adele Horin, "Political victory on Wik comes at a high price," *Sydney Morning Herald* 15 November 1997, 43.

135 Jayasuriya (2003).

136 See David Marr and Marian Wilkinson, *Dark Victory*, Allen and Unwin, Crows Nest, 2003. The jacket reads: "They put lives at risk. They twisted the law. They drew the military into the heart of an election campaign. They muzzled the press. They misused intelligence services, defied the United Nations, antagonised Indonesia and bribed poverty stricken Pacific States. They closed Australia to refugees - and won a mighty election victory." See also Madan Sarup, *Identity, Culture and the Modern World*, Edinburgh University Press, Edinburgh, 1996, 11 citing Erving Goffman, *Stigma: Notes on the Management of Spoiled Identity*, London, Penguin Books, 1968, (who discusses how people can be sigmatised as being different in a way which is "in principle beyond repair, and hence justifies a permanent exclusion.").

137 as Howard said in March 2003.

islands, under uniformly appalling conditions.[138] Race is used in a negative manner in Australia today to marginalise groups not seen as being part of the dominant Anglo-Australian culture, but that negative use is masked by the 'new' racism as being about ethnicity and different cultures and values.[139] To the extent that an unstated nationalism underpins much of Australian 'high cultural activity,'[140] cultural activities will also tend to promote the new, exclusive form of nationalism.

Reactionary Modernisation

Jayasuriya describes Australia's current conservative identity politics as 'Reactionary Modernisation', blending a commitment to economic liberalism with illiberal policies that draw on a "backward looking communitarianism" and on "reactionary and nostalgic understandings of community and culture."[141]

This type of politics is hostile to the values of universalism, political equality and social amelioration which underpin liberalism and social democracy. Jayasuriya argues that to maintain what are essentially the values of the White Australia policy, and to call upon the mythical idea of a secure community, the Federal Government must reject and devalue the universality of citizenship, rights and entitlements, making the benefits of citizenship conditional on membership of a (white) cultural community.[142] To the extent that admission to that community is indeed possible for those of other cultures, entry is based on social and economic criteria such as "acceptable responsible behaviour, or the capacity to participate in the formal

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138 UN Special Rapporteur (2002) par 103 ff, 47.

139 Anti-Discrimination Board (2003).

140 See for example Anne-Marie Willis, *Illusions of Identity: The Art of Nation*, Hale & Iremonger, Sydney, 1993, 14 and generally, arguing that Australian artists who are seen to depict a contemporary 'national' tradition rather than a peripheral culture will be most valued and 'made most prominent'.

141 Jayasuriya (2003).

142 Jayasuriya (2003). See also Jupp (2003) 118 and more generally, Sarup (1996) 8, as to the conflict between the rights of man and the rights of the citizen, noting that 'foreigners' are regularly deprived of political rights, excluded from public service, and not permitted to own real estate.

economy."[143] These criteria will be hard for marginalised groups, such as refugees or indigenous Australians, to meet.[144]

The harms that affect marginalised groups are not perceived as unacceptable "social and distributional conflicts associated with economic restructuring,"[145] for which the government has some responsibility. Rather, they are increasingly presented as the socially acceptable results of a failure on the part of those groups to achieve the social and economic requirements of the conservative politics of identity, which promotes an Anglo-Celtic core culture.[146] But human rights without citizens' rights are extremely limited rights.[147] Once again, it is a policy of 'blaming the victim'.

The truncated view of Australian culture promoted by Howard necessarily involves a rejection of much of our history and many of our existing values. Howard and his government have denied the centrality of immigration and indigenous rights to the development of Australian society and identity and have ignored the reality of Australian pluralism.[148]

Denial of past racism

They say, "Why do you always bring up the past?"
Why do whites always bring up their past?
They always telling you when they came over here and what kind of a time they had.
They never let you forget their history, but they want you to forget yours.[149]

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143 Jayasuriya (2003).
144 see too Stephenson (1997) at footnote 14 and following.
145 Jayasuriya (2003).
146 Jayasuriya (2003).
147 See Razack (2002) 217.
148 However Liberal Treasurer Peter Costello has called for Australia to be a more tolerant society, differentiating himself from Howard on this issue: Mike Seccombe, "Watch out for the enemy within", *Sydney Morning Herald*, 7 June 2003.
149 Maggie Holmes (a black woman in Chicago) in Studs Terkel, *Race*, Minerva, London, 1993, 146.

Howard has repeatedly criticised the 'black armband view of history'. (Better, his opponents argue, than the 'white blindfold' view). He has been supported in this by writers such as Windschuttle who have questioned the extent and duration of violence against Aborigines. In doing so, Windschuttle argues for a narrow and old-fashioned historical view[150] which questions oral histories but takes historical documents at face value, without considering the motivations of those who created the documents, nor the historical context.[151] His methods of historical analysis have similarities to those of David Irving in his defamation case against Deborah Lipstadt.[152] Windschuttle's methods of historical analysis, like those of Irving, seek to 'revise' more complex approaches to history, and in doing so have profoundly political implications. In simple terms, Irving concludes that the government of the Third Reich had no organised plan to kill Jews; Windschuttle concludes that there was no organised violence against Aborigines under the British colonial administration. The implications, although unstated by these historians, are to belittle the harms that were visited upon Jews and Aborigines, and to present the political legacy of the respective administrations as neutral or even beneficent. Howard and Windschuttle, says Attwood,

> want to celebrate the triumph of British civilisation in Australia and to brush aside the traumatic impact of British colonisation upon Aboriginal people. Both men suffer from an inability to identify and empathise with the plight of 'others', an inability to mourn for those different to themselves.[153]

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150 Attwood (2003a) arguing that Windschuttle's most recent work "bears a remarkable resemblance to historical accounts penned from the mid-19th century onwards."

151 Windschuttle (2000) and Windschuttle (2002). Contra, see Deborah Bird Rose, "Oral histories and knowledge" in Bain Attwood and and S. G. Foster (eds) *Frontier Conflict: The Australian Experience*, National Museum of Australia, Canberra, 2003, 120. It is also interesting to note the comment of historian Michael Burleigh that lack of historical documentation showing agreement on a particular point does not prove that no consensus existed, because "consensus, like happiness in love, requires no written expression". *The Third Reich: A New History*, Pan Books, London, 2001, 157.

152 *David Irving* v *Penguin Books Limited and Deborah Lipstadt* [2000] EWHC QB 115 before Mr Justice Gray, available at: http://www.pixunlimited.co.uk/news/rtf/irvingjudgment.rtf

153 (2003a) at 8.

Windschuttle's 'savage' book, he concludes, "lacks a sense of compassion for Aboriginal people, a sense of tragedy about their plight."[154]

The cumulative effect of such influences has been to discourage a general understanding of our colonial past, or of its effects on Australian society today,[155] and of course to discourage Reconciliation.[156] In the words of Sir William Deane, the then Governor-General of Australia:

> It should, I think, be apparent to all well-meaning people that true reconciliation between the Australian nation and its Indigenous peoples is not achievable in the absence of acknowledgment by the nation of the wrongfulness of the past dispossession, oppression and degradation of the Aboriginal peoples.[157]

Institutional and policy changes

Howard's government has made a number of policy and institutional changes which effectively ended multiculturalism as a federal policy, and continue to restrict immigration and the activities of the Federal Human Rights and Equal Opportunities Commission. Upon taking office, Howard abolished the Office of Multicultural Affairs in the Department of the Prime Minister and Cabinet, which became part of the Department of Immigration and Multicultural Affairs (DIMA), and the Bureau of Immigration, Multicultural and Population Research.[158] He subsequently cut funding

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154 (2003a) at 8. See generally Robert Manne, *In Denial – The Stolen Generations and the Right*, Black Inc, Melbourne, 2001 and Stanley Cohen, *States of Denial*, Polity Press, Cambridge, 2001 both discussed in Tatz (2003) Chapter 6 at 122ff. See also Cunneen et al (1997) 5ff.

155 Ann Curthoys, "Constructing National Histories" in Attwood and Foster (2003) 185 generally and at 187 as to white concepts of victimhood.

156 See report of UN Special Rapporteur (2002) par 52, 24 ff. See also Hollinsworth (1998) for a discussion of "what to do about the past" and issues of reconciliation: 21ff.

157 Sir William Deane, "Some Signposts from Daguragu," The Inaugural Lingiari Lecture, Darwin, 22 August 1996, reprinted at http://www.gg.gov.au/speeches/textonly/speeches/1996/960822.html at page 9 of 16 pages.

158 Jupp (2003) 55.

for the Aboriginal and Torres Strait Islander Commission by $400 million[159] and finally abolished it in completely in 2004. The Howard government has cut funding to HREOC drastically since 1996,[160] and transferred the functions of HREOC to the Federal Court.[161] It has put forward legislation to reduce the scope and functions of the Commission, which at one stage was to be renamed the 'Human Rights and Responsibilities Commission'.[162] It seems that one effect will be to make discrimination cases prohibitively expensive.[163] Proposed changes require the Attorney-General's approval for intervention by HREOC in court proceedings – even when the government is a party to the proceedings – despite similar laws proposed in 1998 being rejected by a Senate committee.[164]

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159 Kalantzis and Cope (1997) at 77 and 68 as to broken electoral promises in relation to immigration and multiculturalism. In relation to the impact of similar cuts to programmes for women, see Anne Summers, *The end of equality? Australian Women and the Howard government* Pamela Denoon Lecture 6 March 2003, http://www.wel.org.au/announce/denoon/03lecture.htm

160 by approximately 43% over 3 years: Adele Horin, "Human rights and the Howard hatchet", *Sydney Morning Herald*, 17 May 1997, 43, and down from $21.6 million in 1995-6 to $10 million from 1999: Colin Hollis, Second Reading Speech to House of Representatives opposing *The Human Rights Legislation Amendment Bill* (No.2) 1998, 25 June 1998, *Hansard*, 5465.

161 partly as a response to the High Court decision in *Brandy* v. *HREOC* (1995) 183 CLR 245; (1995) 127 ALR 1; (1995) 69 ALJR 191; (1995) 37 ALD 340; (1995) EOC 92-662 which queried the constitutionality of the commission's determinative powers. The legislation provides that complaints that are not resolved by conciliation can be dealt with directly by the Federal Court.

162 Various *Human Rights Legislation Amendment Bills* were put forward in 1996, 1998 and 1999. The *Australian Human Rights Commission Legislation Bill* 2003 includes most of the major provisions in the previous bills and renames the Commission as the 'Australian Human Rights Commission.' The latest bill was opposed in the House of Representatives and amendments were proposed. As at the date of writing the Bill has not passed the Senate. The legislation would override the *Racial Discrimination Act 1975* and amend 13 other Acts.

163 As argued by the Physical Disability Council of Australia – see Jenny Macklin, MP for Jagajaga, *Hansard*, 30 June 1998, 5680-1. Labor's minority report to the Senate committee recommended changes (which were not taken up) which were aimed at minimising the cost and complexity of Federal Court proceedings in discrimination matters; ensuring that conciliation powers remained vested in specialist commissioners who would be allowed to commence proceedings as a complainant in some cases, and empowering the specialist commissioners to address systemic discrimination.

164 See Anne Summers, "The priority that no longer rates," *Sydney Morning Herald*, 28 April 2003, 11, George Williams and Ronnit Redman, "Litigation work vital to education on human rights" and Daryl Williams, "Commission must change with the times," both at *Australian Financial Review*, 2 May 2003, 64. Commissioner and Professor Alice Tay pointed to HREOC's intervention on detention issues as having been "an irritant to the Government" and President of the Australian Council for Civil Liberties Terry O'Gorman pointed to a direct connection between HREOC's intervention in the Tampa matter and the Government's move to

The Howard government has cut immigration to a strict minimum and curtailed programmes for the integration of immigrants. It has introduced a two-year waiting period for social security to legal immigrants,[165] and reduction in language learning grants. Family reunification programmes for immigrants have been cut back, especially where relatives are disabled.[166]

Generally, there has been increased Federal Government opposition to Australian participation in international tribunals and organisations, and to the concept of international law. [167]

Conclusion

Since the election in 1996 of a Federal Liberal government, popular attitudes on such race-related matters as Reconciliation, immigration, refugees and treatment of Aborigines have changed noticeably. With the new 'identity politics' that has sprung from 'new' racism, the boundaries of legitimate political discourse in Australia have moved to the right – away from civic pluralism, social justice, equality and the idea of sharing, of 'an inclusive Australia',[168] back towards an imagined white community which is necessarily defined on a exclusionary and racist basis.[169] The present Federal Government barely keeps up a political pretence of neutrality. In 2000 Howard

limit its intervention powers: Cynthia Banham, "Human rights head in battle on powers," *Sydney Morning Herald*, 19 April 2003.

165 *Social Security Legislation Amendment (Newly Arrived Residents Waiting Periods and Other Measures) Act 1997* No 5 - which in section 4 overrides the *Racial Discrimination Act 1975*.

166 See UN Special Rapporteur (2002) par 101, 46.

167 Some brief examples: on ABC Television News on 11 February 1993, John Howard spoke of his opposition to the introduction of 12 month (unpaid) parental leave, as proposed by the Government in accordance with spirit of the UN treaty on Industrial Relations signed by Australia, on the grounds that he didn't want a "bunch of foreigners in Geneva telling us how to run our industrial relations policy." Similarly his government has undermined Australia's interaction with the UN Treaty Committee system: see the Law Council of Australia's submission to the Prime Minister on the Commonwealth Government's proposals: *Australian Lawyer*, November 2000, 3, Spencer Zifcak, *The new anti-internationalism: Australia and the United Nations human rights treaty system*, Australia Institute, Canberra, 2003 and *Mr Ruddock goes to Geneva*, University of NSW Press, Sydney, 2003.

168 Pettman (1987) 128 at 131, Anti-Discrimination Board (2003) 11.

169 See Balibar (1991b) 60. The very sexist and racist self-images of a nationalism that we appeared to be moving away from 20 years ago at the time of the Bicentenary (see Castles et al (1992) 9ff) are now held up to us, once again, as positive and desirable.

rejected key elements of the 'Roadmap for Reconciliation' produced by the Council for Aboriginal Reconciliation. In 2003 he commented that "people no longer ask me for an apology."[170]

Moral authority has not been seized by the Opposition. HREOC's National Consultations in 2001 found:

> a recurring recognition that racism is becoming more evident in the broader political sphere. There is an increase in the space and support gained by political parties and organisations which are openly expressing racist discriminatory and xenophobic views. This is seen as being coupled with the lack of political leadership from the major political parties in taking a strong anti-racist stance.[171]

Despite some vigorous community activism, and some sympathetic media treatment, particularly by SBS Television, it can be generally said that denigration and abuse of refugees is now socially acceptable in Australia. There is anecdotal evidence that media attention on issues of indigenous land rights, immigration, race, and Pauline Hanson, the Prime Minister's implicit 'permission to be racist', the 'children overboard' incident and of course September 11 and the Bali Bombing, have been the catalysts for a marked increase over the last few years in racist abuse and violence, demonstrating that racism is still very much part of Australia's cultural heritage.[172]

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170 Riley (2003) 1 and 8.

171 HREOC (2001b). See also generally Jupp (2003).

172 Wainwright (2002). See Cunneen et al (1997) 11 and the *Sydney Morning Herald* reports cited there, including 14 November 1996, 5 and Chris Puplick's "Forward" to Anti-Discrimination Board (2003) 6; Langton (1997) 103; in the same volume McKenzie Wark describes how he and his Asian girlfriend were, during this period, abused and spat on for walking hand in hand, even in the relatively multicultural and Labor-oriented inner Sydney suburb of Newtown: Wark (1997) 166, Kim Arlington, "Attack racially motivated, says victim," *Sydney Morning Herald*, 13 January 1997 (Vietnamese family punched and kicked by strangers); Helen Pitt, "Jewish leaders link Hanson speech to attacks," *Sydney Morning Herald*, 27 February 1997, 8 (physical and verbal attacks on Jews reached the highest level in 1996 since 1990, says the Executive Council of Australian Jewry, with over 300 reports. Over half the reports related to incidents between the time of Hanson's maiden speech and the subsequent parliamentary response

We need to be aware of this cultural background in considering the nature of 'racism', its connection with 'race' in Chapter 2, and in Chapters 3 and 4 the role of speech in reproducing racism. The analysis of Australia's racial vilification laws in Chapter 5, and of the jurisprudence which both supports and limits those laws, needs to be informed by a sympathetic understanding of the social experience of racism, also discussed in Chapter 5. And that understanding will be based upon sense of the history of race in Australia and the tensions between citizens and their government. The legislation and jurisprudence need to be considered in the context of present-day Australian society, not at a theoretical level removed from the real problems facing a multicultural, plural nation.

condemning racism); Debra Jopson, "The joke's on racists thanks to singers' fishy scales," *Sydney Morning Herald*, 28 February 1997, 8 (Since Pauline Hanson's election SBS newsreader Indira Naidoo received hate mail for the first time); Leonie Lamont and Greg Roberts, "Hanson forms a party as race complaints soar," *Sydney Morning Herald*, 12 April 1997, 10 (10 year old Asian Australian boy kicked in the stomach by a stranger); Kitney (1997) 19 (Asian Australian taxi driver abused almost daily since Hanson's speech), Kevin Sullivan, "Australians Close Eyes to Openness," *Guardian Weekly*, 4 January 1998, 11 (increase in verbal and physical abuse of Asians), Nadia Jamal, "Asians learn to cope with racists," *Sydney Morning Herald*, 13 October 1997, 2 (Chinese community asks NSW Ethnic Communities Council to teach how to protect against potentially violent situations) and racist abuse was regularly reported in sport: Stephen Linnell, "Racial abusers may be 'outed,'" *Sydney Morning Herald*, 22 April 1997, 45; Stephen Linnell, "New Abuse allegations inflame racism row," *Sydney Morning Herald*, 23 April 1997, 43. See too Douglas Booth and Colin Tatz, "The mouthguard defence", *Inside Sport* No. 67, July 1997, 18 arguing that racial vilification has been a constant in Australian sport at least from the 1930s.

Chapter 2: The trouble with 'race'

In order to get beyond racism, we must first take account of race. There is no other way.[1]

I know perfectly well, just as well as all these tremendously clever intellectuals, that in the scientific sense there is no such thing as race …[2]

Notions of race and exclusion, touched on in the previous Chapter, are not unique to the Australian experience. This Chapter explores some of the broader foundations to modern notions of race, the relationship between 'race' and racism as well as the 'new' racism which is influential in contemporary Australia. It considers the congruence of social and scientific concepts of race, and the mythological features of racism.

A socially grounded understanding of the different ways in which 'race' is conceptualised is crucial to an understanding of 'racism'. The way in which we classify the concepts of 'race' determines how we use the terms 'race' and 'racism' across legal, social, and political contexts. Negative consequences can result from categorising people by 'race', whether defined in terms of skin colour, religion, ethnic background, or social self-identification.

As the theorisations of race and racism considered in this Chapter make clear, 'racism' is not simply about 'race'. It is an attractive ideology which empowers the racist at the expense of others. Thus racial vilification is not simply an expression of an 'offensive point of view.' It is an activity through which the racist aims to achieve certain effects.

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1 Ian F. Haney López, *White by Law*, New York University Press, New York and London, 1996, 176 quoting Justice Harry Blackmun, dissenting in *Regents of the Univ.* v *Bakke*, 438 U.S. 265, 407 (1978).

2 Adolph Hitler, quoted in C.W. Cassinelli, *Total Revolution: A Comparative Study of Germany under Hitler, the Soviet Union under Stalin and China Under Mao*, Clio Books, Santa Barbara and Oxford, 1976, 21, referred to in Ghassan Hage, "The Limits of 'Anti-Racist Sociology'" (1995) 1(1) *UTS Review* 59 at 59.

This is generally not appreciated in the drafting of racial vilification legislation nor in its interpretation. Modern Australian legislation against racial vilification has required there to be a connection between the vilification and the 'race' of the victim, leading to a number of interpretative and enforcement problems discussed in Chapter 9. The nature of the racist's aims - in achieving implicit social permission for discriminatory and even violent behaviour - is a crucial element in understanding the dynamics of racism and the role of law.

Traditional concepts of 'race'

The word 'race' is used, uncontroversially, as a synonym for 'species,' to describe the 'human race'. Different social understandings of the word 'race' emerge when it is used to classify groups or individuals.[3] 'Race' has been used anthropologically and anatomically to distinguish between groups with different physical characteristics. The 'traditional' view is that 'race' is quantifiable and measurable in physical or biological terms, and that purported physical differences have social significance because they explain supposed intellectual or psychological distinctions.

'Race' as a biological or pseudo-scientific description has influenced judicial modes of thinking and legislation, including legislation against racism. Australian legislation has regulated Aborigines by defining 'Aboriginal blood' as opposed to 'white blood.' Legislation enshrined the categories of half-caste, quadroon and octoroon[4] imported from the 'arithmetic of colour' applied in previous centuries, as this "Table of Mixtures"[5] shows.

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[3] The word came into general use in Northern Europe about the middle of the sixteenth century and was not used to describe ethnic groups until the late seventeenth century: Anti-Discrimination Board (2003) at 15, citing Ivan Hannaford, *Race: The History of an Idea in the West*, The Woodrow Wilson Centre Press, 1996.

[4] McCorquodale notes 67 different definitions of 'Aboriginal native' in over 700 pieces of legislation: "Aboriginal identity: legislative, judicial and administrative definitions" (1997) 2 *Australian Aboriginal Studies* 24. Even in 1976, *the Aboriginal Land Rights (Northern Territory) Act* defines an Aborigine as a person "who is a member of the Aboriginal race of Australia" (s. 3(1)).

[5] Gilberto Freyre, *The Mansions and the Shanties*, Alfred A. Knopf, New York, 1968 at 401, quoting from "a trade chart of America".

TABLE OF MIXTURES
TO BECOME WHITE
White and Negro produces mulatto
Half white, half black
White and mulatto produces quadroon
Three-quarters white and one-quarter Negro
White and quadroon produces octoroon
Seven eighths white and one-eighth Negro
White and octoroon produces white
Completely white

An individual's "character, morality, personality and worth" were seen as largely determined by their 'blood'.[6] Both biological and social concepts of 'race' underpinned Australian legislation which required the separation of children from their parents: nurture was intended to eradicate 'nature' – with 'half caste' children required to be brought up apart from their Aboriginal families, apparently in the hope of improving their lives and making them socially more 'white'.[7]

Other notable examples are South African and Nazi legislation, which made detailed racial distinctions, for harmful purposes. Nazi legislation combined criteria of parentage, marriage and religion.[8] Sometimes distinctions had to be drawn by the

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6 Hollinsworth (1998) 120.

7 Current concepts of Aboriginality in Australia require Aboriginal descent, self-identification and acceptance by the Aboriginal community: for discussion of the problems involved, including with mis-identification, see Gerhard Fischer, "Mis-taken Identity: Mudrooroo and Gordon Matthews" in Docker and Fischer (2000) 95 at 97 and generally.

8 See C.M. Tatz, *Four Kinds of Dominion*, University of New England, 1972 at 10, citing the South African *Group Areas Act* and the *Population Registration Act* of 1950, and discussing Canadian and New Zealand definitions of natives and Maoris and Michael Blain, "Group Defamation and the Holocaust" in Monroe H. Freedman and Eric M. Freedman, *Group Defamation and Freedom of Speech: The Relationship between Language and Violence*, Greenwood Press, Westport & London, 1995, 45 at 61: Jews being defined as persons descended from two Jewish grandparents

judiciary where legislation was silent. In 1790, the American Congress restricted naturalization to 'white persons': words interpreted in 52 cases between 1878 and 1952.[9]

Some brief examples of United States legislation are worth mentioning because they provide a background to later discussions of issues of freedom and equality in United States jurisprudence. Miscegenation laws of the early colonies punished a white husband with banishment or imprisonment and forced white wives to work for their husbands' masters.[10] By the late nineteenth century over 38 States had "built a labyrinthine system of legal prohibitions on marriages between whites and Chinese, Japanese, Filipinos, Hawaiians, Hindus, and Native Americans, as well as on marriages between whites and blacks."[11] Such legislation defined racial identity and repressed non-whites.[12] In 1909, a Virginian judge sentenced a couple to 18 years' jail on the basis that the husband was really white although he claimed to be black.[13] In 1949 a man whose family had been considered white for seventy years was held to be black and sentenced to 5 years' jail for having married a white woman.[14]

The notion that race is fundamentally a biological categorisation, a "fixed and inherited identity,"[15] has persisted even in recent years. López points to a 1988 statute that explains that "the term 'racial group' means a set of individuals whose identity as such

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and belonging to the Jewish religion or married to a Jewish person on 15 September 1935, and persons descended from three or four Jewish grandparents.

9 See generally Haney López (1996).

10 Rachel F. Moran, *Interracial Intimacy: the regulation of race and romance*, University of Chicago Press, Chicago and London, 2003, 19-20. See generally Derrick A. Bell Jr, *Race, Racism and American Law*, Little, Brown and Company, Boston & Toronto, 1980, Chapter 2 and following at 53ff.

11 Moran (2003) 17ff, citing Martha Hodes (ed) *Sex, Love, Race: Crossing Boundaries in North American History* (1999).

12 Moran (2003) 17ff.

13 Moran (2003) 46, citing St Clair Drake and Horace R. Cayton, *Black Metropolis*, 1993.

14 Moran (2003) 87.

15 to quote Luis Angel Toro, "Race and Identity in Contemporary Law" at http://academic.udayton.edu/race/01race/race04.htm, extracted from "'A People Distinct from Others': Race and Identity in Federal Indian Law and the Hispanic Classification in OMB Directive No. 15" (1995) 26 *Tex. Tech L. Rev.* 1219.

is distinctive in terms of physical characteristics or biological descent."[16] Justice White of the Supreme Court commented that racial discrimination includes discrimination against a person because they are "genetically part of an ethnically and physiognomically distinctive subgrouping of homo sapiens."[17] Justice Scalia refused to accept the argument that granting broadcasting licences to minority groups would enhance cultural diversity by saying that it would instead lead to granting of licences on the basis of "blood, not background and environment."[18]

Luis Angel Toro points to Justice O'Connor's majority opinion for the Supreme Court in *Shaw*, which appeared to be based on the belief that race is merely a matter of skin colour, with no social consequences, and that "therefore, government should almost never take note of it."[19] The challenge facing the government, concludes Toro, is to formulate a racial/ethnic classification scheme that does not rely on an enquiry into a person's bloodline to determine their cultural identity.[20]

Perhaps part of the answer is (at least in the context of census information), as in Australia[21] and New Zealand[22] and the United States,[23] to permit self-identification in more than one category, or not to categorise at all, but only to seek specific information.[24]

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16 Ironically, the *Genocide Convention Implementation Act* of 1987 18 U.S.C. § 1093 (1988): Ian F. Haney López, "The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice" (1994) 29 *Harvard Civil Rights-Civil Liberties Law Review* 1, 16.

17 *Saint Francis College* v. *Al-Khazraji* 481 U.S. 604 (1987) at 613 – discussed in Neil Gotanda, "A Critique of 'Our Constitution is Color-Blind'" (1991) *Stan. L. R.* 1, 29ff and cited in Haney López (1994) 16-17.

18 *Metrobroadcasting* v. *FCC* 110 S. Ct. 2997 (1990), discussed in Haney López (1994).

19 Luis Angel Toro (1995).

20 Luis Angel Toro (1995).

21 See Moran (2003) 160 ff for the problems involved.

22 See David Thomas, *Review of the Measurement of Ethnicity – Submission to Project Team*, Health Research Methods Advisory Service, University of Auckland, 1 April 2002, http://www2.auckland.ac.nz/mch/hrmas/ethnicitymeasurement.htm – discussing increased reporting in New Zealand of dual or multiple ethnicities.

23 Moran (2003) 161.

24 In Australia, census forms ask for self-identification as Aboriginal or Torres Strait Islander, but then do not attempt to describe further groupings, instead asking separate questions about country of birth of the respondent and each of their parents, religion, language spoken at home, and level of fluency in English: Australian Federal Parliament, Department of the Parliamentary Library,

Science and 'race'

'Scientific' classifications of races were (and are) largely used to justify racist Social Darwinist theories.[25] 'Social Darwinism' was not born entirely out of others' misconstructions of Darwin's *Origin of the Species*, but stemmed also from the efforts which Darwin made himself in *The Descent of Man* to connect physical characteristics with social characteristics.[26] Darwin's comparative method of demonstrating cultural development resulted in his ordering of cultures according to the similarity or dissimilarity of each to European culture, which was given first place in the hierarchy. Contemporary non-literate people such as the Aborigines came to be regarded as 'fossilized societies.'[27] This theory provided a convenient justification for land appropriation and exploitation of indigenous peoples.[28] Hollinsworth points out that Social Darwinism, coupled with Aboriginal susceptibility to introduced diseases, provided colonial Australia with the concept that the indigenous Australians were dying out and would ultimately be replaced by the superior European 'species'. In this way, the notion that Aborigines were biologically and culturally inferior became deeply

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Research Note 32 (1997-98) "Census 96: Countries of Birth of the Australian population" http://www.aph.gov.au/library/pbs/rn/1997-98/98rn32.htm. See also Australian Bureau of Statistics, "Australian Standard Classification of Cultural and Ethnic Groups 1249.0 2000-01," "for use in the collection, storage and dissemination of all Australian statistical and administrative data relating to ethnic identity, ancestry or cultural identity."

25 for a description of the development of social and scientific ideas of race, see Hollinsworth (1998) 35ff.

26 Sheelagh Strawbridge, "Darwin and Victorian Social Values" in Eric M. Sigsworth (ed) *In Search of Victorian Values*, Manchester University Press, Manchester, 1988, 102. Strawbridge draws upon K. Bock, *Human Nature and History: A Response to Sociobiology*, Columbia University Press, New York, 1980. Social Darwinism continues to influence 'scientific' ways of perceiving reality. In January 1995 it was disclosed that for some decades up until the mid-1960s, American Ivy League Universities took compulsory frontal and profile nude photos of all students – ostensibly to analyse students' posture but in reality in an effort to support a theory linking body shape to intelligence: Ian Katz, "America's finest spared media exposure", *Guardian Weekly*, 5 February 1995, 6. Apparently the students so photographed included George Bush and Hilary Clinton.

27 M.C. Hartwig, "Aborigines and Racism: an Historical Perspective" in F.S. Stevens (ed), *Racism: The Australian Experience* Vol 2, Sydney, ANZ Book Co. 1972, 9 at 16 and 17. See also Robert A. Nisbet, *Social Change and History: Aspects of the Western Theory of Development*, Oxford, 1969, 203 and Ashley Montagu, *Man's Most Dangerous Myth: The Fallacy of Race*, AltaMira Press (Sage Publications), Walnut Creek (6th ed) 1997 (first published 1942), Chapter 2, 99ff ('The Fallaciousness of the Older Anthropological Conception of Race').

28 Hollinsworth (1998) 41. See Charles W. Mills, *The Racial Contract*, Cornell University Press, Ithaca and London, 1997, 31ff.

entrenched and continued to apply even when it became clear that 'natural selection' was not resulting in the extinction of Aborigines.[29]

Social Darwinism influenced psychology,[30] encouraging racist psychological interpretations. The biological determinism of pre-World War II was repudiated, but the racial stereotypes it had created, and the nationalism that arose during the twentieth century, were reaffirmed with new cultural or sociopsychological explanations.[31] The debate amongst psychologists about race as an indicator of IQ is still vigorous, and still often manages to ignore the basic points: that the extent to which intelligence is heritable, however measured, and whether or not certain genetic groups have different average levels of intelligence, are of no relevance to the manner in which people should be treated, nor to the capacity of individuals to develop and contribute as members of society.[32] Hernstein and Murray's 1994 popular book, *The Bell Curve: Intelligence and Class Structure in American Life*,[33] argued for the genetically superior intelligence of white people. It was described by one reviewer as "crude biological determinism" constituting "a truly venomous racism, combined with scandalous disregard for scientific objectivity."[34]

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29 Hollinsworth (1998) 92-93.

30 Freud was particularly influenced by *The Descent of Man* (1871) and by Darwin's closely related work *The Expression of the Emotions in Man and Animals* (1872) and Darwin has been ranked alongside Freud in terms of the importance of his influence upon twentieth century psychology: Frank J. Sulloway, *Freud, Biologist of the Mind*, Burnett Books, London, 1979, 239, quoting Edwin G. Boring, *A History of Experimental Psychology*, Appleton- Century- Crofts, New York, 1950, 468ff.

31 John Dower, "Race, Language and War in Two Cultures: World War II in Asia," in Freedman and Freedman (1995) 23 at 30. See also Thomas David Jones, *Human Rights: Group Defamation, Freedom of Expression and the Law of Nations*, Martinus Nijhoff Publishers, The Hague, Boston & London, 1998 at 119ff as to the discredited work of Burt and Shockley.

32 Richard Cohen, "Why the Bell Curve Peals for All Racist Americans," *Guardian Weekly*, 30 October 1994, discussing *The Bell Curve*, Tobin Peever's letter in response (*Guardian Weekly* 13 November 1994, 2) and Greg Sheridan, "Genetic inferiority just mumbo-jumbo," *Australian*, 2 November 1994. See also Ken Coghill MP, letter to *Guardian Weekly* 27 November 1994, 2.

33 Free Press, New York, 1996 (first published 1994).

34 The calibre of the data is said to be "pathetic" at "many critical points," as well as discounting the negative experiences of non-white Americans in every area. "The book has nothing to do with science" concluded the review: Leon J. Kamin, "Behind the Curve", *Scientific American*, February 1995, 82 to 86. See also Leon Kamin, *The Politics of IQ*, Halstead Press, New York, 1974, 1-2, arguing that there is no evidence that those with low IQ test results are "genetically inferior victims on their own immutable defects," despite prevalent social views to the contrary.

Laissez-faire capitalism eagerly adopted Social Darwinism as confirming that social relationships should properly be regulated by the 'natural selection' of market forces. The racist consequences of Social Darwinism were therefore imported in England not only into social attitudes, but into economic philosophy. Similar arguments have been used in both Britain and the United States to justify the 'natural selection' of migrant cultures on the basis of whether or not those cultures are "culturally attuned to the capitalist marketplace."[35] Failure to achieve economic prosperity is evidence of one's cultural inability to adapt, and therefore is justification for one's marginalisation or deportation.

Social Darwinism is still very much a part of Australia's 'cultural baggage'. Aborigines are still called 'rock apes' in south-western Queensland,[36] echoing depictions of the Irish by the British and the Japanese by Americans.[37]

Today, the scientific position is that 'race' does not describe a physiological reality for any existing social group and that quantifiable physical characteristics cannot be used to define 'racial' groups.[38] The child of one white parent and one black parent does not 'come out' genetically half 'white' and half 'black' in the tidy fractions described in the

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Also see "The mythology of Race, or For Whom the Bell Tolls," Chapter 6 in Montagu (1997) 155.

35 Jakubowicz (1984) 37, citing Thomas Sowell, *Ethnic America: A History*, New York, Basic Books, 1981, 284 to 285 and *Markets and Minorities*, New York, Basic Books, 1981. This is one facet of the 'new racism' discussed below.

36 quoted in Debra Jopson, "Racism , *or* just arrogance?" *Sydney Morning Herald,* 14 April 1995, 11.

37 Dower (1995) 28, 29. See also Jack Levin and Jack McDevitt, *Hate Crimes: The Rising Tide of Bigotry and Bloodshed*, Plenum Press, New York and London, 1993, 26 -27.

38 Pierre L. van den Berghe, *Race and Racism*, John Wiley & Sons Inc, New York, 1967, 21 and Haney López (1994) 11. This has been confirmed by a statement on race prepared by a task force of the American Association of Physical Anthropologists (AAPA) which is to be incorporated into the United Nations *Declaration on Race and Racial Prejudice*. The AAPA statement confirms that 'pure races' do not exist and probably never did, and that no group of people can be said to be genetically superior to another group: Leigh Dayton, "The *race* is over", *Sydney Morning Herald*, 14 April 1995, 11. See also Robert Miles, *Racism*, Routledge, London, 1989, 70, UNESCO, *Sociological Theories: Race and Colonialism*, Paris, 1980, Stephen Rose, R. C. Lewontin and Leon J. Kamin, *Not in Our Genes: biology, ideology and human nature*, Penguin, Harmondsworth, 1984, 119ff and Bryan Sykes, *The Seven Daughters of Eve*, Bantam Press, London and New York, 2001, 295-6.

Table.[39] Physical distinctions such as skin or eye colour are responsible only for a minute part of our genetic makeup, the greatest part of which is common to all humankind.[40] If one were to define 'race' according to common physical characteristics, there would be as many races as there were characteristics or categories selected.[41] People would belong to a variety of races, depending upon which characteristics happened to be selected as determinative. If race were to be determined by the number of possible genetic combinations, the number of races would be many times larger than the total number of humans.[42]

The point is not that there are some physical distinctions between individuals or groups that are objectively ascertainable, but that those distinctions are seen as socially significant.[43] This is also the position taken by modern sociology – that race is not a biological reality but a changing social construct or product of multi-intersectional social forces[44] including class.[45] "Race is neither an essence nor an illusion," says López, "but rather an ongoing, contradictory, self-reinforcing process subject to the macro forces of social and political struggle and the micro effects of daily decisions."[46]

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39 Moran (2003) 175 notes how 'people laugh' if Ward Connerly, an opponent of Californian 'color-conscious' policies, tries to identify himself as Irish on the basis that he is 37.5% Irish, 25 % French, 25 % black, and 12.5 % Choctaw. Such identity issues are also discussed in Audra Simpson, "Paths Toward a Mohawk Nation: Narratives of Citizenship and Nationhood in Kahnawake" in Duncan Ivison, Paul Patton and Will Sanders, *Political Theory and the Rights of Indigenous Peoples*, Cambridge University Press, Cambridge and Melbourne, 2000, 113.

40 See Anti-Discrimination Board (2003) 14, citing President's Cancer Panel, *The Meaning of Race in Science – Considerations for Cancer Research: Highlights and Recommendations*, 9 April 1997, National Institute of Health, National Cancer Institute, 1998, at 2. Indeed, Sykes (2001) argues that patterns in DNA suggest that we can trace our origins back to a small number of 'clans' whose descendants spread throughout the world.

41 D. Van Arkel, "Racism in Europe" in Robert Ross (ed), *Racism and Colonialism*, Martinus Nijhoff Publishers, The Hague, 1982, 11 at 11, 12.

42 Van Arkel (1982), quoting Dunn and Dobzhansky, *Heredity, Race and Society*, 9, 48 and 53.

43 van den Berghe (1967) 11.

44 van den Berghe (1967) 21; see generally Hollinsworth (1998) 31ff, Introduction to Valdes et al (2002) 2, Robert S. Chang, "Critiquing 'Race' and Its Uses: Critical Race Theory's Uncompleted Argument" at 87ff in Valdes et al (2002) and other articles in Part II Section A in Valdes et al (2002).

45 See David R. Roediger,.*The Wages of Whiteness: Race and the Making of the American Working Class*, Verso, London, 1999, 6-7.

46 Haney López (1994) 7. See also Toro (1995), Montagu (1997), Marie de Lepervanche and Gill Bottomley (eds), *The Cultural Construction of Race*, Sydney Association for Studies in Society and Culture, University of Sydney, Sydney, 1988; Hollinsworth (1998).

It is relational and dynamic.[47] Cohen goes further and describes race as an ideological construct which has no meaning outside racist discourse and which legitimises real social domination or subordination.[48] Moran points out that for people of 'multiracial' identity, race is a fluid construct, not "an artefact of ancestry or appearance" but at times a "function of social experience and ties"[49] and calls for us to 'undo race'.[50] "Race is not a fixed characteristic," she says, "but a contingent form of personal identity. It depends on the reactions of family, friends, and strangers ... ."[51] Hayman Jr and Levit similarly suggest that the point is that what is really important about 'race' is not how it is categorised or caused but the response.[52]

And just as 'race' is socially constructed, so is the 'whiteness' from which it is said to differ - but which is invisible as the normal or 'neutral' state of things. White privilege or 'whiteness' is the norm and those who identify with it are likely, by that identification, to be blind to their own advantages and thus to the inequality inherent in the social determination.[53]

Unfortunately, the 'constructionist position' is not generally accepted in popular or legal discourses, which continue to be underpinned by naturalistic or biological concepts of race. In the United States, this may be because recognition that constraints which are race-based are by definition group-based calls into question the liberal premise of the

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47 Charles Mills, *Blackness Visible*: *Essays on Philosophy and Race*, Cornell University Press, Ithaca and London, 1998, 76.

48 Hollinsworth (1998) 32 citing Phil Cohen, "The perversions of inheritance" in P. Cohen and H. Bains (eds) *Multi-racist Britain*, Macmillan, London, 1988, 9 at 23.

49 Moran (2003) 181.

50 Moran (2003) 196. This call has a long history. In 1936 Julian Huxley and A.C. Haddon wrote in their anti-eugenics work, *We Europeans*, that 'the term race as applied to human groups, should be dropped from the vocabulary of science': Robert L. Hayman Jr and Nancy Levit in "Un-Natural Things: Constructions of Race, Gender, and Disability" in Valdes et al (2002) 159 at 164.

51 Moran (2003) 191.

52 Hayman Jr and Levit in Valdes et al (2002) 160.

53 Stephenson (1997). See generally the literature on 'whiteness', including Ruth Frankenberg, *White Women, race matters: The social construction of Whiteness*, University of Minnesota Press, Minneapolis, 1993, 6-7 and France Winddance Twine, "Brown Skinned White Girls: Class, Culture, and the Construction of White Identity in Suburban Communities" in Ruth Frankenberg (ed),

autonomy of the individual. It also calls into question the related viewpoint that the *status quo* represents, if not the 'best of all possible worlds', at least a natural order of things. [54]

For Critical Race Theory, an understanding of 'race' as a social construct involving subordination (and strongly connected to legal or social bans on intermarriage and integration, as Moran says[55]) is essential to contextual analysis which focuses upon the experiences of oppressed peoples. While rejecting the biological concept of race, Critical Race Theory also rejects a 'colour-blind' approach to law, which "ignores the fact that Blacks and Whites have not been and are not similarly situated with regard to legal doctrines, rules, principles and practices."[56] This view has had some judicial support. For example, in *Keyes* v. *School District No. 1*, Justice Brennan of the American Supreme Court demonstrated his understanding of these concepts, saying that race is not a fixed trait but a matter of local culture and historic development, and that racial discrimination could be found wherever the dominant (white or Anglo) group viewed other groups as inferior and acted on those beliefs with exclusionary practices.[57]

The construction of 'race' can be part of a process of attempting to find a neutral descriptor. Critical race theorists argue that self-conscious racial identities can also be the source of individual fulfillment and collective strength.[58] Where 'race' is used negatively, it is generally as a traditional, biological classification which equates physical characteristics with social consequences, or as a more purely social construct derived from racist attitudes and racist mythologies, only tenuously tied to physical

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Displacing Whiteness: Essays in social and cultural criticism, Duke University Press, Durham, N.C. and London, 1997, 214 at 238.

54 Hayman Jr and Levit in Valdes et al (2002) 160ff.

55 Moran (2003) generally and 183.

56 Carol Aylward, "Critical Race Theory" in *Canadian Critical Race Theory: Racism and the Law*, Fernwood Publishing, Black Point, Nova Scotia, 1999, 19 at 21-25. See also Introduction by the editors in Valdes et al (2002) 1.

57 See Toro (1995).

58 Introduction to Valdes et al (2002) 1. However, to the extent that such self-identification is necessarily exclusionary, this does raise further questions. Cassinelli comments that, "like a

characteristics.[59] In those cases, categorisation is fundamentally about providing a justification for racism. Reminding ourselves that race, like whiteness, is a social construct makes it clear to us that 'race' is fundamentally about racism.[60]

'New' or neo-racism

> *When the children of the bourgeois classes are taught several languages, we do not hear them (multilingual as they are) complain or talk about the psychological evils of bilingualism, though the latter is supposed to do irreparable damage to dominated groups.*[61]

A more sophisticated racism has been identified in Australia since the 1970s as part of conservative political theory, reinforced by the media. The 'new' racism or 'neo-racism' purports to accept that there are no scientifically distinct races, but identifies cultural differences and 'values' as inherent, ineradicable and meaningful – "the given that cannot be changed"[62] – resulting in a "racism without race."[63] In the manner of Social Darwinism, immigrants and Aborigines are distinguished and marginalised not on the basis of skin colour or race but on the basis of their supposed cultural difference and alleged incompatibility with the lifestyles or "social fabric of Australia."[64] 'Australia' is seen, for these purposes, as being white and monocultural.[65] Minority

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nation, a race exists when a number of people come to believe they have a common and distinct existence and destiny and consequently to develop racial consciousness" (1976) 22.

59 Castles (1996) 22.

60 See Hayman Jr and Levit in Valdes et al (2002) 180 -182.

61 Colette Guillaumin, "The idea of race and its elevation to autonomous scientific and legal status" in UNESCO (1980) 37 at 64.

62 Anti-Discrimination Board (2003) 34, citing Samuel P. Huntington, "The clash of civilizations," (1993) 72 (3) *Foreign Affairs*, 22.

63 see generally Thomas C. Holt, *The Problem of Race in the 21st Century*, Harvard University Press, 2000, 14. This is a tactic identified by Erin Tucker, "'Old Racism', 'New Racism'" in Markus and Rasmussen (1987) 16, 17 and 19, and exposed by Fish as merely rhetorical: (1994) 31-50, 70-79, 89-101.

64 Anti-Discrimination Board (2003) 32.

65 Which racial or ethnic groups are considered to be 'white' has changed over time, so that Irish, Northern and Southern European communities which were in the past in Australia considered as the 'other' are now more usually considered to be part of 'white' Australia: Anti-Discrimination Board (2003) 33.

cultures are regarded as a threat to social cohesion.[66] Nationalism and nationhood are seen as incompatible with diversity.[67]

Just as it was claimed in the past that 'scientific' racial distinctions naturally led to racism, it is claimed that ethnic groups 'naturally' resent each other, naturally compete and conflict, and naturally should remain in their own spaces.[68] That is, the new racism opposes immigration.[69] In Australia the 'new' racism has been facilitated by previous policies of multiculturalism which failed to challenge the notion that there are insurmountable cultural differences between groups of people from different continents.[70] The media has played a principal role in reinforcing the new racism through its continued presentation of white Australia as normal, and non-Anglo cultures as threatening,[71] through failing to portray Australia's cultural diversity,[72] and through allegations of 'reverse racism' which portray the white majority as vicitms.[73]

Claims of 'natural' differences and conflicts are racist, points out Jakubowicz, "because they maintain that the privileges of one group should prevail over those of another purely on the basis that cultural differences are incompatible."[74] "The shift from biology to culture," says Holt, "has opened another can of worms for defining the concept of race."[75] Race is agreed to be erroneously based on biology and thus suspect,

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66 see for example the Australian nationalist website which refers approvingly to 'those who value their European Cultural identity and who seek to preserve it": http://www.aphalink.com.au/~radnat/links.html

67 *Racism No Way – Understanding Racism*, 3 of 5 at http://racismnoway.com.au /library/understanding/index-What.html

68 Jakubowicz (1994) 29.

69 In Balibar's words, "racial stigma and class hatred are combined today in the category of immigration": (1991c) at 205. This has been described as 'the modern packaging of hatred towards foreigners" and has increased female membership of right wing parties: Kate Connolly, "Women lured by neo-Nazi nationalism," *Guardian Weekly*, 19-25 April 2001, 5.

70 Anti-Discrimination Board (2003) 32. See also Tucker (1987) 17 and 19.

71 See generally Anti-Discrimination Board (2003) Chapter 3 and Jakubowicz (1994) 38-9, 103-7, 114-21.

72 See Anti-Discrimination Board (2003) Chapter 3, 73 as to lack of non-white role models in the Australian media. See also *Racism No Way – Understanding Racism* 3 of 5 and Jakubowicz (1994) 12, 57-60, 74, 82-4, 104-6, 194-5.

73 See *Racism No Way – Understanding Racism*, 3 of 5.

74 Jakubowicz (1994) 29, Etienne Balibar, "Is there a 'Neo-Racism'?" in Balibar and Wallerstein (1991) 17, 22.

75 Holt (2000) 16.

but ethnicity[76] is "socially and culturally grounded," and thus a valid basis for differentiation.[77] However the underlying mindset – that groups of people possess fixed, immutable qualities – remains the same[78] – and in this way ethnicity is 'biologised' and (mis)used in the same way as was 'race'.[79]

Racism that focuses on culture is not really new. Some writers identify it as being a merely a more sophisticated form of Social Darwinism.[80] Martin Barker calls it 'pseudo-biological culturalism':

> Nations on this view are not built out of politics and economics, but out of human nature. It is in our biology, our instincts, to defend our way of life, traditions and customs against outsiders – not because they are inferior, but because they are part of different cultures. This is a non-rational process; and none the worse for it. For we are soaked in, made up out of, our traditions and our culture.[81]

Barker identifies the genesis of 'new' racism with English Conservative party speeches on immigration from 1976 onwards, including one by Margaret Thatcher in 1978 which was echoed by Hanson in 1996.[82]

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76 Sarup defines ethnicity as "the shared, cultural, historical features of a group": (1996) 178.

77 Holt (2000) 16.

78 Anti-Discrimination Board (2003) 33.

79 As Sarup points out, the term 'ethnicity' has been appropriated by the political Right and used (in Britain) to divide 'black' people into different categories, which are then seen as divided and fragmented, in contrast to the homogenous white 'British' population, which is not seen as 'ethnic': Sarup (1996) 179

80 See Sarup (1996) 177. Hollinsworth agrees that 'cultural essentialism' is not new but considers that it is distinct from social Darwinism: (1998) 53.

81 Martin Barker, *The New Racism: Conservatives and the Ideology of the Tribe*, Aletheia Books, Frederick, Maryland, 1982 (first published 1981), 23 – 24.

82 In her maiden speech Hanson stated: "I believe we are in danger of being swamped by Asians. Between 1984 and 1995, 40 per cent of all migrants into this country were of Asian origin. They have their own culture and religion, form ghettos and do not assimilate… A truly multicultural country can never be strong or united": House of Representatives, *Hansard*, 10 September 1996, 3802ff. See also Mark Metherell and Damien Murphy, "Flame-haired flame-out", *Sydney Morning Herald*, 21 August 2003 15. Similar statements are regularly made, including by the German Federal Interior Minister in 1991, quoted in Witte (1993) 161.

> If we went on as we are, then by the end of the century there would be 4 million people of the New Commonwealth or Pakistan here. Now that is an awful lot and I think it means that people are really rather afraid that this country might be swamped by people with a different culture. And, you know, the British character has done so much for democracy, for law, and done so much through out the world, that if there is a fear that it might be swamped, people are going to react and be rather hostile to those coming in.[83]

Others point out that 'cultural' racism has always existed in the 'bogus anti-capitalism' of antisemitism which is based on cultural rather than 'racial' identification.[84] The 'new racism' appears to have informed Samuel P. Huntington's influential 1993 article 'The clash of civilizations'[85] (subsequently published in book form[86]) which argued that the principal conflicts of global politics will occur between 'groups of different civilizations' or different 'cultures' and that multicultural countries cannot endure as 'coherent societies.'[87] McCausland points out how Huntington's view "permeates most of the contemporary debate about social, cultural and immigration policy" and has influenced debates about international relations, war and peace:

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83 Barker (1982) 15 quoting *Daily Mail*, 31 January 1978. Compare Hanson: "If we were to have too many of one race coming in that weren't assimilating and becoming Australians, it would take over our culture, our own way of life and our own identity, and that's what I'm protecting" reported in 'Leader flees as police and protesters fight', *Sydney Morning Herald*, 23 July 1998 and quoted in Ang (2000) 126.

84 Balibar, 'Class Racism' in Balibar and Wallerstein (1991) 204 at 205-6. Cassinelli (1976) notes that Hitler needed, however, to depict Jews as a racial group in order to present them as the enemy of the 'Aryans': 24. See also Fish (1994) 31-50, 70-79, 89-101.

85 (1993) 72 (3) *Foreign Affairs* 22. It is interesting to note that the Howard government for a time promoted the term 'culturally and linguistically diverse' in preference to the term that had been used for the previous thirty years: 'non-English-speaking background': Jupp (2003) 3.

86 *The Clash of Civilizations and the Remaking of World Order*, The Free Press, Simon & Schuster, London, 2002 (first published 1996).

87 (2002) 306. Contra, see Fouad Ajami, "The Summoning" (1993) 72 (4) *Foreign Affairs* 2 (who points out that Huntington incorrectly assumes the West to be a single, monocultural, entity) and Guillaumin (1980) generally as to the supposed 'naturalness' of social groups and separate cultures.

> If we accept that our future is already determined by 'what' we are, and that 'what' is defined in essentially racial term – masquerading as cultural norms – then the challenges to our public policy are enormous and our hopes for a greater universalism or a commonality of rights among all human beings, regardless of race or culture, are threatened profoundly.[88]

The mythology of racism

History has its truth, legend has hers. Legendary truth is wholly different from historic. Legendary truth is invention that has reality for a result.[89]

… racism is …a historiography which makes history the consequence of a hidden secret revealed to men about their own nature and their own birth…[90]

… room has to be made for race as both real and unreal…[91]

The use of 'race' as a negative social construct can only be fully understood by examining the mythological nature and functions of racism. 'Racism' is not simply about 'race' and 'neo-racism' is not simply about culture. Both involve a 'plan'[92] – a mythology which preaches a distinct way of seeing and acting upon the world. As Balibar says, there is no racism without theory.[93]

'Traditional' racism (as distinct from 'new' or 'cultural' racism) uses both real and imagined distinctions to justify maltreatment, exploitation and genocide and to maintain power for the in-group and its members.[94] It is attractive because of its elitism, because

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88 Anti-Discrimination Board (2003) 34.
89 Victor Hugo, *Ninety Three*, Collins, London & Glasgow, undated, 192.
90 Balibar (1991b) 54-5.
91 Mills (1998) xiv.
92 See Barker (1982) generally and at 173.
93 Balibar (1991a) at 18.
94 See Teun A. van Dijk, *Communicating Racism*, Sage Publications, Newbury Park 1987, 359.

of the distinctions it draws which place the racist above the rest of society, and because it operates as a unifying personal 'religion.' But it is harmful to its victims and uses differentiation to justify violence and discrimination against target groups. In its extreme forms, racism is intensely political, and seeks to advantage racists at the expense of scapegoat groups.

'New' racism emphasises its concern, even liking, for the prospective immigrant. As Barker says, restricting immigration is supposedly being 'kind' as immigrants would undoubtedly be happier in their 'natural home', which is the only place where anyone should be.[95] But underlying the apparent concern is the notion that harsh measures are justified if the immigrant insists on arriving in your country – as we have seen with treatment of refugees since 1996 in Australia.

While the traditional forms of racism promote inequality within the nation, the new racism promotes exclusion from a supposedly homogeneous nation and assimilation of those already there. Both forms of racism oppose fundamental participatory aspects of democracy.

Colin Tatz defines the term 'racism' as

> convenient shorthand to cover *any* system or process by which people equate one set of characteristics – such as colour, religion, ethnicity, language – with another set of socially relevant characteristics, invariably negative; who then use those equated beliefs as *legitimate* reason for taking institutionalised action against them.[96]

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95 Barker (1982) 21.

96 "Racism and Antisemitism: their Place in University Curricula" (1992) 6 (1) *Australian Journal of Jewish Studies* 83. Note that this definition recognises the active and not static nature of racism, and the centrality of power to racism: dimensions often ignored in sociological definitions: Hage (1995) 66 and 67. See also van den Berghe (1967) 11: "Racism is any set of beliefs that organic, genetically transmitted differences (whether real or imagined) between human groups are intrinsically associated with the presence or the absence of certain socially

The concept of racism is enhanced by the judicial definition of discrimination as "the drawing of an irrational distinction between people based on some irrelevant personal characteristic for the purpose, or having the effect, of imposing on certain of them a penalty, disadvantage or indignity, or denying them an advantage."[97]

Peter Jackson's definition of racism incorporates the concepts of the 'new' racism:

> Racism … involves the attempt by a dominant group to exclude a subordinate group from the material and symbolic rewards of status and power. It differs from other modes of exclusion in terms of the distinguishing features by which groups are identified for exclusion. However, racism need not have recourse to purely physical distinctions but can rest on the recognition of certain 'cultural' traits where these are thought to be an inherent and inviolable characteristic of particular social groups.[98]

It is *the fact* that a distinction or categorisation is made, in order to rationalise maltreatment or refusal to give privileges, rather than *the way* in which the differentiation is justified, which is the most useful demonstration of 'racism'. As Stephenson says,

> the identity of the oppressed group will alter depending not only on who is doing the defining, but also on what informs their motivations or reasons … Racism is a discourse and practice of inferiorising particular groups of people, which may be just as easily justified in terms of the negative attribution given to "culture, ethnic identity [or] personality as well as 'racial stock'".[99]

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relevant abilities or characteristics, hence that such differences are a legitimate basis of invidious distinctions between groups socially defined as races" and Balibar (1991a) 17-18.

97 Mr Justice Taylor in *Andrews* v. *Law Society of British Columbia*, quoted by the Court of Appeal in (1986) 2 B.C.L.R. (2d) 305, 310.

98 Peter Jackson, *Race and Racism: Lessons in Social Geography*, Allen and Unwin, London, 1987, 12 -13.

99 Stephenson (1997) citing F. Anthias and N. Yuval-Davis, *Racialized Boundaries: Race, Nation, Gender, Colour and Class and Anti-Racist Struggle*, Routledge, London, 1992, 12.

'Racism' is used in this thesis as meaning *an ideology of differentiation which justifies subordination and mistreatment* or, where the context indicates, speech or actions based on that ideology. It places "responsibility for inferiority on the victims", says Stephenson, "thereby providing a powerful rationale for inequality".[100]

In the following discussion of essential features of 'racism', and in making generalisations about how 'racists' think and behave, I have focused often on the most extreme 'white supremacist' racist attitudes. Admittedly not all 'racists' hold extremist views, and many people who hold racist views do not generally act on them. I agree with Hollinsworth that the ultimate aim must be to deal with 'commonsense' racism, and not to excuse racists on the basis of any distinctive psychological traits.[101] But extremist attitudes are still very relevant to the outlook of less 'active' racists, and to the rest of society. Extremist racist attitudes are part of a continuum of racist beliefs that exists throughout society, and that affects us all to a greater or lesser degree. The many ways in which racism is already part of our culture, and attempts by extremists and 'new racists' to skew the terms of political debate in their favour, make increasingly overt forms of racism socially acceptable. Barker points out how in England the Conservative Party's new racism has allowed the National Front to argue that they are normal and respectable – they are not racist in promoting hatred, they are only 'racialist' in recognising inherent cultural differences.[102] That is, extremist statements are harmful because they are part of a systemic practice.[103] Moon points out that:

> [a]t one level, the issue in these cases is whether a particular instance of expression goes 'too far' and causes harm to important human interests, but at a deeper level the issue is whether certain forms of expression, or certain messages or perspectives, so completely dominate public discourse that the space for critical judgment by the individual is compressed. In such a context, the concern

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100 Stephenson (1997) citing J. Pettman, "Antiracist Teaching", paper presented at AARE Conference, ANU, Canberra, 1983, 3.

101 Hollinsworth (1998) 50.

102 Barker (1982) 26.

> is that (extremist) 'speech' no longer appeals, or contributes, to independent reflection and judgment.[104]

The implications of the widespread adoption of any racist ideology are profound. Once one has accepted that the 'Other' should be treated differently than 'Us' for some social, economic or political purpose, there is no logical stopping-point on the spectrum that leads to the most extreme forms of subordination or to extermination. The Holocaust showed how readily the 'common or garden variety' of antisemitism between one neighbour and another could turn to murder.[105]

Features of racism

Overview

Where racism is given free rein it necessarily affects the level of democracy that is practised in any society, because racism is essentially undemocratic and inegalitarian in its ideals. The ultimate aim of racism is for an elite group to obtain and maintain superiority over other groups, or at least for target groups, differentiated from mainstream society, to be substantively disempowered and excluded from full participation in the body politic.[106]

Discrete elements of the behaviour described below are also carried out by people who would not regard themselves as racist, and do not necessarily have the same ultimate aims, but who are caught up in the racist pattern of behaviour. Racists corrupt democratic ideals and attempt to accustom society to racism:

- through direct intimidation and violence, discouraging members of target groups and their supporters from taking part in public debate, from standing for public office, or

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103 Moon (2000) 146.
104 Moon (2000) 147.
105 See for example Jan T Gross, *Neighbors: The Destruction of the Jewish community at Jedwabne, Poland*, Princeton University Press, Princeton and Oxford, 2001.
106 Lawrence (1993) 79.

from promoting pluralist policies once they get there. The intimidation leads to disempowerment of the group as a whole, and effectively to political exclusion. Racist speech decreases the total amount of speech that reaches the market, or the voters, by coercively silencing target groups.[107]

- through hate propaganda which defames and denigrates the worth of target group members and belittles their words and ideas, or by more subtle arguments which denigrate the worth of the group's culture, so that even if a target group member speaks publicly, or stands for parliament, he is less likely to be respectfully listened to, to be taken seriously, or to receive votes. If members of a distinct group seek to enter politics other than as part of the dominant cultural group, they are accused of 'Balkanising' politics. The speech of the victims becomes less 'saleable' in the marketplace.[108] Tactics include denigrating the ethnic backgrounds of candidates.[109]

- through hate propaganda which encourages fear and dislike of the target group, including by speaking (sas we have seen) of the dominant group being 'overrun' or 'innundated';

- through scapegoating which blames the target group for economic or social problems which are not theirs alone. Inaccurate information is disseminated about race-related issues, such as the supposedly deleterious economic consequences of immigration, government benefits given to Aborigines at the expense of whites, and the like; and

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107 Lawrence (1993) 79; Richard Delgado, "Words that Wound: A Tort Action for Racial Insults, Epithets, and Name Calling" (1982) 17 *Harv. Civil Rights – Civil Liberties L. Rev.* 133 reprinted in Matsuda (1993) 89, 95; Mari J. Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 *Michigan Law Review* 2320, reprinted in Matsuda et al (1993) 17, 24-5; Katharine Gelber, *Speaking Back: The Free Speech Versus Hate Speech Debate*, John Benjamins, Amsterdam and Philadelphia, 2002, 85.

108 Lawrence (1993) 79.

109 Mark Latham, *Hansard*, House of Representatives, 16 November 1994, 3410.

- through myth-making political propaganda which either whitewashes the nature and violent consequences of racist ideology (notably Holocaust Denial), or presents a 'clash of civilizations' as inevitable. 'Whitewashing' is aimed at concealing genocide and acceptance of violence against victim groups and their supporters, and presenting the relevant ideology as economically beneficial to voters. The 'new' racism also glosses over harm to marginalised groups, but alternatively presents that harm as the inevitable result of Social Darwinism or 'cultural essentialism' – the success of a superior culture. Both types of political propaganda are used in order to obtain votes for racist candidates and to encourage social acceptance of racist behaviour.

In these ways, racists attempt to skew the terms of political debate in favour of racism and elitism; to make those elements of their ideology a normal part of the political scene and to present their mythology as a valid view of reality, on the basis of which electoral decisions should be made.[110]

Racism is different from other harmful ideas in the way that it opposes concepts of human unity and humanity. Racism is pernicious because it enshrines the concept that certain people are necessarily superior to other people *by birth* and should be given social privileges, and be allowed to disadvantage, mistreat and even physically hurt others, solely because of their supposed genetic superiority. There can be no idea which is more clearly inequitable and destructive of human relationships, and no ideology which more clearly opposes the concept of humanity itself.

[110] Recent increases in female membership of European extreme right groups have made such groups more attractive, and their views appear to be more mainstream: Connolly (2001) 5.

Racism is about differentiation, not logic

… the common bond between Us may be the Other
and We may require to invent Them to re-invent Ourselves[111]

The extent to which 'race' is a (negative) social construct, a mythology and not a reality, is demonstrated by the illogical nature of many categorisations of 'race', and by accepted exceptions to those categories.

Any attempt to combat hate speech with legislation immediately faces the problem that racist attitudes and expressions are not necessarily connected with physical or social realities of 'race', but are more about perceptions of difference. Racist targets are seen as 'different', 'unlike' or 'other.' The victim is differentiated from the perpetrator *by the perpetrator*, often not on any rational basis. It is rarely the *activities* of the victim that cause him or her to be targeted, but rather his or her *existence* as a person perceived to have different characteristics.[112] The perpetrator fears or dislikes those whom he perceives as different and racist theories (perhaps sincerely held) are both the reason for his fear or dislike and his justification for acting against those people. Victim groups are defined "on the basis of real or imagined physical characteristics which are believed to be both innate and intrinsically related to moral, intellectual and other non-physical attributes and abilities"[113] and victims are then terrorised or acted against for purportedly belonging to such a group. Classic examples are homosexuality and Jewishness. For example, Nazi categorisation of Jews involved two stages of distortion. A fantastic set of imaginary characteristics was invoked as the inherent characteristics of a particular 'race'. Any of a variety of characteristics including religion, family background, social and physical attributes were then used to select those deemed to belong to that 'race'.

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111 R.D. Laing, *The Politics of Experience and The Bird of Paradise*, Penguin Books, Harmondsworth, 1975, 77.

112 In Reich's words: "the conclusion is always there ready-made *before* the thinking process; the thinking does not serve, as in the rational realm, to arrive at a correct conclusion; rather, it serves to confirm an already existing irrational conclusion and to rationalize it": Wilhelm Reich, *Character Analysis*, Vision Press Ltd, London, 1969 (1st ed 1933) 256.

All actions against the targeted group were in this way inspired and justified by racist ideology through a chain of racist categorisations.

Racist differentiation also occurs through infantilisation (men being called 'boys' who lacked the sophistication or intelligence to fend for themselves). This is effective only so long as the group members are docile and conform to their subordinate role. If they become a threat, then they are no longer stereotyped as humans, but categorised as being outside the human race, as 'untermenschen' or the 'other'; as demons or devils, animals, insects, pestilence or disease.[114] Where there are no obvious signs of the racist's target being dangerous the racist is driven to postulate secret organisations and conspiracies, which in turn stimulate his anxiety and drive him to even more violent reactions.[115] Target groups are accused of rape, child murder, incest: the 'uncanny crimes', which could only be expected of a strange people.[116] The racist is afraid, not of the real Asian, Black or Jew, but of the stereotype he has created, which must be dangerous in order to justify his own pre-occupation with it – even though the racist is at the same time busy denigrating his target's characteristics and abilities. Thus Americans denigrated Japanese during the Second World War as small, primitive and childish, but at the same time feared them as supermen and 'devils'.[117]

Because racism involves general prejudice against others seen as different, and the belief that inequalities between humans are inevitable and largely irreversible, it is rare for people to hold racist views only in relation to one other group. People who are prejudiced against one group tend to be prejudiced also against others. Antisemites are generally also prejudiced against other groups perceived as different.[118] German

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113 van den Berghe (1967) 9.

114 Levin & McDermitt (1993) 25-6. Feminist leaders were lampooned as "she-devils" in cartoons of the 1960s and 1970s: 27.

115 van den Berghe (1967) 25, referring to Bruno Bettelheim, "The Dynamism of Anti-Semitism in Gentile and Jew", *Journal of Abnormal and Social Psychology*, 42 (1947) 153 to 168.

116 van den Berghe (1967) 18.

117 Dower (1995) 27 and 31.

118 As shown by the 1950s survey of working class antisemitism in London: James H. Robb, *Working-Class Anti-Semite*, Tavistock Publications, London, 1954.

skinhead gangs target not only foreigners but "any group that does not fit into their nationalistic, conservative world-view: gays, the disabled, leftwingers and even young people who listen to the wrong kind of music." Single mothers are abused and attacked for not creating "a proper German family."[119] Dower suggests that the basic patterns and idioms of racial stereotyping often tend to be free-floating, easily transferred from one target of prejudice to another.[120] Circumstances dictate against which 'out-group' racist prejudice will be directed at any time.

Exceptions allow the racist to recognise that not every person from a marginalised group fits the group stereotype, while allowing the racist to continue to hold to the stereotyped image as a general rule.[121] This is seen most clearly at the levels of national and group politics. The Nazis did not hesitate to form alliances with the non-Aryan Japanese, despite their otherwise rigorous classification of non-Aryans as sub-human German neo-Nazis today cooperate with otherwise 'racially inferior' people who have common political aims, and take intolerant and brutal leaders of all colours and races as their models.[122] Hitler had his 340 'first rate Jews' who were not treated as Jews.[123] White Australians may discriminate against Aborigines, but seek monuments to West Indian cricketers.[124] . However American WWII officers were 'consistent' in their racism in often treating German prisoners better than black American soldiers.[125]

In societies with a white elite, people of colour have been socially accepted by virtue of some characteristic such as military rank or wealth as 'honorary whites' – justifying

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119 Denis Staunton, "Rise of neo-Nazism in Germany" *Guardian Weekly*, 10-16 August 2000, 4. . Similarly see Martha Albertson Fineman, *The Neutered Mother, The Sexual Family and Other Twentieth Century Tragedies*, Routledge, New York and London, 1995, 101ff in relation to the single 'deviant' mother.

120 Dower (1995) 26 and 29 and Kenneth Clark, "Group Defamation and the Oppression of Black Americans", in Freedman and Freedman (1995) 3 at 6. Levin and McDevitt agree, saying that racists typically shift their attention from one outsider group to another and that it is therefore imperative that all vulnerable groups band together in opposition to racism: (1993) x.

121 As Colin Tatz points out, racism can be both "divisible" and "selective": "Cricket's ugly colored wounds" *The Age*, 7 November 1995, 11. See also Levin & McDermitt (1993) 22-3.

122 M. Schmidt, *The New Reich*, Hutchinson, London, 1993, 26.

123 Cassinelli (1976) 51.

124 Tatz (1995c).

their exception from the normal racist categorisations, to the extent that their obvious colour is denied by white people.[126] . "It's hard being black. You ever been black? I was black once – when I was poor"[127] said former world heavyweight boxing champion Larry Holmes. In the 1950s and 1960s white Americans' hatred of American blacks did not automatically extend to those who appeared to share the same physical characteristics, but who were seen as belonging to the more acceptable category of 'Africans'.

> They don't have to pass civil-rights bills for Africans. An African can go anywhere he wants right now. All you've got to do is tie your head up. That's right, go anywhere you want. Just stop being a Negro. Change your name to Hoogagagooba. That'll show you how silly the white man is. You're dealing with a silly man. A friend of mine who's very dark put a turban on his head and went into a restaurant in Atlanta before they called themselves desegregated. He went into a white restaurant, he sat down, they served him, and he said, "What would happen if a Negro came in here?" And there he's sitting, black as night, but because he had his head wrapped up the waitress looked back at him and says "Why, there wouldn't no nigger dare come in here."

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125 Les Back, "In the mood for tackling the Nazis" *Guardian Weekly*, 19 February 1995, 26.

126 I am reminded of how Andrew Young, visiting Australia when US foreign minister, was referred to by one Australian journalist as having 'a good suntan'. Brander Rasmussen points out that many writers described the same phenomenon before the word 'whiteness' came into popular academic use: see Birgit Brander Rasmussen (ed), *The making and unmaking of whiteness*, Duke University Press, Durham, N.C., 2001, 18 especially the references at Footnote 6. For example, Gilberto Freyre describes the irrationality of the 'magic power' of a university degree, a high position in the army, or an illustrious ancestor which in Brazil turned a black into an honorary white: " ... this handful of mulattoes who came to hold the posts of gentlemen became thereby officially whites, having achieved their position of authority through some exceptional quality or circumstance. Possibly some act of heroism against rebels. Perhaps a large fortune inherited from a vicar godfather. When the Englishman inquired in Pernambuco whether the captain-major was a mulatto – a fact which, moreover, leaped to the eye – instead of being answered, he was asked 'if it was possible that a captain-major should be a mulatto?' The title of captain-major Aryanized the darkest mulatto." – Freyre (1968) 369. Gotanda confirms that "Money Whitens" remains a fundamental cultural concept in Brazil: Gotanda (1991) 31. See also Cheryl I. Harris, "Myths of Race and Gender in the Trials of O.J. Simson and Susan Smith – Spectacles of Our Times" (1996-7) 35 *Washburn LJ* 225 at 236ff, reproduced at http://washburnlaw.edu/wlj/35-2/articles/harrtxt.htm#/txtto

127 Tatz (1995b) 110, quoting Joyce Carol Oates, *On Boxing*, Pan, London, 1987, 62.

> So, you're dealing with a man whose bias and prejudice are making him lose his mind, his intelligence, every day.[128]

The event described here provides a perfect illustration of Baudrillard's comment that:

> "Racism does not exist so long as the other remains Other, so long as the Stranger remains foreign. It comes into existence when the other becomes merely different - that is to say, dangerously similar. This is the moment when the inclination to keep the other at a distance comes into being."[129]

Differentiation and power relations

To make sense out of the nonsense,
one has to look for the real reasons behind the racial ones.[130]

Racism involves the constant identification of difference. The statement of difference is made by those with the power to name and the power to treat themselves as the norm.[131] Such differentiation is not a benign activity.[132] Racist categorisations are subordinate to a practical function ('justification' for the racist's otherwise obviously harmful actions) and therefore one cannot separate racist ideology from what racists do or wish to do.[133] Racists don't identify people as the 'other' in order to be kind to them or to leave them alone.[134] Racism is about elitist justifications for the subordination of other groups: that is, about power and about lies. "It needs to be recognised" warned former Australian

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128 George Breitman (ed), *Malcolm X Speaks*, Ballantine Books, New York, 1973, at 37 to 38.
129 Jean Baudrillard, *The Transparency of Evil*, Verso, London and New York, 1993, 129.
130 Dinyar Godrej, "Race: Unlocking Prejudice," *New Internationalist*, October 1994, 4 at 6.
131 Minow (1990) 111 and 142.
132 Dianne Otto, "Tolerance: A Gendered Technology of Power" (1995) 20 *Melb Uni LR* 192 at193; Jan Pettman, *Living in the Margins: racism, sexism and feminism in Australia*, Allen and Unwin, Sydney, 1992, 3, 58.
133 Hage (1995) 66 to 67.
134 Hollinsworth (1998) 32-33.

Attorney-General Michael Lavarch, "that racial hatred does not exist in a vacuum or for the intellectual satisfaction of those feeling it."[135]

When we identify one thing as 'not like the others', we are not merely classifying the world, says Minow, we are investing our classifications with consequences; we are dividing the world and using our categorisations to exclude, distinguish and discriminate. When we simplify and sort, we focus on some traits rather than others, and we assign consequences to the presence and absence of the traits we make significant, and which we assume to be 'intrinsic' differences, rather than merely the traits on which we have focused. When we respond to a person's traits rather than their conduct, we attribute consequences to the differences we see. We neglect the other traits that may be shared. To categorise a mouse as a pet, vermin, snake food, or the subject of an experiment has different consequences for how we treat the mouse. It is the same with categorising humans.[136]

Social permission to act against people who are supposedly different is the first step along the road to genocide.[137] In this way German Jews, separated from the rest of the German population by legislation and segregation, were ultimately dehumanised through language and expressive speech, including pornographic propaganda, as devils, lice, and vermin, to the point where their destruction was apparently justifiable.[138] Genocide and war are not due only to labelling, but labelling makes it easier to deny any common bonds.[139]

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135 *Hansard*, House of Representatives, 15 November 1994, 3340.

136 Minow (1990) 4 - 7, 50 ff, 112, Balibar (1991b) 55-6.

137 Tatz (1995a) 18.

138 See generally, Blain (1995), Dower (1995), Laurence Hauptman, "Group Defamation and the Genocide of American Indians" in Freedman and Freedman (1995) 9 and Deborah Tannen, *The Argument Culture*, Ballantine Books, New York, 1999, 84.

139 Minow (1990) 7. Gaudreault-DesBiens points out that the nexus between hate propaganda, hate crimes and genocide is more often acknowledged in the socio-political realm than the legal: (2001) 1118. See however W. A. Schabas, 'Hate Speech in Rwanda: The Road to Genocide' (2000) 46 *McGill L.J.* 141 and Case No. ICTR - 99 - 52 -T decided on 3 December 2003, concerning Nakemana, Barayagwiza and Ngeze, available at the International Criminal Tribunal for Rwanda Website at

The labels don't have to be correct. Gangs who beat up homosexuals also beat up straight men who aren't gay but who happen to be in the wrong place at the wrong time. The gangs don't stop to enquire; their need to prove their power over the 'other' is apparently satisfied whether or not their victim is really one of the minority group whose members they view as justifiable targets. Gail Mason described how lesbian women experience two different patterns of harassment and violence. One echoes that of attacks against homosexuals: abusive or physically violent attacks by total strangers in public places, while the other reflects the majority of sexual attacks against non-homosexual women: sexual harassment or rape by acquaintances.[140] Both patterns demonstrate the strong taking advantage of the weak, the form of domination differing according to whether or not the victim is perceived as basically unfeminine.

Quentin Crisp has argued that the perpetrator's aggression or wish to persecute:

> is not directed at a person, it is directed at anybody who is not likely to find defenders ... one day you see someone whom no one will blame you for attacking, and then all your bitterness pours out. And it doesn't matter who it is, as long as you can lash out at somebody without anyone reproaching you later. This is why people attack the weak, homosexuals, but especially effeminate homosexuals.[141]

Racist youths in Perth made arson attacks on Asian women alone with children, choosing targets obviously weaker than themselves.[142]

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http://www.ictr.org/ENGLISH/cases/Barayagwiza/judgement/Summary%20of%20judgment-Media.pdf.

140 "Visages of Hate: Anti-Gay Violence": paper presented on 29 September 1993 to the 9th Annual Conference of the Australian and New Zealand Society of Criminology, Sydney. See also Gail Mason, 'Sexuality and Violence: Questions of Difference' in Cunneen et al (1997) 115 at 124 and 133-4.

141 Interview on *The Late, Late Show*, Eire TV, 1985, quoted in Dorothy Rowe, *Beyond Fear*, Fontana, London, 1987, 129 to 130.

142 HREOC (1991) 506 to 513.

Hate crimes have a basis, say Levin and McDevitt, in the stereotypes that members of a society are taught as they grow up. The perpetrator of hate crimes learns through his culture precisely those groups against which he is supposed or allowed to vent his anger: the groups that his culture has classified as inferior. By defining the enemy, the offender's culture has given him implicit permission to attack.[143]

Racist categorisations affect our social and political thinking. The way we define the world determines the decisions we make about it. If people have a distorted view of reality, operate on the basis of false stereotypes, and are misinformed about other people and maybe about themselves, they will make unfair and inappropriate choices about the best distribution of social resources to limit the supposed influence of minorities.[144]

The attractions of racism and racist scapegoating; its effect as a unifying 'religion'

Animals are determined by their instincts;
humans are determined by the way they define the world.
–Edward Bond[145]

Our fundamental tactic of self-protection, self-control, and self-definition is not spinning webs or building dams, but telling stories, and more particularly concocting and controlling the story we tell others – and ourselves – about who we are.
–Daniel C. Dennett[146]

Racism as an outlook or world view is a 'belief system' which meets the four functions of a living mythology identified by Joseph Campbell: a mystical function, the offering of an acceptable image of the universe which is consistent with the knowledge of the

143 Levin & McDevitt (1993) 48.
144 Levin & McDevitt (1993) 30-1.
145 In an interview with Thomas Sotinel, "Defining the world through paradoxes", *Guardian Weekly*, 24 July 1994, 18.
146 Daniel C. Dennett, *Consciousness Explained*, Little, Brown and Co, Boston, 1991, 418.

group, the validation of group norms, and a guide for all the stages of life.[147] These four functions are all linked to the racist way of seeing the world which is elitist, promoting the superiority and power of the racist and his group, seeing inequality as natural.

Racism has a mystical and unifying function, in giving its adherents the sense of a higher, common, supra-national purpose.[148] In the white supremacist version of racist mythology, the white man controls human progress. The racist mythology provides a pattern for life: it explains the world the racist lives in, imposes social norms, and provides a defence network through which information is filtered.[149]

Subordination of human concerns to mythology is a constant and universal attribute of mankind, says Campbell, resulting from the impulse to transcend one's own mortality. Mythic aims and laws are the primary rules by which man organises his life, and economic aims and laws are generally secondary.[150] We are all drawn towards mythological aims and concerns, and racism as an ideology fulfils the functions of a mythology.

Racism as a mythology and a way of seeing the world can fulfil the need for security and for justice caused by the precarious nature of human existence.[151] It replaces the need for personal morality, and undermines the role of the Church or other moral influences which might otherwise countermand its message of violence and exclusion.

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147 Campbell (1985) 172 and 173. See also Blain (1995) 53 in relation to the similar characteristics of political movements.

148 In the words of Robert Lifton "... there was all through the Nazi era a sense of mythic transcendence. One didn't commit a little act, a small patriotic act in an everyday way just for one's self. It was for the thousand year Reich, it had a higher purpose": "Life Unworthy of Life: Nazi racial views" in Randolph L. Braham (ed), *The Psychological Perspectives of the Holocaust and of its Aftermath*, Columbia University Press, New York, 1988, 1 at 9. Hitler spoke of requiring the concept of 'race' as providing a political justification for a 'new order' that would transcend historical national boundaries. He saw 'race' as essentially a sense of mutual identification amongst its members: Cassinelli (1976) 21-2. As to the super-national aspects of racism, see Balibar (1991c) 207 and 211-2, Balibar (1991b) generally and in particular at 59ff.

149 Derek Wright, The *Psychology of Moral Behaviour*, Penguin, Harmondsworth, 1971, 191-2 summarising M. Rokeach, *The Open and Closed Mind*, Basic Books, New York, 1960.

150 Campbell (1985) 15 and 16.

151 See Rowe (1987) generally.

Racists seek security in a set of beliefs which, like creationism or fundamentalism, make everything that happens seem part of a pattern. The pattern need not be in terms of Heaven and Hell, but whatever the pattern is, it gives a sense of stability in otherwise meaningless chaos.[152] "What we want" said a former SS member active in the 1990s in neo-Nazi organisations, is a "mythical concept of a force for order in the heart of Europe, and that, above all else, is what urges us on."[153]

Racism can provide a sustaining world view which helps to deny that life can be capricious, unfair and cruel. While we cling to a belief in a just world as long as we can, even an unjust universe is more tolerable than a senseless one, and so we blame others in an effort to establish a coherent, comforting story about causes and events.[154] Scapegoating enables racists to deny inconvenient realities and to maintain belief in their own mythology. An American white supremacist member commented:

> The number one thing is that nobody [in the group] gets blamed for anything. My marriage didn't work? It's not my fault, it's because I was a racial activist and my wife couldn't stand it. I didn't graduate from high school? It's because my Jewish English teacher didn't like me. If you couldn't find a job – hey it's not your fault, it's the Jews.[155]

Advantageous social and economic inequalities are said to be natural, but any disadvantage is blamed upon racist scapegoats: Asian or Mexican immigration, black mothers on welfare, or conspiracies involving 'international bankers'.[156] Conflicting

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152 Rowe (1987) 26.

153 Schmidt (1993) 51, quoting Walter Matthaei.

154 Judith N. Shklar, *The Faces of Injustice*, Yale University Press, New Haven and London, 1990, 58 and 64, suggesting that scapegoating is still likely even in technologically advanced societies whose members cannot easily explain away, as resulting from natural forces, their sense of injustice.

155 *New Internationalist* October 1994, 15 quoting *Mother Jones* (1994) Foundation for National Progress, United States.

156 Martin Walker, citing Christian Coalition leader Pat Robertson's *The New World Order*, 1991: "Poisonous words foul the well of democracy," *Guardian Weekly*, 7 May 1995, 6. In the Australian context, the description is of 'their financier mates who control world affairs':

information is ignored or explained away. "We are smarter," says a member of the Aryan Movement, "and we deserve a break."[157]

A more sophisticated version of the racist mythology which has elements in common with the 'new racism' relates the 'survival of the fittest' not simply to race or culture, but also to economic success. Existing economic inequalities are proof of superiority or inferiority. Lack of economic success is the characteristic used to differentiate 'them' from 'us'; to determine 'class' membership, and to rationalise maltreatment and exploitation. For marginalised groups, this is a 'nightmare proposition'.[158]

Where 'racism' is adopted as part of an individual's personal mythology it takes on features of a religion, becoming an all-encompassing way of viewing the world and human relationships both as they presently exist, and as ideals.[159] Racism is often seen, like religion, as a search for an ideal of 'perfection' which will end man's alienation.[160]

Mythology is a potent force in uniting members of any group. A group's mythology can become institutionalised and create its own patterns of 'reality' which rule the lives of the group members.[161] Where an individual's goals and expectations reflect group norms, he feels identification with the group, loyalty, and a desire to cooperate with other group members.[162] As mentioned above, hate crimes are generally carried out by

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newspaper of the West Australian Confederate Action Party (also registered as a political party in Queensland and NSW), quoted in Duncan Graham, "Plenty to ponder when you reach the wild West", *Sydney Morning Herald*, 5 May 1995, 7.

157 Pastor Bob Miles, Aryan Movement, American National Socialist Party, Michigan, interviewed in documentary "Blood on the Face", ABC, 14 November 1993. See also Levin & McDevitt (1993) 51-4.

158 George Jackson, *Soledad Brother: The Prison Letters of George Jackson*, Penguin, London, 1976 at 163.

159 Campbell (1985) 15.

160 George L. Mosse, "Mass Politics and the Political Liturgy of Nationalism", in Eugene Kamenka (ed), *Nationalism*, ANU Press, Canberra 1975, 39 at 51. As to the aesthetisization of racism, see Balibar (1991c) 211.

161 Laing (1975) 80-81.

162 Philip G. Zimbardo, *Psychology and Life*, Scott, Foresman and Company, Glenview, Illinois, 1979, 635.

groups.[163] The joint activity involved in attacking the victims no doubt also has a 'bonding' effect.

The 'religious' aspects of racism also form a bond between group members. Laing points out how one of the attractions of both Nazism and Christianity lies in the "pure flame of unified experience" – the way in which both emphasise that adherents are united by their shared perceptions of the same presence, whether that be of Hitler or of Christ.[164] This is not to say that racism is necessarily connected with Christianity (although of course the histories of antisemitism and Christianity are intertwined, and Christianity has traditionally shown little concern for the 'heathen').[165] While some racist ideologies are purportedly Christian, it is a fundamentalist and authoritarian 'Christianity' which envisages the disempowerment and exploitation of target groups and replaces any personal morality with a group morality.[166]

Enhancement of self-esteem

At the most basic level, the racist enhances his own self-esteem by criticising or belittling someone else. This is a common human failing; Canetti speaks of the satisfaction or 'cruel pleasure' obtained simply through making an unfavourable comment about a book, a meal, or a person. The satisfaction consists in relegating something to an inferior group, while presupposing a higher group to which the person passing judgment belongs or conforms.[167]

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163 Levin & McDevitt (1993) 17, citing a National Crime Survey which suggests that 64% of hate crimes reported to the police involve two or more perpetrators, as opposed to the general percentage of 25% in relation to all crimes of violence; Tore Björgo, "Terrorist Violence against Immigrants and Refugees in Scandinavia: Patterns and Motives" in Björgo and Witte (1993) 29 at 38.

164 Laing (1975) 78.

165 As to the white supremacist imagery of Christianity see Tim Wise, "Dreaming of a Non-White Christmas: Santa, Jesus and the Symbolism of White Supremacy," 20 December 2000 at http://academic.udayton.edu/race/01race/white07.htm.

166 See Levin & McDevitt (1993) 111.

167 *Crowds and Power*, Penguin, Harmondsworth, 1973, 345.

In individualistic and increasingly alienating cultures, where fears and experiences of poverty, failure, and insecurity are not cushioned by one's community, group, or family, our ability to conform with other people may be the easiest way to maintain a sense of communality. V.S. Naipaul's story of a group of men taking medical tests who are given different coloured dressing gowns and who tend, lacking any other social signals or points of reference, to form groups with other men whose gowns are of the same colour[168] may or not be factually true, but it certainly describes behaviour in a way which we recognise as realistic.

The denial of reality

Because racist mythologies bear little relation to reality or to any ethical ideal such as social justice or equality, adherents are forced into the position of denying those inconvenient elements of human experience, knowledge, ethics and ideals which refuse to fit into the pattern. The individual's belief-system tends to be "frozen, resistant to change and intolerant of ambiguity and uncertainty; the individual *knows* what is true and what is false, what is right and what is wrong, and has no intention of altering his views."[169] Charles Mills calls this an 'epistemology of ignorance', a 'schedule of structured blindness'.[170] Racism is not an imaginative mindset. The racist's fixed patterns of perception may be subtle, but they are limited.[171] It is easier for the racist to deny the validity of any positive information about the 'other',[172] to indulge in paranoia,[173] than to re-examine his whole way of seeing the world.[174] The racist's

168 *A Way in the World*, Heinemann, London, 1994, 364.

169 Wright (1971) 191. One is reminded of Bjelke-Petersen who said something along the following lines: "Don't confuse me with the facts, I know what I believe."

170 (1997), quoted by Andrew Markus in his paper 'Race Politics' at HREOC National Conference on Racism, "Beyond Tolerance", 12-13 March 2002, Sydney, reproduced on HREOC Website: http://www.hreoc.gov.au/racial_discrimination/beyond_tolerance/speeches/markus/html

171 Dower (1995) 25, 27.

172 Levin & McDevitt (1993) 22: the racist is "emotionally invested" in believing the worst about the members of stigmatized groups.

173 See generally Markus (2001) 113 ff as to the 'politics of paranoia' in Australia.

174 For a description of an exception to this rule, see the account of C.P. Ellis in Terkel (1993) 271 - 288. Levin & McDevitt (1993) note that a Gallup national survey demonstrated that the average American believed that 30 % of the US population is black (when the real figure was less than 13%), that 25% are Hispanic (8%) and that 14% are Jewish (actually 2%) – suggesting a dominant misperception that "minorities are taking over." Other surveys have confirmed these kinds of misperceptions in other countries too.

certainty in his belief-system goes well beyond what is justifiable in terms of evidence and reasoning alone, and has to be defended in other ways.[175]

A group's mythology can become institutionalised and create its own patterns of 'reality' which rule the lives of the group members.[176] Racists are ruled by their own perception of reality and usually need to impose their perceptions upon others, finding the existence of others who think differently as threatening to their own personal stability.[177] The racist experiences everything which contradicts his views as 'provocation' – a crucial concept, indicating a propensity to a violent response – and consequently hates and fights it. But of course because his views are irrational and unreal, virtually every social interaction will be a contradiction, and will make him increasingly fearful and angry, escalating the violence of his responses. He will try every means of changing his environment so that his way of thinking is not interfered with.[178] He will tend to avoid conflicting views or new information and stay close to others of similar opinions. He cannot be reasoned with, because his beliefs are irrational.[179] ' Free speech' in the sense of 'more speech' will be completely ineffective in the case of a person with strong racist beliefs because that person cannot be persuaded by reason and will easily respond with anger to the views of others.[180] Where he meets

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175 Wright (1971) 192.

176 Laing (1975) 80 to 81

177 Wright (1971) 192-193. The practitioners of fundamentalist religions also depend upon a mythological world view, and they too see the existence of other views as threatening. See Richard Swift, "Fundamentalism: Reaching for Certainty", *New Internationalist*, August 1990 at 6 and David Rayside, "Unholy Alliances: Fundamentalism and the politics of hate" (1994) *University of Toronto Magazine*, Winter, Vol XII No.2 32. A fundamentalist religion is one whose doctrine is derived solely from the Scriptures of that religion, regarded as the word of God, as opposed to an integrated interpretation which draws upon historical and anthropological research and intellectual and cultural developments: John Romer, *Testament*, Collins Dove, Melbourne, 1989, 340. This is the sense in which the word was coined in 1909 as a result of calls by evangelists, in pamphlets entitled "On Fundamentals", for a return to the Holy Scripture as the basis of the Protestant faith.

178 Reich (1969), describing the reactions of 'the plague character': 258.

179 Gaudreault-DesBiens (2001) at 1127 notes how Jean-Paul Sartre (amongst others) identified the devaluation of rationality inherent in antisemitism in *Réflexions sur la question juive*, Gaillimard, Paris, 1954.

180 It is interesting to note how often Sheehan (1998) expresses anger in relation to the views of Castles, Cope and Kalantzis, whom he derides as 'outmoded Marxists,' and anger at the concept that the 'mainstream Australian cultural identity' is not all-important; see also Millbank (1998).

opposing views, he will attempt to suppress their expression by law, ostracism, derision and 'shouting down'.[181] National Action demonstrations against the redrafted Bill in Melbourne in March 1995 also indicated that racists felt threatened by legislation against racist expressions.[182]

Like a fundamentalist religion, racism requires the suppression of reason not just amongst the faithful, but throughout society – because every reminder of reality is threatening. Ernst Zundel, prosecuted in Canada for racist propaganda and Holocaust denial, in his first trial referred to a future when white supremacists will 'enforce' their 'justice' upon others.[183]

A vision of the world which is based upon those unconscious defences of the mind which constantly seek certainty, warns Nandy, is likely to push one towards totalism.[184] Long-term denial, agrees Rowe, puts us further and further out of touch with reality. If we start any kind of denial early enough and practise it assiduously enough we forget that we are denying and this way of living becomes our character.[185]

Taking control of the political debate

Amongst the more organised and extremist white supremacist groups and specifically neo-Nazi groups, the purpose of racist behaviour, including racial vilification, is to gain personal and political power. A subsidiary purpose is to gain social acceptance of the methods used to gain and retain that power. Political power has been defined as the primary power (as opposed to economic or ideological power) because it can have recourse to force, and is capable of doing so because it has a socially-accepted

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181 Wright (1971) 193.

182 Margaret Safran, "Youth Groups in anti-Nazi demo", *Australian Jewish News*, 24 March 1995, 6 and Mark Skulley, "Racial hatred bill to spark more protests", *Sydney Morning Herald*, 20 March 1995, 7.

183 4355 of the transcript, quoted in Leonidas E. Hill, "The Trial of Ernst Zundel" (1989) 6 *Simon Wiesenthal Center Annual* 165.

184 Ashis Nandy, *Traditions, Tyranny and Utopias*, Oxford University Press, Delhi, 1987, 9.

185 Rowe (1987) 68.

monopoly upon force.[186] Racist organisations cannot achieve power through democratic means in a political climate which rejects explicit and extreme racism and elitism, therefore it is necessary for them to move the political debate to the extreme right; to make such elements of their ideology as racism an acceptable part of the political scene. Of this they are fully aware: one German neo-Nazi stated that while it would be unrealistic to seize power in the immediate future, his group's aim was to "put enough pressure on the parties to force them to drift toward the right." The aim was achieved, with formerly conservative parties now taking positions that twenty years ago were to the far right.[187] Thus the democratic system is corrupted by the marketing of racist mythology as a valid view of reality, on the basis of which electoral decisions should be made.

One parliamentarian commented that while Australia has a base of social justice and multicultural tolerance,

> we also have a significant minority of individuals and groups who are determined to tear that fabric apart. These people are not going to be thwarted simply by some sophisticated argument. They know what they are on about. They know what they do not want: a tolerant multicultural Australian society. They are out to tear it apart through their activities. So they embark on all kinds of campaigns of promoting racial hatred and ethnic vilification.[188]

That racist political activity can corrupt democratic processes was recognised by the German government in 1992 with bans of the neo-Nazi Nationalist Front and of the neo-Nazi German Alternative group, and with an application by the Government to the High

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186 Norberto Bobbio, *Democracy and Dictatorship: the nature and limits of State Power*, trans. Peter Kennealy, Polity Press & Basil Blackwell Ltd, Cambridge, 1989, 76-9.

187 'Today', he comments, 'the CDU [Christian Democratic Union] and the CSU [Christian Social Union] are making statements as far to the right as the NPD [German National Democratic Party] of twenty years ago': Schmidt (1993) 178.

188 Dr Theophanous, *Hansard*, House of Representatives, 16 November 1994, 3434.

Court to ban two leading neo-Nazis from expressing their views, voting, attending political meetings or organising political activities.[189]

The methods used by racists to achieve political power are intimidation and hate propaganda, including scapegoating and the 'sanitising' propaganda of Holocaust denial, which attempts to portray extreme racism as non-violent.

At the same time as the extremists have sought political power, conservative forces have (as discussed above) cloaked their traditionally racist arguments in terms of the 'cultural differences' of 'new' racism. This is not to say that the parameters of political conservatism have changed; only that its terminology has become more socially acceptable and thus harder to refute.

Conclusion

Where racist speech becomes normal and an accepted part of our culture, the harmful results of racism and the aims of the perpetrator become less visible. This chapter has considered the evolution of theoretical constructions of race and racism and the motivations behind a racist mindset. Reminding ourselves of the real nature of racist behaviour and speech as underpinned by violence makes it possible for us to appreciate the extent to which that nature is obscured, both deliberately by the perpetrators themselves and through a conformist culture. These issues are important because without a full understanding of what racism is and how it works, we cannot properly assess the usefulness of specific racial vilification legislation, or the implications of failing to legislate. The following chapters discuss the ways in which our Anglo-Australian culture is sympathetic to racist tendencies, which are encouraged and reproduced in a variety of different ways.

189 "Germany bans neo-Nazi party", *Sydney Morning Herald*, 11 December 1992.

Chapter 3: How racism is reproduced through cultural influences and extremist speech

It's difficult for white society to stop denying its racism. Denial is rooted in our culture. Our country, founded on the principles of enlightenment, was practising slavery. It required an enormous amount of denial to have these two things going on simultaneously. Racism and its denial are bone-deep parts of American culture. We have to keep pointing this out. It's never easy to admit.[1]

Introduction

The previous chapter noted that 'race,' like 'whiteness,' is not a biological reality but a changing social construct, subject to social and political forces. In the same way, racist mythologies and 'racism' are socially constructed and reinvented, a 'social and political tide,'[2] not a natural or inevitable process as the 'new' racism or 'clash of cultures' theories would have us believe.[3] Indeed, anyone who has seen small children of different colours playing happily together will recognise that racism has to be taught, and that it only develops with the development of language ability[4] that is, through speech.

Learning to hate is almost as inescapable as breathing.[5] "I know how to teach racism" says Jean Elliott, "all you have to do is use most of the textbooks available today."[6] Racism is perpetuated across generations by laws and treaties, group norms and

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1 Salim Muwakkil in Terkel (1993) 169.

2 Wilhelm Heitmeyer, 'Hostility and Violence towards Foreigners in Germany' in Björgo and Witte (1993) 17, 18.

3 Hollinsworth (1998) 46-47 and 59ff; Miles (1989) 73.

4 Discussion with Paul Connolly on ABC Radio programme about Bigotry, 25 September 2002, relating to his work, *Too Young to Notice? The Cultural and Political Awareness of 3-6 year Olds in Northern Ireland*. Connolly found prejudices existing in Irish children by the age of 3 which became well-developed and specific when the children started (religiously-based) school. See also Mary Ellen Goodman, *Race Awareness in Young Children*, Collier Books, New York, 1964, Debra van Ausdale and Joe R Feagin, *The First R: How Children Learn Race and Racism*, Rowman and Littlefield, Lanham, 2001 and Moran (2003) 155, citing Robyn M Holmes, *How Young Children Perceive Race (*1995).

5 Levin & McDevitt (1993) 21.

customs, newspapers[7] and textbooks.[8] It is taught through "half-truths and ethnic prejudices passed from one generation to the next, through religion, political demagoguery, inflammatory tracts, the practice of medicine,[9] and even through abuse of folk song and tales."[10] Stereotypes are powerful, widely accepted, and enduring.[11] We are taught to define and distinguish the 'Other', to see variations in appearance as relevant differences,[12] from the earliest Sesame Street game of "One of these things is not like the others ... ."[13] We learn to see others as inferior through the ethnocentric teaching of history from the victor's point of view,[14] fairy stories,[15] scientific mnemonics,[16] and racist jokes which subtly reinforce racist ideas and stereotypes.[17] Their values 'aren't the same' as ours; ours are better.[18] Even the labelling of crayons

6 in the documentary by Bertram Verhaag about her anti-racism work, *Blue Eyes*, 1996.

7 The role of the media in fostering racist stereotypes is considered by Anti-Discrimination Board (2003) 73ff.

8 Zimbardo (1979) 639.

9 Warwick Anderson, *The Cultivation of Whiteness: Science, Health and Racial Destiny in Australia*, University of Melbourne Press, Carlton, 2002.

10 Thomas Butler, "Centuries of Grudges Behind Today's Balkans Calamity," *The Guardian Weekly*, 13 September, 1992 at 21.

11 Levin & McDevitt (1993) 21-2, Frankenberg (1993) 240.

12 Given such instruction, three-year-olds can perceive overt ethnic variations, and by seven the smallest distinctions: Godrej (1994) 4 , citing *The Working Group Against Racism in Childrens' Resources Newsletter*, No 3, Summer 1991.

13 "… one of these things just doesn't belong…." continues the song. Martha Minow tell how this song disturbed her too, as an encouragement to children to categorise and differentiate, and notes that the game has more recently been amended to demonstrate that objects can be categorised in different ways depending upon which characteristics are isolated: "differences are not intrinsic but relative to chosen ends": Minow (1990) 1, 390.

14 For example: while for years it has been taught that the Mayan and Aztec civilizations had no writing, the truth is that virtually every written document of those civilizations was burnt by the Spaniards: "Don Juan de Zumárraga, first bishop of Mexico, destroyed every scrap of writing he could find in a gigantic auto-da-fé; the other bishops and priests followed his example... of Mayan documents from pre-conquistador times exactly three manuscripts are left to us." C.W. Ceran, *Gods, Graves and Scholars: The Story of Archaeology*, Victor Gollancz Limited, London, Second edition, 1971, 368.

15 Such as Hans Christian Andersen's sentimental tale "The Jewish Maiden": *The Complete Hans Christian Andersen Fairy Tales*, edited by Lily Owens, Avenel Books, New York, 1981, 266. The motherless Jewish girl is irresistibly drawn to Christianity, but resists accepting Christianity through loyalty to her dead mother. The conflict eventually kills her. The story gives the message that there is no value in Judaism and that the girl should be pitied for her situation as the child of Jewish parents.

16 In Australian scientific and army circles the mnemonic for the colour coding of electronic resistors goes as follows: Black Bastards Rape Our Young Girls: Bloody Virginity Gone West: information from Australian scientist Richard Peir.

17 Levin & McDevitt (1993) 34.

18 Despite evidence that most cultures share the same values in theory: Wright (1971) 199-200.

contributes to a biased perception of reality: 'skin colour' has traditionally been ... pink. Black is bad, white is good:[19] a black mark, a black day, blackballed, black words, black looks, black magic ....

In creating the imagined community of Australia as a nation, says Willis,

> [e]ven the most obvious artefacts and symbols are caught up in extensive networks of cultural conventions and assumptions, ones that generally appear obvious, natural and therefore go unquestioned.[20]

And many of these symbols give a racist message about who is included and who is not included in mainstream Australian society. Picture postcards with illustrated maps of Australia show crude 'icons' of blond, white women in bikinis at beaches and black Aborigines in loin-cloths in the desert. Tea towels and souvenirs echo those images. "These stock figures" says Willis, "work to render invisible urban Aboriginals, women in active roles and, more generally, a multicultural population."[21] Since colonisation, Australian literature has given similar messages of prejudice and exclusion in 'uncomfortable popular fictions.'[22]

The combined effect of the multitude of racist signals which we are given by our culture is insidious and powerful.[23]

> When traffic's beginning to close in on me and I'm behind in my money, I'm really uptight. There's a black driver in front of me, the word 'nigger' will come

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19 To the point where in Europe ruddy ducks are being slaughtered to prevent "miscegenation" and maintain the purity of white-headed ducks: Paul Brown, "Ducking the issue of racial purity," *Guardian Weekly* 16 July 1995, 25.

20 Willis (1993). See too A. Brewster, *Literary Formations: Post -Colonialism, Nationalism, Globalism*, Melbourne University Press, Melbourne, 1995, 3.

21 Willis (1993) 17. See also Chapter 4 (Nation and Otherness) and Willis' comments on the adoption by Australian 'icon' Margaret Preston of Aboriginal art as a source: 151 ff.

22 Janeen S. Webb and Andrew Enstice, *Aliens and Savages: Fiction, Politics and Prejudice in Australia*, Harper Collins, Pymble, 1998.

> into my head. No matter how much education you may have had, the prejudices you were taught come out. These sinister forces are buried deep inside you.[24]

Van den Berghe divides race relations (and thus racism) into two general social types: paternalism (of the slave societies) and competitive race relations characteristic of industrialized and urbanized societies with a complex division of labour and a manufacturing basis of production.[25] It appears that exploitation is at the heart of both of these types of interrelationships, and that the modern form of racism has developed from the more obviously exploitative type of racism found in slave societies.[26]

Husbands notes that theories about the cause and continuation of racism can be divided into those that are conflict-based and those that are culturally-based, with further divisions according to whether the apparent causes have been experienced directly or not.[27] Culture-based theories of the causation and continuation of racism centre on language conflicts, different religious practices, different culinary practices, supposedly different sexual practices, fear of miscegenation and cultural dilution, whether in one's immediate area, town, country or of the 'white race'.[28]

Hollinsworth notes that no single theory appears able to explain the different forms of racism in different places and across different times, and suggests an inter-disciplinary approach which distinguishes the production and re-production of racism.[29] While this is a logical categorisation, which is a starting-point here, it is hard to separate the two.

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23 See Levin & McDermitt (1993) Chapter 2.

24 Terkel (1993) 6.

25 van den Berghe (1967) 27 to 33.

26 Robert Ross, "Reflections on a Theme," in Ross (ed) (1982) 1 at 7 and 8, citing van Arkel.

27 Christopher T. Husbands, 'Racism and Racist Violence: Some Theories and Policy Perspectives' in Björgo and Witte, (1993) 113, 119ff.

28 Husbands (1993) 121. In this context one needs to recall that Western anthropologists have regularly categorised the other man's religion as "superstition" and the behavioural patterns by which one socializes, marries, reproduces and divorces as the other man's 'promiscuity': See the examples given by Sidney W. Mintz, "History and Anthropology: A Brief Reprise" in Stanley L. Engerman and Eugene D. Genovese (eds), *Race and Slavery in the Western Hemisphere: Quantitative Studies*, Princeton University Press, Princeton, New Jersey, 1975, 477 at 488 to 493. See generally Moran (2003).

Racism is passed from one generation to another, even where the original reasons for a racist outlook are no longer applicable or appropriate. Cultural attitudes formulated in one life-time linger on to condition the minds and actions of people generations removed from the original ideology, or point of contact or experience.[30] Inequalities produced by racist treatment become accepted and institutionalised within society, giving rise in turn to further racism. There is a time gap between the basic reasons for the creation of cultural attitudes and the final departure of those attitudes from the value systems of people who may never have experienced the causes of the particular process of opinion formulation.[31]

Production of racism

Given that it can be difficult to separate causes of racism from manifestations "as the causal relationships are often two way and not necessarily linear,"[32] there is some overlapping between this and the following chapters.

Real fears and conflicts

Present racist attitudes can be based on realistic fears resulting from real conflicts, as in Northern Ireland, the Middle East, or the former Yugoslavia. The bombing of the twin towers in New York on 9 November 2001, the Bali Bombing of the following year and Australia's participation in the war on Iraq, are all conflicts that give rise to real fears which may find solace in, or give rise to, racist attitudes.

Any type of conflict can cause the hostility which leads to racism. Psychological research confirms that negative inter-group attitudes and behaviour develop as a result of apparent conflicts of interests. Two groups of 12 to 14-year-old boys, encouraged after an initial phase of growing friendship to strive for the achievement of incompatible goals, became antagonistic and hostile. The subsequent introduction of a goal

29 Hollinsworth (1998) 59 ff.
30 Robert Ezra Park, *Race and Culture*, Free Press, Glencoe, 1950, 3-4.
31 F.S. Stevens, "Parliamentary Attitudes to Aboriginal Affairs," in Stevens (1972) at 110.
32 Jonas (2001).

achievable only through cooperation between the groups made negative intergroup behaviour disappear and more positive attitudes reappear.[33]

Imagined Fears and Conflicts

Racist societies are literally sick societies. Their myopia will not let them see that their economic woes are due to economic policies rather than scapegoats: they bear the ulcers of violence, mistrust and inequality. The racist is chained to hatred: it defines and controls.

—Godrej[34]

Many of the situations which give rise to racist behaviour are imagined rather than real, in that real fears are engendered by imaginary connections. Thus racism is encouraged where there are real problems (lack of employment, poverty, competition for resources) that are not caused by racial minorities, or there are real conflicts (the Twin Tower bombing) that are not caused by the targeted group (the bombing has been generally regarded in the United States as connected with Iraq, although there is no evidence for this).[35] Scapegoating of minority groups either through extremist hate propaganda or by politicians for their own purposes, including through negative media stereotyping, foster these 'imaginary' fears and conflicts and thus both invent and reinvent racism. Fears can even arise simply from overt physical difference. Racism can be a 'search for perfection' in which all models except that of white males are judged inferior. Maleness and whiteness are associated with reason, as Foucault argues, resulting in negative stereotyping of others.[36]

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33 Sandra G.L. Schruijer, Richard DeRidder, Ype H. Poortinga and Rama C. Tripathi, "Norm Violations and Intergroup Behaviour: A framework for Research," in Ekstrand (1986) 67 ff citing the study by M. Sherif, O. J. Harvey, B. J. White, W. R. Hood & C. W. Sherif, *Intergroup conflict and cooperation: The Robbers Cave Experiment*, Norman, Oklahoma, University of Oklahoma Book Exchange, 1961. See also Claude M. Steiner, *Scripts People Live*, Bantam Books, New York, 1975, 189.

34 Godrej (1994) 4.

35 Dana Milbank and Claudia Deane, "U.S. public believes Hussein link to 9/11," *Guardian Weekly*, 11-17 September 2003, 27.

36 Don Fletcher, "Iris Marion Young: The Politics of Difference, Justice and Democracy" in April Carter and Geoffrey Stokes (eds), *Liberal Democracy and its Critics*, Polity Press, Cambridge, 1998, 196 at 201ff, discussing Chapter 5 of Iris Marion Young, *Justice and the Politics of Difference*, Princeton University Press, Princeton New Jersey, 1990.

In 2002 in Sydney, publicity about violent gang rapes for which Australian-Lebanese youths were convicted led a high school boy to plan to beat up a (new) Lebanese student who had said 'Hello' to the boy's sister.[37] The Acting Human Rights Commissioner identified lack of understanding of cultural differences as a recurring and major issue which encouraged fear of other communities, including between culturally and linguistically diverse communities.[38]

Barker explains how Conservative politicians in Britain in the 1970s used imaginary fears to create real fears based on racist concepts: "first, present a case that we are normally and by nature fair and tolerant; then claim that these good qualities are being overstrained."[39] He quotes a speech by William Whitelaw in 1976 (Barker's emphases):

> Over the years Britain has been an *absorbent* society, welcoming all comers and in due course *assimilating* them into our *way of life*.[40]

Whitelaw continued by saying that the principles of a fair and tolerant society would be undermined "if individual fears and resentments are allowed to grow" but then encouraged those types of fears by suggesting that there was 'no smoke without fire' and that some stories of illegal immigration might therefore be true.[41] In this way, emphasis is placed on the fact that those holding the fears are 'genuine people' or 'ordinary folk' who are not themselves prejudiced. So because they are genuine people,

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37 Comment from Susan, NSW secondary school teacher concerning a personal experience at her school, ABC Radio programme about Bigotry, 25 September 2002.

38 HREOC (2001b).

39 (1982) 13 ff. Similarly, Rob Witte notes that in the face of racist violence in Germany, neither Kohl nor his ministers condemned violence against refugees without commenting at the same time on abuse of the asylum laws Witte (1993) 161.

40 Barker (1982) 13 to 14.

41 Barker (1982) 13 to 14. Similarly, Razack discusses how in Canada, the minister of immigration in 1992 would say that Canadians are characteristically kind and generous but "don't want to be taken for a ride" – the implication being both that this is what refugee claimants were doing by claiming refuge without having identity documents, and that they would go on to defraud welfare: (2002) 204.

with genuine fears, the object of the fears must be real;[42] there must be a real connection between the targeted group and the 'ordinary' person's concerns.

The other essential element of the 'genuine fears' theory, which links it to the nationalistic identity arguments discussed in Chapter 1, is the need for a homogeneous way of life. Together, these elements are said to justify, says Barker, "that policy steps be taken to remove what is felt as threatening."[43]

> The very existence of fears about damage to the unit of the nation is proof that the unit of the nation is threatened. The fears are self-validating. For the feelings, the customs make up the nation for all it is worth. The nation is its 'way of life'.
> … You do not need to think of yourself as superior – you do not even need to dislike or blame those who are so different from you – in order to say that the presence of these aliens constitutes a threat to our way of life.[44]

These methods are clearly recognisable in Australian race politics today.

Björgo and Witte note that if racist violence were a real or rational response to fears about immigration, logically that violence would decline once governments had imposed restrictive immigration measures. However the experience in Scandinavia and Germany is the opposite: racist violence has increased *after* immigration restrictions were introduced[45] – probably partly as a result of the legitimation of racist attitudes

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42 Barker (1982) 15.

43 Barker (1982) 17.

44 Barker (1982) 17 and 18. Barker first published this material in 1979 ("Racism – the new inheritors" (1979) *Radical Philosophy*, vol 21) commenting on "the absence of a whole alternative view of race and immigration from Labour" in England. Similar rhetoric is used in Sweden, says Razack (2002) 215. Razack comments how Enoch Powell used images of Oxford and Cambridge, Queen Victoria and Churchill, and the storming of Dunkirk to invoke nationalist opposition to immigration: Razack (2002) 214.

45 Björgo and Witte (1993) 7 and 8.

brought about by the change in government policy, and partly as a result of increased propaganda at the time by anti-immigration activists.[46]

Racial extremists take an active role in encouraging racism, drawing upon the 'background' social, political and economic influences that encourage racism. The following section considers those various background influences. The last part of the chapter discusses the special case of extremist speech and the different methods by which extremists foster racism.

Reproduction of racism

> *…we are gripped by a sense of threat, dread or apprehension. We are convinced of the necessity to look after ourselves first; we are more blaming; we feel let down on all sides – by our politicians and by our great institutions including the Church. We worry that today's young people do not have the same opportunities or prospects as their parents did. We seek the safe and the familiar and in doing so we retreat into and reinforce our prejudices. Some of those are directed against all manner of outsiders, people who are racially, religiously, ethnically and culturally different.*[47]

Encouragements to racism in Anglo-Australian culture result not only from the hate propaganda of extremists, but also from a variety of intertwined historic, religious, social and economic influences: the competitive nature of laissez-faire economics, the values associated with capitalism and colonialism, the way in which the prevalent forms of Christianity supported all of these, and theories of Social Darwinism and Developmentalism.

As discussed in the previous Chapter, racism continues, once it has arisen, because it is an attractive ideology for its adherents in psychological, economic and political terms. Racist ideology 'justifies' the coloniser's exploitation of the native, the master's treatment of his slave, the Christian's exploitation of the heathen, and each religion's

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[46] Björgo (1993) 29 at 33.

[47] Chris Puplick, in the introduction to Anti-Discrimination Board (2003) 5, citing Hugh Mackay.

exploitation of people of other faiths. It justifies perpetuating inequalities instead of remedying them. The inequalities become institutionalised and in turn support further racism, reinforcing the domination of certain groups at the expense of others.[48]

And there are no particular barriers to entry; as Albert Memmi wrote, "Racism is a pleasure within everyone's reach."[49]

It is essential to recognise the multitude of ways in which racism has been reinforced and encouraged throughout human history, from one 'civilised' country to another, in order to appreciate the failings of various First Amendment doctrines. I argue in Part II that it is not possible for a 'free market' in speech to be unaffected by racist expression, nor to establish neutral structures within which harmful speech will always be rebutted so truth may emerge, because of the scope and strength of the numerous cultural encouragements to racism which we encounter every day.

'Background' influences

Imperialism, Nationalism and ethnocentrism

Chapters 1 and 2 discussed how racism has played a role in shaping Australia's history, with different targets and different rationales or justifications.[50] We also saw how Australian race politics has used arguments about cultural difference in debates about immigration, national identity and multiculturalism[51] in ways that have fostered justifications for different treatment between a supposedly homogenous white Australia and outsider groups. Such arguments draw upon basic concepts of culture and identity. Most people are taught from birth that their culture is superior to that of the rest of the

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48 Godrej (1994) 7.

49 Anthony Paul Farley, 'The Poetics of Colorlined Space' in Valdes et al (2002) 97, 106, citing *Dominated Man: Notes Toward a Portrait*, Orion Press, New York, 1968, 201. Inga Clendinnen made similar commments on Geraldine Doogue's ABC Radio Programme about Bigotry, 25 September 2002. Farley refers to the 'ensemble' of cultural assumptions that empower white people as the 'pleasure of whiteness': 109ff.

50 On this point, see Stephenson (1997).

world.[52] The part played in world history by Eastern, non-Christian or Arab nations is barely known in the West at a popular level, let alone taught.[53] Ethnocentrism goes beyond confidence in one's own culture and receptivity to the values of other cultures and leads to racial prejudice[54] and what Karl Popper refers to as 'the nationalist faith'.[55] Colonialism reinforces the ethnocentrism of the colonisers, who in coming unasked to a country, appropriating it and exploiting the inhabitants must believe their own culture to be superior, perhaps even a desirable 'gift'.[56]

The undoubted authority of Darwin's science added weight to Victorian notions of racial superiority and helped to justify imperialism.[57] Struggle or conflict between races was not an evil thing, but "nature's indispensable method of producing superior men, superior nations, and superior races."[58] This theory was useful for justifying the enslavement of Negroes in the Americas and the oppression, dispossession and destruction of the North and South American Indians and of the indigenous Australians.

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51 Hollinsworth (1998) 52.

52 That different ethnic groups in a pluralist society each believe their own group to be superior to all others is confirmed by Berry (1986) at 43.

53 Jennifer Parmelee, "Radical Islam on March in Horn of Africa", *The Guardian Weekly*, 22 November 1992, 17. See also Dower (1995) re anti-Asian racism in America during the Second World War (and subsequently).

54 Jonas Widgren, "Immigrants and Ethnic Minorities in Europe" in Ekstrand (1986) 40, 44.

55 The "alleged right of a nation to self-determination": Karl Popper, "The History of Our Time", The Sixth Eleanor Rathbone Memorial lecture, delivered at the University of Bristol on 12 October 1956 and republished in Karl Popper, *Conjectures and Refutations*, London, Routledge and Kegan Paul, 1963, 364 at 367.
Popper criticises this "alleged right" as absurd, requiring in practice that each state be composed only of one ethnic group and that its border should coincide with the long-standing location of that group – a practical impossibility. See also Amos Oz, "When Evil comes Wrapped in a Flag," 18 October 1992, *Guardian Weekly*, 23.

56 Hartwig (1972) 15.

57 Strawbridge (1988) 112. During the Second World War, a Smithsonian Institute anthropologist informed President Roosevelt that Japanese skulls showed Japanese to be "2,000 years behind" the white man: Dower (1995) 29.

58 Louis L. Knowles and Kenneth Prewitt (eds), *Institutional Racism in America*, Prentice-Hall, Englewood Cliffs, N.J., 1969, 9, quoting Thomas F. Gossett, *Race: The History of an Idea in America* (1963) at 145. Jan Roberts (1981) quotes at 30 from the *Geelong Advertiser* of 2 May 1846: "the perpetration of the Aboriginal race is not to be desired ... it is no more desirable that any inferior race should be perpetuated than that the transmission of an hereditary disease such as scrofula or insanity should be encouraged."

All ideologies such as nationalism and ethnocentrism inevitably degenerate into racism because, as Hartwig points out, maintenance of the concept of the superiority of one's own nation or culture leads to contempt for those of other nations or other cultures, including the people being colonised or the ethnic minority in one's own country. This will particularly be the case if they fail to accept or adapt to the mores of the colonists or the majority.[59] In Adorno's words, it is a basic feature of domination that everyone who does not identify with it is consigned to the enemy camp.[60]

Slavery

In the past, racism was of course enshrined in the English-speaking legal system through slavery in England, the United States and Canada, which was protected by law[61] and justified politically and philosophically, despite the development in those countries of liberal philosophy, theories of democracy and the concept of human rights. There has always been a dichotomy between slavery and social or legal justice: slavery has existed from the earliest civilisations and was morally acceptable to such philosophers and proponents of justice as Aristotle, Plato and Cicero[62] and to English and American jurists and philosophers in colonial times.[63] Rationalizations for the slave trade have indeed brought into question the very concept of what constitutes a civilization.[64]

As van den Berghe mentions, the desire amongst the bourgeoisie to preserve financial exploitation while espousing the democratic ideology of the Enlightenment spread by the American and French Revolutions made it necessary for them to deny humanity to the oppressed groups: the scope of egalitarian, democratic and libertarian ideas was

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59 Hartwig (1972) 5. See also Hollinsworth (1998) 50ff.

60 Theodor Adorno, *Minima Moralia*, NLB, London, 1974, 131 and 132. This was demonstrated by the repression of internal opposition within the United States to the war on Iraq.

61 See Folarin Olawale Shyllon, *Black Slaves in Britain*, Oxford University Press, London, 1974 and *Black People in Britain, 1555 – 1833*, Oxford University Press, Oxford, 1977.

62 C. Duncan Rice, *The Rise and Fall of Black Slavery*, Harper & Row, New York, 1975, 10.

63 See generally, D.B. Davis, *The Problem of Slavery in the Age of Revolution 1770 – 1823*, Cornell University Press, Ithaca and London, 1975, Reginald Coupland, *The British Anti-Slavery Movement*, Frank Cass & Co Ltd, London, 1964, Rice (1975), Engerman and. Genovese (1975).

confined to the whites, not extended to the 'savages'.[65] Libertarian ideas purportedly applied to all of mankind, therefore it was necessary in order to maintain the libertarian mythology to recategorise non-whites as non-human. Thus the reason why "it was not agonising for Jefferson the *philosophe*, Jefferson the humanitarian, to hold slaves was that ... he had not taken the step of accepting that black people had the degree of responsibility which would entitle them to take a place in society as free men."[66] The Declaration of Independence was not regarded at the time it was made as being a statement against slavery. The text of the Constitution scrupulously avoided the word 'slave' and seemed "chosen to conceal from Europe, that in this enlightened century, the practice of slavery has its advocates among men in the highest stations."[67] Thomas Paine saw the situation more clearly: in *African Slavery in America (1775)* he asked Americans "to consider with what consistency or decency they complain so loudly of attempts to enslave them while they hold so many hundred thousands in slavery."[68] It was subsequently revealed that the New England states had agreed to give the slave trade a twenty-year immunity from federal restriction in exchange for southern votes to eliminate any restrictions on navigation acts.[69]

Thus the egalitarian and libertarian ideas of the Enlightenment spread by the American and French Revolutions paradoxically contributed to the development of racism. Applicability of the egalitarian ideals was restricted to 'the people', that is, the whites, leading to '*Herrenvolk* democracies', regimes such as those of the United States or South Africa that were democratic for the master race but tyrannical for the subordinate groups.

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64 George Shepperson, "Comment: the Study of the Slave Trade" in Engerman and Genovese (1975) 99 at 106. See generally Mills (1977) and (1998).

65 van den Berghe (1967) at 17, 18, 126. See also: W. Haywood Burns, "Law and Race in Early America" in Kairys (1990) 115ff and Shepperson (1975) 106.

66 Rice (1975) 206 and see generally Burns (1990). Mills (1998) points out that for mainstream First World political philosophers, then and now, race 'barely exists': 97.

67 Davis (1975) 321-323.

68 Coupland (1964) 61.

69 Davis (1975) 321-323. See also Clark (1995) 4, quoting Article 1, Section 2 of the American Constitution, which apportioned taxes between the states according to state population; Blacks being counted for this purpose as equal to three fifths of a white man.

Many of the American military leaders who fought for freedom from Britain and democracy for the American people, continued their post-Independence careers by persecuting and exterminating American Indians and forcing them into reservations. The American Thanksgiving celebration is a meal consumed over the bones of the vanquished.[70]

> Our nation was born in genocide when it embraced the doctrine that the original American, the Indian, was an inferior race. Even before there were large numbers of Negroes on our shores, the scar of racial hatred had already disfigured colonial society. From the sixteenth century forward, blood flowed in battles over racial supremacy. We are perhaps the only nation which tried as a matter of national policy to wipe out its indigenous population. Moreover, we elevated that tragic experience into a noble crusade. Indeed, even today we have not permitted ourselves to reject or to feel remorse for this shameful episode. Our literature, our films, our drama, our folklore all exalt it. Our children are still taught to respect the violence which reduced a red-skinned people of an earlier culture into a few fragmented groups herded into impoverished reservations.[71]

The extended process of genocide gave rise to such aphorisms as "The only good Indian is a dead Indian."[72] The history of slavery and the extermination of the American Indians provides the background and explanation for much of today's prejudice and discrimination.

Myrdal identified the 'American dilemma' in 1944 not as black versus white but as the dichotomy between white American ideals such as equality, and Americans' actual

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70 See generally, Hauptman (1995) and references therein.

71 Dr Martin Luther King, quoted at 485 of Malcolm X and Alex Haley, *The Autobiography of Malcolm X*, Penguin, Harmondsworth, 1976.

72 Knowles and Prewitt (1969) 7 to 8. See also David E. Stannard, *American Holocaust: the conquest of the New World*, Oxford University Press, New York, 1992.

behaviour, usually the opposite.[73] Charles Mills argues for a new philosophy which meaningfully addresses experiences of racism and of race.[74]

Religion, Christianity and Antisemitism

Leo Kuper noted that there are few exceptions to the general rule that in the most extreme form of racism, genocide, the murderers and the victims are invariably of different religions.[75] Christianity supported slavery and colonialisation, enabling the white man to label as 'heathen' and 'pagan' ancient non-white cultures and civilizations.

Neither Judaism, Christianity, nor Islam required the abolition of slavery. Adherents of all these religions participated in the slave trade.[76] The Old Testament supports slavery and accepted it as part of man's social organisation[77] and the Koran forbids only the enslavement of Moslems. Pauline determinism supports the concept that differences in status between individuals were part of God's plan: from "the rich man in his castle, the poor man at his gate" to the black man working on a plantation.[78]

Religion is particularly significant in teaching differentiation between groups: that the world is made up of the faithful (the righteous) and the heathens or unbelievers who are wrong and perhaps evil. Like other religions, Christianity teaches differentiation between true believers and unbelievers, the saved and the lost, classifications which foster the 'us' and 'them' mentality, or which attract people who already have it. To be

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73 Gunnar Myrdal, *The American Dilemma: The Negro Problem and Modern Democracy,* Harper & Row, New York, 1962 (1st published 1944).

74 Mills (1997) and (1998).

75 quoted in the *Guardian Weekly*, 7 April 1985 and cited in Gill Seidel, *The Holocaust Denial: Antisemitism, Racism and the New Right,* Beyond the Pale Collective, Leeds, 1986, 10.

76 See Paul Johnson, *A History of the Jews*, Harper & Row, New York, 1987 – although it is not true that the American slave trade involved a disproportionate number of Jews: David Streitfeld, "Jewish Role in Slave Trade 'Distorted," *Guardian Weekly*, 26 February 1995, 20 and Levin & McDevitt (1993) 139, 140.

77 Exodus 21: 2 to 7. See also Leviticus 25: 44 to 55.

78 Shyllon (1977) 62.

'one of the chosen' or 'in a state of grace' is to be very much an insider with (argues one psychologist) a decreasingly compassionate attitude towards others.[79]

Practically every mythology, including that of the Old Testament, regards the enemy as subhuman. In killing the enemy one is protecting the only truly valuable order of human life on earth, which of course is that of one's own people, and therefore carrying out a 'just war'.[80] The Holy Grail legends, central to the heroic concepts of Medieval Europe which influenced Western culture and were drawn upon by Wagner and Hitler, refer positively to wars against the Saracens (the name given to all pagans).[81] Numerous other literary examples can be found. And of course it is these kind of concepts that underpin all religious fundamentalisms.

Christianity is not confined to white people, who indeed actively promote the religion amongst non-whites, but images of Western Christianity are generally white, from portrayals of Nativity scenes to the grown Christ. This is not lost on non-whites. "If his mother was from Egypt," asks an African-American woman, "how would he have come out with blond hair and blue eyes" and "keen features like the English"?[82] TimWise argues that these kind of images are fundamental to the reproduction of racist attitudes, and that it will be impossible to eradicate racism from the United States so long as nativity scenes continue to show the characters as predominantly white.[83]

English ethnocentrism involves an extra level of differentiation between English culture and the rest of the world because of the development of the separate Church of England which divided the English from European Catholics and from the Irish. While the

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79 Wright (1971) 148.

80 Campbell (1985) 138. We have been bred, reflects Campbell in contemplating various passages from Deuteronomy calling for the utter destruction of the enemies of the 'chosen people', to one of the most brutal war mythologies of all time: Campbell (1985) 140 to 141, quoting Deuteronomy 7: 1-6, 20: 10-18 and 6: 10-12. See also Hauptman (1995), Dower (1995) and Blain (1995).

81 H.A. Guerber, *Myths and Legends of the Middle Ages*, George G. Harrap & Company Limited, London, 1925 at 245.

82 Terkel (1993) 146. See also Wise (2000).

Christianity of Rome traditionally supported slavery and taught antisemitism and racist attitudes against 'the heathen', it did not teach the superiority of one European country over another. All Western European countries originally looked to Rome and the Vatican for spiritual guidance, and some degree of fellow-feeling was possible between people from different European countries where they shared the same Catholic religion. Once the Church of England had been created, not only nationality, common language, and 'the English Channel'[84] separated England from Europe, but the final link, that of religion, had been broken. As a result, English culture became able to proclaim the superiority of England over other countries, and of the Church of England and protestant religions over Catholicism – concepts which proved influential in Australia.[85]

The long history of European antisemitism which has become an intrinsic part of Western culture is also part of our Anglo-Australian cultural heritage. The story that Christ's death was demanded by the Jews, rather than upon the order of the Romans,[86] was enshrined in the Gospel of Matthew[87] and has remained there, despite Vatican acknowlegements to the contrary.[88] It has for almost two thousand years provided justification for Christian persecution of Jews.

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83 Wise (2000). Generally only one wise man is shown as black.

84 The 'English' Channel is known in France as 'la Manche' or 'the sleeve'. Only the English claim it is 'theirs'.

85 "Many of our new settlers see us as an ethnic Anglo church and find racism runs deeply in us" says an internal document of the Sydney Anglican Church: Peter Fray, "Perceived racism worries Church," *Sydney Morning Herald*, 3 July 1995, 2. Dr Anne Pattel-Gray comments: "In Australia, the racist ideology that is found in white society is absorbed into the lives and works of theologians and their writings" so that racism permeates even theological assumptions: Dorothy Lee and Anne Pattel-Gray, "Feminism at the crossroads," *Sydney Morning Herald*, 17 July 1995, 13.

86 See generally Romer (1989), S.G.F. Brandon, *The Trial of Jesus of Nazareth*, Paladin, London, 1971 and Hyam Maccoby, *The Mythmaker: Paul and the Invention of Christianity*, Weidenfeld & Nicholson, London, 1986.

87 "And the people, to a man, shouted back, 'His blood be on us and on our children!'": Matthew 27:25. The note to this verse points out that this was a traditional Old Testament phrase: 2 Samuel 1:16; 3:29. Particular emphasis is placed on it in Leviticus 20: 9 - 16 (describing offences against the family laid down by Yahweh and the punishment for them), but in some cases it is apparently used not as a curse but in the sense of "on your own head be it": Acts 18:6. See also Mark 15: 6 - 15, John 19:12 - 16: and Luke 23:13 - 25.

88 Despite the Vatican II ecumenical council censuring the charge of deicide against Jewish people, the relevant passages in the New Testament still appear in the same form and are still endorsed by commentaries; see Henri Tincq, "Anti-Jewish bible banned", *Guardian Weekly*, 23 April 1995,

Economic conflict and capitalist values

In a society where competition for the basic cultural goods is a pivot of action, people cannot be taught to love one another.[89]

Economics is always the stuff of race and identity, and the changing discussion about race and identity is, as much as anything else, a changing discussion about economics.[90]

Economic issues are a source of both real and imagined conflict. Competition-based theories suggest that conflict can arise over real or imagined lack of job opportunities,[91] promotion prospects within specific employment areas, immigrants or minorities undercutting others by accepting lower wages, or taking from the finite level of income available. Other related sources of conflict are access to government housing, or the effect of immigration on private rents and house prices, access to welfare benefits,[92] and the distribution of educational resources.[93]

The competitive nature of modern individualistic economies creates a constant source of social and economic conflict over limited goods. Racist stereotypes express growing

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13, describing the banning by the Paris High Court of an annotated "Christian Communities' Bible" which spoke in the annotations to the Gospel of St Mark of Jewish "collective responsibility" for Christ's death. The banning was apparently on the basis that the annotations were likely to "revive anti-Judaism" and therefore constituted a manifestly unlawful disturbance, even through the text itself was surely the primary source of anti-Judaism.

89 Laing (1975) 58, quoting J. Henry, *Culture Against Man*, New York, Random House, 1963, 293. He continues: "It thus becomes necessary for the school to teach children how to hate, and without appearing to do so, for our culture cannot tolerate the idea that babes should hate each other. How does the school accomplish this ambiguity?".

90 Cope and Kalantzis (2000) 50.

91 The HREOC (2001b) identified lack of employment opportunities for indigenous Australians as a major structural problem and a major form of racism: "we want our kids in offices, not out with shovels." The report pointed to a general labour market segmentation along ethnic and gender lines.

92 This is a constant source of criticism against Aborigines which ignores the reality that ATSIC often ends up funding services which are the responsibility of local state or national governments and should not come out of 'Aboriginal' funding: Hollinsworth (1998) 197-199. Thus Pauline Hanson referred in her maiden speech to "the various taxpayer funded 'industries' that flourish in our society servicing Aboriginals, multiculturalists and a host of other minority groups," House of Representatives, *Hansard*, 10 September 1996, 3802, quoted in Hollinsworth (1998) 275.

93 Husbands (1993) 120.

social anxieties about being able to compete for scarce resources and moral outrage that others might get some of those resources at our expense.[94] The dominant ideology of individualism encourages people to move beyond family and class and to bear their failures alone, increasing fears and feelings of estrangement and powerlessness[95] – the very situation in which racist theories are most likely to thrive. One writer commented, following extreme violence at English football matches in February 1995, that the misguided nationalism and organised right-wing violence of the supporters were symptoms of a general social disillusion caused by harsh economic struggle and social injustice.[96]

In Australia at the beginning of the twenty-first century, says Markus, the "prime cause for what is seen as the politics of despair is the impact of economic change on people's lives, which leaves them searching for solutions in terms of the certainties of a past age."[97] Robert Manne agrees that "contemporary right-wing populism might be described… as the mobilisation of those for whom the era of globalisation has offered, thus far, not prosperity or hope but the threat of meaninglessness and social fear."[98]

Laissez-faire economics encourages social and even pseudo-moral distinctions to be drawn between the holders of capital and the 'wage slaves'[99] following a tradition of identifying moral 'good' with worldy 'goods', traceable back to Homer and Aristotle.[100]

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94 Levin & McDevitt (1993) 24.

95 Heitmeyer (1993) 20-24. See also Eric and Mary Josephson (eds), *Man Alone: Alienation in Modern Society*, Dell Publishing Co, New York, 1968 (first printing 1962).

96 John W. Deeley, letter to *Guardian Weekly*, 5 March 1995, 2. See also Thomas B. Edsell, "Masculinity on the Run Lashes Out," *Guardian Weekly*, 14 May 1995, 19.

97 Markus (2001) 201.

98 Quoted in Markus (2001) 202.

99 See generally Katherine Newman, *Falling from Grace*, The Free Press, New York, 1988. There is little doubt, conversely, that capital is the most effective socialization medium of all: A. Gordon, "Black Education in South Africa: Psychological and Sociological Correlates of Achievement" in Ekstrand (1986) 245, quoting J. Baudrillard, *In the shadow of the silent majorities ... or the end of the social and other essays*, New York, Foreign Agents Series, 1983, 65.

100 Adorno (1974) 184 to 187. S.G. F. Brandon, *The Judgment of the Dead*, Weidenfeld & Nicholson, London, 1967 at 77 and 78, describes how there is evidence for a pre-Hellenic belief, held by the Cretans and Mycenaeans, that even the post-mortem destiny of men of high status was necessarily better than that of lesser mortals, and that such a man would have a blessed after-

Capitalism eagerly adopted Social Darwinism as confirming that social relationships should properly be regulated by the 'natural selection' of market forces. The racist consequences of Social Darwinism were therefore imported not only into social attitudes, but into economic philosophy.

Similar arguments have been used to justify the 'natural selection' of migrant cultures on the basis of whether or not those cultures are "culturally attuned to the capitalist marketplace."[101] Failure to achieve economic prosperity is evidence of one's cultural inability to adapt, and therefore is justification for one's marginalisation or deportation.

Racism today undoubtedly has an economic component, economic disparity being a hook on which racist attitudes can be hung and the once-colonised can be controlled as migrant workers.[102] Building our societies around competition rather than co-operation, says Godrej, we continually reinvent racism.[103] Racism is nourished by social disclocation and inequitable economic and power relationships,[104] although this element of racism is often overlooked, and racism presented as the result of individual decisions. Race relations have been described "as a moral dilemma in the hearts and minds of men," a matter of personal choice, whereas they are rather "a complex dynamic of group conflict resulting from the differential distribution of power, wealth, prestige and other social rewards."[105] As in Victorian times, a combination of laissez-faire economic philosophy and the Protestant work ethic is used by 'the contented majority' to justify praising the rich and denigrating the poor, especially those from marginalised groups, to

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life not because of his moral character, but because of his wealth or social importance. It seems, however, that Graeco-Roman culture had no properly developed concept of post-mortem judgement, whether on the basis of morality or of rank (79 to 97).

101 Jakubowicz (1984) 37, citing Thomas Sowell, *Ethnic America: A History*, New York, Basic Books, 1981, 284 to 285.

102 Hollinsworth (1998) 53. See Mills (1997) 33ff.

103 Godrej (1994) 7.

104 The central roles in racism of power and privilege and the encouragement of competition between groups were recognised in the findings of HREOC (1991).

105 van den Berghe (1967) 7 referring to Gunnar Myrdal's *An American Dilemma* (1944). Stephen Steinberg analyses the background to that work, its flaws, and its effect upon American society in *Turning Back*: *The Retreat from Racial Justice in American Thought and Policy*, Beacon Press, Boston, 1995.

turn people against people, to promote "division, mistrust, a sense of isolation. The antipodes of love."[106]

Extremist speech

All forms of extremist hate propaganda (except the special argument which denies racism's connection with violence) draw upon the background influences discussed above to encourage imagined fears and thus perpetuate racist attitudes and justify racist violence. Extremists' racist views inform the more commonplace and usually more muted racist comments from rightwing groups and organisations, politicians and the media. Indeed, as Moon points out, the harmful effects of racist speech may be greater when extremist views are presented as thoughtful contributions to public opinion.[107]

I have divided the discussion into hate propaganda which:

- defames and denigrates the worth of target group members, including by speaking of the dominant group being 'overrun' or 'innundated';

- blames the target group for economic or social problems; and.

- whitewashes the nature and violent consequences of racist ideology (notably Holocaust Denial).

These categories naturally overlap, and are mutually reinforcing.

First of all, I consider the one aspect of extremist behaviour which does not involve the promotion of a particular point of view within the rest of society: the direct intimidation of targeted victims and groups, their supporters, and opponents of hate speech.

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106 Jackson (1981) 209. In the words of an old saying, "fascism is the iron hoop that will try to bind together the rotting barrel of capitalism": letter to *Guardian Weekly*, 19 March 1995, 2.

107 Moon (2002) 134.

Although not aimed at society generally, intimidation does affect other sectors of society, because it discourages or 'chills' general opposition to extremist groups.

Intimidation

Intimidation of course involves the threat of violence and it cannot be emphasised enough that racist behaviour involves both the use of violence against, and tolerance of violence towards, target groups.

Racial vilification is often used to intimidate politicians from promoting multiculturalism, immigration, or racial and ethnic equality. Members of victim groups may be abused or attacked if they do seek to enter politics.[108] One Australian politician spoke of the number of letters he received during his time as chairman of the parliamentary and caucus immigration committees "which threatened to kill not only me but also members of my family and which insisted that I was not Australian because of my ethnic background."[109]

Intimidation can silence public opposition to dangerous groups, allowing them to promote their views without much public analysis or debate, and to claim the support of the 'silent majority'.[110]

> "We'll get you all!" So runs one of the neo-Nazis' favourite chants. The younger generation might better understand the full reach of this threat when I quote the feelings of ... a seventy-year-old. Shielding her mouth with her hand, she told me, "If I protest now, and then one day they come into power, then I'll have a 'previous record.' Our politicians, it's easy for them to make speeches

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108 Although this is capable of change: Dalits and low-caste Hindus who until recently did not even dare to vote against landlord interests are now fighting their own seats: Editorial, *Guardian Weekly*, 5 May 1996, 12.

109 Dr Theophanous, *Hansard*, House of Representatives, 16 November 1994, 3434.

110 Schmidt (1993) 76 to 78.

> about 'moral courage.' They've got it easy. They can just take off and leave. But me, where am I supposed to go?"[111]

In such ways racist ideology and intimidation corrupt the rational informed debate that is an essential part of democratic political processes, not just depriving electors of political information, but deliberately misleading them and changing both the terms of the debate and the rules of the political game.

Racial vilification is used to intimidate victims in face to face situations. Behaviour against individuals ranges from put-downs and pressure to respond with good humour to racist jokes and humiliating treatment,[112] often classed as innocent or trivial behaviour,[113] to anonymous phone calls, hate mail, damage to the person's house or office, name-calling, spitting, obscenities, aggressive behaviour and violence.

More indirect racial abuse also has the power to intimidate many of the members of the victim groups against which the abuse is directed.

Defamation and Denigration

Hate propaganda by extremists is designed to discredit a target group in the eyes of the rest of the community, hurting the members of the group, but also damaging the group's reputation, affecting the degree to which it will be accepted by the dominant society. Canadian Supreme Court judges noted how antisemitic propaganda fostered hatred and contempt for Jews "in a particularly vicious manner because the objects of the fabrication are themselves characterized as diabolical liars such that their attempts to clarify and rebut the allegations would not be believed."[114] Hate propaganda is often

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111 Schmidt (1993) 78, describing the apparent lack of public reaction to a neo-Nazi march in Dresden in 1991.

112 E. Stefanou-Haag, "Antiracism: from legislation to Education" (1994) 1 *AJHR* 185, 189.

113 Melinda Jones, "Empowering Victims of Racial Hatred by Outlawing Spirit-Murder" (1994) 1 *AJHR* 299, 301.

114 *R*. v. *Zundel* (1992) 95 D.L.R. (4th) 202, 215.

designed to incite hatred and violence against target groups. As one writer noted ominously in 1942,[115] in the fascist[116] tactic defamation is used in the early stages of the conflict, before other forms of sadism are safe.

The content of internet and other written hate propaganda denigrates blacks, Asians and Jews including through fabricated Talmudic extracts, promotion of the 'blood libel'[117] (that a minority religion is involved in ritual child sacrifice), and a mixture of pseudo-Christianity and Nazi or 'Odinist' occultism. 'Christian Identity' proponents say that whites are the only true descendants of Adam (the 'sacred gene pool'), the only real 'children of Israel.' Some internet sites target individuals by publishing the names and addresses of those said to be Jewish or left wing.[118] People with other skin colours are explained as descendants of Satan, or 'beasts' rescued on Noah's ark. Race war and violence are dominant themes. Less overtly racist speech often claims to be about matters of public interest or political issues, particularly anti-Communism, anti-NATO and anti-UN opinions. Discussions about the desirability of immigration are a favourite vehicle for expressions of the ideology of racial superiority.

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115 David Riesman, "Democracy and Defamation: Fair Game and Fair Comment I" (1942) 42 *Colum. L. Rev.* 1085 at 1088. See also Matsuda (1993) 24.

116 Various twentieth century fascist movements are defined in the *Fontana Dictionary of Modern Thought* (1979) 228 as having the following common traits: all were "strongly nationalist, violently anti-Communist, and anti-Marxist; all hated liberalism, democracy, and parliamentary parties, which they sought to replace by a new authoritarian state in which there would only be one party, their own, with a monopoly of power, and a single leader with charismatic qualities and dictatorial powers; all shared a cult of violence and action, planned to *seize* power, exalted war, and with their uniforms, ranks, salutes and rallies gave their parties a para-military character. In their political campaigns, they relied heavily on mass propaganda and terrorism; once in power, they used the power of the State to liquidate their rivals without regard for the law. Racism and antisemitism were strongly marked features of some fascist movements ...".

117 See "Nazi Alert: Propaganda 1997" at http://www.jdl.org/ nazipropaganda97.html; "Renaissance Press" at http://home.onestop.net/rpress/index.html and Aryan Nations Website: http://www.nidlink.com/-aryanvic/. "How many unbaptised babies did you bleed or eat last Pesach?" was asked of Jews who spoke at public meetings in favour of the *Commonwealth Racial Hatred Bill* (*Australian Jewish News* 19 February 1993, 1).

118 Staunton (2000) 4.

The number of coloured people, their ability to reproduce, and hence their sexuality, are traditionally a particular source of fear.[119] The immigration of 'hordes' of Asians, blacks and Jews will lead, it is said, to the 'biological alteration and destruction' of the white majority,[120] fears described by F. Scott Fitzgerald as existing in America in the 1920s:

> 'Civilization's going to pieces,' broke out Tom violently. 'I've gotten to be a terrible pessimist about things. Have you read *The Rise of the Coloured Empires* by this man Goddard?'
>
> 'Why no,' I answered, rather surprised by his tone.
>
> 'Well it's a fine book, and everybody ought to read it. The idea is if we don't look out the white race will be – will be utterly submerged. It's all scientific stuff; it's been proved ... This fellow has worked out the whole thing. It's up to us, who are the dominant race, to watch out or these other races will have control of things'.
>
> 'We've got to beat them down,' whispered Daisy, winking ferociously toward the fervent sun.[121]

Such fears have a long history. *Candid Reflections Upon the Negroe Cause* (1772) cautioned against bringing black slaves to England for fear of sexual miscegenation and ultimate racial domination. "Such is the twisted contradiction in the thoughts of the white man" comments Shyllon, "that he takes the black woman at will, and at the same

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119 See Moran (2003).

120 Quotation from the antisemitic pamphlet which Ernst Zundel published in Canada, *Did Six Million Really Die? R.* v. *Zundel* (1992) 95 D.L.R. (4th) 202, 209.

121 F. Scott Fitzgerald, *The Great Gatsby*, Penguin Books, Harmondsworth, 1954 (first published 1926) 19. Moran (2003) 37 notes that race riots against Filipinos broke out in California in the 1930s with English-speaking Filipino men, brought up in the traditions of American equality, refusing to accept limits on their freedom to marry as they chose, citing H. Brett Melendy, *Asians in America* (1977).

time believes that his civilization is destroyed when the black man enters the body of the white woman."[122] Southern whites thought they had lost the civil war because of the corrupting influence of miscegenation.[123] Southerners opposing the 1960s American civil rights movement warned of miscegenation, as did Henry Lawson in Australia.[124]

Even where no colour difference exists, fear of interbreeding and a perverse satisfaction in dwelling upon the imagery of sexual relations with the 'out' group are a general feature of racial prejudice. The Nazis made much of the image of a swarthy Jew raping a pure white German maiden as well as of black American soldiers debauching European women.[125] In the former Yugoslavia, racial prejudice carried the desire to control 'race' through sexuality to the ultimate horrifying extreme: the impregnation of Muslim women and girls through rape in order that they will bear 'Serbian' and not 'Muslim' children.[126]

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122 Shyllon (1977) 3, 106 and 107. Further evidence of the white man's obsession with the sexual prowess of the black man is evidenced by the number of studies made by white men of the size of black mens' genital organs. Some of these studies are discussed in Freyre (1968) 382 and 383. There is even a word coined to describe the 'contamination' of a white woman with 'black blood': 'telegamy': Pastor Bob Miles, Aryan Movement, American National Socialist Party, Michigan, interviewed in documentary "Blood on the Face" (1993).

123 Moran (2003) 26, citing a letter dated 1868 in the *Gregorie-Elliott Papers*, Southern Historical Collection, University of North Carolina.

124 "O my people, take heed, For the time may be near for the mating of the Black and the White to breed": "The Great Fight" quoted in Tatz (1995b) 109.

125 Back (1995) 26: while Glen Miller's band recorded radio broadcasts to the Wehrmacht were intended to challenge the cultural sensibilities of Nazism, black American musicians were excluded from the band and Nazi POWs were permitted to see shows for American troops whereas black soldiers were not.

126 See Alexandra Stiglmayer (ed) *Mass Rape, The War Against Women in Bosnia-Herzegovina*, Lincoln, University of Nebraska Press, 1994.

Economic and social conflict

Racism is the magic formula that reconciles [capitalism's] objectives.[127]

Scapegoating often occurs when new or reformed groups take power. The importance attached by new regimes to conformity and discipline as symbols of their legitimacy gives rise to actions against specific 'deviant' groups for the purpose of ensuring conformity to the new regime.[128] Segregation in the southern states of America after the Civil War, argues Woodward, was not an inevitable result of the pre-civil war enslavement of blacks, but of deliberate scapegoating which enabled the estranged white classes to become reconciled and the South reunited.[129] The same newspaper that in 1898 regarded the whole concept of segregation as a joke was by 1906 calling for mass deportation of blacks, saying that there was no room for them in America.[130]

In *Mein Kampf* (1925), Hitler described his method for consolidating political power: direction of the people against 'the Jew,' who could be blamed for the post-World War I problems of Germany.[131] The art of truly great leaders, Hitler said, lies in "not dividing

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127 Immanuel Wallerstein, "Ideological tensions of Capitalism" in Balibar and Wallerstein (1991) 29 at 33. Wallerstein notes at pp 32 to 33 that the maximisation of capital requires minimisation of the costs of production and minimisation of political disruption, which is difficult in capitalist societies that are purportedly based on meritocracy without the purported justifications provided by racism.

128 Where no suitable racial or religious scapegoat group exists, it is invented. Post-Reformation Scotland invented the witches' coven. Where there were racial minorities or organized heretics in any region of Scotland, they were persecuted instead, and that region escaped the witch hunts: see Christina Larner, "The Witch-Hunt in Scotland" and "Demonic Witchcraft and the Law" in Frank Chalk and Kurt Jonassohn, *The History and Sociology of Genocide*, Yale University Press, New Haven and London, 1990, 153 and 166.

129 C. Vann Woodward, *The Strange Career of Jim Crow***,** Oxford University Press/Galaxy, New York, 1957, 65.

130 Woodward (1957) at 81, quoting the Charleston *News and Courier*. In 1896 there were 130,334 registered Negro voters in Louisiana. After the introduction of literacy, property and poll-tax qualifications, and as a result of intimidation of black voters, by 1904 the number was 1,342: Woodward (1957) 68 and 69.

131 Yves Chevalier, "The Holocaust as a Paroxystic Form of a Scapegoat Strategy" in *Remembering for the Future: The impact of the Holocaust on the Contemporary World*, Volume II of a Collection of papers presented at Oxford in July 1988, Pergamon Press, Oxford, 1988, 1343.

the attention of a people, but in concentrating it upon a single foe"[132] thus unifying the people as opponents of that foe. Particular genius is shown by the leader who makes "even adversaries far removed from one another seem to belong to a single category."[133]

> Once the wavering mass sees itself in a struggle against too many enemies, objectivity will put in an appearance, throwing open the question whether all others are really wrong and only their own people or their own movement are in the right. ... Hence a multiplicity of different adversaries must always be combined so that in the eyes of the masses of one's own supporters the struggle is directed against only one enemy. This strengthens their faith in their own right and enhances their bitterness against those who attack it.[134]

In uniting the German people against the Jews, the 'single enemy' manifested in bolshevism, socialism, democracy, liberalism and capitalism, Hitler was able to substitute racism and antisemitism for the class struggle.[135]

Hitler's scapegoating has continued to influence attitudes over several generations. Many people remain convinced that the extermination of six million men, women and children was based on valid economic reasons, or at least put Germany back on a sound economic footing.[136] It is not recognised that the Nazis never increased the number of jobs, but caused jobs to be taken from Jews nor that the economy of the Third Reich was intrinsically connected with slave labour from the concentration camps.[137] Today from

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132 *Mein Kampf*, Hutchinson, London, 1969 edition, reprinted 1990 (1st published in English 1933), 108.

133 Hitler (1969) 108.

134 Hitler (1969) 108 and 109. The antisemitism of the Christian Social Party did not succeed in Hitler's view because it was "based on religious ideas instead of racial knowledge", enabling Jews to take defensive action to avoid being regarded as the enemy: "a splash of baptismal water could always save the business and the Jew at the same time": Hitler (1969) 109 and 110.

135 See Jackson (1981) 209, Cassinelli (1976) 22-29.

136 Alice Miller, *Breaking Down the Wall of Silence*, Virago Press Ltd, London, 1991, 82.

137 F. Neumann, *Behemoth*, New York, Octagon, 1963 (1st edition, 1942), Uncompleted English documentary showing footage taken immediately after the liberation of various concentration camps, produced by Alfred Hitchcock, narrated by Trevor Howell, and shown on SBS on 27 April 1995: *Memories of the Camps*.

Russia[138] to South America,[139] antisemitic propaganda continues to be a safety valve for regimes with discontented populations.

Racist propaganda is used today by politicians to blame all economic and social problems upon a 'scapegoat' group (in the United States: single black mothers[140] or non-white immigrants[141]), unite the population by identifying a common (imaginary) foe (in Australia: illegal immigrants especially boat people), or ensure conformity by the majority by punishing 'deviance' in a specific group. If the perception is that the standard of living is falling, then somebody somewhere must be responsible – someone who is concrete, visible and vulnerable. Someone who is different.[142]

> All Western industrial countries report a marked increase in ethnic hostility and expressions of dogmatism and authoritarianism during periods of economic recession. The most common explanation for such right-wing sentiment is that the heightened level of economic anxiety generates a need for scapegoats, so recent immigrants or visible minorities are frequently singled out. Widespread working-class racism in particular is explained by economic factors.[143]

The anomaly of the rich and powerful, who have the money and the influence to improve society in so many ways, blaming all social and economic misfortune upon the poor and powerless, is rarely recognised – such is the power of scapegoating.

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138 Olivia Ward, "Are you a pure Aryan?" *New Internationalist*, October 1994, 16 at 17.

139 Godrej (1994) 4 at 6, citing Judith Laikin Elkin, "Colonial Legacy of Anti-Semitism", *Report on the Americas*, Vol 25 No 4, February 1992.

140 George Will, "The Lethal Crisis in Welfare," *Guardian Weekly*, 26 June 1995, 17.

141 Susan Wyndham, "Prophet of the Apocalypse," *Weekend Australian*, 6-7 May 1995, 27, and Stephan Thernstrom, "Has the Melting Pot Begun to Boil?" *Guardian Weekly*, 14 May 1995, 20, discussing Peter Brimelow's book *Alien Nation* (1995). See also Richard Cohen, "Capitalism Brings Rich Pickings," *Guardian Weekly*, 30 April 1995, 18.

142 Levin & McDevitt (1993) 52-4. While, as Levin & McDevitt note, it is "zero sum" economic thinking that causes those with economic problems to blame the people who appear to be getting more of the pie, the victims never seem to blame those who receive most of the pie – the wealthy.

143 Heribert Adam and Kogila Moodley, *South Africa without Apartheid*, University of California Press, Berkeley, 1986, 33.

Denial of violence

> *... racism [does] not constitute an opinion but an aggression… every time racism [is] allowed to express itself publicly, the public order [is] immediately and severely threatened.*[144]

Violence is a necessary and inevitable part of the structure of racism, says Matsuda, barely held at bay while the tactical weapons of segregation, disparagement and hate propaganda do their work.[145] This is logical: the ultimate aim of racist ideology is for racists to have power over others for the benefit of the racists. That others will suffer is an accepted part of the plan.[146] Racist behaviour lays the foundation, and racism provides the justification, for mistreatment and violence against members of the victimised group.[147] Racism has more to do with justifications for violence, inequality, oppression, and the exercise of power,[148] than with the issue of race *per se*.

The racist adopts "the superman's scorn for the sub-human,"[149] accepting that some groups will be disadvantaged, exploited, or harmed. Violence is condoned, because other people are less worthy, less important, and ultimately dispensable.[150] The natural law of the survival of the fittest must 'glean out' (that is, prevent from reproducing) the unintelligent, the (economically) unsuccessful: those 'unfit to live'.

The Nazis emphasised to Germans the harmfulness, blameworthiness and general worthlessness of Jews. Killing was sanctioned, first implicitly and then explicitly,

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144 Former French Minister for Justice, M. Arpaillange, quoted in U.N. Doc. CCPR/C/58/D/550/1993 (1996) *Robert Faurisson* v. *France*, Communication No. 550/1993 par 7.3, available at: http://www.unhchr.ch/tbs/doc.nsf/0/4c47b59ea48f734802566f200352fea?Opendocument

145 Matsuda (1993) 24.

146 Anti-Defamation League, *Hitler's Apologists: the Anti-Semitic Propaganda of Holocaust "Revisionism"*, Anti-Defamation League, New York, 1993.

147 Mahoney (1994) 9. See also Björgo (1993) 31.

148 Hage (1995) 67 to 68, and van Dijk (1987) 359.

149 Simon Wiesenthal, *The Sunflower*, Schocken Books, New York, 1976 (first English translation 1970) 92-93.

150 See Dower (1995).

where the victim was Jewish. The attraction of permission to murder cannot be underestimated, says Elias Canetti: a murder "shared with many others, which is not only safe and permitted, but indeed recommended, is irresistible to the great majority of men."[151]

The attempt to split 'bias' from violence, comments Patricia Williams, has been society's most enduring rationalisation.[152] Hate propaganda deceives by denying the violent consequences of racism. Occasional 'accidents' to members of scapegoat groups by members of the movement are dismissed as unimportant 'boyish tricks and drunken pranks'[153] not connected with racism and not condemned – especially where the violence is committed under the influence of alcohol and by young men with no political organisation and past records of petty crime.[154] Right-wing Presidential candidate Le Pen dismissed as accidental the murder of a coloured Comorian youth by National Front supporters in Marseille in February 1995, despite the 'accident' involving gunshots from a car at the (unarmed) rap group of which he was a member[155] and suggested that the killing of a Moroccan man by skinheads during a National Front march in Paris on May Day 1995 was really an attack by communists disguised as skinheads: a theory "shared by virtually no-one else."[156] Attacks which are not obviously carried out by followers of the racist group are played down as unrelated acts of gratuitous violence in no way connected to the practice or aims of the movement.

> Politicians, scholars, security forces, and the courts are thus unanimous in their agreement that Germany contains many spontaneously acting, isolated

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151 Canetti (1973) 56.

152 Patricia Williams, *The Alchemy of Race and Rights*, Harvard University Press, Cambridge, Mass., 1991, 129.

153 This comment concerned two young men exploding half a kilo of TNT outside a centre for asylum-seekers in Norway: Björgo (1993) 37.

154 Björgo (1993) 37.

155 Philippe Bernard and Christiane Chombeau, "Le Pen tainted by rapper's death," *Guardian Weekly* 12 March 1995, 16, Alex Duval Smith, "Racist – and proud of it", *Guardian Weekly*, 30 April 1995, 4. See also Ellen Goodman, "When hatred is the worst part of a crime," *Guardian Weekly*, 9-15 December 1999, 32.

> xenophobes who are so distressed by boredom and the immigrants that they have no choice but to beat foreigners unconscious, or to death, and set fire to refugee homes. These acts naturally do not have any sort of political background, let alone an organizational framework.[157]

The special case of 'Holocaust Denial'

One particularly vicious form of antisemitic hate propaganda is 'Holocaust denial', the primary aim of which is to discredit Jews as a group.[158] Holocaust denial attempts to win converts,[159] to promote a pro-Nazi consensus[160] and to desensitise society to racism and antisemitism, through denial of the centrality of Judeocide to National Socialism. In this way they replace historical truth with the deniers' own self-serving mythology: that there is 'no harm' in National Socialist views and aims.

The myth of the extremists is that fascism is the achievement of a new order of power carried out through race. Almost all attempts to erase the Holocaust from world history are linked to political propaganda aimed at denying that the vilification, mistreatment, segregation and killing of all Jews *simply because they were classified as Jews and for no other reason*, was an essential part of National Socialist ideology. The fact of the Holocaust, with its images of torture and genocide – the gassing of naked women with their children – shows very starkly that genocide was a direct result of the congruence of Nazi antisemitism and the Nazi 'racial hygiene' policy.[161] In order for the racist mythology to be successful, history must therefore be 'revised' and the Holocaust denied.

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156 Report from *The Independent* and *The Guardian*: "French honour victim of racism," *Sydney Morning Herald*, 5 May 1995, 8.

157 Schmidt (1993) 160.

158 As suggested by Dickson C.J.C. of the Canadian Supreme Court in *R.* v. *Keegstra* (1990) 61 C.C.C. (3d) 1 at 17.

159 See *R.* v. *Zundel* (1992) 95 D.L.R. (4th) 202 at 249.

160 Seidel (1986) 105.

161 Lifton (1988) at 4.

So long as people are generally aware that Nazi antisemitism led to a complete reversal of ordinary human values and to mass slaughter of Jewish adults and children throughout Europe,[162] they are likely to see both antisemitism and 'neo'-Nazi movements as potentially dangerous and as proper subjects for state control.[163] They are unlikely to vote for neo-Nazi political candidates. By denying the reality of the Holocaust, the revisionists can argue that there is 'no harm' in antisemitism or the National Socialist form of fascism, and no evidence that Nazi antisemitism necessarily results in any physical or psychological harm to Jews. Neither Nazis nor racists, it follows, should be restricted in their speech or their activities in any way. There is no reason not to vote for them and their parties. If the Holocaust never happened, it is further argued, there can be no obvious harm in denigrating Jews – although often there is the strong implication that this is a task that remains to be accomplished (along the lines that 'if the Holocaust *had* happened, it would have been justified'). These inconsistent apologies for Holocaust Denial show it for the fraud that it is.[164] In the early 1990s, polls showed that approximately 30,000 Germans aged between 16 and 24 were prepared to act violently towards foreigners and refugees, and one fourth of all schoolchildren and 40 percent of apprentices in the states of Saxony and Saxony-Anhalt felt that the Third Reich 'also had its good sides'. Seventeen percent considered descriptions of the Holocaust to be greatly exaggerated.[165]

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162 Such general consciousness is decreasing rapidly. The Anti-Defamation League (1993) notes that a *Time Magazine* poll conducted in 1985 found that 32% of those questioned did not know what the Holocaust was. By 1993 this had increased to 38% of adults and 53% of high school students: Jennifer Golub and Renae Cohen, *What Do Americans Know About the Holocaust?* The American Jewish Committee, New York, 1993 at 3, 4 and 14 to 16. For a general analysis of the way in which the Holocaust is ignored in most modern history books, see Lucy Dawidowicz, *The Holocaust and the Historians*, Harvard University Press, Cambridge, Massachusetts and London, 1981.

163 Rabbi Joseph Telushkin, *Jewish Literacy*, William Morrow & Co, New York, 1991, 383. Lipstadt points out how denial not only aims to reshape history not just in order to rehabilitate the persecutors but also in order to demonize the victims: Deborah E. Lipstadt, *Denying the Holocaust: the Growing Assault on Truth and Memory*, The Free Press, New York, 1993, 216.

164 See generally: Lipstadt (1993); Seidel (1986); Tamsin Clarke, "Denying the Holocaust" (1994) 8 (2) *Australian Journal of Jewish Studies* 103, Tamsin Solomon, "Antisemitism as Free Speech: Judicial Responses to Hate Propaganda in Zundel and Keegstra" (1995) 13 *Journal of Australian-Canadian Studies* 1 and Jeremy Jones, "Holocaust Denial: Clear and Present Racial Vilification" (1994) 1 *AJHR* 169.

165 Schmidt (1993) 155 and 156.

Hate propaganda which takes the form of Holocaust denial carries an extra hurt: to the survivors and to the families of those killed in the Holocaust, it is a blanket denial of the worth and the humanity of those who died.[166] The Human Rights Committee of the United Nations has recognised that although Holocaust denial does not meet the strict legal criteria of incitement, it can be shown to be part of a pattern of incitement, having the same pernicious effect as less sophisticated forms of speech.[167] Unfortunately, pseudo-academic forms of Holocaust denial have been quite successful in obtaining judicial acceptance as 'provocative' types of free speech, the apparently political nature of such speech protecting even the most sadistic and racist statements.[168]

In two Canadian Supreme Court cases, *R* v. *Keegstra*[169] and *R* v. *Zundel*,[170] arguments that denied the connection between speech and action, and that equated hate propaganda with political debate, were advanced in order to minimise the harms of antisemitic hate propaganda. Keegstra was charged under the hate propaganda provisions of the Canadian *Criminal Code*[171] for teaching students that Jews "created the Holocaust to gain sympathy" and were subversive, child killers, money-loving, power hungry, attackers of Christianity, and responsible for economic depressions, anarchy, wars and revolution. Zundel was charged under the 'false news' provisions of the *Criminal Code*[172] with publishing a racist and antisemitic pamphlet entitled "Did Six Million Really Die?" which appeared to be a piece of academic research, but was simply

166 Holocaust denial is specifically prohibited by France, Austria, Germany, Israel: Stephen J. Roth, *Denial of the Holocaust: An Issue of Law* (July 1994) Australian Institute of Jewish Affairs Inc, Briefing Paper No. 23, and Switzerland: Mahoney (1994) 16. As to the use of Holocaust Denial, see generally Clarke (1994) and David Fraser, "Memory, murder and justice: holocaust denial and the 'scholarship' of hate" in Cunneen et al (1997) 162.

167 *Robert Faurisson* v. *France*, Communication No. 550/1993, opinion of Elizabeth Evatt and David Kretzmer U.N. Doc. CCPR/C/58/D/550/1993 (1996).

168 See generally Solomon (1995).

169 (1990) 61 CCC (3d) 1.

170 These cases are discussed in more detail in Solomon (1995).

171 Section 319(2) of the *Canadian Criminal Code* prohibits communicating statements that wilfully promote hatred against any identifiable group.

172 Section 181 prohibits the publication of false statements which are likely to cause injury or mischief to a public interest. The prosecution was commenced privately by the Holocaust Remembrance Association under this section because the then Attorney General of Ontario had refused to consent to prosecution by the State under the more appropriate section 319(2). The Attorney General later took over the section 181 prosecution, but did not bring any additional charges under section 319.

"Holocaust denial with footnotes": full of factual errors, misinformation, and offensive allegations. The pamphlet alleged that there was no Nazi policy of Jewish extermination, that the concentration camps were only work camps, every perpetrator who admitted complicity was coerced, and every one of the millions who disappeared at Auschwitz and other camps had either died of typhus or moved to the United States and changed their name. Some members of the Canadian Supreme Court seemed inclined to accept that such kinds of speech could be basically political in nature, and thus could be categorised as 'provocative' free speech, despite the hurtful and harmful nature of the statements. The majority, on the other hand, found hate propaganda to be an illegitimate form of political speech which loses the protection of the usual democratic guarantee to free expression because the ideas it expresses are entirely opposed to democratic values.[173]

Conclusion

Racism is all too easily created and perpetuated through real fears and conflicts and through imaginary connections. Given the host of existing cultural encouragements to racism, it is very easy for racists to play on social divisions and fears in order to encourage racism.

The next Chapter considers the institutional mechanisms that produce and reproduce the social problems of racism at the individual level, with particular reference to the role of speech and the media. Again, we need to remember in the following discussions the importance of linking theory with history and context, in order to see beyond popular generalisations and academic theories that reproduce, but do not acknowledge, racist viewpoints.

The essential role of speech in perpetuating racism, discussed in this and the following Chapters, provides the background to consideration in Part Two of the role of First

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173 *Keegstra's Case* (1990) 61 C.C.C. (3d) 1, 49 and 50.

Amendment jurisprudence in limiting legislation against racial vilification in the United States and thereby influencing Australian concepts of free speech.

Chapter 4: Communicating racism

What is so interesting about mythology is that it is a triumph of belief over reality, depending not on evidence but on constant reiteration for its survival.[1]

Racism is not inevitable: many people are not racist, and some racist attitudes can be overcome. Given the manner in which racist ideology is reiterated and encouraged – as we have seen - through a multitude of cultural signals, by race politics, and by extremist hate propaganda, it is more likely that racism is a learned response, the result of cultural conditioning,[2] rather than an inherent human 'need' to be racist.[3] Even if racism were a 'natural' response,[4] that response can be discouraged. As Shklar notes, following the Kantian tradition, we still need to ask the question: even if this is human nature, are we not creatures who can choose to act otherwise?[5]

The evidence is that encouraging, accepting and tolerating racism causes it to increase and for the forms that racism takes to become more harmful and more violent . Receptivity to racist ideologies can differ between groups and can increase in times of

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1 Helena Kennedy QC, speaking at the Fifth National Family Law Conference, Perth, 1992, quoted by Louise Blazejowska, "Sorting the myths and reality of domestic violence", *NSW Law Society Journal*, December 1994, 41.

2 Hartwig (1972) 12. Laurence Rees notes in the documentary *Horror in the East: Turning against the West*, that Japanese troops in WWI were instructed to behave respectfully towards POWs, who were generally well treated. However by WWII the army culture had significantly changed. The army was part of a superior race, headed by a God-like Emperor. Chinese were treated as subhuman and white POWs harshly treated with little guilt or remorse on the part of the Japanese; approximately one in four dying in captivity: written and produced by Laurence Rees, BBC/ History Channel, 2000 shown on ABC 10 February 2004.

3 The theory that the mere existence of separate groups is in itself a necessary and sufficient cause for the emergence of negative intergroup attitudes and behaviour (Schruijer et al (1986) 68) might only describe a learned social response: surely it is through social constructs that one learns to differentiate human beings as the 'Other'?

4 Against the argument that racism is a natural human response there is evidence that more beneficial responses are inherent not just in humans but in other primates. A desire for justice is apparently not just a natural human need but one experienced also by monkeys: Deborah Smith, "Grapes of wrath at feeding time," *Sydney Morning Herald*, 18 September 2003, 1, reporting on research by Dr Sarah Brosnan reported in *Nature*.

5 See Seyla Benhabib, "Judith Shklar's Dystopic Liberalism," 55 at 56 in Bernard Yack (ed) *Liberalism without Illusions*, University of Chicago Press, Chicago & London, 1996.

economic hardship or social change, when the certainties of the racist viewpoint can provide a comforting explanation of life's injustices.

This Chapter considers the effect of social encouragements to racism and the issue of social conformity in influencing receptivity to any idea. People generally conform to the mores of their society, and if they believe racism to be acceptable they are more likely to behave in a racist way. Racist concepts are kept alive through communication of racist viewpoints and social mediation and the use of racist scapegoating as acceptable aspects of political debate. Where there is 'social permission' to be racist, racism is a permissible way of releasing frustrations and aggression. Conversely, discouraging racist attitudes and behaviour is likely to cause racism to decrease.

Unfortunately, human consciousness can be so affected by the desire for conformity as to affect the information that a person receives, so if a culture is predominantly racist, contrary information will generally be ignored. This is a reason that 'more speech', 'speaking back' and education are unlikely to be sufficient on their own to counteract a racist culture.

This Chapter also considers the essential role of speech in the reproduction of racist ideologies. Communication is crucial in the reinvention and perpetuation of racism. Hence the mass media has a primary role in promoting or discouraging conformity with racist attitudes. Any analysis of the suitability of First Amendment jurisprudence to Australian society needs to be informed by an understanding of the way in which racial vilification reinvents racism. That understanding is largely ignored by United States courts although it is reflected within the United States in communications theory, Critical Race Theory, and by feminist writers such as Catharine MacKinnon.[6] It is also is recognised in other jurisdictions such as Canada and Germany.

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[6] The following discussion draws generally upon Catharine A. MacKinnon, *Only Words*, Harvard University Press, Cambridge, Massachusetts, 1993.

Finally, this Chapter considers some of the arguments against regulating racial vilification which depend upon its categorisation as 'speech.'

What racist speech does

Many arguments against regulating racial vilification say that speech is different in nature to actions, and does not have the same effect upon reality.[7] Legally it should therefore be dealt with differently, the arguments go, despite its consequences. But it is clear that racist speech causes offence and emotional pain, which are themselves real and very harmful consequences. But it also provides the preconditions for action. It changes reality in doing something that only speech can do: it communicates the message that racial superiority permits one to denigrate and act against those perceived as inferior. Direct racial vilification and the language of 'new racism' are essential to the perpetuation of racism. Racist speech justifies and encourages all other racist behaviours. It provides the underpinning, the rationale, for all more direct forms of racist action and violence.

Like any other mythology, racism must be constantly communicated to survive. And like any power, it must constantly be exercised.[8] Racist words and language make the distinctions on which racism feeds by justifying the choice of victim. Categorisations are made through language. Language, notes Minow, embodies unstated norms that are used for comparison within categories that are assumed to be natural and inevitable.[9] Humans use labels to describe and sort their perceptions of the world, including of other people, but their categorisations necessarily have consequences for how those so

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7 The Russian scientist Pavlov (1849 – 1935) regarded speech as a signalling system constituting a 'second reality', as distinct from the reality perceived directly by the visual, auditory and other receptors of the body. He warned that "numerous speech stimulations have removed us from reality, and we must always remember this in order not to distort our attitude to reality": I. P. Pavlov, *Selected Works*, Foreign Languages Publishing House, Moscow, 1955, 643.

8 Mills refers to the constant 'boundary-policing' against those who wish to be included in the majority or to dissolve the system of racial categorisation: (1998) 77.

9 For example, 'working mother' implies that mothers don't work.

labelled are treated. Labels carry social and moral consequences "while burying the choices and responsibility for those consequences."[10]

Because of the nature of any communication, hate speech can still have an effect even if its message is rejected. No matter how much both victims and their supporters resist racist ideas, at some level racial inferiority is planted in our minds as an idea that may hold some truth.[11] "Even when audience members flatly reject ideas expressed by the mass media," notes Lull, "they do so only after being introduced to and, at some level, recognizing and contemplating dominant motifs in the ideological patterns mobilized before them."[12] So it is with social expressions of racism. Racism works "by socializing, by establishing the expected and the permissible."[13] Its effects are subtle, and it relies upon indoctrination over time.[14] Society is changed for the worse.

Reproduction of racism through social encouragement and conformity

Receptivity to racist messages

Certain social and economic factors, seem to increase receptivity to racist messages. The relative importance of different factors is hard to estimate. Heitmeyer identifies the disintegration of social responsibility and social membership as increasing the likelihood of racist violence.[15] He also identifies socioeconomic factors such as lower education and lack of social security systems as more conducive to racism than unemployment as such[16] – arguing that the crucial perception is the degree of control over one's destiny: Denmark had high unemployment levels during the 1980s but apparently little racist violence.[17] However strong support for anti-immigration parties has been found in

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10 Minow (1990) 4, 22.
11 Matsuda (1993) 25.
12 Lull (1995) 21.
13 See Kathleen E. Mahoney, "*R v. Keegstra*: A rationale for regulating pornography?" (1992) 37 *Mc Gill Law Journal* 242 at 251, discussing the socialisation of pornography.
14 Mahoney (1994) 14.
15 Heitmeyer (1993) 27.
16 See generally Heitmeyer (1993) 17.
17 Björgo and Witte (1993) 8.

Germany at a time and in areas where there was no mass unemployment, bad housing, poor education or low wages, and indeed Witte argues that there has been more antisemitism and racist violence in the prosperous Western Germany than in Eastern Germany.[18]

While education is not a complete defence against racism, racism often seems to be higher amongst those with less education. Pauline Hanson's support was highest in outer urban or country communities where relatively small numbers had tertiary qualifications, many had low family incomes, there was high unemployment, and a high number of children under five. Limited contact with immigrants from non-English speaking backgrounds was also an indicator of support for Hanson. Contact with indigenous residents was connected with Hanson support in some but not all regions.[19]

Some writers have also identified certain personality types as being more likely to be receptive to racist messages. Whether or not there is some truth in this, I argue, following Zimbardo and Elliot, that we should not regard racism as a personal individual 'illness' but as a structural social problem.

Social encouragement

Psychological experiments confirm that harmful behaviour increases with only minimal encouragement.[20] Encouraging one group to denigrate another rapidly leads to mistreatment of the 'inferior' group. When children were divided according to eye colour in Jane Elliot's experiment and told that one group was superior to the other,

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18 Witte (1993) 139 at 161 and 163. See, contra, research of John Hagan, University of Toronto, in conjunction with the free university of Berlin, described in Veronica Cusack, "Of life and law" (1995) 22 *University of Toronto Magazine*, No 3, Spring, 14 at 17. The economic problems of the former USSR seem to have led to increases in antisemitism: Ward (1994) 16.

19 Markus (2001) 204-5.

20 Just one person can give the 'moral support' which encourages a person to maintain their view point in the face of opposition: Zimbardo (1979) 630-631.

long-standing friendships were broken and the 'inferior' children abused.[21] Zimbardo used American college students to play prisoners and prison officers. Within days formerly pleasant students engaged in abusive, authoritarian behaviour towards their 'prisoners' because they thought it was expected of them.[22] Stereotyped conceptions of what was expected behaviour for guards overwhelmed the participants' natural reactions and values.[23] Stanley Milgram demonstrated that ordinary people would inflict massive electric shocks upon a stranger in the context of a psychological experiment, despite the man explaining that he had a heart condition, moaning and screaming.[24] The researcher gave his subjects no special training. It wasn't necessary, comments Zimbardo: the training "had long since been completed for him by society."[25] 'Good' people will do bad things out of obedience to authority; out of conformity. Reporting on Eichmann's trial, Arendt found, disturbingly, that he was not 'a monster' but a frighteningly normal person with no feelings about the Jewish victims. [26]

The more one relies on the social reward structure of the group for his or her sense of self-worth and legitimacy, the greater the pressures toward conformity that the group can bring to bear on the individual.[27] Irish Catholic and Protestant children who went on holiday together got on well, but the friendships did not continue once they returned to Ireland.[28] Norms which are backed by powerful punishments for violation are even

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21 W. Peters, *A Class Divided, Then and Now*, Yale University Press, New Haven, 1987 (1st edition 1971).

22 Zimbardo (1979) 625 to 626.

23 Zimbardo (1979) 629. The British Prison Service recently found warders guilty of blatant racism against ethnic minority staff and inmates: Vikram Dodd, "Youth prison warders 'guilty of overt racism,'" *Guardian Weekly*, 25-31 Jan, 2001, 9, and institutional police racism was found to have hampered the investigation of the Stephen Lawrence murder: Vikram Dodd, "Race row as Met suspends officer who criticised force," *Guardian Weekly*, 25-31 Jan, 2001, 10.

24 Described in Zimbardo (1979) 9 to 11. See also Ian Parker, "Shock Horror," *Sydney Morning Herald, Good Weekend*, 2 December 2000, 47.

25 Zimbardo (1979) 11.

26 Hannah Arendt, *Eichmann in Jerusalem; A Report on the Banality of Evil*, Penguin Books, New York, 1994, 54, 276 and 287.

27 Zimbardo (1979) 635.

28 Connolly (2002).

more effective in ensuring conformity, no matter how horrific the 'norms' might be, as the Third Reich demonstrated.[29]

Where racism is a "rewarding ideology and a profitable way of life" even otherwise 'tolerant' persons may discriminate out of habit and social conformity.[30] A racist society is beneficial for the racist, where he can improve his own circumstances by exploiting the 'out' group. Forty years ago it could be said that in societies such as South Africa or the southern United States, members of the dominant group would exhibit both prejudice and discrimination because racial bigotry and discrimination by whites were constantly rewarded in terms of approval, prestige, wealth and power, and tolerance and 'color-blindness' were severely punished.[31] Where racism is socially sanctioned and an accepted part of public discourse, social conformity will ensure that the ordinary operation of society continues to construct and reinvigorate racist mythologies.

The racist signals which we receive from our culture create what we regard as normality. Racism arises from the 'normal' or 'ordinary' assumptions we have learned to make about the world, ourselves, and others and from the basic patterns of our social activities,[32] and through the mutually reinforcing messages from society's most entrenched and powerful institutions, organisations and the mass media, which inevitably support the *status quo*.[33]

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29 See generally, Ingo Muller, *Hitler's Justice* Harvard University Press, Cambridge Massachusetts, 1991 and Udo Reifner "The Bar in the Third Reich: Anti-Semitism and the Decline of Liberal Advocacy" (1986) 32 *McGill Law Journal* 97 on the effects of antisemitic Nazi legislation.

30 van den Berghe (1967) 20.

31 van den Berghe (1967) 20.

32 Charles R. Lawrence III, "The Id, the Ego, and Equal Protection: Reckoning with Unconscious Racism" (1987) 39 *Stanford Law Rev* 317, 330, Lull (1995) 18.

33 Lull (1995) 33.

But because racism is not perceived to the extent its "ideological assertions have become self-evident cultural assumptions,"[34] even people who do not see themselves as racist can be influenced by the social and cultural influences that encourage racism.

Reagan's hostility towards civil-rights legislation gave America the message that racism was acceptable, and Bush Senior subsequently reinforced that message. As a result, racist feelings that once were covert, because not socially acceptable, came to be expressed overtly in crude and derogatory language "not only among tavern troopers, but in the most respected quarters."[35] Racism became legitimised through social acceptance of racist language and racist hatred.[36]

Earl Raab, an analyst of trends in antisemitism, warned in 1995 that there was greater permission in American society to act violently towards Jews, blacks and gays than there has been in the past, saying that racists "feel more license to express themselves."[37] Less harmful forms of racism degenerate easily into more serious forms, against a background of encouragement or tolerance of racism.[38] Whether intended or not, say Levin and McDevitt, "the threads of a culture of hate are woven into the fabric" of society in humour, entertainment, music and politics, providing support and encouragement to those who seek to express their personal version of bigotry in criminal behaviour.[39]

The enormous increase in racially motivated crimes reported in Germany and Eastern Europe in recent years is the result, it is argued, of the radical right's message that denigration of foreigners and refugees is an acceptable part of political discussion.[40] In

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34 Lull (1995) 33.
35 Terkel (1993) 5.
36 Bob Matthieson in Terkel (1993) 164.
37 Debra Nussbaum Cohen, "ADL logs antisemitism increase," *Australian Jewish News*, 24 February 1995, 13.
38 Matsuda (1993a) 23 -24.
39 Levin and McDevitt (1993) 34ff and 42-3.
40 Schmidt (1993) 148, citing Heiner Geissler, former general secretary of the Christian Democratic party. A poll of young Germans aged between sixteen and twenty-four conducted in 1992 found

Germany, France and the Netherlands, a striking increase has been found in the number of racist incidents when support for racist political parties has increased. Whether the success of the racist parties has encouraged violence, or whether both the political success and increased violence are independent results of a more general tendency, is arguable.[41] An Australian neo-Nazi stated that racist ideologies helped him to resolve his doubts about using violence against Asians and to justify to himself his fire-bombing of Chinese restaurants (including his own favourite restaurant).[42]

Failure to act against racism

Direct police intimidation and violence, well documented against Aborigines[43] and Arabs[44] in Australia, is a clear expression of racism. Social acceptance of racism can also be indicated by the failure of government authorities to act against it. There is much evidence that police failure to act against racist violence provides considerable encouragement for the perpetrators.[45] "That evening, the police didn't make me feel like I was participating in crime" said a German who with a mob threw two Namibians off their fourth-floor balcony, seriously injuring them. Police had known of the planned assault but failed to intervene.[46] Lack of police intervention when hundreds of violent extremists set fire to a boardinghouse for foreigners in Rostock in August 1992 – a "strange mixture of police incompetence and sympathy toward the perpetrators"[47] – led to worldwide indignation. Police failure to act implies government unwillingness to protect the victims. The victims have no-one to protect them. Racism consists not just

almost a third to be "thoroughly xenophobic or at least prone to xenophobic ideas" and thirteen percent politically "close to a fascist successor organization": Schmidt (1993) 156. See also the polls discussed in Heitmeyer (1993) 19-20.

41 Björgo and Witte (1993) 11 and see generally Jaap van Donselaar, "The Extreme Right and Racist Violence in the Netherlands" in Björgo and Witte (1993) at 46ff.

42 ABC *True Stories* documentary, 27 June 1993.

43 See for example HREOC (1991b).

44 David Fraser, Moha Melhem and Mirna Yacoub, 'Violence Against Arab Australians' in Cunneen et al (1997) 75, 88ff.

45 Björgo and Witte (1993) 10 to 11 and generally Chapters 9 to 16.

46 Schmidt (1993) 163, 164.

47 Schmidt (1993) 170, quoting *Der Spiegel*.

of acts of commission but also of omission. Racist acts are condoned, assisted or ignored by bystanders or collaborators.

> We have to worry about the frequent cowardice of relatively decent individuals and societies whenever they have to confront the ruthless and oppressive ones.[48]

Matsuda argues that government failure to regulate racist expressions amounts to a symbolic endorsement of racist speech.[49] Where racism is encouraged and condoned at the highest levels of society, social conformity will ensure that society is racist, that the most extreme behaviour against victim groups is sanctioned, and that individuals see no other way of behaving.

Conformity reinforces social acceptance of racism

Conformity and racism both provide a source of security in the face of the alienation and uncertainty of modern societies.[50] Laing and Reich identify aspects of conformist behaviour that are particularly relevant to a racist outlook: the way in which conformity encourages abrogation of personal responsibility, and hence undermines individual morality, and the way in which it encourages uniformity, and therefore differentiation and denigration of others seen as different.[51] Adorno comments that society wants us all to be alike,[52] and that those in power perceive only those exactly like themselves as fully human.[53] In Reich's view, racist characteristics give rise to the type of personality that is capable of prejudice and of involvement in fascism, with its antihumanistic tendencies

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48 Oz (1992).

49 Matsuda (1993) 48ff; contra, see Robert Post, "Racist Speech, Democracy, and the First Amendment" (1991) 32 *William and Mary Law Review* 267, reproduced in Gates et al (1994) 115 at 132.

50 Wilhelm Reich, *The Mass Psychology of Fascism*, Farrar, Straus & Giroux, New York, 1944 (1st ed 1933), 30, Laing (1975) 23 and 24 and Wright (1971) 214. Heitmeyer (1993) 26-7 argues that the more authoritarian education system in East Germany has encouraged racism because it has discouraged self-responsibility and social bonds.

51 Laing (1975) 69 and 70

52 Adorno (1974) 102 to 103

53 Adorno (1974) 105.

and indifference to human life.[54]

In some social situations there can be increased pressure to be racist. Zimbardo identifies the situations that might lead any of us to behave in undesirable ways as occurring where there is a 'legitimate' authority such as a superior who assumes responsibility for the consequences of one's actions, acceptance of a subordinate role with functions governed by rules, or where one allows oneself to become part of a social system where social norms such as public etiquette and protocol are more important to maintain than one's personal values and private beliefs.[55] Levin & McDevitt argue that many racist attacks on persons and property in America are carried out by gangs of young men who share the responsibility (and therefore the blame) by each carrying out only part of the assault – although the combined effect may still be horrific.[56] The scenario they describe fits with Zimbardo's analysis in that there is usually a gang leader and rough 'rules' as to the separate functions of the gang members, and in that membership of the gang and conformity with its mores and requirements, enforced through peer pressure, are more important to members than their personal values and beliefs. Common features of racist group attacks are that:

- group members feel that they are not likely to be punished for their behaviour because their victims are not valued by society;
- their victims are weaker, while the group can physically protect each other; and
- as members of a group, the perpetrators are more anonymous and feel less personally responsible.[57]

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54 His conclusions in so far as they are relevant to antisemitism are supported by a 1950 study by Ackerman and Jahoda (*Anti-Semitism and Emotional Disorder*, New York, Harper, 1950) discussed by Robb (1954) at 27 to 29.

55 Zimbardo (1979) 11.

56 Levin & McDevitt (1993) 66.

57 Levin & McDevitt (1993) 16-18. Similarly see Glenn A. Gilmour, *Hate-Motivated Violence*, Department of Justice, Canada, May 1994, available at http://canada.justice.ge.ca/Orientations/Reforme/Haine/hate_en_1.htm at par 2.2.2, citing D. Goleman, "As Bias Crime Seems to Rise, Scientists Study Roots of Racism", *The New York Times*, 29 May 1990, C1, C5.

They may even expect validation from society for their acts.[58] And in any case, they enjoy doing it.

Björgo finds that anti-immigrant bombings in Scandinavia have a similar pattern, being generally carried out by youths[59] who support each other in 'macho' aggression against marginalised groups. He notes that youth gangs who are feared and disliked in their communities for their violence may become popular 'local heros' when they act against immigrants or minority groups.[60] The scenario generally involves:

> a discussion during which hostile feelings against immigrants or asylum-seekers are expressed, an implicit contest among the participants to outdo each other in reckless proposals, a wish to 'show off', plus a good measure of booze to quell second thoughts.[61]

However Husbands notes that when wider definitional approaches to racist violence are used, it can be seen that older people as well as youths are often involved, although usually in less overt ways, and this has policy implications for how racist behaviour should be handled.[62]

If Zimbardo's analysis is accurate, it would seem that societies throughout the world are structured so as to encourage every kind of harm against others if that harm is condoned or encouraged by those in authority.[63]

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58 Levin & McDevitt (1993) 31 and 67.

59 Heitmeyer's findings in Germany were that 90% of those suspected of racist violence were under 26: Heitmeyer (1993) 19.

60 Björgo (1993) 38.

61 Björgo (1993) 38 and see also Heléne Lööw, "The Cult of Violence: The Swedish Racist Counterculture" in Björgo and Witte (1993) 62 at 77 and 79 and Husbands (1993) 118.

62 Husbands (1993) 119.

63 This is certainly the conclusion borne out by Gross (2001).

Conformity influences our receipt of information

Our powerful subjective impression that we are conscious of sensory perceptions in real time is an illusion, argues Daniel C. Dennett. Psychological experiments have demonstrated that the order in which we perceive things is not always the order in which the sensory data arrive in the brain. Out of the data that we receive, only a small fraction is taken in and recalled. What we experience as awareness is that small fraction of our mental events whose influence has persisted and altered our beliefs about what has happened to us. What we experience is generated a little after the fact, as the result of a competition among multiple patterns of mental activity, conscious and unconscious, within the brain.[64] Thus scientists now confirm what has been argued by philosophers from Kant to Foucault, and by mass communications theorists – that our perceptions, our knowledge of the world, is filtered by the processes of understanding, which depend in turn upon our scheme of interpretation.[65]

Consciousness must, says Lull, imperfectly and partially "reflect the pervasive, dominant subjects and patterns of mass-mediated ideological representation" and thereby "inspire concordant thought and social behaviour."[66] Unconscious forces like expectations, cultural bias or prejudice can enormously influence what data is 'taken in', the way in which that data is perceived, and whether that data is remembered so that its influence persists. Expectancy, stance and intention shape perception.[67] Social expectations as to what we believe our group expects of us influence our conscious perceptions to a far greater extent than we imagine. The desire to conform to perceived expectations can overwhelm a person's perceptions, causing him to deny his own

64 Dennett (1991) and see Tim Beardsley, "Dennett's Dangerous Idea," *Scientific American*, February 1996, 24 and 25.

65 See generally Davies (1994) 6 to 8 and Weinberg (1993) 1158ff and the materials cited at footnote 265.

66 Lull (1995) 21, 22.

67 Minow (1990) 59-61 quoting Jerome Bruner, *Actual Minds, Possible Worlds*, Harvard University Press, Cambridge, Massachusetts, 1986, 110.

senses.[68] Our perceptions, our ways of thinking, "our existence as us" are not, says Dennett, independent of our normative concepts.[69]

Dennett's explanation of the manner in which we take in information confirms a common observation: that normal educational methods only reinforce existing cultural prejudices. Visitors to the Holocaust Memorial Museum in Washington were found to react differently according to their existing expectations and viewpoints. Anti-abortionists were reminded of millions of innocent babies being killed throughout America. Children from a church school believed that the Germans were "jealous because the Jews were almost ruling the country." Their teacher explained God's failure to prevent the Holocaust as the result of Jews not recognising Jesus Christ, in which case "the Lord could have heard their prayers a lot more."[70]

Thus in a society that already contains racism, where the normal tendency to conformity will reinforce and encourage racism, it is unlikely that normal education will on its own be an effective counter to racism because of the effect that conformity has, not just on what is taught, but on our very receipt of information.

The role of education

Björgo and Witte note that lower levels of education seem to be more closely connected with racist behaviour than other factors such as unemployment.[71] However history shows that a high level of education is no guarantee against racism; indeed the elitism involved in access to higher education may foster notions of superiority and thereby encourage racism.

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68 Zimbardo (1979) 629, citing experiments where persons saw the movement of a light (Muzafer Sherif (1935)) or its colour (Faucheux & Moscovici (1967) and Moscovici, Lage & Naffrechoux (1969)) as other than it is, and experiments where persons miscalculated lengths (Solomon Asch (1955)): Zimbardo (1979) 631-2.

69 Dennett (1991) 207-8.

70 Philip Gourevitch, "Bearing witness from a safe distance," *Australian Jewish News*, 24 March 1995, 26.

71 Björgo and Witte (1993) 8.

In order to counter the ways in which conformity encourages the development of racism, it is therefore necessary to teach the ability to feel emotion and to empathise with others, to feel a sense of responsibility for others, to teach how to react against conformity, how to maintain personal morality and social values, how to question authority and how to act against structural discrimination and inequality in one's own culture.[72]

> I am a survivor of a concentration camp. My eyes saw what no person should witness. Gas chambers built by learned engineers. Children poisoned by educated physicians. Infants killed by trained nurses. Women and babies shot and killed by high school and college graduates. So, I'm suspicious of education. My request is: help your students to be human. Your efforts must not produce learned monsters, skilled psychopaths, or educated Eichmanns. Reading and writing and spelling and history and arithmetic are only important if they serve to make our students human.[73]

It seems that to protect against racism, education needs to encourage people to question the given social structures of their society, rather than to conform.

The role of the media

The choice of language is … not just a semantic question, it is often a moral one … [74]

Encouragement of cultural conformity and ethnocentric stereotypes

The media has a dominant role in encouraging conformity, and hence in supporting racism, which is not taken into account in arguments that racial vilification legislation should be minimised in the interests of 'free speech.' Indeed, it could be argued that the primary object of First Amendment protection is not the individual, but the media. As

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72 See Oz (1992).

73 Letter to *The International Worker*, quoted in "Unkept Promises and New Opportunities: Social Studies Education and the New World Order," C. Frederick Risinger, *Social Education*, February 1991, 138.

74 Chris Puplick, in Forward to Anti-Discrimination Board (2003) 6.

Collins and Skover point out, while First Amendment jurisprudence is supported by high-sounding references to Socrates, Plato, Aristotle, Milton, Locke, Mill and Hume, the reality of the discourse that is protected in the name of the First Amendment is not philosophical, rational or truthful speech, not a means to a greater end, but a carnival of mass communication, entertainment and advertising – and hate speech.[75] And it is to the reality of this culture, they say, that we should look when considering free speech jurisprudence.[76]

In the last century the existence of a 'mobile public opinion' became the controlling force in politics. At the same time, the systematic manipulation of public opinion through mass media became possible. The mass media presents complex situations in terms of stereotypes that simplify and distort,[77] and appeals to emotions and prejudices, including racism, rather than reason. In these ways, the media has acquired an enormous potential for harm which did not previously exist,[78] and which has not been taken into account in philosophically-based arguments for free speech. Proponents of free speech such as John Stuart Mill assumed that the speech to be protected would be rational debate amongst a relatively small, educated elite. They did not envisage how speech, music and imagery would be transmitted across continents in a "systematic avalanche of falsehoods"[79] to manipulate the emotions and opinions of millions.[80]

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75 See generally Michael Parenti, *Make-believe media: the politics of entertainment*, New York, St Martin's Press, 1992 and other works by the same author cited in Chapter 7.

76 Ronald K. L. Collins and David M., Skover "Pissing in the Snow: A Cultural Approach to the First Amendment" (1993) 45 *Stanford Law Review* 783 at 784ff; and see generally Ronald K. L. Collins and David M. Skover, *The Death of Discourse*, Westview Press, Boulder and Oxford, 1996.

77 Puplick in his Forward to Anti-Discrimination Board (2003) 6, citing Murray Edelman, *The Symbolic Uses of Politics*, University of Illinois Press, Urbana, 1967, 31. See also Peter Manning, *Dog Whistle Politics and Journalism: Reporting Arabic and Muslim people in Sydney newspapers*, Australian Centre for Independent Journalism, University of Technology, Sydney, 2004, discussed on Mike O'Regan's "Media Report", Radio National 4 March 2004, available at: http://www.abc.net.au/rn/talks/8.30/mediarpt/stories/s1057322.htm

78 See the excellent early articles by David Reisman, "Democracy and Defamation: Control of Group Libel" (1942) 42 *Colum L. Rev* 727 at 728 and (1942b) 1089 ff, discussing the role that vilification and personal defamation played in the rise of the Nazis to power.

79 Reisman (1942a).

Language, the very thing that was supposed to bond us together in human society, at the same time has exposed us to exploitation by strangers[81] and has subtly influenced how we see our own social roles and routine personal activities.[82]

The media creates cultural reality[83] through the constant portrayal of dominant cultural stereotypes (thin, white and rich[84]) – images which shape our national vision and our sense of identity. What is shown in newspapers, magazines, film and television is not neutral.[85]

Examples of Australian media reporting which reinforce negative Aboriginal and Arab stereotypes are too numerous to detail.[86] "There's only one thing more spiritually significant than Ayers Rock … my uranium royalties" is typical.[87] *Creek* v. *Cairns Post Pty Ltd* involved a newspaper misleading showing a bush 'humpy' as the permanent home of custodians of an Aboriginal child, and comparing it to the better housing of the child's previous (white) foster parents.[88] Aborigines are rarely referred to in the media, and then mainly as victims or as threats and burdens to Anglo-Australians.[89] Their

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80 Canadian Cohen Committee Report, 1969, quoted in Richard Moon, "Drawing lines in a culture of prejudice: *R.* v. *Keegstra* and the Restriction of Hate Propaganda" (1992) *U.B.C. Law Review* 99 at 117.

81 Stuart Jeffries, "All the joys of monkey business," *Guardian Weekly*, 12 May 1996, 28, reviewing Robin Dunbar, *Grooming, Gossip & the Evolution of Language*, Harvard University Press, Cambridge, Mass., 1997, 23 and generally. Hutchinson refers to the "naïve failure of most scholars to recognise language's scope for domination": Allan C. Hutchinson, *Waiting for Coraf: A Critique of Law and Rights*, University of Toronto Press, Toronto, 1995, 190. See also Lull (1995) 34.

82 See Lull (1995) 33, quoting Philip Elliott, "Uses and Gratifications research: a critique and a sociological alternative", in J G Blumer and E Katz (eds) *The Uses of Mass Communications: Current Perspectives on Gratifications Research*, Beverley Hills, CA, Sage, 1974 at 262.

83 see Lull (1995) 71ff.

84 See generally Frankenberg (1993). The black population in Brazil complains that they are virtually ignored by advertisers and the media, who portray the normal Brazilian as a pale-skinned person of Spanish descent rather than as a black-skinned descendant of slaves: *Foreign Correspondent* Report, ABC Television, May 1996.

85 Patricia Williams, "Metro Broadcasting, Inc v FCC: Regrouping in Singular Times," (1990) 104 *Harvard Law Review* 525 at 529ff.

86 See generally Chris Cunneen, "Hysteria and hate: the vilification of Aboriginal and Torres Strait Islander people" in Cunneen et al (1997) 137 at 150ff and Fraser et al (1997) 75 at 75ff.

87 *Alice Springs Star* 29 November 1983, quoted in Hollinsworth (1989) 180.

88 [2001] FCA 1007.

89 Hollinsworth (1998) 283, Jakubowicz (1993) 37-40, 57-60, 85-9, 185-7.

political aspirations are presented as unreasonable. As Cunneen says, the colonised are denied a representation of the trauma of colonisation.[90]

The media and 'new' racism

'New' racism, or the shift in the basis of differentiation from race to culture, means that more indirect forms of racial vilification are much less likely to be caught by current legislation. Racism has become coded through revised notions of culture.[91] Discussions of public drunkenness in Bourke are understood by readers to refer to Aboriginal drunkenness, because whites would not be written about in the same way.[92] But at the same time, race has become increasingly used in the Australian media as a reference point.[93]

As Hollinsworth notes,

> [o]nce the notion of a national or ethnic culture becomes essentialised, it is possible to conduct politics and everyday life in racially segregated and exploitative ways without reference to race. Essentialised notions of national cultures have shifted discourses on immigration, crime, sexuality and citizenship in fundamental ways, especially the shift from seeing communities as complex entities, and regarding some as 'other' within it.[94]

The problem with dealing with media commentary, says the Anti-Discrimination Board, is that while the media is very influential in communicating racist messages, especially

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90 Cunneen (1997a) 158.

91 Anti-Discrimination Board (2003) 33 and Chapter 3. In this way, Australian Nationalist publications can describe their focus as 'anti-Asianisation' and present racial vilification legislation as persecution of those opposed to Asian immigration: see for example Jim Saleam, "Anti-Racial Vilification Legislation: An Authoritarian Response to criticism of Immigration/Multicultural Policy" at http://www.alphalink.com.au/`radnat/arvlegislation.html.

92 Hollinsworth (1998) 34, Gillian Cowlishaw, "Where is racism?" in G. Cowlishaw and B. Morris (eds), *Race Matters*, Aboriginal Studies Press, Canberra, 1997, 177ff.

93 Anti-Discrimination Board (2003) 11.

94 Hollinsworth (1998) 53.

because of its ability "to represent events or issues in the context of pre-existing fears or prejudices," racism in the media "does not just manifest in overtly racist statements" but "permeates everyday media practices of news gathering and the narrative structures of news reportage."[95] The balance is never redressed in the other direction: where the Anglo-Australian husband of a woman of Asian appearance murders their three children, this is not portrayed as a racist murder.[96]

Reproduction of political and social encouragements to racism

If politicians, respectable businessmen and talk-show hosts express or condone a racist outlook, if newspapers consider xenophobic insults fit for publication[97] and report and comment on events in simplistic and racist ways, the person in the street receives the message that it is acceptable, even admirable, for him to be racist too.[98] The media and the government are both involved in this communication with the public because public presentation of issues in the media is actively shaped by the government and politicians generally.[99] When reputable politicians make inflammatory statements, said a source at Scotland Yard, racist attacks increase.[100] A number of talk back hosts and columnists promote racism through simplistic scapegoating even as they deny that racism exists in Australia.[101] John Howard is adept at coded messages which reinforce racist messages

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95 Anti-Discrimination Board (2003) 10. See generally Cunneen (1997a) 150ff and Fraser et al (1997) 140 ff.

96 Indeed, the front page photographs showing only the mother and children implied to me and others at first sight that this was an 'ethic' attack: Murray Trembath, "Alone in a cell," *Leader*, 17 February 2004, 1 and 4.

97 See John Hooper, "Blind British Prejudice", *Guardian Weekly*, 6-12 September, 2001.

98 Heitmeyer (1993) 27, Hollinsworth (1998) 198, van Dijk (1987) 362. Participants in HREOC's *National Consultation* (2001b) expressed concern at "the attempts by some in positions of influence and power in Australian society to promote models of national identity that are based on stereotypical images and masculine and euro-centric views of history which implicitly exclude or marginalise diverse communities and women." Compare with the complaint against British Home Secretary Jack Straw: Julie Hyland, "Britain's Home Secretary denounced for inciting racial hatred against Gypsies," 23 August 1999, World Socialists Web Site, at http://www.swsw.org/articles/1999/aug1999/roma-a23.shtml

99 Anti-Discrimination Board (2003) 11.

100 *Guardian Weekly* Editorial, "What was all that about?" 2-9 May 2001, 11.

101 Adams and Burton (1997) 46 ff.

indirectly – and not so indirectly.[102] He frequently refers to connections between immigration and unemployment,[103] and suggests that ATSIC money is being misspent, at the expense of taxpayers.[104] Through reporting of such messages social experience is depicted as neutral (that is, free of racism) when in fact it is not.

Cunneen points to another way in which the media reinforces racism: through stereotyping anti-racists, rather than racists, as irrational and 'hysterical', thus belittling the harms of racism and denying that the victims of racism, or their supporters, have valid views.[105]

Encouragement of fears

The Anti-Discrimination Board of NSW says that it "has seen the damage done by news that uses race as its angle,"

> From media commentators who make blatantly racist comments, to a news story that links the causes of crime or conflict to a particular racial or ethnic minority community, the media portrays powerful and permeating messages about who is 'one of us' and who is not ... debates about asylum seekers, terrorism and local crime become linked in media representations, and lead to a damaging environment of anti-Arabic and anti-Muslim sentiment.[106]

McCausland has demonstrated how a series of gang rapes in Sydney were presented by the media as racially motivated (the perpetrators being Australian-Lebanese) against 'white' Australian women, even when the victims included girls from Italian and Greek

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102 See Marr and Wilkinson (2003) 175- 176 as to the extent to which this 'wedge politics' was a conscious decision by Howard.

103 Hollinsworth (1998) 253 quoting *The Weekend Australian*, 5-6 October 1996, 21 and 255, quoting *The Weekend Australian*, 24-25 May 1997.

104 Hollinsworth (1998) 197.

105 Cunneen (1997) 137 at 140ff discussing an *Australian* editorial of 22 April 1991 at 10. This is also a tendency seen in journalists such as Paul Sheehan and P.P. McGuinness and in radio commentators such as John Laws and Alan Jones.

backgrounds.[107] The increasing use by the Australian media of 'race' or culture as a reference point fuels, says McCausland, notions of nationalism and otherness.[108] Inflammatory opinion pieces argue that police are soft on 'Middle Eastern' crime, that 'Middle Eastern males' regularly assault and rape 'Australians' and that racial vilification legislation does not protect victims who are attacked "simply because they are Australian."[109]

Barker argues that newspapers in England in the 1970s played a very large role in a conscious conservative bid to justify the 'new' racism through promoting fears of cultural invasion. He describes how after Margaret Thatcher's inflammatory immigration speech in 1978, the *Daily Mail* ran a series of articles entitled 'the Great Debate':

> As part of it, an article appeared (headlined 'They've taken over my home town …'), supposedly telling the story of a Harlesden man returning to his childhood haunts to find them overrun with immigrants … the hero of the story, had been there when the first immigrants arrived and had welcomed the firstcomers with full English tolerance. Subsequently, he had emigrated to Australia. Returning, homesick, he had found a massive 24 per cent black population and his street 'taken over'.[110]

The man was quoted as saying that he had been robbed and cheated of his birthright and that millions more would suffer the same fate. Challenged by the Harlesden newspaper to produce the actual street or person, the *Mail* did not respond.[111]

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106 Anti-Discrimination Board (2003) 10.

107 Anti-Discrimination Board (2003) Chapter 3 generally.

108 Anti-Discrimination Board (2003) 11.

109 Tim Priest, "Don't turn a blind eye to terror in our midst," *Australian*, 12 January 2004, 9, leading to increases in abuse and harassment of 'Middle Eastern' Australians; Anti-Discrimination Board (2003) 10, referring to the situation in Australia from mid 2001 to 2003.

110 Barker (1982) 24.

111 Barker (1982) 25.

Björgo notes that the manner of media reporting is particularly important in raising the level of fear.[112] Violence is likely to be encouraged where reports on racist incidents go on to suggest that further racist violence is anticipated.[113]

Extremists using the media as a resource

The manipulative power of the media and the potential for harm of public hate propaganda are used deliberately by racial extremists,[114] as well as by terrorists,[115] to encourage the spread of racist behaviour, to garner supporters,[116] and to terrify potential vicitms.[117] Public appearances are carefully arranged demonstrations from which, it is hoped, followers will draw strength and inspiration, and from which the organizers expect their best media propaganda successes.[118] Hate propaganda is disseminated publicly where possible, including by encouraging media discussions of 'revisionist' and 'denial' publications. The Anti-Defamation League has identified the publication on university campuses of Holocaust denial advertisements or articles as a precipitating event or 'flash point' leading to an increase in antisemitic campus incidents.[119]

The encouragement and justification of racist behaviour provided by hate propaganda has widely been recognised as leading to increases in racist violence. The National Inquiry into Racist Violence reported that a racist publicity campaign in Perth had had "a significant effect on racial attitudes in Western Australia,"[120] encouraging violent attacks against Asian women and children, and leading to the death of a taxi driver. In February 1993 the *Guardian Weekly* commented that links between hate propaganda

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112 Tore Björgo, "Role of the Media in Racist Violence" in Björgo and Witte (1993) 96 at 105ff (1993a).

113 Björgo (1993a) 103ff.

114 Nazi understanding of the power to be gained through manipulation of public opinion resulted in vicious and systematic defamation of political opponents in the course of the Nazi rise to power (see Reisman (1942)) and subsequently in the complete propagandising of all aspects of German society, reinforced by a 'reign of terror'.

115 Björgo (1993a) 101-2.

116 Björgo (1993a) 104.

117 Björgo (1993) 106.

118 Schmidt (1993) 38.

119 Nussbaum Cohen (1995).

120 HREOC (1991b) 506 to 513.

literature circulated in Britain and the increase in racist attacks could not be ignored.[121] In Germany one reader wrote to the editors of a Nationalistische Front newspaper which encourages racist violence: "This paper inspires me to get on my feet and join the battle!"[122]

Encouragement to 'copycatting'

It has been suggested from time to time that the reporting of any issue encourages 'copycatting'. In the context of youth suicide, it has been suggested that voluntary restrictions on media reporting should therefore be adopted.[123] The same logic would seem to apply in relation to reporting of racist attacks, and perhaps even reporting of racist attitudes. In Australia, as discussed earlier, the wide coverage given to Pauline Hanson's racist comments and the media debate over her One Nation party's policies appeared to lead to an increase in racist behaviour towards non-Anglo groups. Some commentators argued that without the media 'obsession' with Pauline Hanson, it is unlikely that her party would have had much support.[124] There is no doubt that the act of reporting is not itself neutral[125] and involves a number of messages.

There is the fundamental implication that what is discussed or reported has some public importance, or that its value should not be questioned. For example, articles about home decoration or fashion do not generally question the desirability of spending money on those things, nor consider issues of overpricing and exploitation.[126] The report is not neutral but reinforces the assumptions of the dominant ideology.[127] 'Balanced' reporting of issues that are the subject of debate is not necessarily sufficient to counter the implicit messages of approval given by the very fact of reporting. Thus, says

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121 "The Scourge of Racism," *Guardian Weekly*, 28 February 1993, 7.

122 Schmidt (1993) 185.

123 Suicide rates increase significantly on days immediately following newspaper reports of other suicides: Andrew Ramsey, "Suicides linked to media reports" *The Australian*, 6 June 1995, 4.

124 Paul James, "Figures of Vulnerability: A Culture of Contradiction" (1997) 27 *Arena Magazine* 28 and Nicholas Economou, "How did she do it?" (1997) 27 *Arena Magazine* 35.

125 See generally Kingston (1999) (in the context of the second Pauline Hanson campaign).

126 Keane, *The Media and Democracy*, Polity Press, Cambridge, 1991, 38 describes this as the way in which the structures of the media "set agendas, constrain the contours of possible meanings, and thereby shape what individuals think about, discuss and do from day to day."

Toynbee, while 85 percent of British people consistently support abortion in opinion polls, the BBC always presents an anti-abortion voice when it deals with that issue "simply because the rightwing press demands this as 'balance'."[128] At best, 'balanced' reporting implies that the differing views represented are equally popular or equally valid. At worst, it encourages the extremist views that are given validity by the fact that they are discussed.

If racist views are reported without clear condemnation, those views come to inform our popular culture. If they are reported time and time again, in the context of public figures supporting or refusing to condemn those views (as was the case with Howard in relation to Pauline Hanson's maiden speech) then they are implicitly endorsed. No-one takes responsibility for these effects.

Björgo notes that both organised terror campaigns and copycatting acts that derive from media reports to some degree require a certain (racist) political climate.[129] He says that copycatting acts, while they are often carried out by youths who are not formally affiliated with racist political groups, are committed against a background of propaganda by those groups and media discussion.[130] Atkinson comments that in the majority of the German cases he has studied, the perpetrators have racist or fascist literature and paraphernalia.[131] Often a principal motive of the youths is to achieve media coverage for themselves or their town, and they see racist violence as likely to be reported.[132]

Media reporting as a social sanction

This is not to say that the media presents only a racist point of view. In Australia many feature writers and SBS television programmes argue strongly against racism. One

127 Lull (1995) 11. The war in Iraq provides many examples.
128 Polly Toynbee, "Desperate for an Enemy," *Guardian Weekly*, 21-27 December 2000, 9.
129 Björgo (1993a) 98.
130 Björgo (1993a) 100.
131 Graeme Atkinson, "Germany: Nationalism, Nazism and Violence" in Björgo and Witte (1993) 154 at 163.
132 Björgo (1993a) 99-102.

Norwegian experience was that strong media condemnation of racist violence had an educative effect, discouraging violence and shaming the perpetrators (who were otherwise generally law-abiding).[133] A particularly biting newspaper report on racist violence in a small Norwegian town led to the formation of anti-racist groups and policies both in that town and in others.[134] Investigative journalism into the real functions of racist groups is also valuable, demonstrating the reality of the groups' practices.[135] Objective and sensitive journalism which presents immigrants, for example, as individuals rather than as 'queue jumpers' can educate and minimise unfounded fears.[136]

While it is often argued that media reporting of racial vilification prosecutions will itself encourage racism, studies in Canada suggest this is not what occurs, and that the media can play a positive role in such a context, increasing public sympathy for the victims.[137]

Promotion of Positive role models

Promotion of role models from marginalised groups is essential in order to counter negative stereotypes, but the manner of their portrayal is also crucial, because multiple and sometimes contradictory messages can be conveyed and received.[138]

Media portrayals of blacks in the United States have traditionally been negative, with blacks given comic and subordinate roles[139] and black sportsmen used in advertising

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133 Björgo (1993a) 106ff. Björgo notes that it is perhaps less likely that this effect would be achieved where the perpetrators had a record of criminal behaviour and were more socially marginalised.

134 Björgo (1993a) 108ff.

135 Björgo (1993a) 107-8.

136 Björgo (1993a) 110. In the Australian context, *Australians against Racism* have used film and billboard advertising with this aim. Marr and Wilkinson argue that the Federal Liberal government took great care to exclude journalists from contact with Tampa refugees and other boat people to prevent any telling of 'the human story': (2003) 214-215.

137 Gabriel Weimann and Conrad Winn, *Hate on Trial: The Zundel Affair, the Media, and Public Opinion in Canada*, Mosaic Press, Oakville, 1986, 163ff, reporting the results of a national survey.

only where they are "attention-getting, bad boy[s]."[140] Black shows are forced to include white characters, but not vice versa. The proposal in 2003 to include a major black character in *Friends*, the 6th most popular show amongst white viewers in the United States and only 65th amongst black viewers "signifies how little has changed and how long that little has taken to come about."[141]

In Australia, principal characters who happen to be Aboriginal are virtually non-existent[142] and apart from SBS, the Australian media has generally been slow to promote positive images of ethnic and indigenous Australia. "Female and gay doctors have already made appearances on ABC TV's *GP*, but the idea of an Indian or Fijian doctor joining the practice," says Jaslyn Hall, "still seems too revolutionary for the producers."[143]

The situation on commercial television is even worse: programme makers say that shows with an ethnic content are rejected by the television companies as not being 'commercial' enough. Ethnic Australia remains 'a dangerously exotic concept' trivialised by its portrayal in terms of food or, in comedian Barry Humphries' words, 'colour and movement.' The problem for Australian society, notes Hall, is that unless the media reflects Australian diversity, instead of portraying Australia as monolithically white, ethnic communities will "retreat from the mainstream believing that they will

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138 See generally Marcia Langton, "*Well I heard it on the radio and I saw it on the television…*", Australian Film Commission, Sydney, 1993, as to the depiction of Aboriginal Australia and Jakubowicz (1994) 37-40 and 57-60.

139 There have been fewer than ten 'black' dramatic series in nearly fifty years of American commercial television. 1995 was the first year in which a regular drama series (*Under One Roof*) was shown about the lives of ordinary black people, other than a programme which ran for 3 weeks in 1979: Paul Farhi, "TV 'Ghetto' Has Last Laugh on Blacks," *Guardian Weekly*, 29 January 1995, 21. See generally Parenti (1992) Chapter 8.

140 Lull (1995) 75-8 and 81ff.

141 Gary Younge, "Americans Watch Television in Black and White," *Guardian Weekly*, 24-30 April 2003, 27.

142 Ernie Dingo starred in the 1994 ABC TV series *Heartland*, not repeated until 2002, and Deborah Mailman, Aborigine of the Year for 2003, starred in *The Secret Life of Us* (2002). Mailman commented: "It's appalling … It's still only Ernie Dingo and I. Two actors." Andrew Darby, "Mailman's message: it's still a secret life for us," *Sydney Morning Herald*, 12-13 July, 2003, News, 7.

143 Jaslyn Hall, "Our sanitised multiculturalism," *Sydney Morning Herald*, 25 April 1995, 11.

never be fully understood and accepted" and become further marginalised.[144] In 1999 not one Asian-Australian appeared in a major TV series and non-Anglo actors say that it is difficult to get cast in parts where their race is not the primary issue: "you're still considered as a bit of a risk and it's certainly not the norm."[145]

As Kelsen says, the norm functions as a scheme of interpretation.[146] The effect is to reinforce the ideological assumptions underlying the stereotypes, as well as the stereotypes themselves.[147] It is usual, notes Witte, for racist behaviour to be seen by those not directly affected as an individual and not a social problem.[148] This point of view can be reproduced and confirmed by the media, as has often been the case in Australia.

Arguments about the effect of speech

Consideration of the role of speech in perpetuating racism would not be complete without a brief examination of certain arguments or assumptions as to the nature and effect of speech which have made it easier for free speech theory to dispute that racist speech should be regulated. First it is said that words are emanations of the mind, rather than the body, and should therefore be specially protected. Then it is said that, in any case, words do not have a direct effect upon reality. Even if this is true, there is said to be no direct connection between individual occurrences of racist speech, and harm either to recipients of the racist message, or to society generally.

144 Hall (1995) 11.

145 "3 Dinkum Aussies – 3 Television Rarities," *Sun-Herald*, 7 May 2000, 77; Jakubowicz (1994) 114ff. See generally Hollinsworth (1998) 283-4 and Stratton (1998a) 207.

146 Davies (1994) 6, citing Kelsen's *Pure Theory of Law*, extrapolating from the philosophy of Immanuel Kant.

147 Lull (1995) 20-21.

148 See generally Witte (1993) 139.

Words deserve special protection because they come from the mind

Free speech theory often assumes that the mind is independent of the body and associated only with the spirit - a modern form of the theory of dualism which regarded the immortal soul and the soma (body) as disunited and even fundamentally opposed.[149] Reasonable restrictions upon purely "bodily" actions are seen as acceptable, but speech is seen as being of a different nature, inextricably bound up with one's personal identity, and warranting special protection. Post refers to expressions of one's "interior" frame of mind as valuable irrespective of their content.[150]

This line of thought has been very influential in Australia. In the Australian debate on the *Racial Hatred Act*, Phillip Ruddock expressed similar concerns:

> (S)ome people do have grave reservations about the fact that people can be gaoled for what they say as distinct from what they do. Many people have come to Australia, in fact, to escape the possibility of these sorts of penalties. ... This bill could put at risk the right of some sections in our community who have come from overseas countries to Australia to continue their often vigorous expression of views in relation to their own history and heritage.[151]

Legislation against racist expression is recategorised – as legislation against 'words,' 'ideas' or even 'thoughts' making it possible to claim that the legislation is excessive in its reach. Legislation against "mere words, even if only words of incitement," still tends to erode 'genuine' debate and thus the political process, argues Braun,[152] amounting to "social censorship based only on language."[153]

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149 See introduction to Pavlov (1955) 40.

150 Robert C. Post, " Racist Speech, Democracy, and the First Amendment" (1991) 32 *William and Mary Law Review* 267, 292.

151 Philip Ruddock, Member for Berowra, *Hansard*, House of Representatives, 15 November 1994, 3344.

152 Although Braun does admit that incitement would appear to be the very antithesis of considered discourse: Stefan Braun, "Social and Racial Tolerance and Freedom of Expression in a Democratic Society: Friends or Foes? *Regina v. Zundel*" (1988) 11 *Dalhousie Law Journal* 471, 503.

153 Braun (1988) 505-6.

Such arguments have several obvious defects. Personal experience tells us that the mind and the body are not separate in the way suggested. We know that our physical actions do not take place independently of any mental activity.[154]. Emanations of the mind are not always good or valuable. Speech is not inherently neutral nor beneficial. There are such things as obviously false ideas, and such things as obviously harmful ideas.[155]

Words without consequences

The argument here is that giving and receiving speech is something that occurs principally in the mind – an abstract communication from one cortex to another – so that words have only a 'referential' relationship to reality.[156] Words are light as feathers, signifying nothing and frightening no-one.[157] This construct reduces speech to problems of linguistics or 'moral algebra'.[158]

Again, we know from our own experience that this is not a convincing proposition. Speech in the form of direct orders ('shoot') obviously has direct physical consequences.[159] As Fish says, words do work in the world of a kind that cannot be confined to a purely cognitive realm of 'mere' ideas.[160] Words and images convey meaning and therefore have consequences.[161] Jürgen Habermas suggests that we need to think of ourselves as 'communicative actors.'[162] Dennett regards words and the messages they give as "potent elements of our environment that we readily incorporate"

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154 See generally Daniel C. Dennett, *Elbow Room- The Varieties of Free Will Worth Wanting*, MIT Press, Cambridge Massachusetts and London, England, 1984.

155 These arguments are discussed in more detail in following Chapters.

156 MacKinnon (1993) 11.

157 See Milan Kundera, *The Unbearable Lightness of Being*, Faber & Faber, London, 1984, 4: "because they deal with something that will not return, the bloody years of the Revolution have turned into mere words, theories, and discussions, have become lighter than feathers, frightening no one."

158 Fish (1994) 132.

159 MacKinnon (1993) 12.

160 Fish (1994) 109. See also Margrit Eichler, "Foundations of Bias: Sexist Language and Sexist Thought" in Sheilah L. Martin and Kathleen E. Mahoney, *Equality and Judicial Neutrality*, Carswell, Toronto, 1987, 22.

161 MacKinnon (1993) 30 and 37 (for effect of pornographic images).

162 *The Theory of Communicative Action*, Heinemann, London, 1981, cited in Mann (1995) 267.

and argues that through such incorporation we continuously change our perceptions, our consciousness and our ways of thinking.[163]

Speech is produced with the aim of trying to affect reality. We all act as if there is a real connection between encouraging people to do something and their subsequent behaviour. The advertising industry spends billions of dollars on this assumption. The Nazis knew very well the power of words, using manipulative propaganda and executing the printers of French Resistance Christian newspapers as more dangerous than any soldiers. "Words are like bullets" said Prime Minister John Howard, referring to speech that might influence the stock market falls in October 1997.[164] Mr Howard has consistently refused to apologise to the generations of Aboriginal 'stolen children'. It is hard to know whether this is because he thinks his words would have too little force or too much.

The connection between words and action, and the harms that can be caused by words alone, are recognised in our legal system. What other reason is there for criminalising seditious or 'treasonable' speech, or making it unlawful to incite another person to commit a crime? In these cases, there is seen to be at least a possibility of the words leading to some undesirable action. Because of that perceived connection, spoken and written words are regularly regulated in the interests of government security (sedition), of protecting the reputations of individuals (defamation), as well as in the interests of censorship and public civility (obscenity). Statements which are misleading or deceptive, including by virtue of omission, are penalised in corporations, trade practices and fair trading legislation both as criminal offences and as giving rise to civil liability to those who suffer loss in reliance on the statements. American legislation against speaking ill of food products (for want of a better description) recognises that disparaging comments, even if made without malice, can cause loss of income to

163 Dennett (1991) 417.
164 ABC Radio 29th October 1997.

farmers.[165] In all these areas, the content of speech is analysed by courts without any public outcry and it is recognised that words, whether written or spoken, can cause harm. The whole notion of compensation for defamation relies upon there being a connection between the defamatory words and the future way in which people are likely to treat the defamed person. The offence is not the emotional trauma immediately suffered by the victim, but the subsequent damage caused to his standing when people receive the defamatory message and change their behaviour because of it.[166]

Rosenthal points out how civil libertarians, inconsistently, do not oppose existing legislation limiting expression, even where the harms involved are less substantial than the harms caused by expressions of racism.[167] Similarly, there is a notable absence of opposition to legislation against blasphemy despite the obvious conflict between such legislation and any absolute right of free speech.[168]

Racial vilification and its consequences

A common argument is that racial vilification, especially 'indirect' vilification of a group rather than direct abuse of an individual, is not harmful. Or it is argued that

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165 See Sue Anne Pressley, "'Oprah' Case Tests Veggie Libel Laws," *Guardian Weekly*, 25 January 1998, 14. Thirteen of the United States introduced legislation which penalises those who 'disparage food', under which Oprah Winfrey was prosecuted in 1996, and which places the burden of proof to a large extent upon defendants, who are required to show that their statements are "reasonable and reliable scientific inquiry, fact or data": Howard F. Lyman with Glen Merzer, *Mad Cowboy*, Scribner, 1998, New York, 14 ff.

166 Mark Armstrong, David Lindsay, Ray Watterson, *Media Law in Australia*, Oxford University Press (3rd edition), Melbourne 1995, 12, 24.

167 Peter Rosenthal, "The Criminality of Racial Harassment" (1989 - 90) *Canadian Human Rights Yearbook Annual* 113, 115, 120 and 134 ff.

168 I argue rather that legislation against blasphemy is not justifiable in a modern society, because it is about using government power to maintain dominant religious mythologies rather than preventing religious vilification; an historical anomaly from the times when law was seen as a reflection of the absolute values of religion. Abusing a person for following a particular religion is harmful because it is a form of racism. But no government should be able to proscribe, let alone criminalise, dissenting comments about a religion itself. See, contra, Wojciech Sadurski, "Offending with Impunity: Racial Vilification and Freedom of Speech" (1992) 14 *Syd LR* 163, 187-188. See also Jenny Earle and Kirsty Magarey, "Racial Vilification; Prostitution: Words that Wound" (1992) 17(2) *Alt L J* 87.

although the cumulative effect of individual incidents of racial vilification may be harmful, no individual incident can by itself be said to cause sufficient harm to warrant its restriction. This can be either in the sense that the level of harm cannot be shown to be sufficiently high, or that any harm cannot be shown to be sufficiently *direct* in the common law sense of a causal connection.

Several Canadian Supreme Court judges in *Keegstra 's Case*[169] indicated that they would require evidence not just of a likely or indirect connection, but that they would follow the United States test laid down in *Beauharnais* v. *Illinois*,[170] that speech must cause 'clear and present danger' before it can be restricted.[171] The danger contemplated in that test is of the speech leading to subsequent violent action, rather than the broader harms identified above. The particular judges in *Keegstra* refused to accept that a connection between encouragement of hatred of a group and harmful action against that group was likely. However the International Criminal Tribunal for Rwanda has found such a connection established where media reports encouraged both hatred and violence against Tutsis.[172]

Many Australian academics have also required a direct link between the relevant speech and violent action, despite the inapplicability of the *Beauharnais* test in the Australian context, and despite the considerable evidence of the variety of harms caused by racial vilification. A background influence is perhaps the fact that Anglo- Australian law does not traditionally give redress for indirect harm, except in relation to defamation and libel – and racial vilification. And in the area of defamation law, redress is traditionally given only for defamation of individuals, not of groups. Braun divorces knowledge of "the words of intolerance" of bigots from any likelihood that their words could lead to

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169 *R* v. *Keegstra* (1990) 61 C.C.C. (3d) 1.

170 343 US (1952), rehearing denied 343 US 988.

171 The majority of the Supreme Court in *R. v. Keegstra* rejected the American test, recognizing that the harms of hate propaganda do not necessarily lend themselves to a 'clear and present danger' classification: 34 and 35. See also Mahoney (1992) 250 and 251.

172 See Case No. ICTR - 99 - 52 -T concerning Ferdinand Nakemana, Jean-Bosco Barayagwiza and Hassan Ngeze.decided on 3 December 2003, available at the International Criminal Tribunal for Rwanda Website at http://www.ictr.org/ENGLISH/cases/Barayagwiza/judgement/Summary%20of%20judgment-Media.pdf and generally Schabas (2000).

"lawless acts of social intolerance," describing the possibility of a connection as "subjective and politically speculative."[173] Similarly, Maher argues that "linking the supposed 'dangerous tendencies' of ideas and expressive conduct with a legal entitlement is, as a matter of democratic principle, not a suitable basis for ... regulating conduct."[174] In this manner, Braun and Maher take the moral high ground, assuming that what exists in the absence of that legislation is 'genuine' debate which reflects 'democratic' principles. The terms are prescriptively coded to exclude any consideration of the victims' perspective in public discourse. They conclude that legislation will be detrimental, without producing any evidence for their conclusions.

MacKinnon notes that speech cases that consider words as only relevant where they are triggers to violent action ignore issues of substantive equality.[175] Referring to a woman as a 'girl' or to a black man as 'boy' is not neutral or meaningless to that person but a manifestation of the speaker's power.[176] Racial epithets constitute assaults, not as statements that may be shown as true or false.[177] Most people know today, comments Delgado, that no other use remains for words such as 'nigger', 'wop', 'spick' or 'kike' than to offend and wound.[178] Social inequality is substantially created and enforced through communications such as signs saying 'Whites Only' which maintain a culture in which non-whites are excluded from full rights.[179] Similarly, the fact of segregation conveys the message that black children are unfit to be educated with whites – a message rejected by the court in *Brown* v. *Board of Education* as amounting to a demeaning, caste-creating practice.[180] "Acts speak", and speech acts.[181]

Politician Clive Holding commented in the debate on the *Racial Hatred Act* that "there is a view that they are only words, but words can wound, words can maim and words

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173 Braun (1988) 503 and 502.

174 Laurence W. Maher, "Migration Act Visitor Entry Controls and Free Speech: The Case of David Irving" (1994) 16 *Sydney Law Review* 358, 383. See also Braun (1988) 498 and 501-506.

175 MacKinnon (1993) 86.

176 Simon (1995) 66-67.

177 Lawrence (1993) 75.

178 Delgado (1993) 94.

179 Lawrence (1993) 62.

180 Lawrence (1993) 59 -61.

can incite people to carry out antisocial activity."[182] In the words of another supporter of the *Act*:

> words can cripple people just as surely as receiving a bodily blow. ... We all know that perhaps the greatest harm that can be done to a woman is through the constant verbal message to all who will listen that she is the most worthless creature on the face of the earth. The same message can be delivered to Australians of overseas or Aboriginal origin - that, as a wog or a boong, they are worthless.[183]

Racism does not occur only in the mind. Rather, says Lawrence, its unique characteristic is the inseparability of the practice and idea of racism, demonstrated by racism's reliance upon the defamatory message of white supremacy to achieve its injurious purpose.[184] What we need to bear in mind, says Downs, is that the primary purpose of the speech is not communication but the infliction of harm.[185] As Matsuda says, "part of the special harm of racist speech is that it works in concert with other racist tools to keep victim groups in an inferior position".[186]

Even genocide, the ultimate act of violence, is carried out largely through words. Genocide has always grown out of language; out of the creation of myths which justify destruction. Through language, the victim group is made to appear less than human, a threat to the dominant group, deserving or requiring extermination. Language creates

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181 MacKinnon (1993) 12-13 and 30-31.

182 Clive Holding, *Hansard*, House of Representatives, 15 November 1994, 3371. He gives the example of talks by David Irving: "People say, 'Oh, he's just an historian,' but the young people who are standing there saying 'Sieg heil' then go off and beat up a Turk or some other immigrant, and David Irving washes his hands of it."

183 Ms Worth, *Hansard*, House of Representatives, 15 November 1994, 3374.

184 Lawrence (1993) 60 -62.

185 See Donald A. Downs, "Skokie Revisited: Hate Group Speech and the First Amendment" (1985) 60 *Notre Dame Law Review* 629, 651, arguing for regulation of targeted group libel or racial vilification.

186 Matsuda (1993a) 39.

ideological rationales for mass killing, using words which differentiate the victims and characterize them as sub-human.[187]

> There is always a policy leading to its practice. Policy consists of words. There is a continuum of eight or nine steps: formulation of an idea, its articulation, its exposition and then its justification, legitimation and adoption. What follows is practice, in the form of implementation. What follows later is *post hoc* rationalisation, and ... denial.
>
> Only one step is physical: implementation. The rest comprise nouns, adjectives, and verbs.[188]

Looking for a specific link between a single incident of racist hate speech and direct harm to a specific person or group[189] may well be unrealistic - except in extreme cases like the pro-genocidal media messages given in Rwanda.[190] In the Australian context Maher describes hate propaganda, like Holocaust denial, as only "capable of being hurtful in some diffuse way."[191] Sadurski dismisses the social harms of racist speech as weaker than, or derivative from, the more immediate or direct and therefore more 'fundamental' harms of such speech (presumably being the hurt to the immediate victims).[192]

But as Lawrence notes, the goal of white supremacy is achieved by millions of individual racist acts which are mutually reinforcing, cumulative, and create a culture that is greater than the sum of those acts.[193] In his words, racism is both 100 percent speech – in conveying the message of (usually) white supremacy, and 100 percent

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187 Hauptman (1995) 11. See generally Dower (1995) and Blain (1995) and references there.

188 Tatz (1995a). Similarly, see Schabas (2000), arguing that genocide is prepared and made possible through such hate propaganda.

189 Freckleton (1994) 333.

190 See Case No. ICTR - 99 - 52 -T.

191 Maher (1994) 386.

192 Sadurski (1992) 180.

193 Lawrence (1993) 61.

conduct – in constructing a culture in which white supremacy will be accepted and the life opportunities of non-whites will be limited.[194] To protect all expression necessarily means to protect all racism. Equally, to deny the meaning of racist expression by abstracting it from its content, context and harmful consequences, by considering each individual act of racial vilification while ignoring the others, is to deny the social reality of racist expression.[195] Which is, of course, what 'free speech' theory does.

It is hypocritical, says Mann, to claim that we are opposed to the racial and sexual hierarchies that persist within our culture while defending speech acts that perpetuate these relationships. The speech that becomes protected is the coercive voice of those who would continue to enforce the old hierarchies.[196] Racist speech causes harm and as such it is a valid subject of legal regulation.

Conclusion

Indications are that racist violence[197] has increased throughout the world during the 1990s, fuelled by socio-economic problems, growing numbers of asylum-seekers and political and economic refugees, and by anti-immigrant, nationalist politics. Often racist attacks receive neither national nor international publicity.[198] Media response can be helpful in discouraging racism and racist violence, but the media can also be used by racist groups to promote their own ends and encourage fears in both majority and minority groups. As mass communication theory argues, it is not simply the dissemination of biased content that constructs meaning, but the relationship between the message sent and reinforcement of social mores.

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194 Lawrence (1993) 62.

195 MacKinnon (1993) 59, 60.

196 Mann (1995) 263.

197 And possibly also violence against political opponents, homeless people, homosexuals and handicapped people: Witte (1993) at 162, referring specifically to the situation in Germany.

198 Björgo and Witte (1993) 3; Heitmeyer (1993) 19. See also Cathie Lloyd, "Racist Violence and Anti-racist Reactions: A View of France" in Björgo and Witte (1993) 207 at 212, referring to lack of media attention to police brutality and killings of Algerian demonstrators in 1961 and 1962.

The problem is not of the individual racist, nor incidental racist media coverage, but a broader one of the social construction of racist cultural meanings that both nurture and comfort the racist, reproduce racist views and cement broader racist social relations.

To say that racial vilification legislation has failed where racist violence increases is to ignore the inter-relationship between culture, legislation and enforcement. In one sense the legislation has failed, in that it has not on its own eradicated racist violence. But without the legislation the situation could be even worse. At least the legislation indicates a minimum moral position. Its removal will hardly put things right.

Chapter 5: The Scope of racial vilification and Social Experience of Racism

Discrimination is happy and not happy. [1]

The whole world hates us,
they've chased us away,
they've sworn at us,
they've condemned us to wander for life.[2]

Vilifying conduct is contrary to democratic values because of its effect on people of diverse ethnic, Indigenous and religious backgrounds. It diminishes their dignity, sense of self-worth and belonging to the community. It also reduces their ability to contribute to, or fully participate in, all social, political, economic and cultural aspects of society as equals, thus reducing the benefit that diversity brings to the community.
– Preamble to Victorian Racial and Religious Tolerance Act 2001

In the previous chapters we have seen how racist hate propaganda plays upon various views and fears that are so much a part of the given Anglo-Australian culture that they often pass unnoticed. Speech is essential in the reproduction of those views, which tend to continue to the extent that they are unexamined. They provide a comforting view of life for the proponent, and are often encouraged by politicians and the mass media. The problem of racial vilification is located within 'mainstream' society, not simply in extremist or fringe groups.

Before considering in Part II the impact of First Amendment concepts upon Australian restrictions on racial vilification, including the argument that racial vilification legislation could cause some 'greater harm' to democracy, we need to be clear what kind of speech we are talking about, and what kinds of harm it can cause. The types of

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[1] Dale Brunner, primary student, quoted in Peters (1987) 32.

speech which Australian courts and tribunals have found to amount to 'racial vilification' are discussed in the context of whether the speech is useful or valid, or contributes rather to harms that affect both victim groups and the wider society. The links between the more general overview of race and racist attitudes described in the previous chapters and racial vilification as the subject of legislation are shown.

The starting point in the free speech/hate speech debate should be an unqualified engagement with the consequences of racist speech and behaviour, followed by a desire to redress the harms and injustices that are found to exist. There is no doubt that when "the full quantum of social costs generated by an activity cannot practically be observed, measured, or assessed against those who engage in the activity," as Blasi says,[3] it is easier to deny that there are any social costs. One of the ways, says Hollinsworth, in which ideologies of difference obscure social inequality is by creating and normalising social categories which lead to unequal treatment. And what falls outside those categories is silenced, left out, forgotten.[4] Multiple or simultaneous differentiation and subordination are very difficult to understand in terms of the dominant discourse.[5] Nonetheless, that understanding must be achieved if injustice is to be uncovered and redressed.[6] The reality of the personal, social and political harms caused by racist behaviour and racial vilification are considered in the second part of this Chapter.

In arguing that any limit on racial vilification will cause 'greater harms', supporters of maximum free speech fail to compare those supposed harms against the tangible evils that exist here and now. Where they equate racist speech and behaviour with offensiveness they make an ideological distinction that says racism is a 'misfortune' that just happens (to other people) and on which neither governments nor legislatures need

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2 Hungarian Gypsy song from Tony Gatlif's film *Latcho Drom* (1993), quoted in Roger Morier, "History's scapegoats," *New Internationalist,* April 1995, 23.

3 Vincent Blasi, "Misleading Metaphor: Holmes and the Marketplace of Ideas," General Aspects of Law Seminar, 5th September 2002, Kadish Center for Morality, Law and Public Affairs, available at: http://www.law.berkley.edu/cenpro/kadish/Blasi%20Holmes.pdf at 22.

4 Hollinsworth (1998) 69.

5 Hollinsworth (1998) 69-70.

6 See Simon (1995) 59-60.

to act, rather than an injustice which they have some responsibility to oppose and redress. They show contempt for other peoples' lives.

One writer calculated that only 0.015 percent of the population of NSW would be affected by racial vilification within the terms of the *Racial Hatred Act 1995* (Cth) (calculated on the basis of the number of complaints made under similar provisions of the NSW *Racial Discrimination Act* over the previous five years).[7] But this misses the point. Racist speech encourages social acceptance of racism and racist violence. It involves the "social degradation of the Other play[ing] a central role in political discourse."[8] The issues involved are elegantly summed up in a *Times* article of 1883 concerning the dismissal of a teacher for his encouragement of antisemitism:

> The ferocity with which he waged war with one portion of society rendered it impossible for him to be any longer entrusted with the education of another.[9]

The scope of racial vilification

General overview

There is no generally accepted definition of racial vilification, whether legislative or otherwise.[10] In Europe, the comparable legal concept is not one of 'vilification' but of denigration and insult to one's personal dignity.[11] 'Vilification' is defaming or speaking ill of someone, but the word 'racial' is misleading in so far as it implies that the vilification is a response predominantly to the victim's 'race' not in terms of a social construct but in the sense of a biological fact.

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7 Dr J. Maratos, letter to *The Australian*, 25 May 1995, 12.

8 Gaudreault-DesBiens (2001) 1118.

9 *The Times*, 1 February 1883, quoted by Ben Macintyre, *Forgotten Fatherland*, Macmillan, London, 1992, 109. The teacher in question was Frederick Nietzsche's brother in law, with whose views Nietzsche strongly disagreed.

10 The following discussion draws on McNamara (2002) 9 ff.

11 Dr. Sabine Pitroff, personal communication, March 2003.

In its report on *Multiculturalism and the Law*, the Australian Law Reform Commission described racial vilification as:

> Incitement to racist hatred or hostility … [which] encompasses words, whether speech or writing, and actions and gestures that promote hatred, hostility, contempt or serious ridicule of a person or group of persons on the ground of colour, race, ethnic or national background.[12]

As the Australian debates on the Commonwealth *Racial Hatred Act 1995* and similar legislation have shown, there are profound disagreements about the scope of the speech involved in 'racial vilification' and about the validity and extent of exceptions such as 'fair comment,' 'genuine belief,' and artistic use. The range of conduct described as unlawful differs between Australian States and the Commonwealth, from the narrow focus of Chapter XI of the *Criminal Code 1913* (WA) (introduced in 1990), dealing with written material, to the more comprehensive provisions of the Victorian *Racial and Religious Tolerance Act 2001*.

It seems generally accepted that racial vilification involves 'speech' as opposed to 'behaviour', that it will only be penalised if it is public, not private, speech,[13] and that specific 'racial vilification' legislation is intended to regulate conduct that would generally be considered lawful, if not caught by that legislation.[14]

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12 (1992) 159.

13 although the validity of this distinction is arguable and McNamara has pointed out that Australian tribunals tend to give "public" a wide meaning in this context: 174-6.

14 McNamara (2002) 11. However s 20D of the NSW ADA 1977 provides that racial vilification will be a criminal offence if accompanied by threats of violence or incitement of such threats, matters which are already prohibited under the criminal law: see McNamara (2002) 133.

Direct and indirect racial vilification

The activities described in Australian legislation as racial vilification can be roughly divided into direct public abuse or harassment of specific victims, and indirect abuse of groups by politicians or media figures or by extremists.

Direct abuse involves face to face confrontations in the workplace with employers or co-workers,[15] abuse of children by teachers and classmates, abuse from neighbours, and abuse by police of persons apprehended by them.[16] Racist abuse of Aboriginal sportsmen by both opponents and spectators is also common.[17] Direct abuse also involves victims being shouted at or harassed by passers-by because of their perceived differences. McNamara categorises these types of confrontations as: neighbourhood dispute, personal conflict, employment and sport.[18]

Indirect abuse involves public racist statements and comments from politicians and 'shock jocks.' McNamara's categories of media, racist propaganda, entertainment and public debate are relevant here. Indirect abuse also involves white supremacist writings disseminated by extremists in posters, books, pamphlets, magazines, videos, computer games (at least in Germany),[19] cable television programmes (in the US)[20] and on the internet world-wide. The terms 'hate propaganda' (used in relation to indirect vilification), whatever the basis, or 'hate speech' (as used for both direct and indirect vilification) are in many ways more useful in identifying the political and mass communication aspects of this type of racial vilification.

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15 The HREOC's *National Consultations* (2001b) found that racial discrimination and abuse in the workplace was a recurrent problem for women from culturally and linguistically diverse backgrounds.

16 See examples in HREOC (1991) 7.

17 UN Special Rapporteur (2002) 50, par 112.

18 McNamara (2002) 63.

19 Levin & McDevitt (1993) 151-2, describing the computer games "Aryan Test" and "Concentration Camp Manager" available in Germany.

20 Levin & McDevitt (1993) 109.

Extremists such as neo-Nazis are likely to be involved in direct abuse of those they perceive as different, as well as in more indirectly harmful written and electronic 'hate propaganda.'

In the Commonwealth context, McNamara has found that an average of 31 percent of all complaints to HREOC about racial vilification between 1995 and 2001 concerned neighbour disputes, and 21 percent concerned media publications and broadcasts.[21] The most common types of racial hatred complaints in 2000-2001 were about the media.[22]

Indirect racist speech against groups is most often classified as 'offensive' rather than 'abusive.' Gaudreault-DesBiens argues that this is incorrect because discourse that "denies the very humanity of entire groups" is inherently abusive, both of the victims and of the broader society.[23]

The scope of current legislation

Current Australian legislation does not draw any distinction between direct racist abuse or 'racial harassment'[24] and indirect hate propaganda. While legislation may be drafted with indirect and extremist hate propaganda in mind, it is more likely in Australia to be successfully applied in relation to direct racist abuse.[25]

The racial vilification must be a public act. This can include communications directed to the public, or acts or speech observable by the public such as the display of insignia. Commonwealth and State legislation differs as to the directness of the harm involved.

Commonwealth legislation

The sections referred to in the following text are set out in full in Appendix 2.

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21 McNamara (2002) 62.

22 HREOC http://www.humanrights.gov.au/racial_discrimination/cyberracism/vilification.html note 17.

23 Gaudreault-DesBiens (2001) 1132.

24 which is the activity penalised in the Northern Territory: *Anti-Discrimination Act* s 20(1).

The *Racial Hatred Act 1995* (Cth) introduced into the *Racial Discrimination Act 1975* (Cth) a prohibition against offensive behaviour based on racial hatred. Section 18C provides that it is unlawful for a person to do an act, otherwise than in private, if:

> (a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and
>
> (b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

The rationale for the adoption of this wording in the final version of the federal legislation was, said the then Attorney General, Michael Lavarch, a desire to achieve consistency between the racial vilification provisions of the *Racial Discrimination Act 1975* (Cth) and the sexual harassment provisions contained in the *Sex Discrimination Act 1984* (Cth).[26] Section 18 B provides that if an act is done for two or more reasons and one of the reasons is the race, colour or national or ethnic origin of a person, then the act is deemed to be done 'because of' that characteristic, whether or not it is the dominant reason or a substantial reason for doing the act.

In assessing whether conduct amounts to racial vilification, section 18C requires HREOC to apply an objective test, so that community standards of behaviour are determinative, rather than the subjective views of the respondent (or indeed, the complainant). The victim must be 'reasonable' and not rely on a particular sensitivity to the abuse.[27]

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25 Gelber identifies this as one of the flaws of the legislation (2002) 24ff.

26 The phrase, "offend, insult, humiliate or intimidate" is taken from the definition of sexual harassment in s 28 of the *Sex Discrimination Act* 1984 (Cth).

27 *Corunna* v. *West Australian Newspapers* (2001) EOC 93-146 at 8.4, following Australian Broadcasting Tribunal, *Inquiry into Broadcasts by Ron Casey* (1989) 3 BR 351 at 357.

State legislation

State legislation generally retains the problem implicit in the Commonwealth legislation, of requiring the proscribed behaviour to be 'on the ground of' the particular victim's supposed characteristics. An additional test that must be met is not whether any harm has been caused to the victim or victim group (as is the case with the Commonwealth legislation), or whether the vilification was capable of conveying a significantly racist message, but whether third parties could be, or are, affected by the vilification. Defining vilification in this way, by reference to its likely effect upon an undefined audience, gives rise to a host of interpretative problems.

The NSW legislation, followed by most other States and Territories, provides under section 20C(1) that

> It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.[28]

The relevant provisions of the NSW legislation are set out in full in Appendix 2. 'Race' is defined as including colour, nationality, descent and ethnic, ethno-religious or national origin – but not religion.[29] The NSW Anti-Discrimination Board in 2003 called

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[28] In 1989 the *Anti-Discrimination Act* 1977 (NSW) was amended by the *Anti-Discrimination (Racial Vilification) Amendment Act* to allow for the making of complaints of racial vilification to the Anti-Discrimination Board.

[29] Interestingly, the NSW Law Reform Commission appears to take the view that these characteristics cover groups "which are socially significant, and which are being harmed noticeably and actively by hate directed against them." The Commission takes the view that vilification legislation should be aimed at protecting such groups and not 'all identifiable groups' or other groups covered by the *Anti-Discrimination Act* (Law Reform Commission of NSW, *Review of the Anti-Discrimination Act 1977 (NSW*), Report Number 92, Sydney, 1999, par 7.75ff) and see McNamara (2002) 201 ff. Thus the Commission considered that vilification under the *Anti-Discrimination Act* should only be an offence if on the present grounds of race, homosexuality, transgender or HIV/AIDs status and not on the basis of gender or disability (being the other characteristics to which the Act's discrimination provisions relate). Its main arguments were lack of resources if the vilification provisions were to be applicable across all grounds, and the necessity for Parliament to consider this issue directly, given the 'chilling effect'

for NSW legislation to be changed to reflect the Commonwealth threshold, which is seen as more appropriate.[30]

Some States also categorise as a crime any racial vilification which also involves the threatening of physical harm towards, or towards any property of, the victims, or incites others to do so.[31] Generally, the Attorney General or Director of Public Prosecutions must consent to prosecution for such an offence. Briefly, Queensland and Victoria have both civil and criminal sanctions against vilification based on race or religion, South Australia, NSW and the ACT have civil and criminal sanctions against vilification based on race. Tasmania has civil sanctions only, in relation to both race and religion, the Northern Territory has civil sanctions based on race and religion, but only in relation to harassment, and WA has criminal sanctions based on race. The Western Australian legislation is unlike that of any other State. It was introduced in 1990 to criminalise the possession, publication and display of racist posters and other publications, as a result of a campaign by the Australian Nationalist Movement in Western Australia at the time.[32]

Both Federal and State legislation reflects free speech sensitivities in the scope of exemptions offered, most of which require the perpetrator to have acted reasonably and in good faith. These include artistic academic and scientific works, and debates and comments on matters of public interest. The media has the exception of "fair and accurate reporting on any matter of public interest." This allows editorial opinions that might be perceived as racist, provided they are published reasonably and 'in good faith' – which has been held not to exist where there is malice, or reckless indifference to the result of the communication. Mere carelessness or indifference is not generally held to amount to lack of good faith.[33]

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that the Commission perceived any widening of the vilification provisions would have upon free speech, including pornography and right to life propaganda (pars 7.78 to 7.80).

30 Anti-Discrimination Board (2003) 109ff.

31 For example, s 20D *Anti Discrimination Act* 1977 (NSW) (introduced 1989), as to which see McNamara (2002) 199ff.

32 See McNamara (2002) Chapter 4 generally.

33 HREOC http://www.humanrights.gov.au/racial_discrimination/cyberracism/vilification.html

Australian court and tribunal decisions

The examples given below of behaviours considered under Australian racial vilification law are likely to be at the more extreme end of the spectrum, in that they actually reached a court or tribunal. Conciliation is a usual remedy in most jurisdictions and many complaints are not proceeded with even to that stage.[34] HREOC cannot deal with a complaint unless a named respondent is identified – often preventing consideration of internet publications – and unless the complainant is of the same 'race' as the group abused.[35] Racial vilification is often an element in cases of racial discrimination,[36] but those cases are not considered here.

Workplace, sporting and other social abuse

The following have been held to amount to racial vilification for the purposes of the relevant legislation:[37]

- an employer calling his black employee a 'black cunt,' a 'fucking black lazy bastard' and making 'monkey' gestures at him;[38]
- co-workers calling a woman a 'fucking dumb wog;'[39]
- police calling an Aboriginal teenager a 'coon',[40] and assaulting and abusing an Aboriginal man after a car chase, calling him 'black cunt', 'black bastard' and 'dickhead';[41]
- shouts from neighbours such as "Bloody wogs, go away. Go back to your places. Who do you think you are? You won't get away with this"[42] and 'black bastard'.[43]

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34 McNamara (2002) 56 ff and Gleber (2002) 19ff.

35 Gelber (2002) identifies these as major flaws in the legislation: 23ff.

36 see for example *Chandra* v. *Brisbane City Council* [2002] QADT 2.

37 see generally McNamara (2002) 66 to 72, 164 to 168.

38 *Rugema* v. *J Gadsten Pty Ltd and Derkes* [1997] HREOCA 34, (1997) EOC 92 -887.

39 *Horman* v. *Distribution Group* [2001] FMA 52.

40 this incident was shown on the ABC film "Cop it Sweet" and accompanied by offensive behaviour towards the complainant: McNamara (2002) 164; *Patten* v. *NSW* (21/01/1997) NSWEOT 90/95.

41 *Russell* v. *Commissioner of Police* [2001] NSWADT 32.

42 *Anderson* v. *Thompson* [2001] NSW ADT 11.

Offensive statements about certain Yolgnu individuals and about Yolgnu people in general, made to a Torres Strait Islander who identified with the Yolgnu people, were not found to amount to racial harassment, although the Commissioner agreed that under the Northern Territory *Anti-Discrimination Act*, racial vilification could amount to prohibited racial harassment.[44]

Political abuse

The following were found to amount to vilification:

- statements by a Councillor that Aborigines who made native title claims were 'radical half-castes' with 'savage' ancestors;[45] and
- statements by another Councillor that what should be done about a particular Aboriginal community was to 'shoot them'.[46]

The following were found not to amount to vilification:

- statements by One Nation Party leader Pauline Hanson that she would represent anyone apart from Aboriginal and Torres Strait Islanders,[47] and comments in the book *Pauline Hanson: The Truth* that Aboriginal people were cannibals;[48]
- abusive and offensive comments in newspapers about Greeks or Macedonians (for example, that Greeks are responsible for slavery, homosexuality and prostitution, and are 'radical fascists' who "foster and perpetuate hatred and violence") made in the context of arguments between the Greek and Macedonian communities in Australia over the proper use of the name 'Macedonia';[49] and

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43 *McMahon* v. *Bowman* [2000] FMC 3.

44 *Marla Lewin* v. *Top End Aboriginal Bush Broadcasting Association* [2001] NTADC 3.

45 *Wagga Wagga Aboriginal Group* v. *Eldridge* (1995) EOC 92-701.

46 *Jacobs* v. *Fardig* (1999) EOC 93-016.

47 *Combined Housing Organisation Limited* v. *Hanson* [1997] HREOCA 58.

48 *Walsh and Others* v. *Hanson* (Unreported 2 March 2000) – apparently on the basis that the comments were not necessarily because of the race of the Aborigines. This reasoning is hard to follow. Commissioner Nader commented that "the suppression of political expression would be justified on only extreme grounds."

49 See *Hellenic Council of NSW* v. *Apoleski and Macedonian Youth Association (No. 1)* (25 September 1997) NSWEOT 10/95, *Hellenic Council of NSW* v. *Apoleski (No. 2)* (25 September

- a Queensland electoral pamphlet that was found to incite serious contempt for Muslims – because it was held to be done 'reasonably and in good faith' for a purpose in the public interest.[50]

An HREOC public inquiry decided not to investigate racist remarks made by a State politician because the politician had subsequently been elected to the Senate, where he made a speech which the Commissioner regarded as a public repudiation of previous racist views.[51]

Media abuse

The following have been held to amount to racial vilification:

- a newspaper report of One Nation Party's David Oldfield saying that home invasions "are ethnically based, Lebanese or Iranian, not Australian";[52]
- newspaper statements that "the Palestinians remain vicious thugs who show no serious willingness to comply with agreements";[53]
- radio comments from Alan Jones that refusing to rent a property to an Aboriginal woman wasn't discrimination and which implied that the Aboriginal woman went into the estate agency "looking like a skunk and smelling like a skunk, with a sardine can on one foot and sandshoe on the other, and a half drunk bottle of beer under the arm."[54] The case was overturned on appeal on the ground that the

1997) NSWEOT 9/95, *Aegean Macedonian Association of Australia* v. *Karagiannakis and Hellenic Council of NSW* [1999] NSWADT 130.

50 *Deen* v. *Lamb* [2001] QADT 20, discussed in McNamara (2002) 306.

51 *McGlade* v. *Lightfoot*. (2002) 124 FCR 106; (2002) 73 ALD 385; (2003) EOC 93-252; [2002] FCA 1457. The Federal Court ruled that the Commissioner had applied the wrong test for summary dismissal of the complaint. See McNamara (2002) 102 and 103.

52 *Feghaly* v. *Oldfield* (2000) EOC 93-090.

53 *Kazak* v. *John Fairfax Publications* [2000] NSWADT 77, see also *John Fairfax Publications* v. *Kazak* [2002] NSW ADTAP 35.

54 *Western Aboriginal Legal Service* v. *Jones and Radio 2UE* [2000] NSW ADT 102. However this was reversed on appeal on the basis that the body representing the woman was incorporated and so did not have standing: *Jones and 2UE* v. *Western Aboriginal Legal Service Ltd* [2000] NSWADTAP 28.

complainant had not had standing, rather than on the basis that these comments did not amount to vilification; and..

- radio comments derogating a particular group of native title claimants.[55]

The following have been held not to amount to racial vilification caught by the relevant legislation, sometimes on the basis that the speech fell within a particular 'free speech' exemption:

- the misleading newspaper depiction of a bush camp as the permanent home of custodians of an Aboriginal child, in comparison with the real home of the child's previous (white) foster parents;[56]
- newspaper references to English people as 'Poms' or 'Pommies';[57]
- radio comments that the French "weren't too good on personal hygiene" but usually had 'class' (in the context of commenting on the desirability of French television broadcasting the execution of former Romanian president Ceaucescu);[58]
- the issue of a Telstra phone card showing a German fighter plane carrying the Swastika symbol;[59]
- a satirical 'documentary' entitled "Darkest Austria" shown on SBS in which black Africans 'studied' the habits of white Austrian farmers;[60]
- a play *Miss Bosnia* set in Sarajevo in 1994;[61]
- the (continued) naming of a sports stand as the "ES 'Nigger' Brown Stand" (Mr Brown being white);[62] and
- a cartoon belittling Aboriginal efforts to have the head of an ancestor returned from a London Museum[63] (by reasons of both 'artistic' and 'public interest' exceptions).

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55 *Wanjurri and others* v. *Southern Cross Broadcasting (Aus) Ltd and Sattler* (2001) EOC 93-147.

56 *Creek* v. *Cairns Post Pty Ltd* [2001] FCA 1007. Again, it was said that the misleading description had not been done "because of" the custodian's race, but it is unlikely that any other custodian would have been shown as living in a 'humpy'.

57 *Bryant* v. *Queensland Newspapers Pty Ltd* [1997] HREOCA 23.

58 *Harou- Sourdon* v. *TCN Channel Nine Pty Ltd* (1994) EOC 92-604.

59 *Shron* v. *Telstra* [1998] HREOCA 24.

60 *De La Mare* v. *SBS* [1998] HREOCA 26.

61 *Bryl and Kovacevic* v. *Nowra and Melbourne Theatre Company* [1999] HREOCA 1, (1999) EOC 93 –022.

62 *Hagan* v. *Trustees of Toowoomba Sports Ground Trust* [2000] FCA 1615.

Extremist publications

Courts and tribunals in Australia have found antisemitic pamphlets[64] and antisemitic website material involving Holocaust denial[65] to constitute racial vilification.

In Canada (which has similar legislation), the following have been held by courts to amount to 'hate propaganda': a newsletter that vilified blacks and Jews, anti-semitic statements by a teacher to his pupils, letters against Christianity pretending to come from Jews (intended thereby to promote hatred of Jews), white supremacist handouts, pamphlets and recorded phone messages that promoted hatred of Muslims.[66]

Incidents which have been recorded in the press as occurring in Australia but which have not brought before a court or tribunal include offensive public questions such as "How many unbaptised babies did you bleed or eat last Pesach?"[67] chants of "Death to Sham-Ho,"[68] and National Action stickers and anti-Asian posters and pamphlets in Western Australia and South Australia.[69]

Trends

While no hard and fast conclusions can be drawn from the limited number of examples given above of Australian court and tribunal decisions, some trends can be suggested. Australian judges and tribunals seem most ready to find that racial vilification has

63 *Corunna* v. *West Australian Newspapers Ltd* (2001) EOC 93-146.

64 *Hobart Hebrew Congregation and Jones* v. *Scully* [2002] FCA 1080; (2002) 120 FCR 243; (2002) 71 ALD 567 and see (2000) EOC 93-109; (2001) 113 FCR 343; [2001] FCA 879.

65 *Jones and Executive Council of Australian Jewry* v. *Toben* (2002) 71 ALD 629; (2002) EOC 93-247; [2002] FCA 1150; confirmed in *Toben* v *Jones* [2003] FCAFC 137; (2003) 199 ALR 1; (2003) 74 ALD 321; (2003) EOC 93-284.

66 McNamara (2002) 245-6.

67 This question was asked at a meeting held by the Federal Government in Adelaide in 1993 of Jews who spoke in favour of the proposed Commonwealth *Racial Hatred Act*: *Australian Jewish News*, 19 February 1993, 1.

68 when she was guest speaker at a Liberal Party function honouring her as the state's first Asian member of parliament: McNamara (2002) 122.

69 McNamara (2002) 222-3 and 261.

occurred and is worthy of sanction in incidents of direct abuse, particularly regular abuse.

It would seem that the more general the racist comments, or the more indirect the abuse, the less likely it is that the statements will be held as amounting to racial vilification (Pauline Hanson, Queensland electoral pamphlet). Indeed McNamara comments despairingly that if *Deen* v. *Lamb*,[70] is followed, campaigning politicians are effectively exempt from restriction on their speech in Queensland "so long as their conduct can be regarded as an attempt to make their views and policies known to the electorate."[71]

The comments of Local Government Councillors seem more likely to be regarded as amounting to racial vilification than those of federal politicians, perhaps reflecting the Councillors' relative 'closeness' to the victims. There has been little prosecution of extremists who use hate propaganda, the case of *Jones* v. *Toben* being an exception. Media commentators are not immune from prosecution (Alan Jones, and in previous years, Ron Casey) but their statements have to be particularly blatant.[72] The ordinary 'common or garden' media racism is often the subject of complaints to the Australian Broadcasting Tribunal, but rarely penalised.[73] There is perhaps also a tendency amongst judges and tribunals to perceive many complainants as being too sensitive where the abuse complained of was against a group and not directed at any specific victim.[74]

It would seem that judges and tribunals are reluctant to intervene in disputes between different ethnic communities, even where extreme language is used that would normally be regarded as amounting to racial vilification (the Greek and Macedonian papers).

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70 [2001] QADT 20.

71 McNamara (2002) 306.

72 Nick Poynder expressed the view in 1994 that the Commonwealth legislation would not be likely to restrict media racism and called, following the Australian Law Reform Commission, for broadcasting legislation to contain specific prohibitions on racial vilification: "Racial Vilification Legislation" (1994) 3 (71) *Aboriginal Law Bulletin* 4 and Australian Law Reform Commission (1992) 142.

73 See Adams and Burton (1997) 46ff and Jupp (2003) 127.

Judges also appear reluctant to find that existing descriptions or practices amount to racial vilification, even where language is used that is offensive to some sections of the public (the 'Nigger Brown' stand).

These trends are most likely the result of judicial 'free speech sensitivities' – a feeling that it is reasonable to restrict direct abuse by an employer but more questionable to restrict politicians' rights to express their own views, talk back hosts' rights to belittle others, or one group's right to abuse another, no matter how racist the comments.

The experience of racist vilification and racist behaviour for victim groups

Being a Negro in America means trying to smile when you want to cry. It means trying to hold on to physical life amid psychological death. It means the pain of watching your children grow up with clouds of inferiority in their mental skies. It means having your legs cut off, and then being condemned for being a cripple. It means seeing your mother and father spiritually murdered by the slings and arrows of daily exploitation, and then being hated for being an orphan.

–Martin Luther King Jr, Where Do We Go from Here: Chaos or Community? 1967

The following loose categorisations of the types of harm caused by racist abuse and behaviour are not separate but merge into a complex overlapping pattern, repeated time after time. Björgo and Witte comment that most cases of racist violence consist of repeated incidents which should be seen as a process. While the individual incidents might be less serious, the process as a whole can have a strong impact.[75]

It is now recognised that discrimination and vilification are intersectional, relating to different aspects of the victim's identity or perceived characteristics. Thus women may suffer discrimination of a different kind or to a different degree than men from the same

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74 An attitude which I was also surprised to find amongst some very senior officers in the HREOC: personal communications (1994).

75 Björgo and Witte (1993) 4.

ethnic background. The following discussion emphasises the failings of the 'greater harms' arguments which belittle the serious personal and social harms caused by expressions of racism, and stresses that indirect racist abuse is no less harmful than direct abuse, although its effects are felt in different ways.

Most of the 'free speech' arguments against regulation of racist speech and behaviour focus upon only the personal pain felt by victims of racist hate speech, sometimes described in terms of the attack that hate speech makes upon victims' group identity. But this is only one aspect of the harm that hate speech causes. As mentioned, racist speech also acts indirectly upon the rest of society to encourage action by others against victim groups. It desensitises society to discrimination, effectively establishing social protection and permission for racist behaviour. Kathleen Mahoney describes the public promotion of group hatred as being at the same time: "an act, an injury and a consequence," that is, it is a virulent form of harassment and at the same time a deliberate practice of inequality which lays the foundation for mistreatment and "well documented consequent physical aggression."[76]

Victim groups appreciate that racist harms are cumulative and mutually reinforcing, creating a culture of harm that is greater than the sum of the individual acts of expression or behaviour. However against this perception of harm, free speech theorists argue that if no one act of expression on its own creates especial harm, it is wrong to penalise that individual act. Loveland argues that it is wrong to penalise speech that "disseminate[s] information that might change the opinions people held … even though the changed opinions were not in themselves criminal."[77] Moon recognises that the injuries of hate speech are caused through multiple incidents of hate speech against a background of racist prejudices. He recognises that hate speech does cause substantive injury, and is often a prelude to violent behaviour. However he concludes that it is

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[76] (1992) 248 to 249. See also Rosenthal (1989 -90) 120.

[77] Ian Loveland, "The Criminalization of Racist Violence?" in Ian Loveland (ed), *A Special Relationship?* Clarendon Press, Oxford, 1995, 253 at 262.

wrong at law to punish only single incidents of hate speech, even if extremist speech, which could not alone cause harm.[78]

Writers such as Lawrence and MacKinnon respond that to deny the meaning of racist expression by abstracting it from its content, context and harmful consequences is to deny the social reality of that expression; to say that this social reality (of sexual harassment or racial discrimination) does not exist.[79] Which is of course what First Amendment 'free speech' theory does, as discussed in the next Chapter. Charles Mills, like them, emphasises the constant and central role of 'race' and subordination to the life experiences of "a majority of the world's population." He describes this in philosophical terms as the 'Racial Contract' which is imposed upon exploited groups.[80]

Before turning to those issues, we consider in the second part of this Chapter the effects of racist behaviour and racist speech upon victim groups and society.

Effects of racism on victim groups

People from groups targeted by racists are more likely than the rest of the community (with the exception of gays) to experience a range of intimidatory and violent behaviours; to be violently attacked, vilified and mistreated, leading to direct physical and mental harm for the victims, their families and communities. They are more likely than the rest of the community not just to experience isolated incidents of violence or abuse, but to experience for the whole of their lives a continuous pattern of maltreatment which has psychological, social and economic effects, and which has an impact on following generations. It is not therefore correct to claim that the only 'harms' caused by racial vilification are offence or hurt to those who suffer direct abuse.

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78 Moon (2000) 129 and 132ff.

79 MacKinnon (1993) 59, 60. See too Luke McNamara, "Confronting the Reality of Hate Speech" (1995) 20 (5) *Alt L J* 231 at 233-4.

80 Mills (1997) 4 and generally.

Physical harm

Physical attacks that have racist motivation are characterised by their ferocity[81] and the callousness shown as to whether or nor the victims survive – because, after all, the victims are less than human and dispensable. Fires are lit where Turkish guest workers live, gypsy houses and playgrounds are firebombed,[82] blacks are dropped from tall buildings, and coloured youths are shot or kicked in the head "like a playground football."[83] In Romania, gypsy houses were firebombed in 1992 while families were asleep, killing parents and children and melting the flesh to their bones.[84]

Racist attacks are often perpetrated at random on total strangers, which makes such attacks particularly terrifying. There is nothing the victim can do, except never leaving their house, which can protect them from attack – and sometimes even that is not enough.[85]

Physical damage to community property of social and emotional significance: schools, cemeteries and places of worship,[86] is a form of racist behaviour directed against the whole group, intended to hurt and to intimidate all the individuals in that group, just as a racially-motivated physical assault upon a group member can terrorise others in the group. The firebombing of a Jewish kindergarten must make every Jewish family fearful.

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81 Levin & McDevitt (1993) 8 -11. They suggest that this stems partly from the group nature of most racist violence, whereby no individual feels direct personal responsibility, and peer pressure encourages members of the group to outdo each other in their atrocities: 18-19.

82 Ian Traynor, "Right targets Gypsies," *Guardian Weekly*, 12 February 1995, 3.

83 Schmidt (1993) 155, 163, 164, 184. Late in 1994, English anti-racist campaigners demanded new laws to outlaw racial violence after a vicious attack in London on a Bengali youth who was kicked 'like a playground football' by a gang of about 20 white youths, leaving the victim with his scalp detatched from his skull, and 'grotesque' facial injuries. – Vivek Chaudhary, "Call for race violence law," *Guardian Weekly*, 27 November 1994, 10.

84 *The Guardian Weekly*, 11 October 1992, 8.

85 Levin & McDevitt (1993) 12 -14.

86 Specifically prohibited in Colombia, Article 296 of the Constitution: Centre for Human Rights, Geneva, *Second Decade to Combat Racism & Racial Discrimination*, United Nations, New York, 1991, 57.

The National Inquiry into Racist Violence reported 1,447 violent or intimidatory racist acts during the late 1980s (likely to be an underreporting).[87] Victims included Aboriginal, Asian, Middle Eastern, Jewish and non-English-speaking people, as well as supporters of anti-racist policies. In addition to the activities mentioned in the previous chapter which involved abuse and verbal harassment, actions reported against Aborigines[88] included manslaughter, attempted murder, shooting a pregnant woman (killing her baby), poisoning the contents of flagons of alcohol (killing five), frequent death threats, intimidation, property damage including to sacred sites, police brutality and intimidation, assault and rape.[89] The Jewish community in Australia reported a 47 percent increase in anti-semitic incidents in 2000 over the previous year including attacks on property and persons and hate mail.[90] In 2002, the New South Wales Anti-Discrimination Board reported receiving over 40 calls a day concerning racial vilification.[91]

Mosques, synagogues and Muslim and Jewish schools have been burned and bombed. Nine Chinese restaurants were firebombed in Perth in 1988 and 1989 by an extremist group.[92]

87 HREOC (1991) 7.

88 HREOC (1991) Appendix 14, 478 to 505.

89 In relation to police violence against Aborigines see Chris Cunneen, *A study of Aboriginal Juveniles and Police Violence*, Sydney, 1990 and *Aboriginal - Police Relations in Redfern*, Sydney, 1990 (both papers commissioned by HREOC's National Inquiry into Racist Violence), Royal Commission into Aboriginal Deaths in Custody (1991), HREOC (1991) 79ff and Chris Cunneen, "Enforcing genocide? Aboriginal young people and the police" in R. White and C. Alder (eds), *The police and young people in Australia*, Cambridge University Press, Melbourne, 1994, 128. As to police violence against other minorities see Janet Chan, 'Policing Youth in 'Ethnic' Communities: is community policing the answer?' in White and Alder (1994) 175, HREOC (1991) 163ff.

90 UN Special Rapporteur (2002) 44, par 94.

91 Wainwright (2002).

92 HREOC (1991) 506 to 513.

Psychological harm

For the person subject to race hatred, every social inter-action can be a reminder[93]

Suffering is more subtly manifested in the psychosocial realm.[94] Racist discrimination or abuse attacks the victim for being part of the group of which his or her family and social circle are also a part. It thus attacks at the same time the victim's own identity, his family and his social group,[95] leaving him nowhere to turn. "Once you lose your identity" says one Mexican-American, "your whole psyche is twisted. You're at the whim of anything that occurs in a society."[96]

Behaviour against individuals which falls short of actual violence often classified as a lesser type of 'psychological' harm despite the level of suffering it causes.

For many millions of adults and children racist prejudice, abuse or discrimination must be borne every moment of every day. In the words of one African-American,

> Being black in America is like being forced to wear ill-fitting shoes. Some people adjust to it. It's always uncomfortable on your foot, but you've got to wear it because it's the only shoe you've got. You don't necessarily like it. Some people can bear the uncomfort more than others. Some people can block it from their mind, some can't. When you see some acting docile and some acting militant, they have one thing in common: the shoe is uncomfortable. It always has been and always will be.[97]

The former Commissioner of the Royal Commission into Black Deaths in Custody, Elliott Johnson, was horrified to discover "the degree of pin-pricking domination, abuse

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93 Godrej (1994) 4

94 Simon (1995) 62. See also *Page* v. *Smith* [1995] 2 WLR 664 at 668-9 (judicial recognition of psychiatric effects).

95 Rosenthal (1989-1990) 118.

96 Ron Maydon in Terkel (1993) 156. See also Matsuda (1993a) 25.

of personal power, utter paternalism, open contempt and total indifference" with which so many Aboriginal people are treated in Australia on a day to day basis.[98] Even minor and subtle forms of racism such as people averting their gaze, not sitting next to them on a bus, or ignoring their presence, have a debilitating effect on individuals, found the HREOC *National Consultations*,[99] "denying a person's humanity and thereby attacking the basis of their identity."

"There's never been equality for me. Nor freedom in this 'homeland of the free'" said Langston Hughes.[100]

People of colour see the world through the focus of racism, but generally 'white' people do not appreciate the comparative ease with which they move through life because of their 'whiteness'.[101] The effects of racism have only become shockingly visible to whites when white men pretended to be black. In 1959 a white American, John Howard Griffin, changed his skin colour to dark brown with drugs and ray lamp treatment to find out for himself what it was like to be black in America. *Black Like Me*[102] described the shock he felt at experiencing the automatic denigration and marginalisation of black people.[103] In 1994 an American college student, Joshua Solomon, decided to reproduce the experiment. He lasted two days as a black man travelling in the southern states of America. While he had many black friends, Solomon had always secretly felt that many black people used racism as an excuse: they should be more robust and better able to shrug off the racist rantings of ignorant people. When he had dark skin himself, he

97 Joseph Lattimore in Terkel (1993) 136.

98 quoted by Garrie Gibson, *Hansard*, House of Representatives, 15 November 1994, 3349 to 3350.

99 http://www.humanrights.gov.au/racial_discrimination/consultations/consultations.html

100 quoted in a letter from A. Leon Higginbotham, Jr published in *The Boston Sunday Globe* 19 May 1996 and quoted in Higginbotham Jr (1996) 188 at 189.

101 Stephenson (1997), citing Peggy McIntosh at footnote 31 and following.

102 John Howard Griffin, *Black Like Me*, Collins, London, 1962 and Signet, New York, 1996 (35th anniversary edition) cited in Joshua Solomon, "Skin Deep is Just Not Deep Enough," *Guardian Weekly*, 13 November 1994, 20 and 21. It was suspected that his early death in 1980 was partly due to liver damage caused by the medication.

103 See generally Vron Ware, "Room with a View" in Vron Ware and Les Back, *Out of whiteness: color, politics, and culture*, University of Chicago Press, Chicago, 2002, 271 describing Griffin's books *Black Like Me* and *A Time to be Human*.

found that such an attitude was impossible: the constant prejudice and anger that was shown towards him made him feel physically sick.

> I found myself trying to be polite to an extent that was foreign to me. I gained new insight into a why a black person would act like a so-called Uncle Tom – I was desperate for a little respect. Usually, I'd made friends pretty easily. I was nice to them and they were nice to me. Now people acted like they hated me. Nothing had changed but the color of my skin.[104]

While traditionally threats of harm are only recognised as hurting the individual directly threatened,[105] and discrimination the whole group with which the victim has been associated pays the price, says Colin Rubinstein, in fear, insecurity, and genuine psychological harm,[106] damaging each person's self-image and confidence and affecting relations with friends, family and society.[107]

Psychological harm is reinforced by the fact that direct response by victims is usually not a practical option. One can imagine the reaction of universities, says Lawrence, if Black students started to respond to racist words by beating up the white students who call them names.[108] In most situations, minority group members correctly perceive that a violent response, or indeed any response, to direct hate speech will result in violence to themselves. The risk of violence forces them to remain silent and submissive in the face of racist abuse, discrimination and coercion. They have no 'right' to be offended and in that sense the victim of the racial slur is entitled to less than other citizens.[109]

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104 Solomon (1994) 20 and 21. See also Fish (1994) 65 to 66.

105 Former Attorney-General Michael Lavarch, *Hansard*, House of Representatives, 15 November 1994, 3339.

106 *Australian*, 1 June 1994, quoted by Martin Ferguson, *Hansard*, House of Representatives, 16 November 1995, 3427.

107 See Howard J. Ehrlich, Barbara E.K. Larcom and Robert D. Purvis, "The Traumatic Impact of Ethnoviolence," in Lederer and Delgado (1995) 62.

108 Lawrence (1993) 69.

109 Delgado (1993) 94. See also Chika Dixon in Colin Tatz (ed), *Black Viewpoints: the Aboriginal Experience*, Australia and New Zealand Book Company, Sydney, 1975, 49: "I came off that

Hurt, rage and anger must be disguised and suppressed from a very early age, contributing enormously to psychological stress. Victims choose not to challenge behaviour which perpetuates their subordination out of fear and out of knowledge that they will not receive social support if they respond to the perpetrator's attacks. Failing any strong response the victims continue to be disempowered and fearful and the behaviour of the perpetrators continues to be reinforced. It is doubtful if any type of harassment will be discontinued when the victims continue to put up with it.[110]

Any analysis of suffering, says Simon, should include the case of members of a particular group being placed in a constant state of fear.[111] American research has indicated that the emotional stress constantly experienced by Afro-Americans because of the general level of ill-feeling against them from the predominantly white society, coupled with Afro-Americans' generally lower socio-economic status,[112] has resulted in higher levels of sickness and stress-related disorders and lower life expectancy, and in learning difficulties, including at college level.[113] Surveys of black South African school children support findings that such stress severely hampers a child's learning process.[114] Even where there is no obvious physical damage, the stress and fear caused by racist behaviour can result in nausea, headaches, high blood pressure, stomach pains, heart attacks, suicide.[115] The individual might be scared to leave the house, reluctant to

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mission, aged about sixteen, and a white man spoke to me, I put my head down because that had been bred into me."

110 Personal communication from Brent Sanders, author of *How Dangerous Men Think*, Random House, Sydney, 2001.

111 Simon (1995) 63.

112 See Gordon, (1986) 251, quoting F. Coffield, P. Robinson & J. Sarsby, *A cycle of deprivation? A case study of four families*, London, Heinemann Educational Books 1980 at 172: "It was not so much that one of their problems created another in a simple, linear chain, as that they had so many problems to tackle simultaneously. The overcrowding, unemployment, low wages, poor nutrition, enuresis, depressions and family violence should not be looked upon as discrete areas of deprivation, but as interconnecting and cumulative forms of inequality. It is this interlocking network of inequalities – this web of deprivations – which was the families' greatest obstacle to coping in society."

113 Reginald A. Gougis, "How a Prejudice-Based Stressor Disrupts the Emotional State and Academic Achievement of Black-American Students" in Ekstrand (1986) 260.

114 Gordon (1986) 251 quoting Mana Slabbert, *Repetitive Cycles*, University of Cape Town, Institute of Criminology, Cape Town, 1980, 9.

115 See Matsuda (1993a) 24.

socialise, or to allow their children to do so, and constantly sensitive to the possibility of abuse or attacks. Repeated racist intimidation from neighbours or workmates can ruin an adult's life. Harassment and abuse at school can terrorise a child, particularly if their teachers fail to protect them or join in the abuse. We all know, commented Clive Holding in the debate on the Commonwealth *Racial Hatred Act*, "that there are people who leave their jobs because they cannot stand racist comments, people who move from suburbs because of racist comments and people who have committed suicide because of racist comments."[116] Many people cannot handle the denigration and hatred of racist abuse.[117]

People not in the target group but who protect or support a member of that group by employing them, socializing with them, or marrying them, are also subjected to abuse, threats and violence because of their association. They too are forced to live in fear.[118] A poll conducted in the early 1990s by the University of Cologne researchers found that one fourth of all German Jews between the ages of eighteen and twenty-four felt 'personally threatened.'[119]

Jane Elliott described the pain that children in her primary school class felt when they were treated in a 'racist' manner by the others for a single day, when eye colour was used as an excuse for treating them badly: giving them fewer privileges, and acting towards them as if they were less interesting and less intelligent.

> By the lunch-hour, there was no need to think before identifying a child as blue or brown-eyed. I could tell simply by looking at them. The brown-eyed children were happy, alert, having the time of their lives. And they were doing far better work than they had ever done before. The blue-eyed children were miserable. Their posture, their expressions, their entire attitudes were those of defeat. Their

116 *Hansard*, House of Representatives, 15 November 1994, 3371.
117 Laurie Ferguson, *Hansard*, House of Representatives, 16 November 1995, 3425.
118 Matsuda (1993a) 25.
119 Schmidt (1993) 156.

> classroom work regressed sharply from that of the day before. Inside of an hour or so, they looked and acted as though they were, in fact, inferior. It was shocking.[120]

The targeted children described how they felt: I was sick; I felt dirty. I didn't want to work. I didn't feel like I was very big. I felt like crying. I felt like quitting school. They were 'mad', they were angry, and they wanted to 'tie up' or slap the other students who were hurting them and "blow the teacher sky high."[121] Their pictures of themselves when they were part of the 'superior' group were large, bright and beautiful – dramatically different from the dark and miserable pictures they drew of themselves as tiny insignificant figures, when they were in the 'inferior' group.[122]

In 1993, 630 Higher School Certificate Melbourne students were interviewed by researchers at the Melbourne University Department of Psychiatry. Of one hundred Vietnamese refugee students in that group, 69 percent said they experienced racism at school, 59 percent experienced it in the streets and 14 percent said racism involved physical threat or injury. As a result of such experiences, some of the students suffered from loss of sleep, others felt "nervous and shaky inside," some said they panicked in crowds and some even thought of killing themselves. The constant fear and vulnerability caused by racist violence, intimidation and hate speech is a real injury[123].

Economic Social and Political harm

Social acceptance of racism restricts social, economic and political opportunities for members of disadvantaged or targeted groups, leading to disempowerment and

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120 Peters (1987) 24 and 25.

121 Peters (1987) 32 to 34.

122 Peters (1987) 88 to 90. For other descriptions of the immediacy and intensity of the harm wrought by the encouragement of prejudice, see the descriptions of experiments of American college students in Zimbardo (1979), and also Richard Delgado, "Words that Wound" (1982) 17 *Harv. Civ. Rts-Civ. Lib. L. Rev.* 133, 136 to 149.

123 See generally the interview with the Jones family who had a cross burnt on their front lawn: Laura Lederer, "The Case of the Cross-Burning" in Lederer and (1995) 27 and the other articles in Chapter One of that volume.

'negative community'.[124] Minority groups get the worst jobs, have the highest rates of unemployment,[125] and in some countries are still enslaved.[126] An official French inquiry in 1992 found that every second or third job offer made through legal employment agencies in France was discriminatory.[127] Minority groups are likely to have worse access to state services, and worse treatment when they get there.[128]

Educational opportunities for minority groups are generally more limited, and the curricula aimed at enforcing the dominant culture, leading to lower educational achievement rates. Many participants in HREOC's 2001 *National Consultation*[129] identified these factors as leaving many indigenous people in a disadvantaged position.

The disempowerment and fear engendered in target groups by racist behaviour and speech effectively undermine the ability of victim groups to participate equally with the rest of the community in social, cultural and public life.

Restriction of opportunities in one generation limits the next, born into conditions of suffering with negative stereotypes already attached to them, creating an 'interconnectedness of disadvantaged conditions'. The cycle is self-perpetuating,

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124 See generally Thomas Sowell,, *Markets and Minorities*, Blackwell for the International Centre for Economic Policy Studies, Oxford, 1981. In Chapter 2 of *Justice and the Politics of Difference* (1990) Iris Marion Young analyses the different forms of oppression and their connection with racism, being exploitation, marginalisation, powerlessness, cultural imperialism, and violence. See Fletcher (1998) 201ff.

125 confirmed by the findings of HREOC (2001b) with both ethnic women and Aborigines suffering the most in Australia.

126 Suzanne Goldenberg, "Families enslaved in life of brutality," *Guardian Weekly*, 31 March 1996, 5, describing third-generation slavery in Pakistan.

127 In 1995 the general manager of the government job centre organisation justified employers' refusal to hire black supermarket cashiers, saying that "unfortunately there are people with whom one doesn't feel very comfortable, and that "the darker the skin, the more uncomfortable one is": Philippe Bernard, "Anti-racists fight French 'apartheid,'" *Guardian Weekly*, 29 January 1995, 14. The French National Front is proposing a system of "national preference" in employment and housing: that is, racial discrimination, and calling for retroactive annulment of all naturalisations granted since 1974: Philippe Bernard, "Racism by any other name," *Guardian Weekly*, 9 July 1995, 15.

128 Again confirmed by HREOC (2001b).

129 HREOC (2001b)

affecting academic achievement, occupational status, income, and overall quality of life.[130]

Alienation from democratic structures

When the powerlessness of a group becomes deeply entrenched, argues Simon, when group powerlessness cuts across generations and becomes an inescapable and effectively defining feature of the group, then that is not only a democratic cause for concern, but "should receive top priority on the democratic agenda." At that point, powerlessness can no longer be fairly characterised, he says, as part of the give and take of politics. Democracy, Simon argues, needs to address political causes of social suffering that result in entrenched group powerlessness; to confront the problems of social injustice.[131]

The cruellest aspect of racism, it is said, lies not so much in the direct abuse, but in the tolerance of that racism shown by society's elite.[132] Target-group members must either identify with a community that promotes racist speech, or admit that the community does not include them – that the democratic structures established to protect other citizens from abuse, attack or discrimination are of little assistance to the victim group.[133] As Matsuda says, the law's failure to provide recourse is an effective second injury.[134] Their personal experience of wrongs is reclassified as a misfortune for which there is effectively no legal redress. Governments act to stop spitting in the street, to

130 Gougis (1986) 267.

131 Simon (1995) 71.

132 Tatz (1995a) 27, quoting Matthew Parris, *The Times* 11 April 1994. See also Gaudreault-Des-Biens (2001) at 1135, citing G. Haarsher, *Philosophie des droits de l'homme*, Université de Bruxelles, Brussels, 1993 at 42.

133 Matsuda (1993a) 25. See also Björgo and Witte (1993) 11 and generally Chapters 9 to 16.

134 Matsuda (1993a) 49. See generally Ghassan Hage (ed), *Arab Australians today: citizenship and belonging*, Melbourne University Press, Carlton, 2002, 2ff and the concept of 'dishonourable' citizenship.

criminalise breaches of the *Trade Practice Act*, or the issuing of a misleading prospectus.[135] But the harms of racism are denied or belittled.

Where the police or military are directly involved in racist behaviour, as has been known,[136] the victim's security is completely undermined – there is no one in authority upon whom the victim can rely for protection.[137]

The social experience for victim groups is therefore inevitably one of loss of faith in, and alienation from, the democratic structures of government – which are not responsive to the harms those groups have suffered. In its 1994 study, *Changing Ethnic Identities*, the English Policy Studies Institute suggested that although black Britons have much in common with white Britons both culturally and socially, blacks do not feel accepted as British, believing that the majority of white British people think that only white people are truly 'British'.[138] Such feelings of rejection and marginalisation by mainstream society are felt across the world, from Blacks in Brazil, Dalits in India and Aborigines in Australia, to immigrants everywhere. In the words of a Vietnamese born Australian:

> Commitment to a country ... is often a tentative and incremental process. Like a transplanted seedling, it needs time and tender loving care to take roots and grow. Acceptance and encouragement strengthen it. Rejection and rebuttal make it wither.[139]

The victim who feels helpless and unable by his own acts to effect any positive change is not likely to be motivated to vote, nor likely to have the economic means or the desire to participate in public life or the wider political process.

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135 See comments by Michael Lavarch, *Hansard*, House of Representatives, 15 November 1994, 3337.

136 See Levin & McDevitt (1993) 159- 164.

137 For the effect on Australian Aborigines, see Hollinsworth (1998) 11.

138 Martin Linton and Gary Younge, "Racial Prejudice alive in UK" and see also Gary Younge, "Where are we now?" both in *Guardian Weekly* 26 March 1995, 13.

139 Dr Nguyen Trieu Dan, *Quadrant*, November 1994 quoted by Marjorie Henzell, *Hansard*, House of Representatives, 16 November 1994, 3419.

Simon points out that while formal political exclusion is clearly a form of social injustice which undermines democracy, other forms of *de facto* exclusion, being economic or social, are often regarded as acceptable – or at least as not directly related to essential elements of democracy.[140]

Undermining Democratic Values for the whole community

> *In a racist society all our social structures become polluted, privileging dominant groups at the expense of all others. Therein lies its rationale.*[141]

Before considering in more detail how racism harms democracy, we need to consider the main elements of a democracy. This will also be relevant when we consider in Part II the argument that unregulated 'free' speech is an essential underpinning of democracy. The main elements of democracy are generally agreed upon as being:

- individual and group access to the political process;
- regular free elections, with votes of roughly equal weight;[142]
- sequential and/or concurrent sharing of political power between political groups, so that no political group is able to maintain power over other groups indefinitely;
- maximisation of information available to voters on political issues, including free public discussion of political issues and free assembly;
- an independent judiciary;
- just procedures, including in enforcement and interpretation of legislation;
- government self-regulation and accountability (to ensure lack of corruption in government and judicial processes); and

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140 See Simon (1995) 69.

141 Godrej (1994) 7. Similarly see Hage (2002).

142 The issue then arises whether elections should permit the direct expression of the 'people's will' (the populist model) or should allow for indirect representation by elected persons and for debate between those elected: see Kanishka Jayasuriya, "Beware the fascist roots of populism," *Australian*, 17 February 1999, 13.

- maximisation of personal freedom/individual autonomy and privacy of citizens (perhaps including freedom of conscience and religion and even freedom from discrimination).

It is generally agreed that participation in a democracy should not be limited to voting at elections, but should enable and encourage participation in public debate.[143] For a meaningful democracy to exist, argues Stuart Ewen, the public must experience itself as such, and as actively engaged in discussion: "answering poll questions in the privacy of your living room is no substitute for discussion in an active public sphere."[144] On the other hand, Chomsky says that for Americans "democracy is more narrowly conceived: the citizen is a consumer, an observer but not a participant."[145] For many 'democratic' countries, the essence of the democratic process is the 'freedom' to persuade and suggest described as "the engineering of consent."[146] Certainly where 'democracy' is used as a justification for not limiting hate speech (as discussed in Chapter 7), the concept is not closely analysed and does seem to reflect the narrow 'realist' theories of democracy of writers such as Eckstein, Berelson, Dahl and Sartori in the 1950s and 60s for whom 'political equality' meant universal suffrage and 'participation' meant the act of voting.[147]

It is generally agreed that in a democracy, voters should receive the maximum of accurate relevant information about political, social and economic issues and the people involved in those issues, in order to enable them to make a fully informed decision when they cast their vote. This requires both a free press[148] and an unbiased press. It is often assumed that the democracy in question is one in which voters regularly receive full

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143 See *Australian Capital Television, Pty Ltd and Ors*, v. *Commonwealth of Australia (No 2)* (1992) 66 *ALJR* 695, per Mc Hugh J, at 743.

144 Interviewed by Richard Swift, "One-trick Pony," *New Internationalist* July 1999, 16 at 17.

145 Noam Chomsky, *Necessary Illusions: Thought Control in Democratic Societies*, Pluto Press, London, 1989, 14.

146 Chomsky (1989) 16 quoting Edward Bernays.

147 See Barbara Sullivan, "Carole Pateman: Participatory Democracy and Feminism" in Carter and Stokes (1998) 175 at 177.

148 Keane (1991) 16.

information about relevant issues, without examination of the social and economic barriers to receipt of information.

Drawing upon such assumptions about the nature of democracy, the Australian High Court has identified the following types of political participation as essential to a democracy and as deriving from sections 7 and 24 of the Constitution: "nominating, campaigning, advertising, debating, criticising and voting." The High Court has also identified a "right to convey and receive opinions, arguments and information concerning material intended or likely to affect voting."[149]

Bobbio sees substantive democracy as necessarily enshrining the principle of equality as a value and as an aim.[150] Campbell's description of the democratic ideal similarly involves equality of power[151] – at least, of political power – and, like Simon, a commitment to the elimination of suffering.[152] The struggle for democracy, says Simon, is the struggle against social injustices. Similarly Kinley argues that an essential prerequisite of democracy is that human rights are guaranteed and therefore the protection of human rights is a constitutional matter.[153] In Europe this last argument does not have to be put because it is generally accepted that the protection of human rights is both a constitutional matter and a positive state duty.[154]

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149 *Australian Capital Television, Pty Ltd and Ors*, v. *Commonwealth of Australia (No 2)* (1992) 66 *ALJR* 695, per Mc Hugh J, at 743.

150 Bobbio (1989) 157.

151 Tom D. Campbell, "Democracy, Human Rights and Positive Law" (1994) 16 *Sydney Law Review*, 195 at 204.

152 Campbell (1994a) 199.

153 David Kinley, "Casting an Australian Eye to European Human Rights in the United Kingdom: The Political Dimensions of a Legal World" (1995) 2 (1) *AJHR* 91, 93.

154 See generally Kinley (1995) and Donald P. Kommers, "The Jurisprudence of Free Speech in the United States and the Federal Republic of Germany" 53 (1980) *South Cal. Law Rev* 657. The German Federal Constitutional Court defined "the free democratic basic order" in 1952 as an order which excludes any form of tyranny or arbitrariness and represents a governmental system under a rule of law, based upon self-determination of the people as expressed by the will of the existing majority and upon freedom and equality. The fundamental principles of this order include at least: respect for the human rights given concrete form in the Basic Law, in particular for the right of a person to life and free development; popular sovereignty; separation of powers; responsibility of government; lawfulness of administration; independence of the judiciary; the multi-party principle; and equality of opportunities for all political parties– Kommers (1980) at

Simon argues that democratic theory should also be concerned with treatment by voters, through the governments that they have elected, of non-voters: the children, the incompetent, the immigrants, who do not have the ability to vote and are thereby excluded from an essential part of the democratic process. Citizenship, he argues, carries serious responsibilities with it, one of which is not to use the power associated with citizenship to inflict suffering on other groups, particularly those with less power. The mistreatment of one group by another can have serious repercussions for a democracy, particularly where the mistreatment results in the mistreating group attaining political power at the expense of the mistreated group.[155]

Democratic values held by the community as a whole, and the opportunity for socialisation between all groups, are undermined by racism through the encouragement of inequality, subordination and discrimination. Where racism is given free rein it necessarily affects the level of democracy that is practised in any society, because racism is inherently undemocratic and inegalitarian in its ideals. It prevents the development of a just and egalitarian culture. It denigrates and wastes human resources. Even where racist speech is under some social control, such speech attempts to corrupt the proper working of the political system through scapegoating, intimidation, deception, defamation and denigration. "Would race matter in a truly democratic society?" it has been asked.[156]

The ultimate aim of racism is for an elite 'white' group to obtain and maintain superiority over other groups, or at least for target groups, differentiated from mainstream society, to be substantively disempowered and excluded from full participation in the body politic.[157] Substantive disempowerment can be followed with formal disempowerment through legislation, as of blacks from the *demos* of apartheid

680, quoting Judgment of October 23, 1952 [1952] Federal Constitutional Court (First Senate), 2 BVerfGE 1, 12-13.

155 Simon (1995) 70 - 71.

156 Dyann Ross, "The Human Connection - Beyond Colour" in McKay (ed) (1999) 247 at 252, attributing the question to Carole Ferrier.

157 Lawrence (1993) 79.

South Africa or Jews from Nazi Germany. A proper formulation of democracy requires, argues Simon, that no group be able to maintain power over other groups indefinitely, and that the wholesale exclusion of certain groups from rule or from the political process – for example, through racism – should not be tolerated.[158]

Racism aims to bring about tolerance of discrimination and maltreatment, not tolerance of diversity. It aims to control victim groups and to restrict social, economic and political freedoms firstly to those categorised as 'white' but secondly to to an a more limited group of those who are prepared to be both 'white and racist'.

If the democratic ideal is not simply concerned with maintaining the *status quo*, but involves changing society for the better and promoting human rights, substantive equality, and the status and well-being of minority groups, then a racist society will not achieve that democratic ideal.

Categories of the different types of harms caused by racism overlap. The killing of a Comorian youth in Marseille in February 1995 by National Front supporters[159] caused many harms: the death of the boy, hurt to his family, his friends and his immediate community at his death, as well as intimidation of them and of other marginalised groups in Marseille, and perhaps throughout France. Not only those people, but people everywhere in France may think twice about pulling down a National Front poster, about opposing National Front hecklers, or about standing against a National Front candidate. They might think twice about befriending or employing peole with different skin colours. Debate is ‘chilled’ and the democratic process is corrupted – not through government regulation, but through violence. If the boy’s murderers are not caught or convicted, his family, his community, and other marginalised groups will also feel the hurt of their rejection by society: they will feel that the society in which they live is not concerned about protecting people like them.

158 Simon (1995) 69 ff.

159 Bernard and Chombeau (1995) 16.

In such ways, racist harms involve both victim groups and the wider community in social experiences which are opposed to values such as tolerance, freedom, equality and democracy.

Different social perceptions of racism

Result from different experiences

It needs to be emphasised that many of the racist activities which are perceived by victim groups as harmful are not noticed by people outside the targeted groups, or if they are noticed they are seen as isolated and inconsequential incidents, rather than as part of an overall pattern of racist behaviour, intimidation and abuse.[160] What does not touch one personally often remains invisible.[161] Racist behaviour is seen as an inevitable aspect of the human condition with which those (other people) unfortunate enough to be born coloured must learn to cope. It will always be easier to see misfortune rather than injustice in the afflictions of other people, says Shklar.[162] Discriminatory or racist conduct which is culturally accepted is regarded as neutral to the extent that it has succeeded in constructing social reality.[163]

> As non-Asians, when we see graffiti that reads 'Asians out' we probably do not feel very much. We really do not have the ability to understand the impact that racism, racial intimidation and racial vilification have on those who are victims of it. We really do not have the ability to understand how much it hurts, affects, intimidates and denies these people their civil liberties.[164]

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160 See generally Lawrence (1993), Matsuda (1993a).

161 This truth is recognised in literature from John Keats ("A proverb is no proverb to you until life has illustrated it") to k. d. lang: "you're only as deep as what's carved in you."

162 Shklar (1990) 15.

163 Lawrence (1993) 62 (citing MacKinnon) and 77. See also Sadurski (1992) 186 and Tatz (1995a) 27.

164 Tanner, *Hansard*, House of Representatives, 15 November 1994, 3358.

There are parallels between denial of the harms of racism and the denials commonly expressed by commentators who have not personally experienced another kind of harm: domestic violence.

> Many still believe that women who make allegations of violence are either lying or crazy ... or that the perpetrator's acts are out of character and somehow deserving of sympathy ... at the heart of these myths is a denial of the problem of violence against women, a refusal to listen to and accept women's experiences, attempts to trivialise and minimise the reality of violence for women and the belief that it is a private issue.[165]

A NSW Supreme Court judge described the rape of a 15-year-old by her step-father, her subsequent molestation by him, violence by him towards his wife, and his threats to shoot them both whenever he cleaned his gun, as a 'domestic dispute'.[166] Continuous physical attacks upon a wife are described as the 'problems of a marriage' which (by definition) do not justify homicide in self-defence.[167]

Delgado queries whether opponents of hate speech regulation who pay lip service to the problems of racism have any real understanding of the depth and virulence of harm caused by racist speech and of behaviour. He concludes that people who have not had similar experiences to victims of racism might never be able to achieve a full understanding of those harms, nor 'enlarge their sympathies' through 'linguistic means alone'. It is only to a limited extent, he believes, that we can think, talk, read and write our way out of our limitations of experience and perspective.[168] In Stephenson's words: "becoming aware of white advantage is a necessary requriement to challenging it."[169]

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165 Blazejowska (1994) 41, Mahoney (1992) at 250 and 251.

166 Patricia Esteal, "Reconstructing Reality" (1995) 20 *Alt L J* 108, at 110, citing *R* v. *Simington and Saunders* (unreported decision of Loveday J, NSW Supreme Court, 4 November 1988).

167 Esteal (1995) 110, citing *R* v. *Bobach* (unreported decision of Lee J, NSW Supreme Court, 1 November 1988).

168 Richard Delgado and Jean Stefanic, "Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systemic Social Ills?" (1992) 77 *Cornell Law Review* 1258 at 1261ff.

169 Stephenson (1997).

"Even though members of the self-appointed liberal elite," says Lee, "would never dream of stooping to racist speech, neither, it seems, would they ever dream of taking legal steps to stop it."[170]

If this is true, the logical conclusion is that realistic assessment of the pros and cons of hate speech regulation cannot take place only at a theoretical level. We cannot give the greatest weight to 'rational' theoretical arguments from persons with no experience of racist harm. We cannot continue to trivialise and discount the social and personal cost of racist speech and behaviour, but must give primacy to the stories of the victims of racism.

Delgado seems to be correct in identifying a lack of empathy for the victim as the common factor in opposition to hate speech regulation. Free speech proponents find the theoretical 'greater' harms which they say would be caused by regulating racist speech more telling than the reality of a racist experience that they admit to be harmful. They take pride in defending this harmful behaviour in the name of freedom, despite its effects. MacKinnon gives the example of the American judiciary being 'piously evenhanded' in dealing with the Klan or with civil rights leaders, despite the fact that the Klan promotes inequality, and the civil rights leaders resist it, "in a country that is supposedly not constitutionally neutral on the subject." Refusal to take account of the message of racist inequality spread by hate speech results in American courts expressing a "studied inability to tell the difference between oppressor and oppressed that passes for principled neutrality," she concludes.[171]

The attitude of defending harmful behaviour in the interests of some supposed greater good is vividly demonstrated by the surprising rhetorical question of Gates Jr, a leading American writer on civil liberties and the First Amendment, in the context of hate speech: "Once we are forbidden verbally to degrade and humiliate, will we retain the

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170 Simon Lee, *The Cost of Free Speech* Faber & Faber, London, 1990, 42.

171 MacKinnon (1993) 86.

moral autonomy to elevate and affirm?"[172] Gates Jr regards a society in which "'freedom' does not implicate a right to degrade and humiliate another human being" as necessarily being "a regime so heavily policed as to be incompatible with democracy."[173] Similarly Strossen plays down the harm caused by neo-Nazis marching where Holocaust survivors reside as merely amounting to 'offensive speech'.[174] The fact that Canada, Australia, and many European countries find no difficulties in penalising racial vilification at the same time as maintaining civil liberties is ignored. It is hard to imagine how the society of which Gates Jr warns can be so undesirable: a society in which it is not acceptable to degrade and humiliate, (let alone hurt and kill) another human being would be a very different kind of society to the kind we are accustomed to, but not necessarily a non-democratic one.

In the Australian context, a lack of empathy for the victims of racism appears to underpin the apparently separate arguments against racial vilification legislation. Both the 'legislation is unnecessary' arguments and the 'legislation would cause greater harms' arguments provide different 'rational' justifications for leaving the victims to cope on their own, without the protection of law. "They themselves, white and well-connected, cannot imagine being non-white and isolated and subjected to a relentless regime of terror" commented a Labor government back-bencher about opponents of the Australian *Racial Hatred Act*.[175] "They cannot imagine the spitting, threats, harassment, abuse and blows that make the victim bleed; make him nauseous, ill, afraid to leave the house and so despairing as to contemplate suicide."[176]

Lack of empathy for the victims of racism, to the extent where the harms of racism are denied, has of course a long social history:

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172 Henry Louis Gates Jr, "War of Words: Critical Race Theory and the First Amendment" in Gates Jr et al (1994) 17 at 55.

173 Gates Jr (1994) 54-55.

174 Strossen (1990) 497. Contrast Richard Moon who appreciates that the only political meaning or significance of the march stemmed from 'its threatening character': Moon (2000) 129.

175 Mary Easson, *Hansard*, House of Representatives, 16 November 1994, 3446, commenting on the speeches by the coalition opponents of the *Racial Hatred Act*.

176 *Hansard*, 3365 15 November 1994 and see Melinda Jones (1994a) 301.

> It's difficult for white society to stop denying its racism. Denial is rooted in our culture. Our country, founded on the principles of enlightenment, was practising slavery. It required an enormous amount of denial to have these two things going on simultaneously. Racism and its denial are bone-deep parts of American culture. We have to keep pointing this out. It's never easy to admit.[177]

The Canadian Supreme Court case *Zundel* demonstrates the ease with which the harms to victim groups and to the rest of society can be ignored or devalued, even when assessment of those harms is crucial to a fair assessment of the issues.[178] The majority purported to balance the harm of an antisemitic pamphlet against the writer's free speech rights, but in so doing ignored most of the content of the pamphlet and the real harm it could effect. The judges referred to what was only a minor part of the pamphlet's contents – the argument that there was no deliberate Nazi plan of Judeocide – as if it were the whole of the pamphlet, ignoring the fact that the greater part of the pamphlet consisted of hate propaganda allegations which the minority described as "lies which were extremely damaging to members of the Jewish community, misleading to all who read [the pamphlet's] words and antithetical to the core values of a multicultural democracy."[179]

The majority stated that in Zundel's honest opinion his assertion that there was no Nazi policy of the extermination of Jews in World War II communicated only one meaning: that there was no policy. Against this single (though admittedly hurtful) meaning the judge delivering the majority opinion, McLachlin J, weighed the numerous (presumably beneficial) meanings which she saw as being communicated simply by Zundel's act of free expression:

> that the public should not be quick to adopt 'accepted' versions of history, truth, etc., or that one should rigorously analyze common characteristics of past events.

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177 Salim Muwakkil in Terkel (1993) 169.

178 An outline of the case is given in Chapter 3- see text around footnote 172.

> Even more esoterically, what is being communicated by the very fact that persons such as the appellant Mr Zundel are able to publish and distribute materials, regardless of their deception, is that there is value inherent in the unimpeded communication or assertion of 'facts' or 'opinions'.[180]

Amazingly, no mention at all was made of the numerous other meanings conveyed by the pamphlet: quite apart from the 'Holocaust denial' part of the pamphlet, the pamphlet implied that Africans and Asians are inferior to Anglo-Saxons, that they are deserving of repression and poor treatment, that they should be deported from Britain and America, and that inter-marriage between them and Anglo-Saxons would result in inferior children. The message was that members of identifiable groups should not be regarded or treated as full members of the community,[181] or even as full human beings, and were not equally deserving of others' concern, respect and consideration.[182] As Chief Justice Dickson said, the pamphlet argued "for a society in which the democratic process is subverted and individuals are denied respect and dignity simply because of racial or religious characteristics."[183] Surely every one of those meanings, as well as each of the pamphlet's numerous antisemitic meanings, should logically have been taken into account by the majority in any balancing of the harm that might be effected by the pamphlet's contents against the desirability of the free expression of those ideas. The majority did not apply its own balancing test to all the facts before it, but only to a selection.

Result from different implications of past experiences

It also must be emphasised that the experience of racism is informed by historical events. Black people, says Lawrence, see a different world than that seen by Americans who do not share their historical experience of being an outsider. Black people often

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179 *Re Zundel* (1992) 95 D. L.R. (4th) 202, 223.
180 *Re Zundel* (1992) 95 D. L.R. (4th) 202, 263.
181 Moon (1992) 122.
182 *R. v. Keegstra* (1990) 61 C.C.C. (3d) 1, 44.
183 *R. v. Keegstra* (1990) 61 C. C.C. (3d) 1, 50.

hear racist speech when their white neighbours are not aware of its presence.[184] Abuses that are minor in themselves are harmful when they are part of a continuous pattern; reminders of unspeakable brutalities carried out in the past.[185] For informed members of the victim communities, notes Matsuda, it is logical to link together several thousand real-life stories into one tale of caution. Members of target-group communities tend to know that racial violence and harassment are widespread, common and life-threatening.[186] When the Klan burns a cross on the lawn of a Black person who joined the NAACP or moved into a white neighbourhood, the effect of this speech does not result from the persuasive power of an idea operating freely in the market, says Lawrence. It is a threat made in the context of a history of lynchings, beatings and economic reprisals, a threat that promises violence and silences a potential speaker.[187]

In the Australian context, there is no doubt that our history has been one of violent repression of the indigenous Aboriginal population and denigration of immigrants. Against this background it becomes easy for those not affected by racism to argue that modern Australian society is, by comparison, not racist. But at the same time, the history of racist violence in Australia necessarily informs the social experiences and the perceptions of victims of racism.

Conclusion

Racial vilification and other forms of racial harassment are serious problems in Australia today,[188] and likely to continue to be so. It is speech that we could well do without.

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184 Lawrence (1993) 56, 74.

185 Moon (1992) 115 – noting that none of the Canadian Supreme Court judges in *Keegstra* seemed to realise this. See also Matsuda (1993a) 42.

186 Matsuda (1993a) 22.

187 Lawrence (1993) 79.

188 For an 'establishment' view on this, see Australian Catholic bishops' annual *Social Justice Sunday* statement for 2003 which speaks of the need to deal with 'widespread racial hostility': Debra Jopson, "Look who's talking … . Deane supports Church's right to speak on politics", *Sydney Morning Herald*, 18 September 2003, 9.

Racial vilification is a tool of racism, used to unite the majority against visible minorities, terrify the humanists, and skew politics to the right.[189] It harms the targets of the speech psychologically, and encourages violence against them. Many victims of both direct and indirect racial harassment are hurt and intimidated. They experience psychological trauma. They are frightened of opposing the harassment directly, in case it leads to more serious harassment. They do not perceive the dominant culture as supporting retaliation, whether in kind or in any other way. But if society does not protect those victims, they experience a second injury. They feel alienated from the dominant culture. They have no place to turn. Victim groups are silenced, and racism becomes accepted as a valid political view.

The Chapters in this first Part analyse the role of racist speech in general terms as an aspect of, and impetus to, racist behaviour. The way in which racist speech seeks to perpetuate and foster racism, and the impact that this has upon fundamental elements of what we think of as 'democracy,' are considered. The many indirect ways in which culture can encourage racism are also described.

Legislators who lack an understanding of the way in which hate speech causes harm have drafted legislation that appears to be aimed at restricting indirect harm to groups and to society, but the case examples show that it is drafted in a way that is more relevant to direct individual acts between parties who know each other. American First Amendment jurisprudence has been very influential in justifying a theoretical approach to racist speech which consciously ignores its consequences and the way in which it operates. That jurisprudence is considered in the second Part of this thesis, against the reality of racist harm and the reality of its reproduction through dominant ideologies. I argue that an inclusive democracy cannot rest on theoretical justifications which ignore the reality of racist harm.

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189 See text in Chapter 2 relating to footnote 106 and following.

Chapter 6: The First Amendment and alternative perceptions of 'free speech'

There is an anomaly in our constitutional law.
While we protect expression once it has come to the fore,
our law is indifferent to creating opportunities for expression.[1]

Congress is not debarred from all action upon freedom of speech.
Legislation which abridges that freedom is forbidden,
but not legislation to enlarge and enrich it.[2]

In Part 1 we examined the nature of racism, the way in which it is reproduced through racist speech, and the various harms that it causes. These issues were considered generally, as well as against the particular background of Australian society and politics. The harms caused by racist speech, including to the very notion of democracy, are so extensive that the need to redress those harms should outweigh any theoretical right to a notion of free speech that includes racist speech. But while free speech proponents may concede some of the harms of racist speech, 'free speech' is generally seen in the United States and Australia as a higher value that frames legislative and policy responses to racial vilification.

The constitutions and legal systems of countries such as Canada, Australia, England and Germany are different from that of the United States. While Canada has a Charter of Rights and Germany's constitution entrenches various human rights (although not always in terms familiar to Australian jurisprudence), neither Australia nor England has

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1 Jerome A Barron, "Access to the Press – A New First Amendment Right" (1967) 80 *Harv. L. Rev* 1641.

2 Alexander Meiklejohn, *Education Between Two Worlds*, Books for Libraries Press, Freeport, New York, 1942, 19.

any constitutional or legislative equivalent to the First Amendment.[3] However it has been suggested that in all of these countries, legal thinking about matters such as free speech rights, communication rights, and racial vilification has been influenced to some degree both by popular and doctrinal notions of free speech as a primary value, derived from First Amendment jurisprudence.[4]

Eberle suggests that in the 1990s, the German Constitutional Court, following the United States, has given greater weight to the right to free speech than was formerly the case.[5] Eric Barendt notes that English courts in *Derbyshire County Council* v. *Times Newspapers Ltd*[6] 'atypically' relied on *New York Times* v. *Sullivan*[7] rather than the jurisprudence of the European Court of Human Rights, to find a common law principle of freedom of speech.[8] He also describes how the Australian High Court in *Nationwide News Pty Ltd* v. *Wills*[9] and *Australian Capital Television Pty Ltd* v. *The Commonwealth*[10] relied on the US case of *Buckley* v. *Valeo*[11] to find a common law principle of free political discourse and subsequently, in *Theophanous*,[12] explicitly approved *New York Times* v *Sullivan*.[13]

No doubt the shared common law traditions of Australia and the United States have discouraged Australian lawyers from looking to the civil law in this area. The common

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3 "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances."

4 This is not to say that these are the only countries whose jurisprudence has been influenced by the First Amendment. A complete analysis of the influence of the First Amendment outside the United States is beyond the scope of this thesis, but these few examples illustrate the point. Eric Barendt discusses a wide range of free speech issues, including racist speech, from a comparative perspective in *Freedom of Speech*, Clarendon Press, Oxford, 1985.

5 Edward J Eberle, *Dignity and Liberty: Constitutional Visions in Germany and the United States*, Praeger, Westport, Connecticut, 2002, 191.

6 [1993] AC 534.

7 376 US 254 (1964).

8 See Eric Barendt, "Libel and Freedom of Speech in English Law," (1993) *PL* 449 and Eric Barendt, "The Importation of United States Free Speech Jurisprudence?" in Loveland (1995) 213.

9 (1992) 177 CLR 1; (1992) 108 ALR 681; (1992) 66 ALJR 658.

10 (1992) 177 CLR 106; (1992) 108 ALR 577; (1992) 66 ALJR 695.

11 424 US 1 (1976).

12 (1994) 182 CLR 104; (1994) 124 ALR 1; (1994) 68 ALJR 713; (1994) 34 ALD 1.

law traditionally provides for individuals rather than groups, and requires "a clearly identifiable plaintiff and defendant linked by an unbroken causal thread."[14] This makes it easier for the common law to recognise an individual right such as the right *to* free speech, as opposed to a 'group' right to be free *from* racist speech. As Martha Minow says, these kind of boundaries have been critical to what has counted as legal analysis and to legal assumptions about society.[15]

The common law also relies upon existing categories of legal wrong. Only an act that goes against some known legal or ethical rule, notes Shklar, is recognised as injustice. If the complaint does not fit with a rule, the common view is that it is only a matter of the victim's subjective reaction, a misfortune, and not really unjust. The victim has misdefined their experience. Their expectations were groundless.[16] This has been a dominant legal and social attitude to racist harm within common law systems. The application of traditional legal categories does not meet the particular ways in which racist expression operates.

While Australia has generally looked towards the United States rather than civil jurisdictions in relation to free speech issues, the lack in Australia of any equivalent constitutional provision to the First Amendment means that most of the enormously complex First Amendment jurisprudence is not directly relevant to Australia. Therefore it is the more populist versions of the right to free speech, divorced from the intricacies of First Amendment jurisprudence, which tend to inform Australian views.

The first part of this Chapter attempts to distinguish popular notions of the right to free speech from the particular characteristics of First Amendment jurisprudence, drawing

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13 Barendt (1995) 214 –215.
14 Thornton (1990) 7.
15 Minow (1990) 7-9.
16 Shklar (1990) 7.

upon academic writings on free speech and the First Amendment which are often informed by popular notions of free speech.[17]

The second part of the Chapter touches on alternative ways of considering free speech and racist speech which have been influential in Australia, Canada, England and Germany. As Kommers notes, a comparative study of law can help in identifying a more adequate public philosophy.[18] Free speech is not seen as absolute in those countries and is generally regarded as a right that should be balanced against other rights. This is important because the civil law concept of balancing competing rights will, through EEC law, gradually become part of English jurisprudence, which will in turn influence Australian decisions.[19] The balancing of rights is also accepted to some extent in Canada in relation to its Charter of Rights.

Rights which are fundamental to European concepts of human rights, and which are regularly contrasted with a limited right of free speech, include the rights to equality (which is fundamental to anti-discrimination law) and human dignity, and communication rights. Australian courts have recognised the contextual nature of equality, rejecting formal equality or formally identical treatment as the sole test for the presence of equality or the absence of discrimination. This Chapter argues that the contextual concept of equality used in both Australia and European jurisdictions should continue to be followed in Australia, in contrast to the United States practice of recognising only formal equality.

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17 In particular I refer to the articles by prominent academics which are collected in Gates et al (1994). The book was published in response to the call by Matsuda and others for a new analysis of the First Amendment that takes account of the stories of victims of racism (Matsuda et al (1993)), and defends mainstream First Amendment jurisprudence.

18 Kommers (1980) 657.

19 The European Convention was incorporated into English domestic law by the *Human Rights Act 1998*, incorporating the right to freedom of expression. See R. D. Nicholson, "A Profound Change to United Kingdom Law: Domestic Application of the European Convention on Human Rights" (1998) 72 *ALJ* 946.

Popular notions of 'free speech' and First Amendment jurisprudence

An absolute right to freedom of speech is perceived as central to the American national identity.[20]

> Although the First Amendment's position was an historical accident, free speech indeed resonates as the first freedom in American society in the hearts and minds of Americans and in the jurisprudence of the Supreme Court, which has privileged extraordinarily the status of expression. There is, perhaps, no other right Americans so clearly associate with, considering it their birthright to speak freely their minds, with vigor, exuberance, and utter abandon. Free speech captures the spirit of being American … it is the archetypal American liberty, representing the idea of freedom.[21]

'Free speech' is popularly celebrated in the press, politics and even the courts as a single, seamless, entity which must not be limited by government or the courts, nor balanced against other rights. Speech is said to be particularly worthy of protection because it emanates from the mind, a privileged and private space into which no government should intrude. Actions, however, can be regulated. Speech must be absolutely free from government control to ensure a 'free market of ideas' (a term derived from the imagery used by Oliver Wendell Holmes in his dissenting judgement in *Abrams* v. *United States*[22]). The free market will maintain values such as truth,

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20 See generally, David Feldman, "Content Neutrality" in Ian Loveland (ed), *Importing the First Amendment*, Hart Publishing, Oxford, 1998, 139 at 141ff and Frederick Schauer, "The First Amendment as Ideology" (1992) 33 *William and Mary L Rev* 853.

21 Eberle (2002) 190-191.

22 Holmes did not use the term 'marketplace of ideas' but referred to men coming to believe that "the ultimate good desired is better reached by free trade in ideas" and that "the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out": 250 U.S. 616, 630 (1919). The particular case, described as 'a disgrace to our law,' confirmed that the First Amendment "left the common law as to seditious libel in force," and resulted in maximum 20 year prison sentences for 3 young men and a 15 year sentence for a 21 year old girl simply for distributing pamphlets (many in Yiddish) that called for American non-intervention in war with Russia: see

tolerance, self-realization, personal identity and democracy. Conversely, limits on speech will prevent the free market from operating to produce those values.[23] There is a vast academic literature relating to First Amendment issues, most of which advocates even greater free speech protection than the Supreme Court grants.[24]

There are a variety of perceived connections between the chosen values. Free speech, it is said, is essential to a sense of self-fulfilment, personal autonomy, or realisation of one's own identity, without which one cannot contribute fully to public discourse. Free communication and free dissemination of information are essential for a properly-working democracy. Without complete information, voters do not know what choices and decisions to make. Speech needs to be 'free' in all relevant respects in order to reveal corruption in government and governmental error. Maximising free speech will increase the potential for 'the truth' to emerge from amongst differing views and thus also encourage democracy. 'Freedom' of speech is linked with the 'liberty' of the person and with the concept that the United States is a 'free' political democracy.

Restrictions on racist speech are generally seen as inconsistent with both popular notions of free speech and the dominant interpretation of the First Amendment.[25] To restrict racist speech would lead to greater harms: the 'chilling' of otherwise valid speech, administrative abuse, making martyrs of those prosecuted,[26] driving racism underground

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generally Zachariah Chafee Jr, "A Contemporary State Trial - The United States versus Jacob Abrams et al" (1920) 33 *Harv L Rev* 747 and Blasi (2002).

23 The assumptions underlying popular free speech notions are analysed in the following Chapters of this Part.

24 Schauer (1992b) 863 comments that in the previous decade about 200 academic articles and notes on First Amendment issues were published every year, over 90% of which were prescriptive (as opposed to simply descriptive). Of those, his assessment is that about 95% proposed greater free speech than granted by the United States Supreme Court.

25 See generally Gates et al (1994), Samuel Walker, *Hate Speech: The History of an American Controversy*, University of Nebraska Press, Lincoln and London, 1994, Nicholas Wolfson, *Hate Speech, Sex Speech, Free Speech*, Praeger, Westport and London, 1997 and references cited by Brietzke (1997) 960.

26 This concern seems to be shared by Steven H. Shiffrin, *Dissent, Injustice and the Meanings of America*, Princeton University Press, New Jersey, 1999, 81-3 (and others). However studies in Canada suggest public sympathy increases for the victims, not the 'martyrs': Weimann and Winn (1986) 163ff.

and decreasing tolerance. Any restrictive legislation, it is said, leads to the 'slippery slope' of increased government control over the 'private' sphere. These harms are seen as outweighing the harms of racism, which alternatively are belittled, for example as an inevitable 'clash of cultures', or simply ignored.

While racist speech might cause harm, the harm is seen to be more in the nature of an offence, threatening personal identity and causing upset feelings – but not a degree of pain and suffering that amounts to a real injury or that should receive legal recognition or compensation. In any case, the harm is regarded as a justifiable by-product of support for free speech as a valuable principle, especially where racist speech is categorised as inherently political (and therefore properly to be protected, whatever its effects).

To the extent that racial vilification advocates future violence, such speech is seen in the United States as protected free speech by virtue of *Brandenburg* v. *Ohio* which held that:

> Freedoms of speech and press do not permit a State to forbid advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action.[27]

This is not a concept shared in Australia.

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[27] 395 U.S. 444 (1969) - headnote. The position may however have changed in practice since September 11: for an early comment see Julie Hilden, "September 11, The First Amendment, and The Advocacy Of Violence," *FindLaw's Legal Commentary* 27 December 2001, available at: http://writ.news.findlaw.com/hilden/20011227.html

The development of the popular notion of free speech

The popular notion of free speech is actually a fluid concept, which has developed over time and which is applied differentially, advantaging some to the detriment of others. However it is not popularly perceived in this way. The wording of the Declaration of Independence: "We hold these truths to be self-evident" is taken not as indicating that choices were made about the values that the new nation was adopting, but as signalling the immutability of all United States constitutional concepts, including that of free speech.[28] There are parallels with the dominant American concept of biblical interpretation; the First Amendment is usually seen as an inerrant document, cast in stone, rather than a flexible source of developing ideas.

But it is a comparatively recent development of First Amendment jurisprudence that has been enshrined in this way in the popular imagination. Kairys argues, following historian Leonard Levy, that while legal literature and judicial decisions assume that freedom of speech is a cornerstone of the United States Constitution and a value that has always been faithfully enforced by its courts, in fact any free speech tradition in the United States is relatively recent in origin, deriving principally from the activities of the labour movement between 1919 and 1940.[29]

Ironically, both the First Amendment and racial vilification legislation such as we have in Australia, which are argued by free speech proponents to be inherently opposed to each other, have the same origins – in the existence of traditional English penalties for sedition.[30] The cruelty with which any speech against the Crown was traditionally treated in Britain[31] and the numerous restrictions on freedom of the press[32] led to the

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28 Peter Fitzpatrick points out that while the US Constitution is taken to both symbolise and create the national identity, this is inevitably at the expense of the exclusion of marginalised groups from that identity: see generally, "The Constitution of the Excluded – Indians and Others" in Loveland (1995) 191.

29 See David Kairys, "Freedom of Speech" in Kairys (1990) 237ff.

30 See generally Nathan Courtney, "British and United States Hate Speech Legislation: A Comparison" (1993) 19 *Brooklyn Journal of International Law* 727.

31 Donald Veall, *The Popular Movement for Law Reform, 1640-1660*, Clarendon Press, Oxford, 1970 and generally F. W. Maitland, *The Constitutional History of England*, Cambridge,

drafting of the First Amendment. English and United States' law at the time of the American Constitution in 1787 criminalised criticism of the government as seditious libel. Dissent, or even the pacifism of the Quakers, was regarded as treasonous.

The desire for freedom from such political repression was one of the important influences in the founding of the United States. That part of the First Amendment which relates to freedom of speech was drafted in 1791, principally by James Madison, to prevent the concept of criminal sedition being used to limit political speech in the United States and to ensure the free practice of certain religions.[33]

Centuries later, jurisdictions such as Australia and Canada followed the definition of the English crime of sedition, which refers to the promotion of 'hatred' and 'contempt' against the monarch, in drafting the terms of legislation against racist speech. It seems that the legislators conceptualised the way in which hate speech promotes racist behaviour as akin to the way in which seditious speech was thought to promote the overthrow of the monarch or government.[34]

Has the value of free speech always been given primacy?

Another aspect of the popular notion of free speech is the concept that judiciaries and governments in the United States have always given primacy to free speech rights. This is demonstrably inaccurate. Historians and legal scholars acknowledge that there have

Cambridge University Press, 1961 (1st edition 1908). Keane mentions that children were sent to prison for selling seditious newspapers that they could not read: Keane (1991) 34.

32 For a brief summary, see Keane (1991) 8 to 10 and 33 –34 and the texts cited there.

33 See Keane (1991) 147 citing Zachariah Chafee Jr, *Free Speech in the United States*, Cambridge, Massachusetts, 1942, 21. Madison took the view that the American republican concepts of limited government, divided powers and popular sovereignty made inapplicable English notions such as that of seditious libel: Blasi (2002) 38 and Vincent Blasi, "*The Checking Value in First Amendment Theory*" (1977) *A. B. F Res J*. 521 at 536. However this historical purpose of the First Amendment was generally unacknowledged by commentators and ignored by courts, most infamously in *Abrams* v *United States* 250 U.S. 616, 630 (1919):see Chafee Jr (1920) and Blasi (1977) 527 ff.

34 Similarities between hate speech and sedition can certainly be found, although the results which the speech in each case seeks to promote are rather different. Arguably, the legislation fails to identify the true nature of either hate speech or sedition.

been notable incidents and periods in the history of the United States in which freedom of speech has been denied, says David Kairys[35] – starting with Roger William's banishment by the Massachusetts Bay authorities in 1635 for maintaining that the land belonged to Native Americans and not to the British crown.[36] Masons were prohibited from serving on juries until 1927, as were Jews who were also excluded from professions and public office until the mid 1800s. Mormons were ordered exterminated by the governor of Missouri and many were massacred in pogroms.

Statutes in every southern State forbade any speech or writing that questioned slavery. In 1837 Congress banned presentation to it of petitions against slavery – contrary to the First Amendment right to petition the Government for redress of grievances. Labour organisers and public speakers, even if speaking in private halls, were regularly jailed from the 1800s until the 1940s, as were suffragettes in the first two decades of the 1900s. The Reverend Davis was jailed in 1894 for speaking against slavery in a public park, and his fine confirmed by the Supreme Court of the United States. "One of the greatest sources of social unrest and bitterness," said a 1915 government report "has been the attitude of the police toward public speaking." Traditionally, one spoke publicly only at the discretion of local, and sometimes federal, authorities, who were more likely to send in the police to stop public speech with "a degree of brutality which would be incredible if it were not vouched for by reliable witnesses."[37]

The 1918 *Federal Espionage Act* prohibited criticism of the American flag, or the uniforms of the armed forces, and convictions for contraventions of these provisions did occur,[38] as did prosecutions of war protesters.[39] The famous case of *Abrams* v. *United States* concerned prosecution of anarchist pamphleteers under that Act, most of whom were sentenced to 20 years' jail for opposing American intervention in Russia. The

35 The following paragraphs are based on Kairys (1990a) 237ff.
36 Eberle (2002) 190.
37 Kairys (1990a) 237 at 249, quoting the *Final Report of the U.S. Commission on Industrial Relations* (1915).
38 Blasi (2002) at 8, citing Chafee Jr (1920) 751-52, n 5.
39 Blasi (2002) at 11, citing *Abrams* v. *United States* 250 US 616 (1919) at 619.

pamphlets were interpreted as opposing war with Germany, which was regarded as sedition, and the First Amendment was held not to apply in cases of sedition.[40] Speech against American participation in the First World War, or against conscription, led to jail, including a ten-year sentence for Eugene Debs for his condemnation of that war as a contest between competing capitalist classes. The War was followed by new sedition, criminal anarchy and syndicalism laws and the New York legislature expelled five socialists.

Until 1925 the United States Supreme Court regarded the First Amendment as inapplicable to State statutes, limiting only the Federal Congress.[41] The 1931 case of *Stromberg* v. *California*[42] was one of the first Supreme Court decisions striking down a state regulation of speech. The leading free speech decisions spanned only the years from 1936 to 1940, and were followed by formal and informal limitations on political speech in relation to the Second World War, and through the McCarthyism of the 1950s.

Popular notions of free speech mask a lack of real political participation and of real freedom of political speech in the United States, argues Kairys. The ideology of free speech says that Americans are free and their society is democratic because they can vote and they have free speech. But the rhetoric masks social and political powerlessness.[43]

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40 Chafee Jr (1920) and Blasi (2002) at 10, 11.

41 See Michael Kent Curtis, *Free Speech, "The People's Darling Privilege"*, Duke University Press, Durham and London, 2000, G.E. White, "The First Amendment Comes of Age: The Emergence of Free Speech in Twentieth Century America", (1996) 95 *Michigan Law Review* 299, David Rabban, *Free Speech in its Forgotten Years, 1870-1920*, Cambridge University Press, Cambridge, 1997. The case of *Fiske* v. *Kansas* (1927) 274 US 380 relied upon dicta in *Gitlow* v. *New York* (1925) 268 US 652 to maintain that the due process clause of the Fourteenth Amendment protected the First Amendment rights from infringement by state law: Kathe Boehringer, "Freedom of Speech: Jurisprudence" in Philip Bell and Roger Bell (eds), *Americanization and Australia*, University of NSW Press, Sydney, 1998, 123 at 147, footnote 11.

42 283 U.S. 359 (1931): see Robert Post, "Reconciling Theory and Doctrine in First Amendment Jurisprudence" (2000) 88 *Calif. L. Rev*. 2353.

43 Kairys (1990) 264-5. See Higginbotham Jr, (1996) Chapter 13 at 169ff for a historical account of the restrictions on voting, and democratic participation generally, for Afro-Americans. Similarly Paul F. Boller Jr, *Freedom and Fate in American Thought - From Edwards to Dewey*, SMU Press, Dallas, 1978, 132 quotes Frederick Douglass: "Nowhere in the world are the worth and

Today United States legislation often regulates speech in order to protect property interests in copyright, patents, trade marks, trade practices and trade secrets. There are also more specific State regulations as demonstrated by the 'food disparagement' laws in Texas and other States that protect primary producers by putting the onus on the speaker to justify claims that food is unsafe.[44] Censorship of information and books in schools is currently accepted (and apparently regarded as Constitutional) in many States in the United States, at a level that in Australia we find incredible.[45] The American Civil Liberties Union does not appear unduly concerned about such censorship. Non-US citizens who express political dissent are also treated harshly.[46] There is anecdotal evidence that United States residents who spoke against US involvement in the war with Iraq have been vilified, and a teacher fired for wearing a T shirt with a peace sign on it.[47] Radio hosts have called for the murder of peace activists. "Every day," says Robbins, "the air waves are filled with warnings, veiled and unveiled threats, spewed invective and hatred directed at any voice of dissent."[48] The United States *Federal Patriot Act* allows the federal government to wiretap phones, monitor emails and website visits, and interrogate libraries about your borrowing habits without needing to prove criminal involvement. Americans have a very weak right to free speech, says Ninio, if the government has "a right to sift through out underwear every time we speak out?"[49]

The jurisprudence of 'free speech' is voluminous and of 'pathological complexity,'[50] "a vast Sargasso Sea of drifting and entangled values, theories, rules, exceptions,

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dignity of manhood more exalted in speech and press than they are here, and nowhere is manhood pure and simple more despised than here."

44 Pressley (1998) 14 and see Lyman (1998) 14 ff.

45 The 2000 list of banned books in Texas schools includes the Harry Potter books and books by Maya Angelou, and Mark Twain's *Huckleberry Finn*.

46 personal discussions with Pearl Cole concerning her daughter's imprisonment in the United States in the mid 1990s for participation in Catholic dissent groups.

47 See speech by Tim Robbins to the National Press Club in Washington DC, April 15, 2003, reproduced at http://www.smh.com.au/articles/2003/04/17/1050172700684.html.

48 Robbins (2003).

49 Julien Ninio, extract from unpublished manuscript, *The IHO Syndrome* at Sydney Morning Herald Webdiary, http://www.smh.com.au/articles/2003/12/15/1071336859827.html. See generally Nancy Snow, *Information War: American Propaganda, Free Speech and Opinion Control since 9/11*, Seven Stories Press, New York, 2003.

50 R. George Wright, *The Future of Free Speech Law*, Quorum Books, New York, 1990, 219.

predilections."[51] With some exceptions, the jurisprudence has resulted in "one of the world's most hostile environments" for regulation of expression.[52]

Popular notions of free speech are derived from First Amendment jurisprudence, but reflect a simplistic or 'romantic'[53] view of the issues involved. Both popular notions and formal jurisprudence treat free speech as a symbolic and ideal value intrinsically connected with democracy, as well as a personal right. Both give primacy to a theoretical freedom identified by reference to a lack of certain kinds of government regulation, and to the values of freedom, democracy, individualism, identity, truth and tolerance. Both tend to ignore or minimise the harms that can be caused by speech and expressive behaviour. Barendt identifies a number of political assumptions underpinning First Amendment jurisprudence, basically summed up as 'distrust of government,'[54] which also seem to underlie popular notions of free speech.

In the following Chapters, the purported links between the various values common to popular and First Amendment concepts of free speech are examined in more detail. It is argued that the values of freedom, democracy, individualism, identity, truth and tolerance are more likely to be achieved through hate speech regulation than through the dominant theories of First Amendment jurisprudence. However before the interrelationship between the dominant values can be considered, it is necessary to consider some of the principal characteristics of First Amendment jurisprudence.

Characteristics of First Amendment Jurisprudence

Nagel describes First Amendment jurisprudence as having been involved, over the past 70 years, in an increasingly complex and not particularly useful attempt to construct

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51 Robert C. Post, *Constitutional Domains: Democracy, Community, Management*, Harvard University Press, Cambridge, Massachusetts and London, England, 1995, 297 and 298.

52 Luke McNamara, "Racial Vilification and Free Speech: The Limitations of 'Constitutional Minimalism,'" (1999) 4 (2) *Media & Arts Law Review*, 133 at 133.

53 Barron (1967) 1641, 1678.

54 (1994a) 62-65, discussed in Chapter 7.

'watertight' categories of different kinds of speech (which are then said to be protected or not protected under the First Amendment), notwithstanding the obviously 'crude' and 'abstract' nature of this process.[55]

The general practice of the Supreme Court has been to protect insulting, outrageous[56] and offensive[57] public speech that is not motivated by 'actual malice'[58] and "to extend constitutional protection to individual rights even when the exercise of such rights 'distorts' public discussion by perpetuating imbalances of social and economic power."[59] Under such theories, only commercial speech can be suppressed for being misleading or for invading privacy.[60] The only publications that are limited are hard-core pictorial pornography.[61] The only broadcasting restriction is on cigarette advertising.[62] The only 'public discourse' that can be regulated is a 'true threat'[63] or direct harm at the level of 'fighting words' – and then more because the words could theoretically lead to a violent reaction by the victim or third parties, and hence to a breach of the peace, than because of the hurt to the victim. To the extent to which racism is agreed to be harmful, the solution is said to be through education rather than legislation.[64]

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55 Robert F. Nagel, "How useful is Judicial Review in Free Speech Cases?" (1984) 69 *Cornell LR* 303. Nagel argues that the necessary level and quality of public debate cannot be produced by piecemeal decisions occurring sporadically within an adversarial system. See also Kathe Boehringer (1998) 131-132 and Robin West, "The Supreme Court, 1989 Term – Foreword: Taking Freedom Seriously" (1990) 104 *Harv L Rev* 43, 102.

56 See *Hustler Magazine, Inc* v. *Falwell*, 485 U.S. 46,53 (1988).

57 See *Cohen* v. *California* 403 U.S. 15, 22 (1971).

58 this being *the New York Times Co.* v. *Sullivan* test (376 U.S. 254 (1964)) which has gradually been extended from public officials to public figures: Kommers (1980) 671-2.

59 Post (2000) 2370, citing Owen Fiss, *Liberalism Divided: Freedom of Speech and the Many Uses of State Power* Westview Press, Boulder, Colo., 1996.

60 Post (2000) 2371-2, citing *Central Hudson Gas and Elec*. v. *Pub Serv. Comm'n* 447 U.S. 557, 563 (1980) and *Florida Bar* v. *Went For It, Inc.*, 515 US. 618, 624 (1995).

61 Barendt (1995) 217, citing *Roth* v. *United States* 354 US 476 (1957) and *Miller* v. *California* 413 US 15 (1973).

62 Barendt (1995) 231.

63 which has finally been held by a majority of the Supreme Court to be capable of including cross burning: *Virginia* v. *Black* (2003) 538 U.S. 343, 155 L Ed 2d 535; (2003) 123 S Ct 1536; (2003) 71 USLW 4263.

64 Eberle (2002) 196.

Refusal to consider the Content of Speech

Blindness to content is the social logic of a society that deals in exchange values: how much?[65]

In terms of constitutional interpretation, says Barendt, 'speech' is really a term of art, and courts should consider the type of communication in issue to determine whether the 'speech' referred to should be covered by a 'free speech' principle and, if so, whether this requires protection from regulation in the particular context.[66] Considering the type of communication involves not just a speech/action dichotomy, but consideration of the content of the communication.

Fish explains this point in more detail, starting from the assertion that "there's no such thing as free speech." Whatever 'free speech' is, he explains, it cannot be a personal right to absolute freedom of expression irrespective of intent or consequences, although this is the logical result of popular notions of free speech. The concept of 'free speech' is a nonsense unless one considers its content and context; it only makes sense to the extent that speech can be distinguished from other areas of human conduct and activity and to the extent that the 'speech' involves some particular value. Speech is produced with the goal of trying to move the world in one direction rather than another,[67] and so is dependent upon context. There is nothing that can be identified in all contexts and for all time as 'free speech'. Nor can we determine the content and form of the right to free speech through any model of human rights.[68] Abstract concepts like 'free speech' do not have any natural content. Their limits must be determined by reference to other

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65 Russell Jacoby, *Social Amnesia*, Beacon Press, Boston, 1975, 106.

66 Barendt (1985) 38; see too F. Schauer, *Free Speech: A philosophical Enquiry*, Cambridge, 1982, 50-52.

67 Fish (1994) 106 to 107.

68 As Campbell notes, while there may be general community agreement about the existence of particular human rights such as free speech, the intuitive model of human rights is insufficient, on its own, to determine the content and form of those rights. There is no agreed methodology for the articulation of even the least controversial rights; choices have to be made: Campbell (1994a) 200 to 201.

values, or to put it another way, by the agendas we wish to advance.[69] Thus any understanding of free speech will be political, for in order to answer the question 'What is free speech for?' one must consider situations in which speech with certain undesirable effects should not be tolerated.[70] This involves having some vision of the way one wants the world to be in the future, and that vision will inevitably be opposed by those who would prefer other consequences. The line to be drawn between protected speech and speech that may be regulated will always reflect a political decision, even though the line will always be presented as if the political considerations were all on one side, and the considerations of principle on the other.[71]

The United States Supreme Court refuses to consider the content of the speech in question. This is presented as the only neutral or ethical attitude that can be taken.[72] Coupled with this position are notions that it is principled to protect the rights of other people to say things that you disagree with, and that there is no such thing as a 'false' idea. Ironically, it seems that the more harmful the expression, the greater the justification for protecting it. Eberle, like many others, argues that protection of the symbolic idea of free speech is more important than the reality of harm:

> Even though the reality may differ from the ideal, the ideal is nonetheless important. The ideal transcends reality, living on in the hearts and minds of Americans. The ideas and ideals we believe in are an important aspect of individual and national identity. America is deeply committed to the principle that government must be neutral with respect to the content of expression,

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69 Fish (1994) 14, 15, 104, 106 to 108. See also Barendt (1985) Chapter III, and Gaudreault-DesBiens (2001) at 1125ff.

70 Fish (1994) 107.

71 Fish (1994) 14 and 15. Similarly Deborah L. Rhode notes that both expression and its constrains cannot be assessed by categorical absolute but only by reference to cultural values which necessarily involves analysis of the importance of the speech, the result of its regulation, and the means chosen: *Justice and Gender: Sex Discrimination and the Law*, Harvard University Press, Cambridge, Massachusetts, 1989, 271.

72 Eberle (2002) 234.

> notwithstanding the horrible truths of hatred, offense, or outrage that may be communicated.[73]

It is not correct to describe this position as 'neutral'. In MacKinnon's words, this position "equates substantive powerlessness and substantive power, and calls treating these the same, 'equality.'"[74] Critical Race scholars agree that neutrality and objectivity are fictions of American law that "obscure the normative supremacy of whiteness in American law and society" including in the context of speech.[75]

The idea of protecting what you don't agree with which underpins modern First Amendment jurisprudence so strongly is an understandable reaction, notes MacKinnon, against the witch-hunting of 'communists' in the McCarthy era and the American history of regular repression of political speech.

> The evil to be avoided is government restricting ideas because it disagrees with the content of their political point of view. The terrain of struggle is the mind; the dynamic at work is intellectual persuasion; the risk is that marginal, powerless, and relatively voiceless dissenters, with ideas we will never hear, will be crushed by governmental power. This has become the "speech you hate" test: the more you disagree with content, the more important it becomes to protect it. You can tell you are being principled by the degree to which you abhor what you allow.[76] ... For constitutional purposes, there is no such thing as a false idea, there are only more or less 'offensive' ones, to remedy which, love of liberty recommends averting the eyes or growing a thicker skin.[77]

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73 Eberle (2002) 196.

74 Catharine A. MacKinnon, *Feminism Unmodified: discourses on life and law*, Harvard University Press, Cambridge, Massachusetts, 1987, 165.

75 Introduction to Valdes et al (2002) 1.

76 MacKinnon (1993) 75, referring to the comment of Holmes that "if there is any principle of the Constitution that more imperatively calls for attachment than any other it is the principle of free thought – not free thought for those who agree with us but freedom for the thought that we hate": *United States* v. *Schwimmer*, 279 U.S. 644, 654-55 (1929).

77 MacKinnon (1993) 76.

Any issue that strikes this chord, says MacKinnon, gets played this tune, even if the consequences are more like a replay of McCarthyism than resistance to it.[78] Judges demonstrate how principled they are by "defending abstractions at the cost of principle,"[79] categorising obviously hurtful behaviour as 'ideas' and therefore allowing that behaviour as protected speech: pornography, cross-burning in front of the home of a black family,[80] outrageous attacks on public figures,[81] and neo-Nazi marches which terrorise elderly Jewish Holocaust survivors.[82]

MacKinnon calls this the 'new insult': that the very harmfulness of a particular expression is taken by some courts to prove the potency of the ideas it expresses, and therefore justify its protection as speech.[83] She asks: on the logic that behaviour which expresses an idea is really speech, is bigoted incitement to murder closer to protected speech than other incitement to murder?[84]

Sadurski points out that there are of course limits to "taking pride in defending what one opposes,"[85] and not much logic in where those limits are drawn. One suspects, as Fish suggests, that the limits correspond closely to the *status quo*.[86]

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78 MacKinnon (1993) 77. As Fish (1994) says (301), where particular words are understood in the same way by all members of a community, it is not because of the property of the words, but because there is a "set of uniform assumptions that so fill the minds and consciousness of members that they will, upon receiving a certain set of words, immediately hear them in a certain way."

79 MacKinnon (1993) 41.

80 MacKinnon (1993) 33, citing *RAV* v. *St Paul* 505 US 377 (1992).

81 Fish (1994) discussing the *Hustler Magazine, Inc* v. *Falwell* case.

82 Fish (1994) 125.

83 MacKinnon (1993) 38. In 2001 a Web site and 'wanted' posters identifying abortion providers were protected as free speech by the 9th US Circuit Court of Appeals in San Francisco, overturning an Orgegon jury verdict that found the Web site and posters to be a real threat to the doctors and clinics where they worked: Jenry Weinstein, "Judges back Web blitz on abortionists", *Los Angeles Times*, reported in *Sydney Morning Herald*, 30 March 2001. The court's decision said that the Web site did not "authorise, ratify, or directly threaten" violence.

84 MacKinnon (1993) 34.

85 and/or in ignoring its content. On this point, see Stanley Fish interview with Peter Lowe and Annemarie Jonson (1998) 9 *Australian Humanities Review* (online), originally published in *UTS Review*, reproduced at http://www.lib.latrobe.edu.au/AHR/archive/Issue – February 1998/fish.html.

86 In that, as Sadurski notes, such theories defend rights for rights' sake, rather than for the values which they promote, and denigrate social dissent: (1992) 193, citing West (1990) 192.

Just as with content, the context and consequences of harmful speech such as hate speech are not considered by 'free speech' proponents except at the outer limits of public safety or public acceptability ('true threat', 'clear and imminent danger', 'incitement to violence' and defamation)[87] on the basis that this is the only way to ensure that judges and legislators are not affected by their personal (political) opinions in determining which speech should be protected.[88]

Consequences are not considered, says Fish, because the consequences have been discounted in relation to a good that is judged to outweigh them. As Fish notes, United States courts are not in the business of protecting speech *per se*, but in the business of classifying speech as protected or not, according to values such as the protection of the economy, or the desirability of social change, which are the true, if unacknowledged, objects of their protection.[89] Hate speech is not seen as being at the outer limits of public safety or acceptability even though, considering the seriousness of racist harms in contemporary society, there would seem to be stronger grounds for a hate speech exception to the First Amendment than for a 'fighting words' or defamation exception.[90]

The 'neutrality' principle of refusing to consider the content or consequences of speech, coupled with the doctrine of formal equality, leads to the rule of 'race blindness' which forbids the consideration of race or racism in constitutional analysis. It must be proved that there was an intention to discriminate before legislation or activities can be regarded as unconstitutional under the Fourteenth Amendment – a requirement which is obviously very difficult to meet.[91] This doctrine has the unfortunate effect of enabling the Supreme Court to strike down affirmative action legislation which refers to race and

87 Fish (1994) 118.

88 Barendt notes that refusal to consider content (or consequences) is linked to the notion that to do so would distort the free exchange of information or ideas – which is apparently an exchange driven by the existence of information rather than its value: see "The First Amendment and the Media" in Loveland (1998) 29 at 48.

89 Fish (1994) 106.

90 Mann (1995) 258.

91 Aylward (1999) 30 to 33.

at the same time to uphold state action that has a clearly racist intent or effect, so long as the action is couched in race-free language.

The refusal to countenance content-based restrictions on speech also means that under present interpretations of the First Amendment it is not possible to have content-based programming standards.[92]

In the United States, free speech proponents who oppose regulation of hate speech set the terms of the debate by claiming that no restriction on free speech can constitutionally be made without a justifying principle which is not content-based. This principle, they say, must delimit all restrictions in every context in terms of both 'coverage' and degree of 'protection' so as to avoid any 'slippery slope' of increased regulation or inappropriate judicial decisions. Whether or not this claim is correct in relation to the interpretation of the United States Constitution (which is queried by 'dissenting' scholars such as Barendt who argue for a consideration of the aims of particular legislation),[93] it is a highly arguable method of interpretation of the Australian Constitution which was introduced in an entirely different historical context and which contains no express prohibitions against limiting freedom of speech.

Feldman points out that First Amendment jurisprudence is incoherent and unsophisticated in its confusion of at least four different senses of 'content.' 'Content' is, and can be, variously used to mean: the subject matter of the legislation, the narrative involved, the viewpoint expressed, or the form of the message.[94] He contrasts the American doctrines with the more contextual and less rigid interpretation of Article 10 of the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, discussed below, where assessment of content may depend upon the narrative or upon the viewpoint expressed (such as the encouragement of racism).[95]

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92 Barendt (1998) 29.
93 Barendt (1998) 49. See also Hutchinson (1995) 191.
94 Feldman (1998) 140.
95 Feldman (1998) 157-8.

Public/Private and private/state distinctions

Further principles which influence United States free speech jurisprudence are the private action/state action distinction and the public/private doctrine established by the Supreme Court.

The private action/state action distinction is based on an interpretation of the Fourteenth Amendment that refers to government practices. It permits government behaviour, but not private behaviour, to be held unconstitutional.[96] However a consequence, as the High Court in *Lange* explained, is the rule that in the United States, a State government may not enforce a State law which infringes the Fourteenth Amendment, even in relation to a civil suit in which the government is not a party:

> The First Amendment … may not be abridged by the making or 'the enforcement' by any State of "any law." That is the effect of the interpretation placed on the Fourteenth Amendment. A civil lawsuit between private parties brought in a State court may involve the State court in the enforcement of a State rule of law which infringes the Fourteenth Amendment. If so, it is no answer that the law in question is the common law of the State, such as its defamation law. The interaction in such cases between the United States Constitution and the State common laws has been said to produce 'a constitutional privilege' against the enforcement of State common law.[97]

The Supreme Court's public/private test upholds free expression only in places and contexts the Court decides are 'public forums'. This has had the anomalous result that the Court is reluctant to uphold legislation promoting speech.[98] The Supreme Court has disallowed leafleting in shopping centres, upheld a blanket prohibition against posting

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96 Strossen (1994) 216-9.

97 *Lange* v. *ABC* (1997) 145 ALR 96, 109; (1997) 145 ALR 96; (1997) 71 ALJR 818.

98 This point was forcefully made as early as 1967: see generally Barron (1967) and Eric Barendt, "Importing United States Free Speech Jurisprudence?" in Tom Campbell and Wojciech Sadurski, *Freedom of Communication*, Dartmouth, Aldershot, 1994, 57, 61.

signs on city-owned buildings and property; approved limits on expression at Boston Common,[99] State fairgrounds and near foreign embassies, and approved censorship of school newspapers[100] as well as disallowing letter box drops,[101] which in Australia is a major mode of political communication, especially at election time. It has struck down local statutes giving limited rights of reply to political candidates and persons mentioned in the press.[102] Given that 94 percent of American adults visit a shopping mall in a typical month, and that the mall is one of the few remaining public meeting-places, limiting political speech in privately-owned malls can have a substantial effect on political speech rights.[103]

The Supreme Court has granted full First Amendment protection to the Internet,[104] but not to radio and television, although private operators like Internet service providers may impose their own terms of service upon consumers.

The Speech/Act or Mind/Body Distinction

While the general rule of the First Amendment jurisprudence is that the content, context or consequences of speech must not be taken into account, the United States Supreme Court has invoked a succession of distinctions in order to categorise various expressive behaviours as speech (which cannot be restricted) or non-speech (which can) for the

99 a decision of Justice Wendell Holmes, that the City of Boston could deny a person the right to speak in the common, like a private landlord: *Commonwealth* v. *Davis*, 39N.E. 113 (Mass.1895) aff'd sub.nom. *Davis* v. *Massachusetts*, 167 U.S. 43 (1897) cited by Blasi (2002) fn 42.

100 *Miami Herald Publishing Co* v. *Tornillo* 418 U.S. 241 (1974) – on the basis that government-enforced right of access would "dampen the vigor and limit the variety of public debate" (quoting *New York Times Co*. v. *Sullivan*, 376 U.S. 254, 279 (1964): Kommers (1980) 672. See also Kairys (1990a) 262, noting that courts have however protected expressive activities highly valued by conservatives, such as religious meetings in schools: fn 80, 271.

101 *US Postal Service* v. *Council of Greenburg Civic Association* 453 US 114 (1981).

102 Kairys (1990a) 263- 4 ; *Buckley* v. *Valeo* 424 US 1 (1976) and *Miami Herald* v. *Tornillo* 418 US 241 (1974).

103 Christopher J Sichok, "The Free Market: An Erosion of Free Speech", (2000) 7 *Murdoch University Electronic Journal of Law* at http://murdoch.edu.au/elaw/issues/v7n3/sichok73.txt at par 28ff citing Mark C. Alexander, "Attention Shoppers: The First Amendment in the Modern Shopping Mall," (1999) 41 *Ariz.L. Rev*. 1. See also Hutchinson (1995) 192ff.

purposes of the First Amendment. These categories have been disputed as being formalistic. Rhode argues that 'rigid speech-nonspeech categories distort what they pretend only to describe'.[105]

The Court has indirectly considered consequences in holding some forms of expression such as libel or 'fighting words'[106] to be so dangerous that they are seen as valid exceptions to the rule that speech must not be limited.[107] It has also held child pornography to be 'worthless' speech which should not be protected.[108] However the general rule is that even the most harmful speech must be protected unless it causes a 'clear and present danger'[109] or 'true threat'.

In mainstream First Amendment jurisprudence the content and consequences – and therefore the harms – of racist speech are generally ignored. Only speech which is likely to produce "a clear and present danger of a serious substantive evil," as expressed by the United States Supreme Court in 1952 in *Beauharnais* v. *Illinois*,[110] or which is perceived as a 'true threat' (a narrow category only widened in 2003 in *Virginia* v. *Black*[111] to include cross burning) is seen as having harmful effects which remove First Amendment protection. Racist speech, even involving intimidation, hate propaganda,

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104 *Reno, Attorney General of the United States* v. *American Civil Liberties Union*, U.S. S.C., 1997, No. 96-511 (Reno I) and *Ashcroft, Attorney-General of the United States* v. *Free Speech Coalition*, US S.C., 2002, No. 00-795 (Reno II).

105 Rhode (1989) 271.

106 Fish points out that the trouble with the 'fighting words' exception is that it distinguishes not between fighting words and words that remain merely expressive, but between words that are provocative to one group, and words that might be provocative to other groups: (1994) 106.

107 Gates Jr (1994) 21.

108 The Supreme Court has however called child pornography "pure speech": MacKinnon (1993) 35 citing *Brockett v Spokane Arcades, Inc* 472 U.S. 491, 503 n. 12 (1985).

109 This principle was expressed by Oliver Wendell Holmes in *Schenck* v. *United States* 249 U.S. 204 (1919), and a number of other cases, and is discussed by Blasi (2002) 19 ff. Blasi argues that Holmes' view was the result of his theory that there should be legal liability only for "specific, proximate, material harm." See also G Edward White, "Justice Holmes and the Modernization of Free Speech Jurisprudence: The Human Dimension" (1992) 80 *Calif. L. Rev.* 391.

110 343 US (1952), rehearing denied 343 US 988.

111 *Virginia* v. *Black* (2003) 538 U.S. 343, 155 L Ed 2d 535; (2003) 123 S Ct 1536; (2003) 71 USLW 4263.

and calls to violence, is usually not seen as meeting the criteria of seriousness, directness and immediacy required by the 'clear and present danger' test.

Other ways of seeing racial vilification and free speech

Alternative views in United States discourse

American free speech thinking is not uniform and there has always been a dissenting tradition in the United States. That tradition has supported an alternative interpretation of the First Amendment, informed by comparative law and the analysis of 'dominant orthodoxies'.[112] As early as 1942 Riesman called for a tort of Group Defamation or 'group libel.'[113] During the second world war several American State legislatures enacted group libel statutes which were upheld as late as 1978, although not thereafter.[114] Other types of free speech regulation have also been supported by the dissenting tradition, including the right of reply and to have programming standards.

The writings of Critical Race scholars form an important strand of the dissenting tradition.[115] Their writings are particularly relevant to Australia because Critical Race scholars step outside the bounds of traditional First Amendment jurisprudence, unlike the advocates of limited free speech rights. The Critical Race Theory movement grew out of the American-based Critical Legal Studies (CLS) movement.[116] Jones notes that "scholarship concerning the intersection of law and race with a focus on the racially subordinating and marginalizing function or power of law has existed as long as the Howard Law Journal, Texas Southern University Law Review (Thurgood Marshall Law Review) and the North Carolina Central Law Review have been published," all being

112 See Barendt (1998) 31ff discussing Baker, Fiss and Sunstein.

113 Riesman (1942a) and (1942b).

114 Melvin Urofsky, "The Law of Hate Speech" (1996) 15 (1) *Communications Law Bulletin* 13, 14.

115 See the collections of critical race theory articles in Matsuda et al (1993), Lederer and Delgado (1995) and Valdes et al (2002).

116 See Kimberlé Crenshaw, "The First Decade" in Valdes et al (2002) 9 at 15ff, Davies (1994) 143-4.

scholarly journals of historically African-American law schools.[117] Following the Legal Realism movement, CLS scholars queried the liberal tenets of the rule of law, formalism, neutrality, abstraction and individual rights, arguing that their result was not neutral but used to maintain the *status quo* to the detriment of marginalised groups (that is, as Margaret Davies says, that formal equality was used to mask real inequality[118]); that it is impossible to distinguish legal reasoning from ethical or political discourse;[119] and that legal theory must take social context and group interests into account.[120]

The Critical Race Theory movement can be said to have formally commenced at the Tenth National Critical Legal Studies Conference held in 1986 in Los Angeles. Scholars of colour felt that the CLS movement did not sufficiently deal with the social effects of racism nor the possibility of using law to redress the situation[121] – what Matsuda calls "the dissonance of combining deep criticism of law with an aspirational vision of law."[122] The CLS call to abandon rights discourse was seen by Critical Race theorists as counterproductive to the fight against racism. Critical Race theorists did not necessarily disagree with the CLS position that the liberal emphasis on the formal legal rights of individuals is illusory, in that only individuals with effective economic or social power can enforce those rights.[123] "We know," says Delgado, "from frequent and

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117 Jones (1998) 254-5. See also Thomas David Jones, "Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination and the First Amendment" (1980) 23 *Howard L J* 429.

118 Davies (1994) 161.

119 See generally Kennedy (1990).

120 See generally Davies (1994) Chapter 5.

121 The origins of the 'movement' lay in the informal course arranged when Harvard Law School refused to replace Derrick Bell's course on "Constitutional Law and Minority Issues" when he left Harvard in 1981: Crenshaw (2002) 9ff. Six papers on racism and the law were presented at a 'minority caucus' by Delgado, Matsuda, Denise Carty-Bennia, Harlon Dalton, Gerald Torres and Patricia Williams, with Cornel West, bell hooks and Rodolfo Acuña as plenary speakers. See Introduction to Matsuda et al (1993) 4ffs, Kimberlé Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas (eds) *Critical Race Theory: The Key Writings That Formed the Movement*, New Press, New York, 1995. The First Critical Race Theory Workshop followed in 1989. Crenshaw mentions (21) that subsequent workshops 'traditionally' exclude whites – which of course raises questions of racial definition.

122 Aylward (1999) 17 and 25 ff.

123 See generally Davies (1994) 153 ff.

sad experience, that the mere announcement of a legal right means little. We live in the gap between law on the books and law in action."[124]

Critical Race Theory has concentrated on expanding rights analysis in the context of group and community interests. Critical Race theorists argue that law can and should be used to combat racism, and that rights involve not just the right to be free from government interference, but the right to be free from racist behaviour or vilification by others. Rights theory can be a focus for Black struggle against white oppression and a crucial tool for negotiation.[125] Critical Race Theory goes beyond anti-discrimination law to the extent that the latter involves only formal equality.

The CRT movement subsequently expanded to include Canadian theorists such as Carol Aylward. The growing bodies of Critical Aboriginal Theory, Critical Race Feminism and Critical White Studies[126] are closely related to CRT as 'Outsider scholarship'.[127] Aylward describes the dominant themes of Critical Race Theory thus:

1. the need to move beyond existing rights analysis;
2. an acknowledgement and analysis of the centrality of racism, not just the White supremacy form of racism but also the systemic and subtle forms that have the effect of subordinating people of colour,
3. a total rejection of the 'colour-blind' approach to law, which ignores the fact that Blacks and Whites have not been and are not similarly situated with regard to legal doctrines, rules, principles and practices,
4. a contextual analysis which positions the experiences of oppressed peoples at its centre,

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124 Richard Delgado, "The Ethereal Scholar: Does Critical Legal Studies Have What Minorities Want?" (1987) 22 *Harvard Civil Rights – Civil Liberties Law Review* 301, 304.

125 Davies (1994) 161.

126 For the papers of the first Australian conference on whiteness in 1998, see Belinda McKay (ed), *Unmasking Whiteness: Race Relations and Reconciliation*, Queensland Studies Centre, Griffith University, Nathan, 1999.

127 Aylward (1999) 30, quoting Mari J. Matsuda, *Where is your body? And other essays on race, gender, and the law*, Beacon Press, Boston, 1996, 22 and 32.

5. a deconstruction which asks the question, How does this legal doctrine, rule, principle, policy or practice subordinate the interests of Black people and other people of colour? and, ultimately
6. a reconstruction which understands the 'duality' of law, recognizing both its contribution to the subordination of Blacks and other people of colour and its transformative power.[128]

Feminist theorists in the area of speech focus generally on its intersection with pornography.

The discourse about free speech in America is enormously complex. A growing number of scholars disagree with the assumptions inherent in the marketplace of ideas metaphor, as discussed in detail in the next Chapter, but comment generally, rather than in the context of hate speech. White describes as 'retrenchment literature' the growing body of American writings which opposes the general increase in 'free speech' protection, not just in the context of hate speech, and which argue that

> some forms of expression are incompatible with the aspirations of contemporary Americans for civic-minded, decent, compassionate and responsible society.[129]

Relevant also, but outside the scope of this thesis, is the work of constitutional scholars such as Robin West in relation to issue of competing rights based on the Fourteenth Amendment, which are largely ignored by the Supreme Court.[130] In Canada, the United Kingdom and Australia, a growing number of scholars argue against the uncritical

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128 Aylward (1999) 34.

129 White (1996) 368. See also Nagel (1984).

130 Section 1 of the Fourteenth Amendment reads as follows: "All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws." See: Robin West, "Progressive and Conservative

application of First Amendment law to those jurisdictions, and analyse the popular notions of free speech.

Balancing rights in civil jurisdictions

European jurisdictions, apart from the United Kingdom and the Republic of Ireland, are essentially civil law jurisdictions possessing written constitutions that almost always include human rights guarantees including the 'negative' rights of freedom from racial discrimination, racist intimidation and racist speech and writings. Matters of constitutional importance, including the protection of human rights, are seen as problems that can and should be solved by the courts.[131] Germany, for example, has a Constitutional Court to deal not only apparent violations of Constitutional rights, but also to give theoretical opinions as to the interpretation of the Constitution in particular contexts, outside the framework of ordinary litigation with adverse parties.[132] There is also a tradition of social philosophy in Europe that generally establishes human rights issues as of public/judicial concern, as opposed to the situation in the United States where (despite the Constitution and Bill of Rights) there is a tendency for human rights issues to be seen as essentially private issues that are not the responsibility of governments or judiciaries.

Human rights are not described in European legislation as formal absolutes. In civil law countries, human rights jurisprudence is consciously contextual and it is recognised that constitutional freedoms must be freedoms restrained by certain political values, community norms, and ethical principles – including the principle of equality. In Europe's civil law jurisdictions, and in the European Court of Human Rights, the concept of balancing such rights as free speech and freedom from racist speech is generally accepted. The 'right to free speech' is therefore a qualified one, as opposed to the traditional common law system, with its formal, positivistic view of law, where it is

Constitutionalism" (1990) 88 *Mich L Rev* 641. Contra, see Suzanna Sherry, "Progressive Regression" in (1995) 47 *Stanford Law Review* 1097.

131 Kinley (1995) 95-6.

said that one proceeds "upon an assumption of freedom of speech" and turns to the law "to discover the established exceptions to it."[133] While the state is seen as playing a major role in supporting such rights through positive action, the rights are most likely to be described as deriving their content from their context and in the light of other rights and public interests.

Thus the guarantee of free speech contained in the 1949 German Constitution or 'Basic Law' (Grundgesetz), while strongly expressed, is immediately followed by a requirement to balance that guarantee against other Constitutional rights, such as the right to human dignity and personhood contained in Article 1 of the Basic Law, which is the fundamental right,[134] and the general laws. As Eberle says, "we might say free speech is to [Americans] what human dignity is to Germans."[135] Article 5 of the Basic Law provides that:

> (1) Everybody has the right freely to express and disseminate their opinions orally, in writing, or visually and to obtain information from generally accessible sources without hindrance. Freedom of the press and freedom of reporting through audio-visual media shall be guaranteed. There shall be no censorship.
>
> (2) These rights are subject to limitations embodied in the provisions of general laws, and in legislative provisions aimed at the protection of young persons, and the right to personal honour.[136]
>
> (3) Art and scholarship, research and teaching shall be unrestricted. Freedom of teaching shall not absolve anybody from loyalty to the Constitution.[137]

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132 For more detail as to the structure of the constitutional tribunals, see Kommers (1980) 659ff.

133 *Attorney-General* v. *Guardian Newspapers (No 2)* [1990] 1 AC 109 at 283. Similarly, see *R* v. *Shayler* [2002] UKHL 11 at par 22.

134 See Barendt (1995) 225.

135 Eberle (2002) 227.

136 Michalowski and Woods (1999) 199 (their translation).

Similarly the Article 2 right to "the free development of … personality" exists only insofar as a person "does not violate the rights of others or offend against the constitutional order or the moral law."[138] Thus in civil as in common law jurisdictions, human rights are not necessarily balanced only against other human rights. Property rights may be given greater weight than human rights – or vice versa.[139] The lower court in the *Lüth Case*[140] put the right of Veit Harlan, the producer of the antisemitic Nazi film *Jud Süss*, to earn money from his film ahead of the right of others to call for a boycott of the film. The Hamburg Court of Appeals agreed, but the Constitutional Court balanced the competing rights differently, taking into account the boycotters' aims of combatting antisemitism.[141]

The manner in which rights are balanced also differs in Germany and the United States. The German Constitutional Court will refer decisions back to lower courts to take greater account of a particular right in the balancing process, whereas the US Supreme Court will formulate general rules to be followed by the lower courts.[142]

The balancing approach to rights is also contemplated in the *International Covenant on Political and Civil Rights*, and in the Canadian *Charter of Rights*. Article 10 (1) of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Article 11 of the European Union Charter of Fundamental Rights protect free speech as a basic right, subject however to certain limitations. Article 10(2) of the Convention describes the limits as follows:

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137 Michalowski and Woods (1999) 227 (their translation).

138 Eberle (2002) 278.

139 See for example: Joan Ryan and Bernard Ominayak, "The Cultural Effects of Judicial Bias", in Martin and Mahoney (1987) 358 ff describing the genocidal consequences for Canadian Indians of widespread oil and gas exploration over their hunting and trapping lands, and the primacy given by the Alberta Court of Appeal to the explorers' economic interests.

140 BVerfGE 7, 198 (1958), see Michalowski and Woods (1999) 199ff.

141 Donald P. Kommers, *The Constitutional Jurisprudence of the Federal Republic of Germany*, Duke University Press, Durham and London, 1989, 368ff.

142 Barendt (1995) 226.

> The exercise of these freedoms, since it carries with it duties and responsibilities, may be subject to such formalities, conditions, restrictions or penalties as are prescribed by law and are **necessary in a democratic society**, in the interests of national security, territorial integrity or public safety, for the prevention of disorder or crime, … for the protection of the … rights of others, for preventing the disclosure of information received in confidence .... (my emphasis)

Similarly, Section 1 of the Canadian *Charter of Rights and Freedoms* provides that the *Charter* guarantees the rights and freedoms set out in it "subject only to such reasonable limits prescribed by law as can be demonstrably justified in a free and democratic society."

As Glass points out, while the Australian High Court has in the past sought to categorise the 'true nature' of the law in question, it has started to take the less formal approach of a balancing of interests.[143] However the words 'necessary in a democratic society' are interpreted strictly in common law jurisdictions.[144]

The balancing of rights is governed under the German Basic Law by the principle of proportionality, which consists of the requirements of suitability, necessity, and appropriateness.[145] Only such measures as are suitable to achieve the intended purpose may be used, or 'no completely unsuitable measures may be taken'. The concept of necessity involves the idea of 'least interference' so that if the State authority can accomplish the same aims through a less drastic measure, or without legislating or carrying out a particular action, that should be done. The concept of appropriateness is that the burden created by the legislation or action should not be disproportionate to the purpose intended by the measure. The intensity of the infringement, and the importance and urgency of the countervailing public interests are considered. The aim is that no

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143 Arthur Glass, "Freedom of Speech and the Constitution" (1995) 17 *Sydney Law Review* 29 at 32.

144 Barendt (1995) 151, referring to *Handyside* v *United Kingdom* (1976) 1 EHRR 737,754, para 48 and *The Sunday Times* v *United Kingdom* (1979) 2 EHRR 245, 277-278, para 62.

145 The following paragraph is drawn from Michalowski and Woods (1999) 83ff.

right should be totally limited, but "all rights will have to accept certain limitations so that, in the end, an optimisation of all rights can be achieved."[146] As Eberle puts it, the degree of the Court's scrutiny will depend on the severity of the incursion of the Constitutional right.[147] The suitability and necessity tests are fundamentally technical tests as to whether any less intrusive means are available. It is generally only at the level of the appropriateness test that the balancing approach and assessment of interests takes place, to see if a basic right was violated, and whether any constitutional justification for that violation applies.[148]

False statements and Abuse of Rights

It is interesting to note that in Germany, the truth or otherwise of the speech in question will be relevant. False statements are less likely to be protected than true statements.[149] It is recognised that false facts "can mislead or distort and thus hinder the quality of public discourse."[150] Generally, as discussed in Chapters 2 and 3, hate propaganda is false and irrational. It is therefore more likely to be seen in Germany as speech that is not worthy of protection.

A general refusal to protect false statements in the same way as true statements (setting aside for the moment the difficulties inherent in deciding whether some statements are true or false) is the logical consequence of the German concept of abuse of rights, analogous to the equitable doctrine that 'he who comes to equity must come with clean hands'. Basic Constitutional rights can be forfeited, including freedom of speech and

146 Michalowski and Woods (1999) 84.

147 Eberle (2002) 210, citing *Deutschland –Magazin* (1976) BVerfGE 42, 269.

148 Michalowski and Woods (1999) 85 -6.

149 Thus a civil court awarded compensation for the publication of a fictitious interview with Princess Soraya purportedly revealing intimate details: see Michalowski and Woods (1999) 115 citing BGH NJW 1965, 685; BVerfGE 34, 269 (1973). See also Eberle (2002) 102ff. In *Böll*, false quotations were held to breach the author's personality rights and personal honour: BVerfGE 54, 208 (1980). See Eberle (2002) at 208ff.

150 Eberle (2002) 201, citing *Schmid – Spiegel*, BVerfGE 12, 113 at 130 (1961). It is difficult to agree with Eberle's subsequent comment that the truth-falsity dichotomy has "general resonance in American law," given that *New York Times* v. *Sullivan* protected speech despite false statements of fact.

freedom of the press, where abuse has occurred.[151] A related principle is the concept of counterattack (*Gegenschlag*): that a harsh attack merits a reply in kind.[152]

The concept of 'abuse of rights' is only one aspect of the German principle of 'militant democracy' – that the democracy has the right to protect itself from attack by anti-democratic forces.[153] Thus the Basic Law allows for the limitation of Constitutional rights if the restriction aims to protect the constitutional order (Articles 9 (2)[154] of the Basic Law) or the free democratic basic order (Articles 18 and 21(2)[155] of the Basic Law). There is of course no such concept in US Constitutional law.[156]

I agree with commentators such as Sedley that a society that enshrines the right to publish falsehoods is hardly a civilised society.[157] While there are of course difficulties in determining the truth of particular statements, this is no reason to protect all statements, irrespective of their content.

How balancing works in the context of hate speech

Most European countries legislate against hate speech[158] and many also specifically penalise Holocaust denial. The European Commission has taken steps to criminalise racist conduct and speech in the same manner throughout the European Union, in

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151 Article 18 of the Basic Law: "Whoever abuses the freedom of expression, in particular the freedom of the press … the freedom of teaching…, the freedom of assembly…, the freedom of association…, the privacy of correspondence, posts and telecommunications…, the rights of property…, or the right of asylum… in order to combat the free democratic basic order shall forfeit these basic rights. This forfeiture and its extent shall be declared by the Federal Constitutional Court": Eberle (2002) 282.

152 Eberle (2002) 200, citing *Schmid – Spiegel*, BVerfGE 12, 113 (1961).

153 See Michalowski and Woods (1999) 18ff.

154 "Associations whose aims or activities contravene the criminal laws, or that are directed against the constitutional order or the concept of international understanding, shall be prohibited": Eberle (2002) 280.

155 Making unconstitutional "parties that, by reason of their aims or the behaviour of their adherents, seek to impair or to abolish the free democratic basic order or to endanger the existence of the Federal Republic of Germany": Eberle (2002) 283 and Michalowski and Woods (1999) 18.

156 Barendt (1995) 227.

157 Stephen Sedley, "The First Amendment: A Case for Import Controls?" in Loveland (1998) 23 at 24.

issuing a proposal in November 2001 for a Council framework decision on combating racism and xenophobia, relating to both legislation and judicial cooperation within the Union. It is proposed that legislation throughout the Union should cover public incitement to violence or hatred for racist or xenophobic purposes, public insults or threats which are racially motivated, and denial or trivialisation of crimes against humanity. Public dissemination or distribution of tracts, pictures or other material containing expressions of racism and xenophobia is also to be illegal.[159]

Occasional prosecutions of internet racism have occurred in various countries in Europe. In the *Yahoo!* case a French court ordered the internet service provider to block access from France to pro-Nazi sites.[160] Similar requests have been made[161] and requirements imposed in Germany.[162] French courts have ordered revisionist books seized, and booksellers fined, even though the books had been published before the *Gayssot Act* against Holocaust denial.[163] Under the European Convention, Dutch right-wing extremists were held to have lost their right to free speech in relation to hate literature, on the principle that they had abused those rights.[164]

The German *Holocaust Denial* or *Auschwitz Lie* case emphasised that the German Constitution would not protect false or incorrect information, saying that "demonstrably

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158 See for example the German legislation: StGB art. 130-131.

159 A protocol was added in 2003 to The Council of Europe Convention on Cybercrime, extending the Convention to cover dissemination of racist material through the internet: Website of Council of Europe, http://conventions.coe.int/

160 *La Ligue Contre Le Racisme et L'Antisemitisme* v *Yahoo!* (Decided 22 May 2000 Jean-Jacques Gomez J). A declaration for 'reconsideration of the order' was sought in the French Court, and then an action for declaratory judgment was filed in the United States District Court for the Northern District of California on the basis of a violation of First Amendment Rights (2001) 145 F Supp 2d 1168 and 169 F Supp 2d 1181.

161 In 2001 and 2002 the German Federal Office for the Protection of the Constitution asked eBay to disable access to the sale of Nazi-related goods, which it did: http://selfregulation.info/iapcoda/rxio-background-020923.htm

162 by Düsseldorf District Government president Jürgen Büssow: see http://selfregulation.info/iapcoda/rxio-background-020923.htm

163 *Le Monde*, 29 June 1996, reported on http://www.codoh.com/newsdesk/960629, a decision of "le tribunal de grande instance de Bordeaux".

164 Article 17 of the ECHR was considered in *Glimmerveen* v. *Netherlands* 18 D & R 187.

incorrect statements of fact are not worthy of protection."[165] Further, it was held that "Holocaust denial is an expression of facts which were proved untrue by numerous reports of eye-witnesses and documents, statements of courts in numerous criminal proceedings and the findings of historians."[166] The court concluded that the violation of freedom of expression involved in banning a demonstration to publicise the view that the Holocaust did not occur was "not particularly severe," as opposed to the severe violation of personal honour of Jewish people that was involved.[167] However in the same year in the *War Guilt Decision*, the court decided not to ban a book which argued that Hitler had not been responsible for the Second World War, saying that while the book contained questionable statements, it was important that different opinions be available for discussion.[168] The court appeared in that case to have placed lesser weight on the personal honour or personality rights of Jewish people, who might be affected by the book's argument. The different conclusions would seem to indicate a view that the racist message of the book was not so clear as the racist message of the demonstration. Perhaps it was also relevant that reading is a more private act than a public demonstration. It was held in 1992 that public use of the word 'cripple' to describe a specific person was humiliating and a severe violation of their personality rights.[169]

The United Nations Human Rights Committee has taken the view that certain forms of Holocaust denial can be an illegitimate form of speech not protected by the *International Covenant on Civil and Political Rights*.[170] They rejected Robert Faurisson's application against his conviction under *Gayssot Act* on the basis of the nature of the statements for which he was convicted, which went beyond simple denial

165 Michalowski and Woods (1999) 220, quoting from BVerfGE 90, 241 (1994) (their translation).

166 Michalowski and Woods (1999) 205, quoting from BVerfGE 90, 241 (1994) (their translation). They disagree with the decision which they categorise as 'artificial and unhelpful'.

167 Michalowski and Woods (1999) 220, quoting from BVerfGE 90, 241 (1994) (their translation). See Eberle (2002) 215.

168 Michalowski and Woods (1999) 224-5, quoting from BVerfGE 90, 1 (1994) (their translation).

169 BVerfGE 86, 1 (1992) discussed by Eberle (2002) 226 ff.

170 in article 19 paragraph 2.

to clear incitement.[171] Elizabeth Evatt and David Kretzmer (with whom Eckart Klein and Cecilia Quiroga concurred) thought that in many respects the Act was phrased too widely to meet the test of providing a restriction that is only as wide as 'necessary' to uphold the value of respect for the rights or reputations of others (as provided in article 19, paragraph 3(a) of the Covenant), including the community as a whole, and the Jewish community.[172] However they held that in relation to the statements in question the relevant restrictions of the Act were in fact proportionate. Rajsoomer Lallah reached the same conclusion but on the basis that the statements would in any case have been objectionable under Article 20, paragraph 2 of the Covenant.[173]

The theoretical underpinning to the concept that 'free speech' is not a primary or absolute value is the view (also held by Critical Race theorists) that it is not possible to have real freedom without equality. Inequality leads to the subordination of some by others, and hence diminishes the freedoms of the subordinated. A formal statement of 'freedom' does not ensure substantive freedom in practice. Limits on free speech can be acknowledged and accepted because the inequitable results of allowing 'absolute' free speech – that speakers are then free to hurt and intimidate their victims and spread the racist message of inequality to others – are fully appreciated. The freedom to express ourselves as we wish is not the only freedom at stake. The dignity and protection of the individual is given primacy over the freedom of others to harm – consistently with the underpinning of the German Basic Law in a value system based on the dignity of man, which has been described as the 'highest legal value' against which state actions can be judged.[174] The primacy of the dignity of man is summed up by Bidet's dismissal of Rawls as someone who puts freedom before equality, "as if one could separate the one

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171 U.N. Doc. CCPR/C/58/D/550/1993 (1996) *Robert Faurisson* v. *France*, Communication No. 550/1993. The legislation (13 July 1990) targeted 'revisionist' versions of history including the denial ("contestation" in French) of the Holocaust and the existence of the Nazi gas chambers. Article 55 of the French Constitution provides that international treaties such as the Covenant take precedence over domestic law.

172 as noted by Bhagwati, concurring with the majority.

173 This provides that: "Any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law."

174 Kommers (1980) 674.

from the other."[175] Because speech is recognised as having social and political functions, freedom of speech is legally restrained by a constitutional acknowledgement that political values, community norms and ethical principles impose valid limits on that freedom. Humans and corporations must use their rights responsibly.[176] The state is seen as having a role in protecting those rights but also in defending particular contexts in which communication can take place,[177] and ensuring that rights such as free speech are exercised in accordance with related responsibilities. The 'critical line' is not between advocacy of ideas and of imminent violence, as in the United States, but is determined by whether the content of the speech is potentially dangerous to the 'free democratic basic order'. The result is that the United States First Amendment places few limits on what the press or individuals can say, whereas the German Basic Law requires a responsible and basically truthful press, and individuals to exercise respect and civility.[178]

New Influences

Human Dignity

Rights to human dignity, personhood and personal honour are concepts enshrined in the legislation of many European countries.[179] Human dignity, it is argued, is the core and foundation of human rights, the highest of all the constitutional principles[180] and of legal

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175 Jacques Bidet, *John Rawls et la théorie de la justice*, Presses Universitaires de France, Paris, 1995, 8: "On peut demander à quoi bon lire Rawls ... Qui donne priorité a la liberté sur l'égalité, comme si l'on pouvait séparer l'une de l'autre. Qui semble admettre que l'inégalité est légitime, dès lors qu'elle est profitable au grand nombre.... " See also Michael J. Sandel, *Liberalism and the Limits of Justice* Cambridge University Press, Cambridge, New York and Melbourne, 1982.

176 Kommers (1980) 675-7. Thus the Springer newspaper house was not permitted to carry out its threat to stop delivering papers to newsdealers who sold a leftwing magazine (1969) Federal Constitutional Court (First Senate) BVerfGE 25, 256, cited at 688.

177 Kommers (1980) 679-80. Thus the state ensures access to the profession of journalism, protects private sources of information, and perhaps even limits 'monopolies of opinion'.

178 See Kommers (1980) 693 -5.

179 eg Articles 1 and 5 of Germany's Basic Law.

180 Michalowski and Woods (1999) 97.

and cultural values,[181] and it is through the implementation of rights that dignity is protected.[182] Article 1 of the Basic Law provides that

> (1) Human dignity shall be inviolable. To respect and protect it shall be the duty of all state authority.
>
> (2) The German people therefore acknowledge inviolable and inalienable human rights as the basis of every community, of peace and of justice in the world.[183]

The Article cannot be amended.[184] It applies to all persons, regardless of their nationality, by the mere fact of their human existence,[185] and relates to their intrinsic value as a human being which must be respected. [186] Whatever the characteristics of the person and whatever their behaviour, that value cannot be taken away.[187] The boundaries of its existence before birth are not clear, but the *Mephisto Case*[188] decided that the right to human dignity does not end with death, as the right not to be belittled and degraded continues.[189]

The right to human dignity means that cruel, inhuman and degrading punishments are prohibited, including the death penalty and life imprisonment, unless a real chance of

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181 Eberle (2002) 232.

182 See generally Paulo César Carbonari, "Human Dignity as a Basic Concept of Ethics and Human Rights" in B.K. Goldewijk, A C Baspineiro and PC Carbonari (eds) *Dignity and Human Rights: The implementation of Economic, Social and Cultural Rights*, Intersentia, 2002, 35 at 39ff.

183 Eberle (2002) 277-278. Similarly section 10 of the *Constitution of the Republic of South Africa Act* 108 of 1996 provides that " Everyone has inherent dignity and the right to have their dignity respected and protected."

184 Basic Law, Art. 79(3).

185 Michalowski and Woods (1999) 97, citing BVerfGE 87, 209, 228 (1992).

186 One is reminded of Hannah Arendt's comment that human rights necessarily result from the simple fact of our multiplicity. In the words of Christine Sypnowitch, *The Concept of Socialist Law*, Clarendon Press, Oxford, 1990, 100: "It is difficult to provide an immutable definition of human dignity that is not vacuous. What we can say is that by protecting human dignity, human rights seek to prevent affronts to our self-respect, our sense of importance as human beings". See generally Sypnowitch (1990) at 100-5 and 109-112.

187 Michalowski and Woods (1999) 99.

188 BverfGE 30, 173 (1971).

189 Michalowski and Woods (1999) 98- 99.

rehabilitation were to be provided.[190] The right imposes an obligation on the state to ensure minimal living conditions for persons under its care.[191] While the right is closely linked to the concept of individual autonomy it is not identical, because a court can refuse to allow persons to be placed, or agree to place themselves, in degrading situations.[192]

Such concepts, although quite alien to the common law system, are gradually being introduced into English common law through the case law of the European Court of Human Rights[193] and the European Community Court of Justice, and have been touched upon in some Australian cases.[194]

Unfortunately the limited material available in English concerning the nature of German constitutional law tends to display a lack of understanding of the nature of rights such as human dignity, and a cultural preference for the primacy of the concept of 'freedom' as espoused by United States jurisprudence and culture. Thus Eberle, in reviewing the different constitutional treatment in Germany and the United States of a variety of issues, argues that free speech is the essential underpinning of all the other rights with which he deals:

> Speech or expression, umbrella terms for the process of thought and communication at the core of human personhood are, in many ways, the most fundamental of liberties ... Thought and its communication is the first step in realizing human capacity. It is the indispensable wellspring for human dignity, its conception, and its elaboration; for formation of personality and freedom of action, described in Chapter 3, for the personal sphere of human personhood,

190 Michalowski and Woods (1999) 101-2.

191 Michalowski and Woods (1999) 104, citing BVerfGNJW 1993, 3190.

192 Michalowski and Woods (1999) 104-106 in relation to the constitutionality of a sexual 'peep show,' citing BVerwGE 64, 274 (1981).

193 This court has been accessible to United Kingdom citizens since 1953, but it was not until 1997 that the United Kingdom effectively adopted the European *Convention on Human Rights and Fundamental Freedoms* as domestic law: Nicholson (1998).

194 *Gerhardy* v. *Brown* (1985) 55 ALR 472 at 516 and *Leeth* v. *The Commonwealth* (1992) 174 CLR 455; (1992) 107 ALR 672; (1992) 66 ALJR 529.

covered in Chapter 4; and for the concept of human autonomy, identity, and self-determination, as elaborated on in Chapters 5 and 6.[195]

Nonetheless, in the United States the concept of 'human dignity' has on occasion been used by courts to limit other rights such as property rights and is influential on the issue of the sale of human organs.[196]

Equality

Dans l'état de nature, les hommes naissent bien dans l'égalité, mais ils n'y sauraient rester. La société a leur fait perdre, et ils ne redeviennent égaux que par les lois.[197]

The right to equality is enshrined in Article 3 of the German Basic Law.[198] Justification for unequal treatment is only permitted according to criteria which are in conformity with the Basic Law and which must be reasonable.[199] The principle of equality has in the 1970s and 1980s come to hold a central place in the jurisprudence of the French Constitutional Council[200] following French philosophy.[201]

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195 Eberle (2002) 189-190.

196 See Joan C. Williams, "Notes of A Jewish Episcopalian: Gender as a Language of Class; Religion as a Dialect of Liberalism" in Anita L. Allen and Milton C. Regan Jr, (eds), *Debating Democracy's Discontent*, Oxford University Press, 1998, 99 at 109. Williams notes that in *State* v. *Shack* 58 N.J. 297, 277 A.2d 369 (1971) the New Jersey Supreme Court held that and landowner could not bar entrance to government workers offering medical and legal help to farm workers and in *Hilder* v. *St Peter* 478 A.2d 202 (Vt.1984) the Supreme Court of Vermont required the refund of rent where the tenant was humiliated by sewage smells in the apartment.

197 Jones (1998) 50, quoting Montesquieu, *De l'Esprit des lois* (The Spirit of the Laws) (1748) (T. Nugent trans and J. V. Prichard, rev ed 1952) 148: "In the state of nature, all men are born in equality, but they do not forever remain so. Society causes them to lose it, and they again become equal only by the law."

198 (1) All human beings are equal before the law. (2) Men and women enjoy equal rights. The state promotes the factual accomplishment of equal opportunities for women and men and works towards the elimination of existing disadvantages. (3) Nobody may be discriminated against or favoured on the grounds of their gender, birth, race, language, national or social origin, faith, religion or political opinion. No one may be discriminated against on the grounds of their disability: Michalowski and Woods (1999) 161 (their translation).

199 Michalowski and Woods (1999) 162.

200 Danièle Lochak, "Les Minorités et le Droit Public Française: du Refus des Différences à la Gestion des Différences" in Alain Fenet et Gérard Soulier (eds), *Les Minorités et leurs Droits Depuis 1789*, Editions L'Harmattan, Paris, 1989, 111 at 115, 114 and 117.

201 see for example Bidet (1995).

Generally, developed countries have gradually introduced anti-discrimination laws over the last fifty years, which are inherently about recognition that the ideal of equality is not always realised.[202] To be discriminated against implies that one has been treated unfairly in that the discriminator has adverted to an improper or irrelevant consideration in deciding upon his treatment of the victim.[203] The existence of discrimination, oppression and offence can only be measured by reference to non-discriminatory, 'normal', standards of behaviour. In Europe this is connected to the concepts of equality and human dignity, discussed above. Anti-discrimination law recognises that the *status quo* is not necessarily the best of all possible worlds: it challenges "white, male, able-bodied, heterosexist hegemony" and threatens existing structures.[204] It contradicts the widespread assumption of the 'culture of contentment' that the *status quo* is natural, uncoerced and good.[205]

Racial vilification legislation is a form of anti-discrimination law, and therefore should be interpreted taking into consideration the context and consequences of the activities in question – in contrast to First Amendment jurisprudence which refuses to do this in 'speech' cases.

Australian courts have recognised the contextual nature of equality, rejecting formal equality or formally identical treatment as the sole test for the presence of equality or the absence of discrimination. In *Street* v. *Queensland Bar Association*[206] the High Court recognised that context and consequences must be considered in discrimination law; that discrimination may be constituted by acts or decisions having a discriminatory effect or disparate impact (indirect discrimination) as well as by acts or decisions based on discriminatory considerations (direct discrimination).[207]

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202 Thornton (1990): see generally Introduction.

203 Thornton (1990) 2.

204 Thornton (1990) 7- 8.

205 See generally Galbraith (1992) and Minow (1990) 21.

206 (1989) 168 CLR 461; (1989) 88 ALR 321; (1989) 63 ALJR 715.

207 Per Gaudron J at 566 (citing the American and Canadian cases of *Griggs* v. *Duke Power Co.; Albemarle Paper Co.* v. *Moody*; *Ontario Human Rights Commission* v. *Simpsons-Sears Ltd*), Mason CJ at 488 (citing *Mandla* v. *Dowell Lee*; *Bhinder* v. *Canadian National Railway Co*),

The concept of equality and equal justice in Australian jurisprudence is one of substance rather than form. That concept should continued to be followed, rather than First Amendment jurisprudence, in developing an Australian jurisprudence concerning freedom of speech.

What Australian courts regard as equality was considered in the family law case of *B.* v. *R. & others*, an unreported 1995 decision of the Family Court.[208] The Full Court considered whether it was contrary to the ideal of equal justice for the unique issues affecting Aboriginal people, going beyond mere cultural differences, to be given weight in a custody case involving a child with an Aboriginal mother and white father. The Court noted that equality of all persons before the law is one of the fundamental tenets of a democratic judicial system and the starting point of all other liberties (*Gerhardy* v. *Brown*[209]), as confirmed by Deane and Toohey JJ in *Leeth* v. *The Commonwealth.*[210] In *Leeth*, Deane and Toohey commented that at the heart of the obligation to act judicially is the duty of a court to extend equal justice to the parties before it, which they regarded as a matter of treating the parties fairly and impartially as equals before the law and refraining from discrimination on irrelevant or irrational grounds.[211] The Family Court commented that this was "no more than the starting point of an examination of equality," continuing:

> Perhaps the principle is better expressed by saying that all people should be treated with equal respect. By recognising that this represents the essential content of the ideal of equality, one realises that equal justice is not always achieved through the identical treatment of individuals. In many cases, superficially identical treatment has a disparate impact on individuals; the same

Brennan J at 508, Dawson J at 545, and McHugh J at 581-2. See also Gaudron and McHugh JJ in *Castlemaine Tooheys Ltd* v. *South Australia* (1990) 169 CLR 436 at 478-80, and McHugh J in *Waters* v. *Public Transport Corporation* (1991) 173 CLR 349 at 402.

208 27 June 1995.

209 (1985) 59 ALJR 311 per Brennan J at 337.

210 (1992) 66 ALJR 529 at 541-2.

211 *Leeth* (1992) 66 ALJR 529, 542 and per Gaudron J, 549.

> law or conduct may have the effect of respecting the essential humanity of certain persons, while ignoring or undermining that of others. Equality and discrimination cannot be measured at the superficial level. This has been acknowledged by modern anti-discrimination law, both in Australia and in other jurisdictions around the world.[212]

One cannot use 'formal equality' as the sole test for the presence of equality, nor as the sole test for the absence of discrimination. The concept of equality, or equal justice, cannot simply be equated with identical treatment. Brennan J recognised this in *Gerhardy* v. *Brown*, where he said that formal equality before the law is "an engine of oppression destructive of human dignity if the law entrenches inequalities 'in the political, economic, social, cultural or any other field of public life.'"[213]

Brennan J in *Gerhardy* v. *Brown*,[214] and Gaudron J in *Street's case*,[215] referred to the 1966 judgment of Judge Tanaka in *South West Africa Cases (Second Phase)*. We can say, said Judge Tanaka, that

> the principle of equality before the law does not mean the absolute equality, namely equal treatment of men without regard to individual, concrete circumstances, but it means the relative equality, namely the principle to treat equally what are equal and unequally what are unequal.[216]

Judge Tanaka went on to say that to treat unequal matters differently according to their inequality is "not only permitted but required." The issue is, he said, whether the difference exists.

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212 paragraph 135 of the unreported decision.
213 57 ALR 472 at 516.
214 (1985) 59 ALJR 311 at 337.
215 (1989) 168 CLR 461 at 571.
216 (1966) ICJR 6 at 305-6.

The Family Court concluded that for it to fail to recognise the tragic, relevant and unique experiences of Aboriginal people in determining the competing custody claims of Aboriginal mother and white father would lead to the court administering something less than equal justice, because such an approach would be formal, not contextual, treating Aboriginal people as other than they are, and would recognise "less than their complete identity and humanity." "That is an effect which this Court finds objectionable," the Full Court concluded, and "one which we reject."[217]

While the Family Court's decision is to be applauded as recognising the inevitably contextual nature of equality, it is noticeable that the equality principles espoused by the High Court and cited in *B* v. *R* have not been applied in the speech cases that have come before that Court, where many of the assumptions of First Amendment jurisprudence have been adopted.[218]

Equality under the First Amendment

Australian and American jurisprudence have different ideas about what constitutes equality, especially in the context of speech. The dominant equality doctrine in the United States – although it is criticised by Critical Race scholars – is of 'equality as sameness', ignoring race, sex and class differences.[219] Similarly, First Amendment jurisprudence is deliberately formal and ignores the content, context and consequences of the speech it considers – which, according to Australian law, is clearly inequitable treatment.

Delgado points out that the stock arguments of First Amendment jurisprudence: that free speech is the best protector of equality, and that "the cure is more speech" should be reconsidered with greater weight being given to the value of equality, so that the issues to be considered are whether equality is a precondition of effective speech, or "the cure

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217 paragraph 145 of the unreported decision.

218 Discussed at Chapter 10.

219 See Berta Esperanza Hernandez-Truyol, "Borders (En)gndered: Normativities, Latinas and LatCrit Paradigm" (1997) 72 *New York University of Law Review* 882, 895 and generally.

is more equality."[220] And powell argues, following Michael Walzer, that in the context of hate speech, equality should be seen as enshrining the ideal of participation, as well as of antisubordination, dignity and citizenship. Restrictions on participation, he argues, harm a person's social membership (which Walzer sees as the primary good) and their development of self.[221]

In the context of racism and speech, any understanding that an unregulated 'free market' in speech leads to subordination of victims through racist speech, and therefore disempowers the victims, is virtually non-existent in United States judgements.

The situation whereby 'freedom' is put ahead of 'equality' in American jurisprudence, with no consideration of what real freedom is, or how it can exist with inequality and injustice, is reinforced by the way in which the First and Fourteenth[222] Amendments are both interpreted negatively against government action rather than as expressing two cherished constitutional values which need to be balanced. Legal philosophers such as Dworkin take a different view of equality as a relationship with, and not a principle in opposition to, government. Dworkin describes the abstract egalitarian principle of equality as a principle "that government must act to make the lives of citizens better, and must act with equal concern for the life of each member."[223]

One wonders, says MacKinnon, if American courts have become unable to recognise the equality that they should be protecting?[224] Sometimes the answer is clearly 'Yes': when courts adopt theories which define equality as a relationship between persons with no history, no matter what their past disadvantages, and ignore the fact that treating

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220 Richard Delgado (1994).

221 powell (1995) 340 – 41, citing Walzer, *Spheres of Justice*, Martin Robertson, Oxford, /Basic Books, New York, 1983, 31.

222 See also Amendment 9: "The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people."

223 Ronald Dworkin, "What is Equality? Part 4: Political Equality" (1987) *Uni of San Francisco LR* 1.

224 MacKinnon (1993) 90. One American psychologist argued that Americans are so trained in competitiveness and individualism that they have difficulty in comprehending or considering equality: Steiner (1975) 186-190.

different people equally is not 'equality'. The claims of white supremacists for the maintenance of their *de facto* preferred status cannot be equated with black claims for affirmative action (although such a result is easily obtained where all content, context and consequence of claims are ignored). White racism stems not from any wrong done to whites, but from the wrongs they are able to inflict on others. Black claims for special status are the result of experience-based hostility of those who have been oppressed.[225] Theories which require strictly formal 'equality' are designed to perpetuate the inequalities produced by a history of repression and exclusion. By refusing to take into account what has happened in the past, they ensure that the privileges of a few will be continued into the future – under a cloak of moral purity.[226]

American free speech jurisprudence has no desire for equality of result.[227] It fails to recognise that communication in modern societies is expensive, and that it is not the people with power and money who need to picket, demonstrate, and distribute leaflets on the street. The real message of a public demonstration is filtered, edited and censured by media organisations so that demonstrations only effect a display of displeasure or discontent rather than actual participation in social dialogue.[228] No account is taken of the fact that an unregulated media tends to become monopolised, and increasingly subscribes to, rather than challenges, current social, political and economic orthodoxies.[229] Neither equal access to public speech, nor protection of one's speech against the speech of those more powerful, is seen as central to any equality agenda,[230] despite the connection recognised in European political thought between the development of public opinion through a free (that is, unmonopolised, and therefore regulated) press and the phenomenon of social development.

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225 Fish (1994) 61.

226 Fish (1994) 91. See also MacKinnon (1993) 86.

227 Thomas S. Axworthy, "Liberalism and Equality" in Martin and Mahoney (1987) 43 at 47.

228 Kairys (1990a) 261.

229 Rosemary Neill, "It's the Economy that's Stupid," *The Australian Magazine*, 10-11 August 1996, 24-5 citing Alexander Cockburn and Ken Silverstein, *Washington Babylon*, Verso, London and New York, 1996 generally – see for example 48ff.

230 MacKinnon (1993) 72, 73.

There are other ways of seeing equality. Bobbio points out that civil society is the place in which the processes of delegitimation and relegitimation of political and social institutions take place, and that civil society cannot exist without the effective expression of public opinion. That is, public expression of agreement or dissent concerning institutions and their activities needs to be able to circulate through the press, radio and television. Where this occurs, public opinion and social movements will develop together and influence each other.[231]

Shklar agrees that perceptions of social injustice, when expressed as public opinion, can give rise to new institutions. But neither American nor Australian judgments appear to recognise the inherent danger for social development that results from a media oligarchy which supports reactionary rather than progressive attitudes and presents comforting 'infotainment' rather than any analysis of real issues.

Communication Rights

Article 5 of the German Basic Law enshrines a right to communication that is lacking in the present Australian jurisprudence. Germany's Federal Constitutional Court is therefore concerned with promoting free communication, not just free speech.[232] The rationale for this right is the protection of democracy.[233] That is, the judiciary in Germany recognises that the Basic Law confers a positive duty upon the state to implement programmes to secure and protect basic rights. In the context of free speech, the state has a duty to safeguard the press by ensuring access to the profession of journalism, by protecting private sources of information,[234] in framing broadcasting legislation so as to allow representation within supervisory authorities of significant

231 Bobbio (1989) 26.
232 Kommers (1980) 677-9 and (1989) Chapter 8, Barendt (1995) 227.
233 Eberle (2002) 199.
234 Thus in *Wallraff*, editorial confidentiality was protected over individual expression: Eberle (2002) 233, citing BVerfGE 66, 116 (1984).

interest groups and impose minimum programme standards and perhaps even by taking action against the development of media monopolies.[235]

Where information rights, including the right to freedom of the press, are abused, this will be taken into account. Thus in the *Soraya Decision* (publication of an invented interview) the court suggested that the right to freedom of the press had been abused by the article having been aimed at 'superficial entertainment' rather than being a 'serious and sober' debate 'to satisfy the informational needs of the public.[236]

The judiciary in Germany assesses the social value of the communication in question. While it generally protects political speech as being of 'public importance' (following the presumption principle or *Vermutungsprinzip*),[237] and generally assesses private commercial speech as of lesser value,[238] it does not automatically categorise hate speech as political speech, and weighs up the value of that speech against the social harms it causes. Thus in *Lüth*,[239] a film-makers reputational and business interests, and right to make films despite his antisemitic past, was outweighed by the right of opponents of hate speech to call for a boycott of his films.[240]

Conclusion

First Amendment jurisprudence has refused to consider the content or consequences of speech, even if it is racist speech. The result is that mainstream First Amendment jurisprudence has solidified into a limited and formal set of rules. The effect of those rules is to perpetuate existing inequalities and ultimately benefit the media rather than individuals. In the context of hate speech, First Amendment jurisprudence disallows racial vilification legislation.

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235 Kommers (1980) 676-80 and Barendt (1995) 227 and 228, noting that the French Constitutional Council and Italian Constitutional Court generally take the same attitudes in relation to broadcasting and media ownership.

236 Michalowski and Woods (1999) 211 (their translation). They disagree, arguing that freedom of the press should be guaranteed "regardless of the content of the product."

237 Eberle (2002) 199 – 200.

238 Eberle (2002) 201.

239 BVerfGE 7, 198 (1958).

Alternative ways of perceiving the right to free speech are available through civil law, with its experience in the balancing of rights, and through equality, human dignity, and communications rights. Balancing rights involves considering rights contextually, and taking account of the falsity of communications and any abuse of rights. This way of dealing with rights is fairer and is more likely to achieve the desirable political outcomes and values that both free speech proponents and critical race theorists agree are central to democracy.

[240] Eberle (2002) 197ff.

Chapter 7: Problems with the 'marketplace of ideas'

The free market of ideas has never been free, but always a market.[1]

… the sound and fury that accompanies the legal and conceptual defense of Free Speech in America serves to mask the process of the rapid erosion of the possibilities of actually exercising that freedom.[2]

Never have so many been held incommunicado by so few.[3]

The popular concept of the right to free speech, considered in the previous Chapter, cannot stand on its own. It is entwined with specific views about the nature of democracy, and the inter-relationship in a democracy between public discourse and the role of government, which rest largely upon dubious economic analogies and metaphors.[4] It is argued, by analogy with economic assumptions concerning the nature and operation of the capitalist 'free market,' that freedom from government control of speech produces an unfettered 'marketplace of ideas.' That is, just as freedom from

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1 Jacoby (1975) xviii.

2 Arundhati Roy, "Instant-Mix Imperial Democracy (Buy One, Get One Free)," speech at The Riverside Church, New York, 13 May 2003 at www.cesr.org/Roy/royspeech.html.

3 Eduardo Galeano, quoted by Robert W. McChesney, "The Political Economy of Global Communication" in Robert W. McChesney, Ellen Meiksins Wood, and John Bellamy Foster (eds), *Capitalism and the information age: political economy of the global communication revolution*, Monthly Review Press, New York, 1998, 1.

4 White warns in this context that economic assumptions and forms of language "entail certain intellectual and ethical dangers, which themselves should be understood more fully than they are both by economists and by those, especially in the law, to whom economics is recommended as a mode of thought.": James Boyd White, *Justice as Translation*, University of Chicago Press, Chicago, 1990, 48. See generally Lakoff and Johnson (1980). Kennedy describes how law students imbibe the concept of the free market through basic law subjects, and learn by implication that the ground rules of laissez-faire are based in natural law, and that while interference with the market may be appropriate, it needs to be limited: Kennedy (1990) 44. See Patricia Monture-Angus, "On being homeless" in Valdes et al (2002) 274 at 275. See also Mark Kelman, "A Critique of Conservative Legal Thought" in Kairys (1990) 437 at 441-9, discussing how legal economists have been "influential in developing a particular complacent view of the economic institutions of laissez-faire capitalism that both reflects and has fortified the general right-wing political revival." Barron comments that it is ironic that while Justice Holmes did not accept that economic theory as such could be embodied in the Constitution, he did accept the cultural assumptions of economic metaphors: (1967) 1643.

government intervention in the economic marketplace is said to produce the most efficient and beneficial economic outcome, so freedom from government control of speech is said to maximise free speech and thereby to achieve and maintain important social values such as truth, tolerance, self-expression, self-realisation and ultimately 'democracy.' The marketplace metaphors are powerfully connected with the popular notion of free speech; Barendt comments that it is "almost impossible to exaggerate" the hold of those metaphors in both popular and judicial thought.[5] As Weinberg says,

> 'all of the criticisms of the marketplace model … have been raised before, yet First Amendment doctrine rolls right along as if none of them posed a problem."[6]

The continued use of marketplace metaphors obscures the reality of the failures of freedom of communication.[7] And like the 'slippery slope' metaphor, also common to the free speech/ hate speech discourse, the marketplace metaphors "drain complexity from any analysis" as Gaudreault-DesBiens says, and become perceived as empirical realities rather than accurate and complete descriptions of the phenomena they are supposed to describe.[8]

More sophisticated 'free speech' proponents purport to have moved beyond free market concepts, and justify their opposition to regulation of harmful speech on the basis of values such as identity or community, as discussed in the following chapter, following

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5 Barendt (1998) 43.

6 Weinberg (1993) 1163. Similarly, one of the more often-quoted writers on democracy in America, Meiklejohn, said as early as 1942 that there is much truth in Rousseau's view that the theories of democracy and laissez-faire are flatly contradictory, and that "we do not make men free merely by saying that they are free….[but] only by vigorous co-operative action": Meiklejohn (1942) 13.

7 See generally Sichok (2000); as to the dangers of metaphors generally see Gaudreault-DesBiens (2001) 1129ff.

8 Gaudreault-DesBiens (2001) at 1129, citing Gaston Bachelard, *La formation de l'esprit scientifique: contribution à une psychanalyse de la connaissance objective*, 12th ed, Vrin, Paris, 1960. See for example Urofsky (1996) 15, who admits that 'more speech' may be an ineffective response but yet holds to the 'slippery slope' argument. Barendt (1998) identifies a similar problem where metaphors are give too literal a meaning, citing Frederick Schauer, "The Political Incidence of the Free Speech Principle" (1993) 64 *U. Col. L. Rev* 935, 949 –52 and Weinberg (1993).

the two main streams of United States political theory. However, free market analogies and the premises of 'market liberalism' still influence perceptions of those values.

This Chapter argues that the economic, social and political assumptions and beliefs which surround the popular notion of free speech, and in particular notions about the operation of the 'marketplace of ideas', are either simply inappropriate or highly arguable, both in their original context[9] and especially when applied to the discipline of law.[10]

It is a fundamental of democratic theory that voters should receive the maximum information possible about political matters in order to make an informed choice when they vote. But it is assumed that the 'free market', as evidenced by refusal of governments to regulate 'speech', will inevitably bring about this effect. I argue here, following modern communications theory, that the 'free market' does not necessarily give voters truthful or complete information. Nor does an unfettered 'marketplace of ideas' diminish racist tendencies and lead to tolerance. There are many areas in which such market 'failures' occur. And in the context of communications issues, just as in the discipline of economics, the social costs of the marketplace – being in this case the personal and social harms of racial vilification - are downplayed or ignored.

Bakan comments that the 'harm' approach to free speech does not accommodate a progressive politics of communication.[11] Arguably the harms caused by racial vilification justify government intervention through hate speech legislation, but no more. However if one takes a broader view of harm, as involving not merely direct personal abuse or offence, but also more indirect harms to democracy and hence to society at

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9 See S. Keen, *Debunking Economics: The Naked Emperor of the Social Sciences*, Pluto Press, Sydney, 2001, especially 148ff as to 'why assumptions do matter' and 300ff as to alternate ways of looking at economics – and hence, if one follows economic metaphors, at other issues too.

10 Generally, the free market point of view continues to dominate the intellectual culture of both Britain and America despite its underlying economic assumptions being called into question in other contexts: John Gray, "Right or Wrong," *Guardian Weekly* 12 February 1995, 29.

11 Joel Bakan, *Just Words: Constitutional Rights and Social Wrongs*, University of Toronto Press, Toronto, 1997 at 76.

large, then both the harms caused by racial vilification and the lack of public discourse that results from media oligarchies can be seen as justifying new ways of thinking about the role of government in relation to public communication.

While it is outside the scope of this thesis to consider the possible remedies for the 'private death of public discourse,'[12] the fact that lack of government intervention in the communications market does not bring about effective public discourse must be borne in mind in considering the free speech arguments against the regulation of hate speech. If the intention of the free speech proponents, says Nagel, is to "create a society in which information is plentiful and vigorous dissent is tolerated …[then] the assumptions upon which this ambitious enterprise rests are largely unproven and often doubtful."[13] The US Supreme Court's protection of speech does not seem to have generated a capable citizenry involved in far-reaching public discussion,[14] but rather to have protected the unequal power of private media oligopolies.

Political assumptions

Barendt identifies a number of political assumptions of First Amendment jurisprudence,[15] which reflect a conservative and formal liberal philosophy of rational individuals as autonomous choosers of their own ends.[16] Shklar comments that such assumptions indicate "low political expectations."[17] The assumptions are that:

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12 Perhaps, as Boehringer argues, in a world of globalism it is necessary to return the power of regulating speech to the level of State government, despite the consequent inconsistencies of legislation, because of the 'managerial' tendencies inherent in both the High Court and the federal government: Boehringer (1998) 123.

13 Nagel (1984).

14 See Kathe Boehringer's discussion of Nagel's article (1998) 131.

15 Barendt (1994a) 62 -65.

16 Michael J. Sandel describes this as the dominant concept of political association in the United States, in contrast to the concept of civic republicanism, with its greater regard to notions of the common good and of community: see generally, *Democracy's Discontent*, Harvard University Press, Cambridge, Massachusetts and London, England, 1996.

17 Shklar (1990) 112. Markus (2001) notes that in the 1990s Australia voters have expressed disenchantment at the failure of the party political system to represent the wishes of the electorate: 200. In 1998, 66% of Australians polled expressed little or no confidence in the political system – an increase from 62% in 1991: Markus (2001) 201.

- government cannot be trusted to determine truth or the limits of permissible political and social debate;
- generally legislation should not be introduced because it can be applied or policed by governments in a discriminatory way in the future;
- restrictions on speech imposed by the state differ fundamentally from those imposed by private people and institutions;
- regulation by government of any type of speech will lead the government to slide down the 'slippery slope' and regulate more and more types of speech, including harmless speech (a related assumption being that if this happens, courts will not be able to limit such unnecessary regulation as unconstitutional);
- truth should be determined in the 'market-place' (based upon the famous dictum of Mr Justice Holmes that "the best test of truth is the power of the thought to get itself accepted in the competition of the market"[18]);
- individual choice in the free market provides the best control, including in relation to free speech issues; and
- existing distributions in the market (society) are broadly just and it is right to protect them through the law and the constitution.

To these can be added the assumption that judicial review of legislation that affects speech and communication is an appropriate means of promoting systemic objectives such as truth, tolerance and democracy.[19]

These assumptions are not self-evident truths (although, as mentioned, in the United States they are generally treated as such), and constitute highly political claims to knowledge about existing and potential relationships between citizens and governments. Barendt comments that these features of free speech theory are obviously connected

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18 *Abrams* v. *United States* (1919) 250 US 616 at 630 –1. At 624 Holmes spoke of the 'marketplace of ideas.' For a reconsideration of this metaphor, see generally Blasi (2002).

19 See Nagel (1984) and the discussion of that article in Boehringer (1998) 123 at 128ff.

with the traditional distrust of government in the United States[20] and the lack of influence of European socialist and egalitarian political theory, or European constitutional interpretation, upon US thinking about fundamental rights. Having avoided the European experience of totalitarian regimes, Americans have been slow, he says, to perceive the dangers of racist and extremist speech, or the desirability of regulating public speech such as broadcasting.[21]

Other highly political assumptions made in First Amendment jurisprudence are that 'democracy' can exist only in a formal sense, and that what the United States has now is 'democracy'.[22] An assumption which is perhaps more relevant to the Australian situation than to the United States, where there is little prospect of hate speech being regulated, is that regulation of any speech would have an undesirably 'chilling' effect, reducing not only harmful speech, but frightening people from valid (although not necessarily valuable) speech which they fear may be illegal.

The assumptions that legislation regulating speech will cause 'greater harms' are discussed in the following Chapter. In this Chapter it is argued that the political assumptions identified above as to the operation of the free market are not sustainable, because the marketplace of ideas does not result in the maximisation of available information about the political process or political or social issues, in any particularly high quality of information, nor in maximum participation by citizens in a 'deliberative democracy'. Any definition of democracy which is dependent upon those assumptions needs to be re-examined.

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20 (1994a) 65. See also Eberle (2002) 234. The level of distrust of government seems to be increasing throughout the world: see Neal Ryan, "Public Confidence in the Public Sector," a Discussion Paper prepared for the Office of the Auditor General of Western Australia, March 2000, available at http://www.audit.wa.gov.au/pubs/publi_confidence.pdf.

21 Eric Barendt, "Free speech in Australia: A comparative Perspective" (1994) 16 *Sydney Law Review* 149, 157. Williams similarly notes a general rejection in the United States even of the language of socialism or egalitarianism: Williams (1998) 99.

22 On the distinction between formal democracy and substantive democracy, see Bobbio (1989) 157-8.

But first we need to go back a step to the fundamental link that is argued to exist between the free market and democracy, which is supposed to be government non-intervention.

The free market and democracy

The assumption of negative freedom

Democracy has become Empire's euphemism for neo-liberal capitalism.[23]

The original identification by Hayek of the market system of capitalism with political freedom or 'democracy' has been described as "one of those naive strokes of genius out of which proselytising religions are made."[24] It has become an article of faith of conservative politics. Tyranny is inevitable, it is argued, if we do not have a perfectly free market. 'Free market' capitalism is not itself sufficient to ensure democracy, but it is an absolutely necessary condition.[25] In equating economic freedom for corporations and individuals with personal and structural political freedom, the free market viewpoint makes the "naive assumption of negative freedom,"[26] commonly put by free speech proponents. That assumption is that freedom means "freedom of the individual from control by the State" (even where that control is exercised for the protection of another individual or corporation), not the substantive "freedom of all individuals from actions of any other person, group, body, or government."

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23 Roy (2003).

24 Harold Perkin, *The Rise of Professional Society: England since 1880* Routledge, New York and London, 1989, 495. See Chandran Kukathas, "Friedrich Hayek: Elitism and Democracy" in Carter and Stokes (1998) 21 at 32ff.

25 Contra, see Roberto Mangabeira Unger, *The Critical Legal Studies Movement,* Harvard University Press, Cambridge, Massachusetts, 1986, 33-4. Kinley proposes, rather, that it is the protection of basic human rights that is the essential prerequisite to realising the ideal of democracy: (1995) 93 and Galbraith calls laissez faire "the license for financial devastation": John Kenneth Galbraith, *The Culture of Contentment,* Houghton Mifflin Company, Boston, 1992, 51. See also the work of Nobel-prize winner Joe Stiglitz on the imperfections of markets.

26 This and the following paragraphs are drawn from the ideas expressed by Perkin (1989) at 499 to 500. See in this context Meiklejohn (1942) 94-5: "Human freedom is not freedom from the state. It is freedom in and by the state….. Our American individualism has been far too simple, far too childish a theory of human experience to account for the facts."

Similarly in the context of communication, market competition of privately owned corporations is typically seen as a key ingredient of freedom of communication[27] whereas 'censorship' is defined narrowly and negatively. It is perceived as including only the exercise of state power in relation to limits on the power of media owners, not the variety of complex ways in which corporate decision-makers within media corporations effectively act as private censors. It is market competition, not government intervention, notes Keane, which generally produces market censorship.[28]

Shklar points out that the idea that the free market and democracy are inevitably entwined depends more on the ways that the roles of the economy and the government are defined, and upon 'democracy' being seen as formal rather than substantive democracy, than upon any historical or social analysis.[29] Even in the absence of government restraint one may still be denied a meaningful choice because of incapacity arising from poverty or powerlessness[30] – or, in the context of speech, from the effects of hate propaganda. If a government refrains from exercising its power to limit hate propaganda, ethnic minorities can be subjected to hate propaganda by others.[31] According to Shklar's theory of injustice, that would be an unjust omission, because it is something within the power of the government to remedy.[32]

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27 Keane (1991) 44 ff and 53ff. See also Sue Curry Jansen, *Critical Communication Theory: power, media, gender, and technology,* Rowman and Littlefiled, Lanham, 2002 173ff as to the effect of such simplistic equations, reproduced in media soundbites, upon the meaning of 'democracy'.

28 Keane (1991) 46, 89 and 90 and his reference to Sue Curry Jansen, *Censorship: The Knot that Binds Power and Knowledge*, New York and Oxford, 1988. See too Benjamin R. Barber, "The Market As Censor: Freedom of Expression in a World of Consumer Totalism" (1997) 29 *Ariz. St. L. J.* 501 at 505ff.

29 Shklar (1990) 75. Detmold points out that freedom is essentially a human quality, and to apply the concept to humans and corporations alike is 'nothing short of bizarre': M.J. Detmold, "Australian Law: Freedom and Identity" (1990) 12 *Sydney Law Review*, 482 at 565.

30 Axworthy (1987) 47, citing the nineteenth century English philosopher T.H. Green, speaking in 1881; and see Minow (1990) 72.

31 This is why Kathleen Mahoney argues that hate propaganda should be seen as a form of discrimination which is a practice of inequality: (1992) 248 and 249.

32 See Shklar (1990) 82, cited in Benhabib (1996) 61. Critical Race scholars also agree that governments should act to limit harm – see Matsuda (1993) 47ff.

There is no doubt that formal government censorship of the media does exist worldwide, as well as more informal types of censorship discussed below. But, as discussed below, informal censorship is not usually taken into account by the marketplace of ideas model. This is so, even where the censorship is by the government, such as government spending on media advertising having a 'chilling' effect on media opposition to that government.

The unacknowledged role of government in the market

The generally unacknowledged result of the free market viewpoint is not that the government should never intervene in the market, but that it should do so continuously, in order to preserve present market inequalities,[33] including those that lead to unequal or unjust outcomes.[34] Government is not neutral in the economic or the communications marketplace, and is not a promoter of equal access to the marketplace or substantive equality within it. To the extent that the interests of elite participants in the market are protected, including by legislation, the outcome for other participants in the market is unfair and economically irrational.[35] The apparent individualism and 'freedom' of the market system is in many respects illusory.[36] The dictates of the market system may be

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33 Galbraith (1992) 14, 20 -5.

34 White (1990) 66 and 67. Shklar (1990) 15. A prime example is the introduction in 13 American States of legislation which penalises those who 'disparage food', under which Oprah Winfrey was prosecuted in 1996, and which places the burden of proof to a large extent upon defendants, who are required to show that their statements are "reasonable and reliable scientific inquiry, fact or data": Lyman with Merzer (1998) 14 ff.

35 White (1990) 67, as economists have long realised, says Galbraith (1992) 52. As to general acceptance of the concept of market failure, and distortion of the market by differential access or collective behaviour, see C. Edwin Baker, "Scope of the First Amendment Freedom of Speech" (1978) 25 *UCLA L Rev* 964, and Stanley Ingber, "The Marketplace of Ideas: A Legitimizing Myth" (1984) *Duke L.J.* 1. A strange example of state intervention which operates to protect a small minority at great expense to the market as a whole is the 127-year old Scottish law which makes it an offence for anyone in Scotland to possess salmon roe, introduced in 1868 to prevent poachers using roe as bait. Eggs can be farmed to produce grown salmon, but not sold, and every year roe worth an estimated £15 million to the Scottish salmon-farming industry has to be destroyed. There was an attempt to change the law in the 1990s, but several peers objected, seeing the repeal of the legislation as an invitation to poachers: "Netting a profit from Salmon Caviare," *Guardian Weekly*, 30 April 1995, 20.

36 Robert L. Heilbroner, *Behind the Veil of Economics*, W.W. Norton and Company, New York and London, 1988, at 89 to 91. Heilbroner argues that capitalism possesses a remarkable capacity "to conceal the exploitative nature of its gains by the fiction of an active 'Monsieur le Capital' and

invisible, but they are there just the same, and all the more overmastering because they seem to be no more than the 'warp and woof of daily life':

> in imagination individuals seem freer under the dominance of the bourgeoisie than before, because their conditions of life seem more accidental; in reality, of course, they are less free because they are more subjected to the violence of things.[37]

In the context of freedom of communication and of the press, Keane points to the 'inevitable tension' between the private market-driven interests of media owners and the freedom of choice of citizens to receive and send information. Only state-guaranteed market competition or public involvement free of the profit motive can, he argues, give citizens any real freedom of communication.[38]

Different concepts of democracy

The notion that the free market is essential to democracy is not questioned in the context of the marketplace of ideas. The marketplace is assumed to be essential to popular participation in democracy.[39] At the same time, it is assumed that what exists in the United States, or Australia, as the case may be, is democracy or even fits particular models of democracy.

There are however many different ways of seeing democracy, other than through the explanatory metaphor of economic competition, as Zolo puts it,[40] and many writers

'Madame la Terre' who make contributions to, not exactions from, the total product." (92). With German reunification, East German women now have economic and political 'freedom' – but one typical East German textile worker has lost her good job, her apartment and her daycare. She even lost her children for a time when she couldn't afford adequate food and housing. "What good is this freedom to me," say such women, "when I can't make use of it?" Rick Atkinson, "Unity Costs Eastern German Women Dear", *Guardian Weekly*, 16 April 1995, 19.

37 Heilbroner (1988) 99, quoting Marx and Engels, *The German Ideology* (1947) 77.

38 Keane (1991) 46 and 85, noting that "private desires stifle public spirit."

39 Ingber (1984) 3-4, noting the curious result that American Courts focus on the social benefits of free speech, as opposed to their normal focus on individual rights.

40 Danilo Zolo, *Democracy and Complexity*, trans. By David McKie, Polity Press, Cambridge and Oxford, 1992, 87.

identify the present arrangements as deficient in some,[41] if not all, respects. The most searing criticism comes from Arundhati Roy:

> Democracy, the modern world's holy cow, is in crisis. And the crisis is a profound one. Every kind of outrage is being committed in the name of democracy. It has become little more than a hollow word, a pretty shell, emptied of all content or meaning.[42]

The 'market liberalism' view of democracy – that what we have now is democratic, and reflects an appropriate balance between individual rights, the market and government – is presented as neutral when in fact it comprises a raft of social and political assumptions.[43] The 'market liberalism' view is perhaps a result of the narrow 'realist' theories of democracy of the 1950s and 60s which equated voting with democracy.[44] But many writers have criticised this narrow view of democracy, including the liberal assumption that political equality is possible without social or economic equality.[45]

Many countries are deficient in the essential elements of democracy identified by Barendt, but still regard themselves as democratic. Adult enfranchisement can be undermined informally by intimidation of voters or denial of ballot papers[46] or formally through residential and competency requirements and the drawing of electoral

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41 See generally Barry Hindess, "Democracy and disenchantment" (1997) 32 *Australian Journal of Political Science* 79.

42 Roy (2003)

43 On this point see generally Jansen (1988) 202ff, Sawer (2003) 162ff and Marian Sawer (ed), *Elections: full, free and fair*, The Federation Press, Annandale, 2001.

44 As criticised by Carole Pateman: see Sullivan (1998) 177.

45 See Fletcher (1998) 210. . Carole Pateman points out that an influential early work was Joseph Schumpeter's *Capitalism, Socialism and Democracy* (1943) which argued that the central participatory role of the people was empirically unrealistic, and which analysed democracy as a political method or process involving competition for leadership, intended to further other ideals: Carole Pateman, *Participation and Democratic Theory*, Cambridge University Press, Cambridge, 1970, 3ff. Zolo (1992) also discusses Schumpeter's influence: 82ff.

46 These activities are alleged to have occurred in the 2000 US Presidential elections, but many African-Americans saw them as "a perpetuation of a wearily familiar pattern": Julian Borger, "Jeb Bush blamed for unfair election" *Guardian Weekly*, June 14-20, 2001, p 6.

boundaries.[47] Indeed, Justice Scalia of the United States Supreme Court indicated that the US Federal Constitution does not guarantee the right to vote.[48] The 2000 US Presidential election disclosed defects in the vote counting systems of several States, expressed by the Florida bumper stickers *One man one vote (not available in all States)* and *Don't blame me, I voted for Gore - I think.*[49] Even where citizens' rights to vote have not been limited by legislation, electoral boundaries, or improper counting,[50] Galbraith points out that a large non-voting minority is still excluded from effective participation in modern democracies such as the United States[51] where neither of the two main parties is prepared to risk their electoral chances, nor their relationship with the business community on which their electoral success is likely to depend,[52] by assisting that minority.[53]

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47 While Frances Fox Piven and Richard A Cloward, in *Why Americans Don't Vote*, Pantheon Books, New York, 1988, identify numerous difficulties in voter registration and hence in voting participation, they fail to describe the extent of intimidation and violence against black voters, or the effects upon them of redrawing of electoral boundaries: see generally Bell Jr (1980), Chapter 4.

48 Gay Alcorn, "Highest court in the land not above party partisanship", *Sydney Morning Herald* 4 December 2000, 8.

49 Borger (2001). Sawer notes that a subsequent review of the State and Federal electoral systems in the United States disclosed a startling lack of the procedures which are considered in countries such as Australia to be basic to a fair electoral system: Sawer (2001) vi and the Preface generally.

50 Justice Scalia of the United States Supreme Court has now commented that in his view the United States Constitution does not guarantee the right to vote: Alcorn (2000). In various American States, residents with felonies are banned from voting for life. Such laws apparently originated in the Reconstruction period after the freeing of black slaves: Borger (2001). The 2000 United States Presidential election disclosed defects in the machine-counting systems of various States, which may have resulted in black votes being discounted for years, and black voters were turned away from polling booths in Florida: See for example John Mitz and Dan Keating, "Ballot dice loaded against blacks", *Guardian Weekly*, Dec 7-13, 2000, 36.

51 Galbraith (1992) 10. The result is, he says, that government is accommodated not to reality or common need but to the beliefs of the contented, who are the majority of those who vote. See also, Nina Eliasoph, *Avoiding Politics: How Americans Produce Apathy in Everyday Life*, Cambridge University Press, Cambridge, 1998 and Michael Parenti, *Power and the Powerless*, New York, St Martin's Press, 1978, 201ff. In Britain 38.2% of those who rent furnished accommodation have never registered to vote: *Democratic Audit*, Charter 88, 1997, quoted in *New Internationalist* 324, June 2000, 19.

52 The degree to which basically bipartite democratic systems tend, whichever party is in power, to respond to business interests rather than public interests is discussed in Zolo (1992); see Anthony Hubbard, "Labour's flame in New Zealand dims as business sees nothing but gloom", *Guardian Weekly*, June 15-21, 2000, 6 (new government strongly criticised for their Employment Relations Bill which encourages collective bargaining by unions; government has conceded that "business has valid concerns" and that the bill will be changed).

53 Galbraith (1992) 144ff. See also Michael Parenti, *Democracy for the Few*, New York, St Martin's Press, 1974, *Inventing Reality: the politics of the mass media*, New York, St Martin's

Nonetheless, popular views of modern democracy still regard the ideal democracy and the (theoretical) right to vote as "nearly synonymous."[54] As Collins and Skover argue, following Pateman,[55] this is unrealistic in the 'carnival culture' which depends on direct appeal to the public and which gives the notion of democracy a new, anarchistic meaning, "fundamentally at war with the notion of a government of laws."[56] In 1971 Wolff described modern political systems as involving a gulf so broad between the rulers and the ruled that active or effective participation in the affairs of government evaporates.

> Even the periodic election becomes a ritual in which voters select a president whom they have not nominated to decide issues which have not been discussed on the basis of facts which cannot be published. The result is a politics of style, of image, of faith, which is repugnant to free men and incompatible with the ideal of democracy.[57]

Over 30 years later, the refusal of governments of Australia, the United States and Europe to listen to their people's protests over the war on Iraq has vividly demonstrated the extent to which government has become indifferent to the desires of the populace.[58]

Press, 1986, (1992) and Michael X Delli Carpini and Scott Keeter, *What Americans know about politics and why it matters*, YaleUniversity Press, New Haven, 1996.

54 Simon (1995) 65. See also Carole Pateman on this issue: *The Problem of Political Obligation: A Critical Analysis of Liberal Theory* John Wiley and Sons, Chichester and New York, 1979, 83ff and generally.

55 who argued that to interpret the act of voting as a form of social consent ignores the extent to which voting may be manipulated or the expression of self-interest, and to which marginalised groups do not participate: see Sullivan (1998) 179-180.

56 Collins and Skover (1993) 799 - 802. See also Piven and Cloward (2000) 16.

57 Robert Paul Wolff, Barrington Moore Jr, and Herbert Marcuse, *A Critique of Pure Tolerance*, Jonathan Cape, London, 1971, 24. See also Brietzke (1997) 955.

58 A Gallup International poll found that in no European country was support for a war carried out "unilaterally by America and its allies" higher than 11 percent: Roy (2003). Sanders asks how, when restricted public communication makes so many social problems invisible, we can achieve any type of community? Barry Sanders, *The Private Death of Public Discourse*, Beacon Press, 1998, 8.

Bobbio regards democracy as comprising procedures for arriving at collective decisions in a way which secures the fullest possible participation of interested parties. He sees such participation as requiring as a minimum equal and universal adult suffrage, majority rule and guarantees of minority rights, the rule of law, constitutional guarantees of freedom of assembly and expression and other liberties which help guarantee that those expected to decide, or to elect those who decide, can choose among real alternatives.[59]

To the above list, one could add also the economic and social aspects of a democracy: provision of a minimum standard of living, the redressing of social injustices, the elimination of suffering, and the promotion of equality and human rights. Democracy, says Bobbio, is used to describe both formal democracy, dealing with the form of government and involving formal legal equality, and substantive democracy which deals with the content of the form of government in terms of social and economic equality.

Despite the existence of significant discourse about the nature and virtue of modern democracy, and some engagement in the United States with 'republican' or communitarian conceptions of democracy, current American 'free speech' jurisprudence only contemplates formal democracy. According to Galbraith's analysis of American political economy, it is essential for American democracy to be viewed only in formal terms. To do otherwise would reveal both the existence of an exploited underclass and the fact that perpetuation of such a class serves the living standard and comfort of the 'contented majority'.[60] Reality must be subordinated to social convenience, and the economic and political system of the 'democracy' be depicted as one in which social exclusion is somehow a remediable affliction, rather than a structural necessity.[61]

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59 Introduction by John Keane to Bobbio (1989) x.

60 see for example the September report of Human Rights Watch, which argues that the American 'economic miracle' of the past eight years has been based on restricting workers' rights: "Labour rights 'are abused by US firms,'" Julian Borger, *Guardian Weekly*, 7-13 September 2000, 5.

61 Galbraith (1992) 31-2.

The classical Greek view of the demos informs republican writings about democracy, of which Hannah Arendt was an exponent. The demos requires full participation by citizens in all public spheres, although it excluded women, slaves, and non-citizens (just as Rousseau's democracy excludes women). Republicans argue for positive freedoms as opposed to the negative freedom of liberty from government interference. They also argue for individual interests to be subject to community concerns.[62]

Every regime is democratic according to the meaning of democracy presumed by its defendants, comments Bobbio, and undemocratic in the sense upheld by its detractors.[63] On purely political concepts of democracy, it is perfectly possible to have a 'democratic' state in a society where most institutions, from the family to school, and from corporations to public services, are not governed democratically.[64] Bobbio suggests that political democracy may, and should, be enlarged through the integration of representative and direct democracy[65] and the extension of democracy beyond politics to the 'social democracy' of the civil sphere, by means of procedures which allow the participation of those affected in the deliberations of a collective body.[66] Similarly Carole Pateman notes that many areas of life, particularly work, are political systems in their own right that would benefit from democratic participation. They are also areas in which democratic values and participation are often excluded.[67]

Like Bobbio, Pateman identifies and addresses barriers to democratic participation. Iris Young agrees that democracy should extend to the workplace, and argues that democratic participation ought to be primarily by (disadvantaged) social groups rather than individuals, so that people can be involved in and, if necessary, veto policy areas

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62 See Carter and Stokes (1998).

63 Bobbio (1989) 157-8.

64 Bobbio (1989) 156.

65 By direct democracy Bobbio means all those forms of participation in power which do not constitute the representation of general and political interests nor of particular and organic interests: (1989) 154.

66 Bobbio (1989) 155-6.

67 See Sullivan (1998) 175ff, Carole Pateman, *The Disorder of Women: Democracy, Feminism and Political Theory*, Polity Press, Cambridge, 1989, 192ff and Pateman (1979).

that directly affect them. She is aware that local control often leads to discrimination against minorities.[68]

These more inclusive views of democracy have implications for the arguments of free speech proponents that racial vilification legislation would impinge upon democracy. That view of democracy is a narrow one in which the harms of hate speech must be borne by minorities, not one in which minorities are entitled to protection from that speech.

To consider the competing democratic theories in detail is outside the scope of this thesis, but it is important to note the depth and importance of other recent analyses, which free speech theory has not to date taken into account. These alternative views generally assume equality and justice as primary values and envisage "constructive forms of power challenging domination."[69] Many theorists consider the inter-relationship between democracy, pluralism and justice. Judith Shklar's work on injustice suggests a theory of democracy that involves government in redressing social wrongs, and a strong independent public service.[70] Iris Young identifies existing structural injustice and the decline in opportunities for participatory decision-making. She proposes a form of democracy that sustains group differences and additional resources for the oppressed.[71] Racial vilification legislation is more naturally a part of such alternate democratic forms that look to context and to substance. Taylor[72] follows Arendt in arguing that the 'ultimate richness' of humanity is something that can only be realised through our plurality, through exchanges and relationships between people who are different.[73] He and Walzer[74] have in turn been criticised by Benhabib for a

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68 Young (1990) 56-58, and as described in Fletcher (1998) 204ff.

69 Carter and Stokes (1998) 11.

70 See Sullivan (1998) 177 and following.

71 See Fletcher (1998) 196ff. See also Young (1990).

72 Charles Taylor (ed), *Multiculturalism: Examining the Politics of Recognition*, Princeton University Press, Princeton, 1994. See John Horton, "Charles Taylor: Selfhood, Community and Democracy," in Carter and Stokes (1998) 155.

73 Charles Taylor, "Living with Difference" in Allen and Regan Jr (1998) 212 at 214-5.

predominant commitment to cultural relativism or essentialism.[75] Pateman and Young argue that republican 'universalism' fails to take account both of the masculine bias of dominant conceptions of citizenship, and the effective exclusion of marginalised groups from the dominant democratic discourse in the United States.[76] Mouffe argues that the notion of citizenship should not rely on gender or group differentiation, but on the concept of a common bond through which 'democratically allied identities' can be constructed while at the same time allowing for individual freedom.[77]

Kymlicka[78] and Nancy Fraser[79] have identified problems of pluralism and identity that procedural liberalism does not address.[80] Joan Williams argues that theoretical concepts of deliberative democracy and self-government are unworkable in a society such as the United States which supports enormous income disparities.[81] Fraser agrees that 'misrecognition' of difference can't be isolated from economic interests (a point made previously by Balibar and Wallerstein) and that different identities still need to be assessed in relation to justice and equality.[82]

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74 Walzer (1983). See Mark Kingwell, "Michael Walzer: Pluralism, Justice and Democracy" in Carter and Stokes (1998) 135 and Michael Walzer, "Michael Sandel's America" in Allen and Regan Jr (1998) 175.

75 Seyla Benhabib, *The Claims of Culture: Equality and Diversity in the Global Era*, Princeton University Press, Princeton and Oxford, 2002, 39-42 and 49ff.

76 Carter and Stokes (1998) 8, Young (1990) 164ff.

77 Lois McNay, "Michel Foucault and Agonistic Democracy" in Carter and Stokes (1998) 216 at 224-5, Chantal Mouffe, *Democratic Paradox*, Verso, London and New York, 2000. It is notable that in the Introduction to Taylor (1994) 3, Amy Gutman implies that racial vilification should be tolerated (21-3), despite her concern with recognition of different cultural identities, and that Taylor himself fails to address the issue, which one would have thought was central to the "politics of recognition."

78 *Multicultural Citizenship*, Clarendon Press, Oxford, 1995, Will Kymlicka, "Liberal Egalitarianism and Civic Republicanism: Friends or Enemies" in Allen and Regan Jr (1998) 131 and Will Kymlicka, *Politics in the vernacular: nationalism, multiculturalism and citizenship*, Oxford University Press, Oxford, 2001.

79 *Justice Interruptus*, Routledge, New York and London, 1997.

80 See also Lee Corbett, "Can Liberalism Meet the Challenge of Cultural Pluralism?" 28 July 2003 (2003) *The Drawing Board* available at http://www.econ.usyd.edu.au/drawingboard/digest/0307/corbett.html.

81 William (1998) 102: "When the law professors were celebrating republicanism's potential to promote deliberative conversations in the 1980s, all I could think of was a teenage drug-dealer telling a high-paid law professor that he would join him in selfless deliberation just as soon as society offered him something other than a dead-end job in a violent neighborhood."

82 (1997) 174, 185-187.

There are both European and American political theorists who argue for greater participation in democratic processes, including Arendt, Shklar, Young and Pateman. Theorists who argue from the point of view of including marginalised groups include Benhabib, Young and Pateman. Others such as Anne Phillips warn against the possible undemocratic consequences of certain forms of participation and the need to maintain distinctions between public and private.[83]

Michel Foucault has influenced radical democratic theorists like Chantal Mouffe and Ernesto Laclau,[84] who argue for the recognition of the interdependence of group rights, following Foucault's idea that liberty is a practice rather than an end-state,[85] as well as William Connolly's concept of 'agonistic' democracy.[86] Mouffe, Connolly and others argue that in a plural society, democracy must be thought of as a 'mode of being' and not a form of government.[87]

Some of the most far-reaching criticism of liberal rights analysis comes from Canadian scholars who perceive the Canadian *Charter of Rights and Freedoms* as having failed to implement its promises. Hutchinson argues that the communitarian reworking of liberalism is based in an elitist and undemocratic view of social life, and that the individualistic ideology of liberalism suppresses understandings of human experience.[88]

In the subsequent sections of this Chapter I discuss the consequences, in the context of free communication, of limited government intervention which serves only to protect the market structure. In discussing the reality of communications within a democracy we

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83 See generally A. Phillips, *Engendering Democracy*, Polity Press, Cambridge, 1991 49ff and *Democracy and Difference*, Polity Press, Cambridge, 1993.

84 Ernesto Laclau and Chantal Mouffe, *Hegemony and Socialist Strategy: Towards a Radical Democratic Politics*, Verso, London, 1985.

85 McNay (1998) 224.

86 Carter and Stokes (1998) 11. See William E. Connolly, "Civic Republicanism and Civic Pluralism: The Silent Struggle of Michael Sandel" in Allen and Regan Jr (1998) 205, 210 and William Connolly, *Identity/Difference: Democratic Negotiations of Political Paradox*, Cornell University Press, Ithaca, New York, 1991.

87 McNay (1998) 230 and see Mouffe (2000).

88 Hutchinson (1995) 184 –187. Similarly, see Jansen (1988) 203.

must constantly compare perceived market failures with the model which purports to reflect the *status quo* for the United States. First I turn to a model, drawn from 'pro-free speech' academic writings, of how the marketplace of ideas works.

Do we have a marketplace of ideas, and does it work?

The concept of the marketplace of ideas is that individuals and groups, if left free to communicate with each other, will disseminate and receive all ideas and choose selectively amongst them. Operating generally on the basis of self-interest, they will act together in a way that maximises speech and available information. This will include false ideas, because sometimes it is necessary to analyse a false idea in order to arrive at the truth. Government will not intervene in this marketplace either to censor ideas or to support their dissemination. Government will not intervene to promote or enable equal access to the marketplace, nor equal treatment within the marketplace. Through this system concerned citizens will receive maximum information on the basis of which to exercise their votes, and truth and tolerance will emerge. As noted previously, there is some speech that is so harmful as to warrant government restriction, such as speech that incites immediate violence, child pornography. But generally it is wrong for government to limit speech, and defamation laws will be interpreted narrowly, especially against public servants and politicians.

If government were to restrict more than these extreme types of speech, or were to intervene in the market to improve access or participation, this would impose an unwarranted restriction on democracy. This model is based upon the political assumptions identified by Barendt, as well as upon various unstated social and economic assumptions. The model does not admit to any 'market failures'. It does not consider substantive issues of access or participation, making the 'negative assumption' that freedom limited only by money is still freedom.

The medium that comes closest to this model is the Internet in the United States, which has ironically enabled publication of hate speech reaching not hundreds, but millions, at a minimal cost.[89] Consistently with traditional First Amendment theory and the 'marketplace of ideas', US courts have refused to enforce decisions of other jurisdictions that internet services providers should restrict access to pro-Nazi sites.[90]

Defects of the model

There are various problems with this model, in terms of its description of the nature of communication and the nature of democracy and in terms of its arguments as to the consequences for individuals and for democracy of regulating speech. The model takes no account of 'market failures' and the social costs which are already being borne in terms of lack of access and lack of diversity.[91] The metaphor which is central to discussions of free speech is flawed and, as Weinberg argues, those flaws matter.[92]

The real nature of communications

To the limited extent that opponents of free speech regulation do consider the way in which the metaphorical 'marketplace' works in the context of speech, they demonstrate an unsophisticated understanding of the nature of communication and social dialogue.

The ways in which people talk to each other and ideas are communicated, particularly given the many economic, social and institutional restrictions on "when people can speak, to whom, about what, and at what volume level"[93] bear little relationship to a

89 See for example Keith Perine, 'The Trouble with Regulating Hate', *The Industry Standard*, 31 July 2000, available at: http>>//www.thestandard.com/article/0.1902,16967,00.html?body_page=1

90 *Yahoo!* v. *La Ligue Contre Le Racisme et L'Antisemitisme* (2001) 145 F Supp 2d 1168 and 169 F Supp 2d 1181.

91 Brietzke argues convincingly for an alternative 'market failure perspective' (1997) 963ff. Similarly see Baker (1978).

92 Weinberg (1993) 1138ff.

93 Lull (1995) 78.

marketplace of ideas in which one can 'shop around'[94] nor a library where one can choose whether or not to look at an 'offensive' book, and when to put it down.[95] The communicative process is not necessarily rational,[96] and language is not a neutral or transparent carrier.[97]

We are free, it is argued (following the shop and library analogies), to choose whether or not to adopt the racist ideas that we receive[98] – an argument which ignores the realities of cultural paradigms. As discussed earlier, those paradigms predispose us to believe some things and to reject others. Those paradigms limit both the ideas that are sent and those that are received. Information is structured symbolically, says Keane, and its 'codes' are continually interpreted by its recipients, who themselves are shaped by the same paradigms, and the social conditioning and media manipulation which support those paradigms.[99] In media contexts, the interpretation of the 'codes' depends upon stocks of given knowledge, "institutional routines and technical tricks."[100] Jacoby argues that the apparent freedom of individual choice is really socially determined:

> The private individual, free to pick and choose, was a fraud from the beginning; not only were the allotments already picked and chosen, but the contents of the choice followed the dictates of the social not the individual world.[101]

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94 As Kelman says, "Each of the efforts to argue that capitalist legal and social institutions (the market, private property, the tort system, the firm) have overcome problems of antagonism, that each has ensured that unbridled selfishness is harnessed for mutual benefit, are far less internally rigorous and convincing than the legal economists would have us believe." ((1990) 446).

95 This concept also ignores the "great structuralist insight" recognised by modern communication theory that "unmediated perception of objects is impossible": Sarup (1996) 15. The 'library' and 'marketplace' metaphors are perhaps only appropriate in the context of "the enterprise of scholarship itself" as Post admits (2000) 2365 (fn 44). See Jonathan Freeland, "When Porn is used to sell Pot Noodle, it is time for society to change its attitude towards sex", *Guardian Weekly*, 16 July 2002.

96 As recognised by the majority in *Keegstra's Case*: *R* v. *Keegstra* (1990) 61 C.C.C. (3d) 1 [747].

97 Hutchinson (1995) 190.

98 See David Kretzmer, "Freedom of Speech and Racism" (1987) 8 *Cardozo Law Review* 445, 461.

99 Keane (1991) 38.

100 Keane (1991) 38.

101 Jacoby (1975) 104.

Keane points out that media entrepreneurs are not interested in the *non-market* or non-commercial preferences of readers, listeners and viewers, and that media choices or methods of communication offered are only those that are *commercially viable* for the particular corporations.[102]

In these ways the range of things that we talk about and think about becomes narrowed, as Orwell described in *1984*, so that there are no words to express concepts that fall outside the media marketplace.[103] Unorthodox ideas are rendered unsayable or incomprehensible. As Delgado comments in the context of racist speech, someone who speaks out against the dominant racism of the day is seen as not credible; as an extremist.[104] Even if they can participate in the discourse, because their narrative goes against the dominant way of seeing things, their speech is ignored or does not 'make sense'.[105] In this way, "speech is least effective where we need it most."[106]

Media communications do not always fulfil the message sender's objectives; the relationship between institutionally sponsored, technologically mediated ideas and culturally situated social actions is complex.[107] The media of communication are not, notes Keane, passive or neutral conduits but themselves influence the reception of opinions.[108] Martin-Barbero agrees that a mass medium is not a vessel which carries ideas from one place to another, but is itself a subjective, interpretative, ideological form.[109] Information and ideas can be accepted in qualified, nuanced ways.[110] A

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102 Keane (1991) 91. See too Barron (1967) 1641-2.

103 George Orwell, *1984*, Penguin, Harmondsworth, 1956, 45. See generally Jansen (1988), Farley (2002) 114.

104 Delgado (1995) 329. See generally Delgado and Stefanic (1992). Lawrence points out that there is therefore a tendency to self-censor, especially where the view expressed, and the persons who express them, are regularly attacked, as is the case with critical race theory: Charles R Lawrence III, "Forward", in Valdes et al (2002) xiv, xv.

105 powell (1995) 336. For an example, see Sherene H. Razack describing the emotive responses from Canadian parliamentarians in reaction to statements by a representative of the Black Coalition of Quebec about the unequal effects of immigration laws upon Somalian refugees: "his points remained out of bounds, impolite, accusatory, and exaggerated accounts that committee members could only dismiss" (2002) 208-9.

106 Delgado (1995) 329.

107 Lull (1995) 31.

108 Barron (1967) 1645, Keane (1991) 37 ff.

109 Lull (1995) 17 quoting from *Communication, Culture and Hegemony*, Newbury Park, CA, Sage, 1993, 102.

message can be rejected, or taken by the audience in ways not intended.[111] But at the same time, audience members are at some level introduced to the ideas in that message,[112] which will not be consciously rejected – or even consciously perceived – to the extent that those ideas are commonly shared in that cultural community.[113]

The social process by which ideas are conceived and disseminated is not analogous to the consumption of goods and services.[114] Ideas are not products or commodities and indeed those metaphors have inherent structural limitations.[115] Concepts of scarcity and price, or of individual self-interest, cannot apply to ideas as they apply to goods.[116] The reception of an idea does not make that idea less available to others; indeed it is likely to make it more available. Ideas are not generally created in response to demand, nor 'bought' because of the intrinsic value of the content of the idea.[117] "Ideas that are not selling often serve a social function," Blasi notes.[118] Appealing ideas are not rejected if substitute ideas become available at a lower price. Indeed there may be social costs in adopting different ideas. [119]

Blasi notes[120] that the imperfections of markets recognised in the economic context apply also to any marketplace of ideas. Economic analogies are generally

110 Blasi (2002).
111 Brietzke (1997) 962.
112 Lull (1995) 21.
113 Lull (1995) 32, quoting K. Nordenstreng, "From mass media to mass consciousness" in G. Gerbner (ed), M*ass Media Policies in Changing Cultures*, Wiley, New York, 1977, 276.
114 Margaret Jane Radin, *Contested Commodities*, Harvard University Press Cambridge, Mass., 1996 at 164-183 argues that ideas should not be treated as consumer goods, nor discussion as competition. See also Blasi (2002) 22, Kathleen Sullivan, "Free Speech and Unfree Markets" (1995) 42 *UCLA L Rev* 949, 962 - 64; Note, "Free Speech and the 'Acid Bath': An Evaluation and Critique of Judge Richard Posner's Economic Interpretation of the First Amendment" (1988) 87 *Mich. L. Rev*. 499, 508-17.
115 Steven L. Winter, 'Transcendental Nonsense, Metaphoric Reasoning, and the Cognitive Stakes for Law" (1989) 137 *U. Penn. L Rev*. 1105 at 1190.
116 although information is more analagous, Blasi thinks, to a good: (2002) 23.
117 Radin (1996) 176.
118 Blasi (2002) 25. See also Blasi (1977) and Baker (1978).
119 See Radin (1996) 166 –168.
120 Blasi (2002) 23 and 24, following other scholars such as C. Edwin Baker, *Human Liberty and Freedom of Speech*, Oxford University Press, New York, 1989, at 7ff and 12, Steven H. Shiffrin,.

inappropriate.[121] He argues that to see the First Amendment as a "self-correcting, knowledge-maximizing, judgment-optimizing and participation-enabling social mechanism" is implausible.[122] Blasi concludes that Holmes' words in *Abrams*[123] should not be taken to claim that all the features of modern (neoclassical) general equilibrium theory apply in the context of free speech. He argues that the metaphor should be seen more as an evocation of the dynamism, adaptability and diversity of a well functioning economic market.[124] Similarly, Post argues that Holmes' theory of the marketplace of ideas should not be interpreted in terms of economic metaphors, but as a theory about the value of truth, and how it can be found through 'experiment' and experience.[125]

Blasi points to an inconsistency between the assumed self-interest of participants in the market model and the assumption of the model that self-interested communications will lead to truth or self-determination.[126] He suggests that listeners and readers would need to search for ideas that are valuable in a broader sense and do not simply "serve their personal needs narrowly conceived."[127]

Unequal access and unequal results

Freedom, like equality, needs to be substantive or it is meaningless. Any child in a kindergarten knows, says Perkin, that "one person's freedom is another's coercion," [128] and formal universal freedom without societal restrain means freedom for the strong

Dissent, Injustice and the Meanings of America, Princeton University Press, New Jersey, 1999 at 97ff.

121 Weinberg (1993) notes that while criticisms of the marketplace metaphor have been accepted in the economic context, they are not accepted in the context of speech: 1164.

122 Blasi (2002) 2.

123 " … the best test of truth is the power of the thought to get itself accepted in the competition of the market": *Abrams* v. *United States* (1919) 250 US 616 at 630 –1. At 624 Holmes spoke of the 'marketplace of ideas.'.

124 Blasi (2002) 26.

125 Post (2000) 2360, describing Holmes' theory as "an expression of American pragmatic epistemology."

126 Similarly, Brietzke (1997) queries the 'marketplace of ideas' assumption that recipients of ideas are 'rational' individuals who can separate form from substance and themselves from their own humanity and cultural context: 962ff.

127 Blasi (2002) 24.

128 Perkin (1989) 499.

against the weak. In the context of market communications, market liberalism depicts the struggle of the strong against the weak as the struggle of private entrepreneurs against each other or against government restrictions. But the real freedoms are won by private media oligopolies against individual consumers, who do not have the means to force their voices to be heard, or their preferences met, and who can only be protected by government intervention on their behalf. The prerequisite of freedom, says George Monbiot, is effective regulation.[129] Freedom and equality of communication needs legal protection.[130]

It is the distribution of freedom that really matters rather than the simple existence of freedom, says Perkin, and the State is necessary "not only to protect the weak from the strong but also, paradoxically, to protect the citizens" from the State itself.[131]

Following from the concept of face to face communication and participatory democracy enshrined in the Greek *polis,*[132] the free market theory presumes that access to, and participation in, the market is equally possible for all individuals within one nation-state, and consequently that "every tool of the media is a genuine means of lateral communication"[133] and all voices are heard. The reality of international communication in dispersed and complex modern societies is quite otherwise.[134]

Even within individual nation-states, there are the practical timing, geographical and economic difficulties of getting the same information to, or receiving communications from, a public that is not homogenous but has different levels of literacy and wealth. On these grounds alone, it is obvious that differential access to information and to communication necessarily exists in modern societies.[135]

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129 George Monbiot, "Freedom through Regulation" *Guardian Weekly,* 3-9 May 2001, 21.
130 Keane (1991) 128, Barrron (1967) 1641.
131 Perkin (1989) 500. See also Kennedy (1990) 46.
132 See Keane (1991) 39.
133 Keane (1991) 165.
134 Keane (1991) 41 ff and p 143.
135 Keane (1991) 41-2.

In complex societies it is inevitable that there will be representative communication, where some speak on behalf of others.[136]

Forces other than the government regulate entry to the marketplace of ideas, as well as what happens within it, through private enforcement of intellectual property rights and other forms of private 'censorship' determined largely by financial means.[137]
The problems are compounded when one considers international communications.

> Domination of the market by ideological interests which serve the middle and upper classes, concentration of media ownership, pressure on journalists and managers to conform, high costs of obtaining access to broadcasting, the influence of advertisers and the high standard of argument and evidence needed to contradict the 'patriotic agenda' are all factors which undermine diversity in the market.[138]

The perfect economic freedom for which the market aims would ideally leave participants with the widest possible choice of action. But this freedom of choice would not be equally distributed and would not provide democratic equality for citizens, only democratic equality for their dollars. In the context of communications, notes Keane, market competition produces a growing division between rich and poor in terms of access to information and to the means of communication.[139] It reinforces existing inequalities, and therefore the marketplace's success in maintaining any values can at best only be partial. That is, the marketplace of ideas will only promote or maintain

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136 Keane (1991) 43.

137 Peter Drahos, "Decentring Communication: The Dark Side of Intellectual Property" in Campbell and Sadurski (1994) 249 at 252. See discussion at website of the Authors Guild (http://www.authorsguild.org/) at http://members.authorsguild.net/trademark/disc.htm A recent Australian example is the withdrawal of the Mick Young Play Award by the trustees of the Mick Young Scholarship Trust, after it was won by a writer whose play involved lesbian and violent fantasies, bad language and drug references: Sharon Verghis, "The play that was too fruity for Labor's moral guardians," *The Sydney Morning Herald*, 30 June 2003, 1.

138 Deborah Z, Cass, "Through the Looking Glass: The High Court and the Right to Political Speech" (1993) *Public Law Review* 229, 241 citing Chomsky (1989) 5-6, reprinted in Campbell and Sadurski (1994) 179.

values such as self-expression, personal identity, and self-determination for an elite group which has access to that marketplace, and can afford full participation in it.[140]

The tendency to concentration of media ownership is itself evidence of market failure.[141] Italy[142] and Australia[143] are examples. "Put simply," says Barendt, "the USA perspective assumes that only broadcasting licensees … enjoy free speech rights on radio and television" – not listeners or viewers.[144] The concentration of media ownership in the hands of a small number of corporations has also meant that free speech is a right that is at the 'head of the queue' for judicial protection, because the media owners who benefit from the First Amendment/free speech protections can most easily bear the costs of litigation.[145] Throughout the world, concentration of newspaper ownership has for decades reduced the number of newspapers, particularly political papers.[146] The voices heard through the media oligarchy are generally of speakers selected by, and speaking for, the media corporations themselves.[147]

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139 Keane (1991) 80-81, Barron (1967) 1642 and 1647ff, Brietzke (1997) 963.

140 See generally Barron (1967), Ingber (1984), Brietzke (1997), Barber (1997).

141 See Keane (1991) 71ff, Lull (1995) 59, Urofsky (1996) 15, Barendt (1998).

142 Prime Minister Silvio Berlusconi controls Italian newspapers, magazines, television channels and publishing houses.

143 See generally Sichok (2000), Margo Kingston, "Governing for the big two: Can people power stop them?" 29 June 2003, available at: http://www.smh.com.au/articles/2003/06/29/1056825276682.html and Margo Kingston, "The debate that dare not speak its name", 25 June 2003, available at: http://www.smh.com.au/articles/2003/06/25/1056449303733.html. See also comments of Brian Harradine in Hansard, 26 June 2003, in the debate on the *Broadcasting Services Amendment (Media Ownership) Bill*, 2002, available at: http://www.smh.com.au/articles/2003/06/29/1056825274551.html.

144 Barendt (1995) 231. See also Kommers (1980) 666.

145 Sedley (1998) 25, Weinberg (1993) 1151.

146 Twenty seven political papers existed in the French Liberation period, only three of which still existed in 1970: Keane (1991) 72. Fourteen English language dailies existed in New York City in 1900 but only 4 in 1967: Barron (1967) 1644 and few papers today fulfil the former role of journals of opinion: C. Edwin Baker, "Advertising and a Democratic Press" (1992) *U Pa L R* 2097, 2138.

147 Barendt (1998) 44ff, citing M. Meyerson, "Authors, Editors and Uncommon Carriers: Identifying the 'Speaker' Within the New Media" (1995) 71 *Notre Dame L R* 79.

The United States Supreme Court recognised in *Buckley* v. *Valeo* (1976)[148] that "virtually every means of communicating ideas in today's mass society requires the expenditure of money." This has consequences for the diversity of speech within the market and for the privileging of certain types of speech.

Private limits on diversity of speech

> *… the speech of the powerful impresses its view upon the world, concealing the truth of powerlessness under a despairing acquiescence that provides the appearance of consent and makes protest inaudible as well as rare.*[149]

It is obvious that those with the most power buy the most speech, and their views are then established as 'truth'.[150]

Lee identifies the government as only one of the actual censors of speech in the context of press freedom, the others being: the judiciary, media owners, media management, print unions, media advertisers, consumers, self-regulatory bodies such as the Press Council, statutory bodies such as the Broadcasting Standards Council, and those who use threats to coerce publication (such as the American Unibomber) or censorship (as in the case of Rushdie's *Satanic Verses*).[151] Methods used include informal influence, defamation law, intellectual property law, bureaucratic controls and the production of "a constant diet of biased and inadequate information."[152] The increased proportion of media revenue obtained from advertising gives advertisers power in relation to content

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148 424 US 1 at 19. That case held expenditure restrictions on election campaigns (but not election contribution limitations) to be unconstitutional restraints on the quantity and diversity of political speech: Barendt (1985) 49, 50.

149 Catharine A. MacKinnon, *Towards a Feminist Theory of the State*, Harvard University Press, Cambridge, Massachusetts, 1989, 204, in relation specifically to gender inequality.

150 MacKinnon (1993) 102. See also Zolo (1992) 147 ff and Antonio Gramsci, *Selections from Political Writings*, translated and edited by Quintin Hoare, Lawrence and Wishart, London, 1978, 35ff as to destruction of working class and left wing newspapers and meeting places and the implications for democratic elections.

151 Lee (1990) 11ff. See also Baker (1989) 250ff.

152 Brian Martin, "Overcoming Barriers to Information", 12 April 2002 in *The Drawing Board* available at http://www.econ.usyd.edu.au/drawingboard/digest/0204/martin.html.

which is inoffensive to their audience and the proper 'surrounding' for their advertisements.[153] As mentioned above, our cultural paradigms and social conformity also combine to impose a high degree of unconscious self-censorship.[154] The combined effect of such private censorship may far exceed any attempts by government to restrict specific types of harmful speech.

Media reports are necessarily selective, and even when a story is published the prominence given to it will determine the extent to which its message is received by the public. Apparent objectivity, notes Baker, has ideological content.[155] Journalists and editors may choose to play down or not report information which is embarrassing to their newspaper or television station owners or major advertisers[156] (including governments[157]). An employee's concerns about his future prospects can easily 'chill' his best intentions to report and analyse issues. One journalist described how he initially failed to report a story about United States planes dropping propaganda leaflets over Cuba, thinking it unlikely to be believed by readers.[158] Reporting of wars is sanitised to protect the sensitivities of viewers,[159] or conceal errors.[160] Investigative reporting is more costly than 'lifestyle' reporting and so major issues of public interest are treated

153 Baker (1992) 2153, 2156. See also Brietzke (1997) 962 and Weinberg (1993) 1153ff.

154 Barron (1967) 1645-6, Keane (1991) 38-39, Jansen (1988) and Noam Chomsky, *Power and Terror*, Seven Stories Press, New York, 2003, 27 – 29.

155 Baker (1992) 2138.

156 McDonald's corporation brought a libel action against two English environmental activists for distributing a leaflet critical of its environmental, employment, nutritional and advertising record. Mass protests in response to the action outside over 3,000 Mc Donald's outlets in the United States, Canada and Mexico in 1994 failed to receive national coverage in America: Jim Carey, "Big Mac versus the little people", *Guardian Weekly*, 23 April 1995, 21 and Cherry Ripe, "David and McGoliath," *Weekend Australian*, 27-28 May 1995, Weekend Review, 5. See generally Kristina Borjesson (ed), *Into the buzzsaw: leading journalists expose the myth of a free press*, Prometheus Books, New York, 2002.

157 See Deborah Z. Cass and Sonia Burrows, "Commonwealth Regulation of Campaign Finance – Public Funding, Disclosure and Expenditure Limits" (2000) 22 *Syd Law Rev* 477 at 487 ff in relation to the constitutionality of expenditure limits on election advertising.

158 Steve Eckardt, "Mr Egg-on-the-Face," *New Internationalist*, May 1996, 35. Similarly, see Chris Masters, *Not for Publication*, ABC Books, Sydney, 2002, 1ff.

159 Ellen Goodman, "War's Bloodiest stories often remain untold," *Guardian Weekly*, 24-30 April, 2003, 37.

160 Alison Broinowski, *Howard's War*, Scribe Publications, Melbourne, 2003, 106ff. See also Chomsky (2003) 99.

superficially.[161] Television debates encourage dispute, not agreement or truth-finding.[162]

So many issues of major importance are ignored or played down by the mainstream media that a special annual publication has arisen to redress the balance.[163] Even journalists who have regular access to the media and who do not restrict their own reports are limited in what they can say by their editors,[164] by D-notices, and by their defamation lawyers. There are a multitude of unseen limits on journalistic free speech.

> Writers are put in an invidious situation. We have to write to live, yet we cannot tell the whole truth. Truth, as any lawyer will tell you, is never a defence. You are presented with X, a much-loved, much-admired role model who you know is a coke fiend, who you know partakes in orgies ... but you're not allowed to tell. I've tried to, but lawyers cut the pieces off at the knees.[165]

An individual's desire to exercise his theoretical right of free speech may be limited by actual or threatened legal action, with the enormous financial risks that litigation involves for an individual.[166]

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161 See Masters (2002). McChesney notes that representations of the poor have disappeared from the media: "The rise and fall of professional journalism" in Borjesson (2002) 363 at 377.

162 See generally Tannen (1999).

163 Project Censored, Sonoma State University, California, USA. One example: first reports that a second catastrophic explosion at Chernobyl could happen 'at any time,' were covered up at government level in several European countries: Polly Ghazi and Robin McKie, "Scientists Predict Chernobyl collapse", *Guardian Weekly* 2 April 1995, 1 and Linda Walker, Chernobyl Children's Project, letter to *Guardian Weekly*, 9 April 1995, 2. See generally Borjesson (2002) and *The Unreported Year 2003*, *New Internationalist* insert February 2004.

164 Two academics who write a regular column in a popular sports magazine that raises more serious sport-related issues were told by their editor that a proposed article about sexual discrimination in sport would not be run by the magazine because it was against management policy, as being likely to alienate readers who buy the magazine partly for its bikini girls: personal communication from Professor Colin Tatz, 1996.

165 Interview with Antonella Gambotto, *Australian Magazine*, March 26-27 1994, 21.

166 One example is the prosecutions of Howard F Lyman and Oprah Winfrey for discussing the possibility of mad cow disease affecting the American livestock industry, discussed in Lyman with Merzer (1998).

Other forms of intimidation involve threats of personal harm or death against speakers and their families, of which the fatwahs imposed upon writers Salman Rushdie and Taslima Nasreen are extreme examples.[167] Death threats have been made to public opponents of the war against Iraq.[168] In Australia, supporters of multiculturalism and opponents of racism have received death threats from racist individuals and groups.[169]

Anti-abortion politics, and related United States government decisions on scientific funding, are said to have cowed respectable scientists into silence and prevented a rational discussion of embryonic stem cell research, leaving the public debate to less respected scientists.[170]

Racist speech may intimidate its victims from exercising their own right to speech: their immediate response may be silence or flight rather than a fight,[171] and the fear they experience may well discourage them from speaking out against the racist behaviour they have suffered. In most situations, says Lawrence, minorities correctly perceive that a violent response to 'fighting words' will result in the risk of their own injury, which forces them to remain silent and submissive.[172]

Thus, to the extent to which mass communication can be seen as a 'marketplace of ideas', the marketplace can be seen to be imperfect and lead to unjust results.[173] The speech of dissenters is not likely to be heard.[174]

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167 In the Russian context, see Susan B. Glasser, "Russian tell-all has tongues wagging," *Guardian Weekly* 27 Nov – 3 Dec 2003, 33 describing reporter Yelena Tregubova's book about the Kremlin's information crackdown and Peter Baker, "Fear of the Kremlin returns to Russian Life" *Guardian Weekly*, 11-17 March 2004, 31 as to Tregubova's subsequent near escape from a bomb. For a comparison of socialist and capitalist forms of censorship generally, see Jansen (1988) Chapters 6 and 7.

168 Robbins (2003).

169 HREOC (1991) 184 and Chapter 7 generally.

170 Shannon Brownless, "Long-life science," *Guardian Weekly*, August 14-20, 2003, reviewing Stephen S Hall, *Merchants of Immortality*, Houghton Mifflin, 2003.

171 Lawrence (1993) 68.

172 Lawrence (1993) 69.

173 Baker (1992) 2169ff.

Much free speech theory ignores the fact that a theoretical right to self-expression is not the same as a right to be heard. It is not merely the right to speak, but the corresponding right to be listened to, that constitutes the basis for democratic participation. Without the right to be heard and have one's words respectfully received as deserving consideration, one may speak to no effect. In the context of public debate through the mass media, it is virtually impossible for most people to have their words heard.

The ability to speak effectively against those who *do* have access to the media depends either upon luck, as when members of the public write letters to newspaper editors, or ring talk back shows, upon status – through which one has a better chance of having one's letter or article published or of being interviewed – or upon wealth, whereby one can buy advertising space or time.[175] For the vast majority of the population, there is no realistic access to the mass media. In competing against paid speech in the media, most of us will be lucky to have a few letters to the paper, perhaps the odd article, published in their whole lifetime. That is the highest degree of publication and publicity that most of us can expect to achieve. Public discourse cannot survive where it is made available only through private means. This fundamental point, which went to the heart of the High Court's decision in the *Australian Capital Television* case, was not addressed by the Court.[176] Barendt suggests that a balance can only be achieved by conferring upon minority groups and individuals legal rights of reply to media comment,[177] as is done without any apparent problem in France.[178]

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174 Shiffrin (1999) argues that the dissenter should be the 'organizing symbol' of First Amendment Jurisprudence, expanding on Blasi's notion of the checking value (1977): 5, 140ff. See also Weinberg (1993) 1139ff, 1149ff and 152.

175 Cass gives the example of the 1990 election campaign in which the Australian Conservation Foundation spent $136,536 and the Forest Industry Companies Association over $1 million: (1993) 243.

176 See Cass (1993) 231 and Drahos (1994) 274, pointing out that freedom is perhaps less important than communication.

177 Barendt (1987) 83.

178 Keane (1991) 131, saying publishers' failure to print the reply is subject to fines and imprisonment. The right of reply is not limited to defamatory or untrue statements. See generally Barron (1967).

If one accepts the argument that the free market of ideas can loosely be equated with a form of democracy in which all citizens are able and encouraged to participate, then it would seem, ironically, that judicial refusal to allow any limit upon free speech effectively 'chills' that participation. One essential aspect of self-government, says Boehringer, would be to determine speech rules.[179] But in the United States that is a decision that is taken out of the hands of all levels of government bodies by the Supreme Court.

The concentration of media ownership throughout the world, and the nature of the issues that interest that media and the advertisers that pay it, also serve to limit our cultural and democratic options. Where the public sphere is owned and dominated by a limited number of corporations, they control who is seen and what is heard. As Keane says, the free-speaking individual is replaced by corporate actors wielding enormous economic power. But they are not restricted by the First Amendment which restricts only federal and state governments. And there are no international regulations or powers to limit them in any consistent way.[180] The mass media has the power of communication, selection, comment and presentation. Generally speaking, it has no sanctions. It has no incentive to correct itself.[181] The language of individualism, says Keane, is used to crush individualism.[182]

In Australia, a recent example of limitations on speech that occur by virtue of economic rationales is the proposal by two competing Sydney radio stations, 2UE and 2GB, to pool news facilities and report news through that shared facility.[183] In the United States at the time of the war on Iraq, radio station owner Clear Channel Worldwide Incorporated, which accounts for 9 percent of the market, organised pro-war "Rallies for America" which it advertised on its own radio stations and reported through its own

179 Boehringer (1998) 132.
180 Keane (1991) 143.
181 Sedley (1998) 25.
182 Keane (1991) 84.
183 "Carr slates news merger", *Sydney Morning Herald*, 28 November 2003, 2.

journalists.[184] Murdoch companies were given broadcasting rights in China on condition that they did not show BBC news.[185]

While one can agree with Blasi that free speech might offer the opportunity for countering "certain illiberal attitudes about truth, change, and authority on which the censorial mentality thrives,"[186] in practice views that challenge the *status quo* are unlikely to be promoted. Mass communications theory acknowledges that media will tend to represent the ideologies of the most powerful, and will influence how people make sense of their societies. The media interpret and synthesize images according to the assumptions of the dominant ideology.[187] Just three press magnates, says Polly Toynbee, control the British media, and their

> pernicious influence corrodes all political discourse. Against these forces of conservatism the liberal voice is pathetically weak. Most of the population will rarely hear or read a liberal sentiment.[188]

Charles Lawrence III argues that lack of access to mainstream media in the United States has meant that critical race theorists are less able to respond publicly to the 'stream of caricature' and personal invective against them in articles, books and 'respected' journals such as the *Wall Street Journal* and *New Republic* and, where they can gain access, are forced into a 'reactive' position.[189]

It is likely that the market actively suppresses the speech of those of lowest status: women, migrants and Aborigines,[190] even where they have access to the market. It is

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184 Roy (2003).
185 Sedley (1998) 26.
186 Blasi (2002) 50.
187 Lull (1995) 11. The war in Iraq provides many examples.
188 Toynbee (2000) 9.
189 Lawrence (2002) xvi, citing Patricia J. Williams, "De Jure, De Facto, De Media….; Diary of a Mad Law Professor," *New Republic*, June 2, 1997, G1.
190 See Cass (1993) 244 and 245.

also unlikely that the market maximises freedom of choice for such groups who are usually underrepresented in the 'ratings'.[191]

Similarly, in the United States, says Lull,

> advocacy of alternative political ideologies, parties, and candidates, or suggestions of viable consumer alternatives to the commercial frenzy stimulated and reinforced by advertising and other marketing techniques, are rarely seen on the popular media. … When genuinely divergent views appear on mainstream media, the information is frequently shown in an unfavorable light or is modified and coopted to surrender to the embrace of mainstream thought.[192]

Quality of Communications

John Stuart Mill's arguments for maximising free speech were made against a long history of political repression, where for centuries political comment was possible only through anonymous pamphleteering. His arguments were also advanced in a culture of rationalism, before any understanding of the use of widespread propaganda to influence public opinion. Mill assumes that public argument will be rational and sincere, and that all parties will seek to find the truth (although he does not necessarily assume that it will be found).[193] But this is no longer the situation. Free speech, mainly unfettered by government regulation, has become systematically corrupted by market forces.

Except where public service radio and television is properly funded, broadcasting standards and the level of content generally fall.[194] The media emphasises personality

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191 Keane (1991) 77.

192 Lull (1995) 36. See also Sedley (1998) 25 commenting on the 'media whiteout' in the United States in relation to Chomsky.

193 See Keane (1991) 20 and 39.

194 Keane (1991) 65. See 66 ff for his discussion of Adorno and Horkheimer's argument that the mass communications industry destroys the distinction between high and low culture, replacing it with 'stylised barbarism'.

over issue,[195] and reproduces the cult of celebrity which diminishes the quality of public communications and functions as a means of social control. Political culture becomes inseparable from Hollywood and celebrities become politicians.[196]

Broadcasting doesn't just become 'infotainment' of lower quality, but becomes highly manipulative. Through advertising and public relations, speech aims to change peoples' views largely by appealing to their emotions rather than their reason, and by manipulating information and arguments. Our culture aims for "maximal impact and instant obsolescence."[197] Public broadcasting does not usually give airtime to clearly manipulative speech, but private broadcasting does.

Public relations firms establish 'concerned citizens' groups and fund them to express a particular point of view. 'Think tanks' funded to express particular views present themselves as independent and non-partisan. Focus group organisers, policy consultants and pollsters also put their own spin on public issues. The data they obtain from a narrow section of the public is presented as 'public opinion'.

In Australia it appeared that secret payments were being made for radio promotions which were misrepresented as objective analysis. It emerged that deals of this type are relatively common in Australian commercial radio and television.[198] 'Free' speech is no longer free in either a philosophical or monetary sense – it has become just another commodity which can be bought and sold.[199] The result is that 'bought' speech is a major part of public speech. And 'bought' speech is generally manipulative speech.

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195 Parenti (1986) 213 and generally.

196 John F Schumaker, "Starstruck" in *New Internationalist*, December 2003, 34, referring to John F Schumaker, *The Age of Insanity: modernity and mental health* Praeger, Westport, Conn, 2001, Michael Parenti (1992), Chris Rojek, *Celebrity*, Reaktion, London, 2001.

197 Zygmunt Bauman, *Alone Again: Ethics After Certainty*, Demos, London, 1994, quoting George Steiner, 17.

198 See Australian Broadcasting Authority, *Commercial radio inquiry*, 2000, available at http://www.aba.gov.au/radio/investigations/projects/commerc_radio/index.htm (last updated 14 June 2001), and Cosima Marriner, "John Laws and 2UE are at it again," *Sydney Morning Herald*, 5 December 2003, available at http://www.smh.com.au/articles/2003/12/04/1070351725314.html.

199 See Baker (1992).

The majority of us who are dependent upon a handful of media corporations to provide us with information have no right to know, notes Sedley, if we are being told the truth. We have no power to make the corporations tell it. None of these considerations, he rightly says, finds any place in First Amendment jurisprudence.[200]

The role of Government

Negative activities

Formal government censorship exists throughout the world. Just some of the extreme cases include nationalisation of private media interests in Russia,[201] and in China, sackings of senior staff on the South China Post, the censure and closing of papers reporting independently,[202] and policing of internet use.[203] Political reform and human rights issues are generally not reported in the Middle East, and intimidation of reporters in Saudi Arabia is common.[204]

As mentioned in the previous Chapter, both in the United States and Australia there is a large degree of regulation of speech, although it is often directed to protection or promotion of the interests of elite participants in the market. One example: in Australia, restrictive legislation was introduced to limit use of words and symbols associated with the Sydney 2000 Olympic and Paralympic Games, for the purpose of protecting the exclusivity of official sponsors.[205] In Britain, a ban on advertising companies buying

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200 Sedley (1998) 26.

201 In 2000 following criticism of Putin over the sinking of the submarine Kursk, Putin nationalised the 49% holding in the Russian Public Television station owned by Boris Berezovsky: SBS, *Dateline*, 21 May 2003. However this followed the death of journalist Vladislav Listev who was "trying to lead an ethical revolution at ORT TV": "Worldbeaters: Boris Berezovsky" in *New Internationalist*, December 2003, 29.

202 John Pomfret, "Chinese scandals lead to media crackdown," *Guardian Weekly*, June 26-July 2, 2003, 31.

203 Kathy Chen, "China Tightens Reins on Debate," *Australian Financial Review*, 26 September 2003, 24, Jonathan Watts, "China tightens net around online dissenters," *Guardian Weekly*, 12-18 February 2004, 3.

204 *New Internationalist*, *The Unreported Year 2003*, insert of February 2004, 2-3.

205 The *Sydney 2000 Games (Indicia and Images) Protection Act* 1995. Even the longstanding system of intellectual property rights failed to privatise these words and symbols. Official

TV stations was recently rescinded, but advertisements by Amnesty International are forbidden (although not advertisements by corporations) in case broadcasting is "skewed by those best able to fund advertising."[206]

Government emergency powers can be used to limit media reporting, including extensions to legislation relating to official secrets and the like,[207] and informal procedures can be used to limit access to government by unsympathetic reporters. Even in peacetime, White House refusal to take questions from reporters who will not 'toe the line' is well documented. Recent media restrictions in Australia on the filming and reporting of US President Bush's speech to the joint Australian Federal Houses of Parliament are another noteworthy example.[208]

Governments can make their operations less visible to the media and to voters by virtue of increasing the unexamined role of the administration, known as 'managerial' government. This can be done informally, or through legislation that restricts the ability of courts to review those administrative actions of democracy.[209] Such action undermines the traditional arrangement of checks and balances between parliament, the administration, the constitution, and the courts. It nullifies the basic notion of law as a defence of the rights of the individual against an arbitrary executive[210] and undermines our concept of the rule of law. Following September 11, judicial review of police and military activities has been increasingly limited by law, although this was the continuation of a growing trend.[211] In the last months of 2002, the NSW government

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sponsors would be charged between $10 million and $40 million for exclusive rights to associate their products with the Olympics: paper presented by Katrina Rathie to Advertising Law Conference, Sydney, 27 March 1996. The legislation was used even against corner cafes which had had 'Olympic' in their names for decades..

206 George Monbiot, "Business as Usual," *Guardian Weekly*, 21-27December 2000, 9.

207 Keane (1991) 111.

208 See report from Natasha Cica, "That's our Bush" on Webdiary 24 October 2003 at http://www.smh.com.au/articles/2003/10/24/1066631624265.html

209 See comments of Chief Justice Gleeson in *Plaintiff S157/ 2002* v. *Commonwealth of Australia* [2003] HCA 2.

210 See Burleigh (2001) 165.

211 See Keane (1991) 97-98.

passed the *Terrorism (Police Powers) Act* which purports to protect the decisions of the NSW Police Minister from any judicial review whatsoever.[212]

Another factor which limits full communication and undermines the operation of democracy is the practice of lying by governments;[213] well known in Australia in the wake of the 'Tampa' affair[214] and the Abu Ghraib scandal.

Governments now have increasing persuasive power with the media by virtue of the increasing advertising revenue which they spend not just on campaign advertising but on promotion of policies and individuals. The form of the journalistic interview may be maintained, says Keane, but the questions asked and the rules of engagement are increasingly set by interviewees. In Britain in the 1980s, the government was the second largest advertiser.[215]

There may be more direct connections between government and the media: in the United States, the Chairman of the Federal Communications Commission is Michael Powell, son of Secretary of State Colin Powell, who has proposed even further deregulation of the communication industry, with greater consolidation.[216]

Positive roles

Governments have a positive role in facilitating public communication, for example through the provision of libraries and internet access, which can be expanded or limited (for example, by the introduction of 'user pays' schemes). 'Dissenting' views of First Amendment jurisprudence also argue that it is legitimate for the government to protect

212 See Section 13 (1).

213 Keane (1991) 101 and ff, and Max Hastings, "Never forget that they lie," *Guardian Weekly*, 5-11 February 2004, 13, commenting on Lord Hutton's report into the BBC's handling of information from Dr David Kelly.

214 See generally Marr and Wilkinson (2003).

215 This paragraph draws on Keane (1991) 101-6.

216 Roy (2003).

free speech *against* the various censorships and controls effected by an unregulated market.[217]

Legislation that ensures political candidates have a guarantee of some minimal access to the mass media would appear to improve the amount of political information available to the electorate, and therefore to be desirable in a democracy, as argued by Tom Campbell[218] and Deborah Cass.[219] However this type of legislation was struck down by the High Court in *Australian Capital Television Pty Ltd* v. *The Commonwealth.*[220]

Keane argues for a 'public service model' of communicative freedom, through government support for a wide variety of countervailing media. Only diversity in the media, he argues, can properly reflect the reality of our social diversity. [221]

Failure to lead to truth

Where is Truth to be found? …
It is rarely found in politics and almost never in the media.[222]

The speech with the most truth does not always win,
otherwise the creationist movement could not survive.[223]

A lie told once is a lie, Goebbels is said to have commented cynically, but a lie told a thousand times is the truth.[224]

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217 See Barendt (1998) 47ff, discussing Carl Sunstein, "The First Amendment in Cyberspace" (1995) 104 *Yale L J* 1757.

218 Campbell (1994).

219 Cass (1993).

220 (1992) 177 CLR 106; (1992) 108 ALR 577; (1992) 66 ALJR 695.

221 Keane (1991) 165 -6 and 116ff.

222 Peter Vardy, *What is Truth?* University of NSW Press, Sydney, 1999, 185.

223 Ninio (2003).

224 see also Lull (1995) 14, 22. The persuasive effect, points out Lull, doesn't occur only at the moment of exposure. See also Paul Sheehan, "Truth still the casualty of a just war," *The Sydney Morning Herald*, 30 June 2003, 9, making the same point both in general and (less convincingly) in relation to the reporting of the Vietnam War.

It is said that a perfect 'marketplace of ideas' will provide the public with maximum information and lead to 'the truth'. So long as governments are prevented from imposing their 'ideological orthodoxy,'[225] all information will be obtainable and falsehoods will be overcome by 'more speech' so that the truth emerges.[226] Free communication and free dissemination of all opinions and information are essential, it is argued, for a properly-working democracy. Without complete information, voters do not know what choices and decisions to make. Speech needs to be free, and the press needs to be free, in order to reveal corruption in government and governmental error.

Discussions of the nature of truth in the various areas of social life such as politics, religion, morality, literature, art, or history, are outside the scope of this thesis.[227] It can however be said that the theory that the marketplace of ideas will lead to conventional understandings of truth that are generally accessible does not accord with the reality. History is full of examples of truths suppressed by force and censorship. Truth has no inherent power to prevail.[228] Success in the marketplace shows the attractiveness of an idea to a limited section of the public, rather than its truthfulness.[229] As described above, there is no forum in which everyone is equally free and able to exchange ideas. Whether ideas are expressed publicly, and how they are received, are limited in many ways, including in terms of access to the mass media. Our existing preconceptions influence the information that we receive.

The result of non-intervention by the state is not to purify public speech and free it from all ideologies, nor to maximise public information. We know that not all public speech, debate and argument is engaged primarily in the search for truth.[230] Lack of government

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225 Maher (1994) 390.

226 Maher (1994) 386.

227 It is notable that the marketplace argument does not examine the nature of 'truth', despite this being the subject of much philosophical debate. See for example Vardy (1999).

228 Keane (1991) 20.

229 Tom Campbell, "Rationales for Freedom of Communication" in Campbell and Sadurski (1994) 17. Similarly, see Bernard Williams, *Truth and Truthfulness*, Princeton University Press, Princeton and Oxford, 2002, 213-215.

230 Cass (1993) 239.

intervention is more likely to result in the ideologies of the wealthy and the persuasions of advertisers dominating, because they are able to pay for access to the media,[231] and because in any case the ideology of the dominant group is most likely to be reflected through all aspects of culture.[232] People's ability to discover truth is also limited by the nature and overwhelming number of advertisements, which trivialise issues and use every possible means to achieve their persuasive potential.[233] Much of the information that we receive is deliberately misleading.[234] Truthful information that is objectionable to special interests may even be discredited in the marketplace through denigrating the speaker as well as the information.[235] Government regulation, or imposition of liability for misleading statements, is often imposed with the aim of achieving truthful information. Post gives the examples of product warning labels, and liability of professionals for advice to their clients.[236] Indeed, we are more attuned to receiving lies than truth.

> Ours is a consumer society. Through the buying and selling of merchandise firmly based on the dictum *caveat emptor* ('buyer beware') we are deeply grounded in lies regarding what we buy and sell. Merchandising and public relations is the selling of things and people through lies. We sell ourselves through lies.

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231 Deborah Z Cass describes how the High Court has placed undue reliance upon the argument that more speech will facilitate the discovery of truth, and hence failed to take account of the potentially deleterious effect upon truth of political advertising: (1993) 229ff.

232 Vardy (1999) points out that 'truth' cannot be accessible only by a privileged group: 124. However such ideological implications are not readily understood: Lull (1995) 14-15.

233 Lull (1995) 16 referring to visual logos, audio jingles, slogans, technical effects, packaging, and the melding of print and electronic media campaigns.

234 Dow Chemicals advertises itself as the company that 'protects wildlife' and Exxon as having an 'environmentally conscious' image: Lull (1995) 13, 14. See generally: John Stauber and Sheldon Rampton, *Toxic Sludge is Good for You*, Common Courage Press, Monroe, Maine, 1995.

235 See, for example, the treatment given to scientists who warned the British government of the connection between Mad Cow Disease and Creutzfeldt-Jakob Disease: Sarah Boseley, "How the truth was butchered," *Guardian Weekly*, 31 March 1996, 10.

236 However, strangely, Post uses these as examples to the contrary, saying that "it makes no sense… to locate a 'truth-seeking function' in the speech between lawyers or doctors and their clients, or in the communication contained in product warning labels": Post (2000) 2366.

> Television and newspaper survive by selling (through lies) ... Further, we expect as little truth from commercials as we do from the material between them, be this news or political statement. We know we are surrounded by lies but don't know what to do about it.[237]

While in the long run, said Chief Justice Dickson, "the human mind is repelled by blatant falsehood and seeks the good," it is too often true, in the short run, that "emotion displaces reason and individuals perversely reject the demonstrations of truth put before them and forsake the good they know."[238] The separation of truth from falsehood requires sophisticated rational determinations.[239] Only if people adopt ideas that espouse some broader values, rather than reinforcing their own narrow self-interest, says Blasi, is it likely that the marketplace of ideas can lead to truth.[240]

Similarly, Post argues that the 'truth seeking function' of the marketplace will not be effective without shared social practices such as the capacity to engage in self-evaluation, a commitment to the conventions of reason, and thus aspirations towards "objectivity, disinterest, civility, and mutual respect."[241] It is notable that these are precisely the type of social practices that are lacking in extremist racist speech. Post quotes John Dewey's comments that the possibility of rational deliberation is inconsistent with the suppression of another's speech by force or psychological means and criticises the Supreme Court's tendency to formulate rules that are independent of "social organization."[242] Yet Post fails to draw the conclusion that, given our existing social organisations, regulation of speech in order to discourage racist ridicule, abuse or intimidation might enhance opportunities for the rational deliberation of others and thus enhance their equality rights. Indeed he specifically disagrees with Meiklejohn's

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237 Steiner (1975) 157-158. See also Noam Chomsky, "Propaganda and Control of the Public Mind" in McChesney, Wood and Foster (1998).

238 Chief Justice Dickson, Keegstra (1990) 61 C.C.C. (3d) 1, 37, quoting from the Cohen Committee Report. See also Cohen (2001).

239 Ingber (1984) 7.

240 Blasi (2002) 24, quoting Holmes' dissent in *Abrams* v. *United States* 250 U.S. 616, 630 (1919).

241 See generally Robert Post, *Recuperating First Amendment Doctrine* (1995) 47 *Stan. L. Rev.* 1249.

242 See generally Post (1995).

arguments that it is necessary to suppress abusive speech to protect 'responsible and regulated discussion.'[243]

Can harmful speech be overcome by more speech?

An unregulated marketplace cannot lead to truth unless harmful speech, including untruthful or misleading statements that are framed to persuade, racist stereotyping, and racist hate speech, can always be completely rebutted in the marketplace by more speech.

The 'more speech' argument is almost an article of faith in American free speech jurisprudence, summed up in the aphorism of Justice Brandeis that "the remedy to be applied is more speech, not enforced silence,"[244] and has been followed by opponents of the *Racial Hatred Act*. "Racist speech" says Maher, "can just as plainly serve to reinforce disgust, whether it is that of the general public or the targeted group, and to fortify a community's determination to fight back with the truth."[245] Unpopular, divergent, derided or even dangerous ideas may best be dealt with, says Ron Merkel, by 'more speech' – by exposing the ideas and those that profess them for what they are.

> (T)o eradicate racism we need to listen to the words which are expressed, to delve beneath them, to find our own words of reply and explanation, before we can even begin to make the changes we seek.[246]

Tim Fischer quotes Thomas Jefferson: "We have nothing to fear from the demoralised reasonings of some people, if others are left free to demonstrate their errors."[247]

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243 Robert Post, "Meiklejohn's Mistake: Individual Autonomy and the Reform of Public Discourse" (1993) 64 *U. Colo. L. Rev.* 1109, citing Alexander Meiklejohn, *Political Freedom: The Constitutional Power of the People*, 1965, 24 (1st published 1948). See also Meiklejohn (1942) 13 and 19 arguing that political freedom does not mean freedom from control, and that legislation to enlarge and enrich speech is not constitutionally prohibited.

244 *Whitney* v. *California* (1927) 274 US 357 at 377.

245 Maher (1994) 385.

246 Merkel (1994).

Katharine Gelber argues that because the socially harmful effects of racial vilification include the silencing and disempowerment of the victims, there should be government support for the communication of responses from the victimised group. The responses would not necessarily be directly to the perpetrators, but to the general community, to improve the group's reputation.[248] Indeed, from what we have seen about the mindset of racists, it is unlikely in most cases that direct responses to the perpetrators would be likely to convince them of the 'error' of their beliefs. While Gelber's suggestions are certainly constructive, and do address a specific and socially harmful consequence of racial vilification, it is unlikely that on their own they would provide a sufficiently strong discouragement to perpetrators.

The argument that more speech is substantially an effective response to the reputational and wider social harms caused by racial vilification relies upon unexamined and unduly optimistic assumptions. It is assumed that complete rebuttal of harmful speech, including intentional falsehoods, is really possible, in that:

(1) there are individuals or organisations willing to engage in countering all harmful and false expressions;
(2) the rebutters will have adequate time, funds and access to enable them to identify and respond to all harmful and false expressions; and
(3) the rebuttal message is received and effectively accepted by the original recipients of the harmful or false message as a complete rebuttal.[249]

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247 *Hansard*, House of Representatives, 15 November 1994, 3353.

248 Gelber (2002) and "*Racial Vilification Policy – empowerment, not punishment"*, paper presented to the 12-13 March 2002 HREOC National Conference on Racism "Beyond Tolerance" available at http://www.hreoc.gov.au/racial_discrimination/beyond_tolerance/ speeches.html. Similarly, see Martha T. Zingo, *Sex/Gender Outsiders, Hate Speech, and Freedom of Expression*, Praeger, Westport, Connecticut, 1998 at 177ff.

249 See generally Richard Delgado, and Jean Stefanic, *Must We Defend Nazis?, Hate speech, pornography and the First Amendment*, New York University Press, New York and London, 1997.

A related claim is that provocative speech followed by 'more speech' produces a satisfactory process of collective deliberation, if not necessarily a satisfactory outcome. Blasi describes this claim as 'unconvincing'.[250]

Our personal experience of reality tells us that speech does have real consequences and the effects of speech cannot simply be cancelled out by 'more speech'. Jewish religious law elevates the biblical prohibition against harmful speech[251] to the level of a principle which forbids saying anything negative about another person, *even if it is true*, unless the person to whom one is speaking or writing has a legitimate need for this information, because of the impossibility of undoing the damage to a man's reputation caused by harmful gossip.[252] As Lull points out, the persuasive effect of a message or theme does not occur only at the moment of exposure. The message or theme, and the underlying values and assumptions, are remembered and recalled long afterwards, in similar contexts.[253]

The possibility of a direct relationship between speech and the effects of that speech upon the recipient is legally recognised in sexual discrimination jurisprudence.[254] Referring to a woman as a 'girl' or to a black man as 'boy' is not neutral or meaningless to that person but a manifestation of the speaker's power, that may be resisted or internalised, but not forgotten.[255] The pain, confusion, hurt and humiliation caused by racist threats cannot be ameliorated by 'more speech'; by saying something like "So's your old man."[256] In the case of indirect abuse of a group, reputational injury can linger

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250 Blasi (2002) 2. Radin agrees (1996) 182.

251 Leviticus 19: 16: "Do not go about as a talebearer among your people."

252 Telushkin (1991) 522 to 523. Traditional Irish or Brehon law seems to have had similar prohibitions: see Vincent Salafia, "Law, Literature and Legend," Tuath na Ciarraide Website at http://ua_tuathal.tripod.com/lawintro.htm, describing the laws as "a legal system which respected individuals first, and property second." The early texts are being collected in a Corpus of Electronic Texts by University College, Cork, available at http://www.ucc.ie/celt/.

253 Lull (1995) 22.

254 MacKinnon (1993) 13 to 14 and 45 to 46.

255 Simon (1995) 66-67.

256 Fish (1994) 109.

despite rebuttals. There is little, if anything, that can be said to redress either the emotional or reputational injury of racist hate speech.[257]

Merkel rightly says that those free speech proponents who seek to protect the right of racists to express their views have a corresponding duty to expose those views for the evil that they represent.[258] But this simply does not happen. Much dangerous and undesirable speech occurs in contexts where there is no-one to rebut the speech, or no-one interested enough and unafraid to do so.

Apologies and explanations, even if given, are rarely afforded the prominence given to the original hate speech. Clive Holding commented that when he was Minister for Aboriginal Affairs, he complained on behalf of Aboriginal people against racist slurs made by two Sydney radio commentators.

> It took six to nine months before the tribunal had dealt with that matter and found that they had been guilty. But that finding did not get half as much publicity as the statements that those commentators made on the radio.[259]

Nor did it diminish the persuasive effect of the original statements, which lived on in the recipients' minds. In November 1994 a Hong Kong television station, Asia Television, placed a two-page advertisement in the *South China Morning Post* and other Chinese papers saying that if Adolf Hitler had had the benefit of that company's marketing skills, he might have won the Second World War. The advertisement concluded with the suggestion that clients contact Asia Television for the 'final solution' to their advertising needs.[260] How would it be possible for rebuttals, that is, 'more speech', to counteract the various effects of that advertisement on all those who read it? Such trivialisation of

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257 Lawrence (1993) 68.

258 Ron Merkel, "Race education better path than prohibition," *Australian*, 2 November 1994, 13.

259 Clive Holding, *Hansard*, House of Representatives, 15 November 1994, 3372.

260 Law Council of Australia, *International Law News*, No 25 January 1995, 33 to 34.

the terror and the slaughter of the Holocaust has an insidious effect and cannot easily be counteracted by apologies or explanations.

There is no certain way of rebutting misleading information that is communicated indirectly. In American 'push polls', potential voters are telephoned and asked to answer a few purportedly objective questions about their voting preferences. "If I told you," asks the interviewer, "that candidate X is cruel to animals, would that make a difference to your vote?" Push polls are now used to support claims that 'informed voters' do not favour 'candidate X'. The quality of the information is dubious. The phoning may be carried out from another state for maximum secrecy.[261] In February 1995 it was discovered that the Liberal Party in Australia had spread highly defamatory disinformation about an ALP candidate through a research company under the guise of opinion polling.[262]

In the context of an election, there may not be time to rebut misleading information.[263] In the United States, misleading and defamatory political mailings have been targeted to narrow demographic or geographic audiences and timed to arrive just before Election Day, when there are no opportunities for opposition rebuttal or press analysis.[264] Even media commentators admit that American-style election commercials on television pose a threat to democracy by the way they distort issues and by their growing expense.[265] As Cass notes, arguably no political advertising contributes to truth because neither the content of advertisements nor their manner of presentation is aimed at accuracy:

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261 David S. Broder, "Politics gets dirtier by the Day," *Guardian Weekly*, 16 October 1994, 20. Concerns as to misleading polls were expressed in the United States in Advertising Research Foundation Position Paper, *Phony or Misleading Polls*, Advertising Research Foundation, 1986.

262 Mike Seccombe, "'Honest John' Howard: it's a matter of opinion," *Sydney Morning Herald*, 28 February 1995, 3. The preamble to the phone poll sought reaction to "some specific issues that may come up in the by-election for the Federal seat of Canberra", saying "all of the statements I'm going to read you are true." The statements included: that the candidate had publicly supported the right of abortion up to nine months, had been a director of the Canberra Labor Club immediately before it went bankrupt; had supported violent demonstrations at an armaments exhibition in Canberra, and had written a book advocating armed struggle against the rich.

263 See Cass (1993) 239 and the articles cited there.

264 Broder (1994) 20.

265 Phillip Adams, "Bigots better in the open", *Weekend Australian*, 1-2 October 1994, Section 2, 2.

important political ideas are presented in disconnected and abbreviated forms, aimed more at emotional responses than at information or content.[266]

In April 1995, Scottish judges banned the BBC from screening a Panorama interview with John Major in the week prior to the holding of local Scottish elections, because of the possible unfair advantage that it could give the Conservatives at the polls. Free speech was – temporarily – limited, but in the interests of democracy, in order to ensure that the election process was not unfairly influenced.[267] If the programme indeed failed to meet the required standards of impartiality and balance, as the three Scottish opposition parties alleged, such a result would appear to be proper.

In the context of the internet, the effect of racist hate speech sites cannot be countermanded by individuals writing to that site: their comments, even if published, are likely to be outnumbered, and will not be presented in the same way as the rest of the information available. Nor can the effect be countermanded by anti-racist sites, which will not necessarily be seen by those who use the racist sites. 'Unflinching exposure and examination'[268] of hate speech will not be published in the same way nor received to the same extent.

Stereotyping is another indirect form of racist expression which is particularly difficult to rebut by 'more speech'.

Given the inequalities inherent in any marketplace, in this case the 'marketplace of ideas', there will be no perfect exchange of information, and false speech will not necessarily be overcome. The 'marketplace of ideas' does not necessarily lead to truth.

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266 Cass (1993) 240 and literature cited there. See also Peter Watkins' film, *The Journey*.

267 Guardian Reporters, "Scots judges ban Major TV interview," *Guardian Weekly*, 9 April 1995, 1.

268 recommended by Perine (2000).

Failure to promote tolerance

It is easy to bear the misfortune of others
– Proverb

… all ideas are not equally true, and hence not all are equally tolerable. To tolerate them all is to degrade each one … If there is repressive tolerance, then there is also liberating intolerance.[269]

Many 'free speech' arguments are based upon the claim that regulation of racist speech would harm the value of tolerance which free speech is said to promote: we should be tolerant of all ideas and expressions, no matter how undesirable, and perhaps *especially* if they are undesirable.[270] The rationale for protecting undesirable ideas is presumably because only by accepting all kinds of expression, irrespective of content, can we hope to ensure that we will not ourselves ever be censored.

Calls for society as a whole to 'tolerate' harm to some of its members for the 'greater good' might at first sound reasonable. 'Tolerance' is commonly portrayed as a universal value, as indicated by the designation of 1995 as the International Year of Tolerance. But, as Charles Lawrence has argued in the context of the United States, whenever it is decided that racist hate speech must be tolerated because of the importance of tolerating unpopular speech, subordinated minorities are being asked to bear a burden for the good of society, to pay the price for the social benefit of a concept of free speech that harms them.[271] The marketplace of ideas has not succeeded in eliminating racism. Those least able to pay are the only ones 'taxed' for this tolerance.[272] Indigenous Australians express the same view in their slogan for Aboriginal and Torres Strait Islander Week, July 1995: "Justice, not tolerance". HREOC's 2001 Conference on Racism was entitled

269 Jacoby (1975) xviii.

270 Phillip Adams, "Agree to Disagree", *Weekend Australian* 26-27 May 1995, Features, 2.

271 Lawrence (1993) 80-83, Matsuda (1993) 17, 25, 47-48. MacKinnon and Fish agree. Donald Horne notes that tolerance is not meaningful unless it is reciprocal: Donald Horne, *10 steps to a more tolerant Australia*, Penguin, Camberwell, Victoria, 2003, 68ff.

"Beyond Tolerance" and the 2001 United Nations World Conference against Racism identified "Related Intolerance" as accompanying racism, racial discrimination and xenophobia.[273] "I don't want to be tolerated" said a participant in HREOC's 2001 National Consultations. "You can tolerate a headache. I want to have respect and equality."[274]

'Tolerance' of racist behaviour and speech by persons not themselves suffering from racist harm is at best meaningless, and at worst, amounts to complicity in the harm. The harms of racial vilification have serious consequences for the victims, their communities, and for society as a whole. These harms have to be taken into account. So-called 'tolerance' of all expressions, irrespective of their content, is a false ideal which, says Marcuse, is inevitably grounded in, and maintains; existing inequalities of power,[275] repressing those against whom harm is tolerated.[276] Philosopher Bernard Williams agrees that this kind of relativism is not a satisfactory theory. He says that "we can't actually doubt everything, and to pretend that we can is a philosophical fiction which tends to devalue doubt where it really matters."[277] In the same way, we can't tolerate everything, irrespective of content and consequences, and to pretend that we can is also false and devalues the whole idea of tolerance.[278] Arguments that society should be tolerant of racial vilification implicitly value unlimited free speech more highly than avoidance of the various direct harms caused to victim groups by racist speech, without any explicit balancing of those competing interests.[279] Such arguments also fail to acknowledge that racist speech causes harm to society as a whole.

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272 Matsuda (1993) 48.

273 See generaally www.humanrights.gov.au/worldconference

274 HREOC (2001).

275 H. Marcuse, "Repressive Tolerance" in Wolff et al (1971) 44-46.

276 D. Spender, *Man Made Language*, Routledge and Kegan Paul, London and Boston, 1980, 104. See also Matsuda (1996) 97ff and D. Otto, W. Morgan and K. Walker, "Rejecting (In)Tolerance: Critical Perspectives on the United Nations Year for Tolerance" (1995) 20 *Melb Uni LR* 190.

277 Comment in online *Guardian* Forum, 12 November 2002, available at: http://educationtalk.guardian.co.uk/WebX?14@77.mKjEcJOhwn5.0@.3ba77186/61.

278 A point made tellingly by one of the more outrageous *South Park* episodes. See also Horne (2003) 69.

279 Feldman (1998) 164-166 citing Frederick Schauer and R. Zechkauser, "Cheap tolerance" (1994) 18 *Synthesis Philosophica* 439.

The meaning of 'tolerance' needs to be carefully examined. The terms 'tolerance', 'toleration' and 'tolerate' are commonly used to describe both:

- a disposition to be patient, fair, and free from bigotry; not unduly severe in judging or reacting to opinions or practices of others (for example, tolerance of other religions or cultures); and

- endurance of something which has a directly harmful effect (such as pain or hardship), or 'putting up' with behaviour or situations which one dislikes.[280]

The second of these meanings contemplates the continued existence of inequality of power; it is the first meaning that is the democratic value that we should seek. But it is the second meaning that is promoted by the 'marketplace of ideas'.

In the debate over the Commonwealth Racial Hatred Bill 1994 there was considerable confusion of these meanings, as well as misunderstanding of the real nature of the value being discussed. It was commonly assumed that a person can validly 'tolerate' harm done to others; that 'tolerance' requires total acceptance or forbearance from responding to, judging, opposing or regulating the behaviour or speech in question; and that the act of 'tolerance' is beneficial and a social value, even if that which is to be perpetuated, through being tolerated, is harmful.

Democrat Senator Chamarette described the proposed legislation as being "intolerant about people who have different views,"[281] portraying the act of regulation as 'intolerant' as opposed to the undesirable behaviour itself. Senator Chamarette was successful in arguing that the Racial Hatred Bill should be amended to remove the three crimes which were originally included, apparently on the basis that society as a whole should be tolerant of racism:

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280 See Baronness Warnock, "The Limits of Toleration" in Susan Mendus and David Edwards (eds), *On Toleration*, Clarendon Press, Oxford, 1987, 141ff.

281 Christabel Chamarette, Interview on ABC *7.30 Report*, 29 May 1995.

> I do not believe that we will become a less racist, more tolerant society by passing a law that imitates exactly the type of intolerance that we are trying to readdress – that is, intolerance of people expressing racial sentiments. We would be guilty of doing just what we are accusing racists of doing – singling out groups of people by labelling them unacceptable. It is a them and us adversarial way of thinking that underlies this Bill. It is the same them and us attitude that underlies racism within our community.[282]

Her equating of the intolerance inherent in expressions of racial hatred with the supposed 'intolerance' of proscribing racist conduct is simply incorrect. The criminal provisions proposed in the Racial Hatred Bill 1994 did not single out groups of people by virtue of perceptions made about their inherent, unchangeable, personal characteristics and label them as 'unacceptable', as racism does. Instead, the provisions targeted behaviour which was unacceptable, whoever the perpetrator might be, in the same way that legislation generally targets actual behaviour.

Arguments in favour of tolerance generally ignore the harmful nature of what is to be tolerated, and who is being asked to be tolerant. In parliamentary debate over the Racial Hatred Bill, the fact that the language of tolerance was used to justify tolerance of harm was ignored. Either the supporters of the legislation were blamed for perceiving the victims of racism excessively vulnerable, or victims of hate speech were themselves denigrated as weak or oversensitive, as discussed in Chapter 4. The unexpressed assumption was that what happens to victims of racism is a mere misfortune, not an injustice. Victims of racism were said to be 'paralysed' by any offensive words[283] and told they should 'learn to cope with psychic harm.' The message of such 'tolerance,' says MacKinnon, is: "accept the freedom of your abusers. This best protects you in the end. Let it happen."[284]

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282 Phillip Adams, "Agree to Disagree", *Weekend Australian* 26-27 May 1995, 2 (Features section).

283 Maher (1994) 384.

A related argument is that allowing hate speech to be heard reminds us of how undesirable it is, and reinforces our commitment to 'tolerance' (in the first sense), causing us to combat hate speech as a community.[285] "It does us good" says Merkel, "to see that there are these dreadful people in the world. It does us good to find out the message of organisations such as the League of Rights."[286]

Analyses of this type are based on the concurrent use of the two different meanings of 'tolerance': to reinforce our commitment to tolerance (in the sense of fairness and freedom from prejudice) we must be tolerant of (in the sense of putting up with) the worst excesses of hate propaganda. In this way, the tables are turned on victims of hate speech and advocates of regulation by labelling the act of regulation as 'intolerant' (as per Senator Chamarette) rather than the undesirable behaviour to which the regulation relates. This argument ignores the nature of the conduct which, in the name of tolerance, is to be free from regulation.[287] In the context of racial vilification and hate speech this involves classifying racial vilification and hate speech as merely 'ideas', and in this way ignoring the harms of racism. There is no evidence that tolerance of racist behaviour leads to its diminution, the evidence being rather that 'tolerance' of racist behaviour encourages racism.[288]

Because the 'free market of ideas' reinforces existing inequalities, it does not promote tolerance in the sense of fairness and freedom from prejudice but only forces the victims of hate speech to put up with that speech.

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284 MacKinnon (1993) 105.

285 In practice, communities and free speech proponents appear reluctant to combat hate speech with 'more speech' or with the good and true ideas that are meant to drive out the bad, reacting rather by ignoring the harmful speech: see Lawrence (1993) 83.

286 Sullivan, *Hansard*, House of Representatives, 15 November 1994, 3369.

287 This 'content-blindness' mirrors the way in which the content of speech is ignored as a pre-condition to arguing that all speech should be 'free' or unrestricted. A variation on this theme is that all ideas should be tolerated, *especially* if they are undesirable, as if this is some measure of society's noble commitment to liberalism and its opposition to censorship: see Adams (1995).

288 R. Leonard, "Why tolerance is a wonderful thing—for other people", *Sydney Morning Herald*, 9 June 1995, 15.

Conclusion

There is in reality no 'free market' in ideas, because access to the mass media and the strength of any message given through the media are limited in practice by inequality of capital. Nor does any free market mechanism lead to truth.[289] The theory in real conditions is unworkable.[290] The ideal of maximum freedom of expression from government regulation cannot be justified on the basis of its stated aims of maximising truth and information. Government regulation of deceptive or otherwise harmful expression is more likely to result in truthful information being obtained than any unregulated 'market'. Government regulation is therefore more likely to support a democratic political system than is the 'free market', which allows manipulation of the political process through false and harmful speech and disempowers certain groups. State restriction of hate speech does not restrict or impoverish public debate, but broadens it, in removing the 'chilling' effect of intimidatory speech upon marginalised groups.[291]

An analogy can be drawn with corporate law: while full disclosure of all matters relevant to public investment is a basic principle of Australian corporate law which might imply a 'more speech' commitment,[292] legislation against the creation of false markets and the distortion of markets through rumours is accepted as supporting, rather than limiting, the concept of full information being given to the public. Thus in at least one 'free market' area it is recognised that in practice it is realistic and useful to limit speech which is potentially harmful. Keane sums up the position in relation to freedom of communication:

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289 See generally: Chomsky (1989).

290 Cass (1993) 239.

291 Mann (1995) 261, quoting Owen Fiss, "Freedom and Feminism", a talk given on 14 November 1991 at New York University.

292 This was expressed by Attorney General Michael Lavarch in a lecture given on 4 August 1993 on "Corporations Law Reform in the 1990s" in the words: "Sunlight is the best disinfectant": reported by the Business Law Section, Law Council of Australia, news release. See also Brietzke (1997) 967 arguing for racist speech to be regulated as being 'false and misleading' in an 'ideas marketplace'.

> … friends of the 'liberty of the press' must recognize that *communications markets restrict freedom of communication* by generating barriers to entry, monopoly and restrictions upon choice, and by shifting the prevailing definition of information from that of a public good to that of a privately appropriable commodity. In short, it must be concluded that there is a structural contradiction between freedom of communication and unlimited freedom of the market, and that the market liberal ideology of freedom of individual choice in the marketplace of opinions is in fact a justification of the privileging of corporate speech and of giving more choice to investors than to citizens. It is an apology for the power of king-sized business to organize and determine and therefore to censor individuals' choices concerning what they listen to or read and watch.[293]

When the 'marketplace of ideas' concept is more thoughtfully addressed in view of the practical lived experience of citizens in modern democracies, the concept's connection with censorship and control becomes more apparent. In the context of speech, just as in the context of economics, government protection is needed *against* the invisible dictates of the market economy.[294] The marketplace of ideas is not synonymous with freedom of participation, truth or diversity of opinion. It deserves careful reappriasal in the Australian context.

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293 Keane (1991) 81. As Rhode notes (1989) 315 in a slightly different context, "to make progress in theory and practice, we must move beyond frameworks that claim to maximize choice but remain neutral about outcome and the socioeconomic factors that restrict it."

294 Lull (1995) 117-8 referring to 1920s United States legislation which required that the new medium, radio, should be a 'public resource.'

Chapter 8: Free will, free speech and a healthy democracy

In truth individuals have been modified and manipulated for a long time, and the alibi has often been freedom and individuality.[1]

... Even though members of the self-appointed liberal elite would never dream of stooping to racist speech, neither, it seems, would they ever dream of taking legal steps to stop it.[2]

A good many observers have remarked that if equality could come at once the Negro would not be ready for it. I submit that the white American is even more unprepared.[3]

If today's First Amendment represents … the triumph of democracy, what kind of democracy?[4]

Free speech, whether or not linked to the 'marketplace of ideas', is said to be an essential precondition of personal identity. It is also said to promote democracy, not just through providing voters with full and truthful information on which they can make political decisions, but through fostering individual and hence social self-determination – a collective identity founded on political decision-making. As discussed earlier, such notions give little weight to the values of equality and social amelioration and protect only members of a certain class. They also ignore the fact that the closest most citizens come to political decision-making is voting, which is not an activity that generally binds individuals to one another. In the context of free speech no consideration is taken of the possibility that self-realisation of one individual or self-determination by a group can be at the expense of others, or that effective self-realisation or self-determination might be effectively impossible for marginalised people.

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1 Jacoby (1975) 71.
2 Lee (1990) 42.
3 Martin Luther King, Jr, *Where Do We Go From Here: Chaos or Community?* Harper & Row, New York, 1967, 9.
4 Collins and Skover (1996) xxiv.

As we have seen, the supposed benefits of an unregulated market in speech are unlikely to occur in practice. Access to the mass media depends upon money or influence, and the conservative and oligarchical nature of media ownership means that speech that departs from the dominant ideology is unlikely to be heard. Without equal access, the market inevitably reinforces existing inequalities and so the marketplace's success in maintaining any values can at best only be partial. That is, the marketplace of ideas will only promote or maintain values such as self-expression, personal identity, and self-determination for an elite group which has access to that marketplace, and which is privileged to be heard. The marketplace of ideas will not, on its own, bring about the principal elements that together we think of as 'democracy', let alone a less formal and more inclusive political system.

This Chapter considers another category of 'free speech' argument. The 'greater harms' arguments admit that racism and racial vilification are harmful, but maintain that legislation restricting racist speech would cause some 'greater harm'.

The values of individual self-realisation and collective self-determination

Every one who considers the matter for a moment knows that there is no such thing as free will among human beings, but also that it is beyond our power not to believe in it. The whole question of free will is a problem badly stated, which ceases to exist so soon as it becomes clear that the belief in free will is one of man's organs by the aid of which he lives, and without which he could not be human, but that freedom of will does not exist in reality, that its existence is just as imaginary as the belief that the individual man stands as a separate and independent being apart from the world.

—Georg Groddeck[5]

[5] Georg Groddeck, *The Unknown Self*, The C.W. Daniel Company Ltd, London, 1937 (1st ed 1929), 35.

Whether or not one agrees with Groddeck that there is no such thing as free will, his comments illuminate the perception which underpins American free speech theory and which is essential to both liberal and conservative political and philosophical viewpoints: that the right to exercise one's own free will or human liberty by speaking as one likes is an essential aspect of self-fulfilment, self-realisation,[6] self-determination, personal autonomy or personal identity,[7] and adaptive character traits.[8]

It is assumed that these particular values will always be beneficial both to the individual involved, and to society at large, opening up personal and communal possibilities of "transcending what is taken for granted"[9] and promoting a vision of "who we would like to be or can become."[10] The values related to personal identity are also said to lead to collective self-determination or "collective understanding and political legitimacy,"[11] and hence democracy. It is said that legislation against "mere words, even if only words of incitement," still tends to erode genuine debate and thus the political process.[12]

In the context of arguments for free expression, the nature of identity that is to be protected is generally unexamined. More sophisticated understandings of identity now accept that the liberal concepts of individual freedom and moral autonomy relate only to

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6 See Martin H. Redish, "The Value of Free Speech" (1982) 130 *U. Pa. L. Rev*. 591.

7 See for example Nick O'Neill and Robin Handley, *Retreat from Injustice: Human Rights in Australian Law*, The Federation Press, Sydney, 1994, 244; Brian C. Murchison, "Speech and the Self-Realization Value" (1998) 33 *Harvard Civil Rights-Civil Liberties Law Review* 443 and the writers cited at footnote 6 including Robert Jay Lifton, Richard Rorty. Murchison stresses that a richer understanding of the self-realization value does not necessarily mean that speech must always prevail against other values: 502-3. For an analysis of the metaphors that influence the "free will problem" see Dennett (1984).

8 Blasi (2002) 2.

9 Eberle (2002) 195 citing Post, "The Constitutional Concept of Public Discourse: Outrageous Opinion, Democratic Deliberation and *Hustler Magazine* v. *Falwell*" (1990) 103 *Harv L Rev* 606, 638.

10 Eberle (2002) 197.

11 Blasi (2002) 2. See also Post (1994) 123-7.

12 Although Braun (1988) 503 does admit that "incitement would appear to be the very antithesis of considered discourse." Sir Maurice Byers, QC, arguing against the constitutionality of the Racial Hatred Bill, seemed to regard threats against the property or person of another as an acceptable mode of political discourse which should be upheld by the High Court. The example he gave was a member of the PLO in Australia threatening Israelis or property in Israel: Sir Maurice Byers, QC, "Free speech a certain casualty of race law", *Australian*, 21 November 1994, 11.

a formal notion of identity. There are complex layers of individual and group identity affected by various forms of oppression and injustice.[13] Identities "change according to the strength of social forces, the dynamics of class, nation, religion, sex and gender, 'race' and ethnicity"[14] and 'radical freedom' does not create 'identity'.[15] Judith Shklar argues that the status of being a wage earner and jobholder is just as fundamental to the public identity of Americans as democratic participation[16] and Joan Williams comments on republicanism's linkage of character with economic independence.[17] Sarup notes that any consideration of identity must be localised in time and space because we cannot apprehend 'identity' in the abstract.[18] Chantal Mouffe and Ernesto Laclau argue that society is an unstable system of identities which are partially stabilized around certain symbolic or ideological points. For them, identities can only be negatively constructed through social relationships.[19] Proponents of 'agonistic democracy' such as William Connolly follow Foucault's concept of an ethics of the self to argue for the constant questioning of personal identities in a way which has broader political implications.[20]

But the concept of identity used in 'free speech' arguments is essentially abstract, homogeneous and static, divorced from social forces. It takes identity privileges for granted.[21] It rests, as Keane says in a slightly different context, upon

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13 See Introduction to Valdes et al (2002) 2 and generally Moran (2003), discussing identity and 'interracial' marriages.

14 Sarup (1996) 171. Nor do the free expression arguments consider the differences between modernist and postmodernist notions of identity: the modernists stressing the unitary subject and the view that identity must have an essence that remains the same, and the postmodernists believing in dispersed or different identities: 175.

15 Detmold (1990) 558.

16 Benhabib (1996) 58.

17 Williams (1998) 100.

18 Sarup (1996) 15.

19 See McNay (1998) 223. Sandel points out that the liberal notion of personhood is purportedly about an individual whose identity is distinct from his social role. However the legal concept of defamation, which is not rejected by that liberal notion, is based on the concept that people have a social role which is valuable to them: Sandel (1996) 81.

20 McNay (1998) 231, discussing Connolly (1991).

21 See Devon W. Carbado, "Straight Out of the Closet: Race, Gender, and Sexual Orientation" in Valdes et al (2002) 221.

> an essentialist picture of the self common not only to Enlightenment rationalism but also to Greek metaphysics and Christian theology: an ahistorical self which finds itself surrounded by inessential, contingent forces, events, things, whose meaning or significance is determined by this core self.[22]

Or as Hutchinson says, the liberal concept of identity assumes that individuals have 'pre-social' preferences and values, and that they are concerned with self fufillment more than shared values.[23] Such concepts fail to appreciate that one's own identity cannot flourish and be unique unless diversity of identity is possible through the protection of other identities.[24] In Sandel's words, "the image of the unencumbered self, despite its appeal, is inadequate to the liberty it promises."[25]

Individualism is at the heart of free speech, says Dworkin, and the baseline of free speech theory, as well as a "constitutive feature of a just political society,"[26] is that adults are responsible moral agents who 'morally deserve' to control their own decisions by hearing all 'views' and then judging for themselves.[27] The arguments for 'truth' and democracy that we have previously considered — that free speech is essential in order to provide voters with full and truthful information on which they can base political decisions – are in this way linked to notions of free will and personal autonomy. But the concept of 'hearing all views' requires that all kinds of harmful speech are recategorised as 'views' which must be protected in order to support the type of communication that is essential to a democratic society. As already discussed, the nature of communication is more subtle than Dworkin suggests.

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22 Keane (1991) 49.

23 Hutchinson (1995) 190.

24 See Bauman (1994) 41.

25 Sandel (1996) 65. Jacoby (1975) 46 and ff argues that modern concepts of identity are informed by the post-Freudian psychological theories based on subjectivity.

26 Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution*, Harvard University Press, Cambridge, Massachusetts, 1996, 200.

27 Martin H Redish and Gary Lippman, "Freedom of Expression and the Civic Republican Revival in Constitutional Theory: The Ominous Implications" (1991) 79 *Calif Law Rev* 267, 273-274.

A related argument is that as racial identity is not a fixed, but a social, construct therefore individuals can pick and choose from amongst the messages that they internalise, and need not take an attack on their racial identity as an attack on them personally.

One cannot so easily pick and choose what messages are truthful or which messages to internalise. 'More speech' is unlikely to lead to truth, and therefore unlikely to produce "a satisfactory process of collective deliberation."[28] According to Blasi,

> The marketplace of ideas does not offer the prospect of a just distribution of the opportunity to persuade. It does not offer the prospect of wisdom through mass deliberation, nor that of meaningful political participation for all interested citizens.[29]

In considering the arguments for absolute free speech as a personal right, one cannot but feel that the underlying issue is a belief in the centrality of free will to identity, and a related failure of ethics.[30] To argue for the right of unrestricted self-expression on the basis that absolute "speech rights are a part of a person's individual moral autonomy"[31] ignores the content of the speech, and fails to balance rights of the speaker to offend[32] or harm against the rights of the audience or the rest of society not to be harmed by undesirable speech. An attack on a group as un-Australian impinges upon that group's own rights and abilities of self-identification.[33] In the following incident, the victim was still affected by the negative messages conveyed to her and her sister. Together with other messages, it affected her way of seeing herself.

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28 Blasi (2002) 2. See also Rhode (1989) 272 noting that the 'more speech' approach is limited by disparities in power, status and money amongst the speakers.

29 Blasi (2002) 50.

30 Particularly if one considers ethics as based on the notion of "putting yourself in someone else's shoes." Williams argues that this is the general Western impulse, as exemplified by Kant and Rawls' original position: Williams (1998) 108-109. See also Gaudreault-DesBiens (2001) 1127.

31 an argument examined by Cass (1993) 234.

32 Adams (1995).

33 Cunneen et al (1997) 3.

> Last month, I was walking down busy Lygon Street in Melbourne one evening with my sister, wearing my veil. A young man in a car shouted out as he was driving by, 'Everybody get down,' only to have a young man sitting with his mates yell out to him, 'Shut up.' The people who witnessed this incident were sympathetic and had the warmest smiles. This positive aspect more than made up for what was shouted by the man in the car, though his outburst is not an isolated case. … These types of incidents take a toll of one's identities. When I encounter similar uncomfortable situations, my identity as an Australian feels like it diminishes, and I feel increasingly marginalised. … My Australian identity fluctuates in accordance with current global events and media misrepresentations.[34]

That the victims of racism cannot simply avoid racism by an exercise of *their* free will is ignored, or it is argued that the victims should 'tolerate' racism and refuse to feel injured or insulted.[35]

It is assumed that the speaker as an individual is worthy of protection, whatever the content or harm of his speech, while the individuals in the audience, or those whose reputations are being damaged, are not worthy of protection simply because they can also be seen as members of a group. Post argues that any group-based remedy against racist speech would inappropriately limit the public discourses of individuals and free political speech generally, and would thereby limit "the profound individualism that characterises the First Amendment."[36] But the freedom of effective decision-making of which Dworkin and Post speak is the privilege of a minority, who are not personally hurt by a failure to legislate against racist speech. Racist speech is not a desirable or inevitable part of public discourse. It is inherently abusive, as Gaudreault-DesBiens argues. It encourages violence. It chills the speech of victim groups and the large majority who, one hopes, are opposed to racism. Bearing in mind exactly what is

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[34] Tuba Boz, "Beyond the Veil", *The Big Issue*, No. 194, 26 January 2004, 17.

[35] Lawrence (1993) 69.

involved in racist speech, it can indeed be regulated without generally endangering free political speech for the majority that is able to refrain from direct or indirect racial vilification. Pateman's arguments about the contradiction between the status of women and the rhetoric of individual rights is also relevant here.[37] The perception of unfettered speech as a natural human right is very much one which identifies human nature, as Bobbio points out, with the members of a certain class – and gender.[38] Posts' concepts of collective self-determination and group identity are not inclusive concepts.[39]

Arguments for unlimited self-expression also assume that the individuals involved will be listened to, and receive at least some positive responses. They ignore the nature of social dialogue; of man as a part of society, even though self-expression and self-realisation cannot take place in a vacuum. It is hard to envisage these values being maintained where an individual's communications are consistently rejected. As Jacoby says in reviewing the history of post-Freudian psychology:

> The reality of violence and destruction, of psychically and physically damaged people, is not merely glossed over, but buried beneath the lingo of self, meaning, authenticity, personality.[40]

In so far as the marketplace of ideas permits racist speech and hate propaganda, the victims of such speech will be harmed and their sense of personal identity and self-realisation will be undermined. They will be discouraged from participating in political discussion. An unregulated marketplace of ideas will not achieve or promote the values of self-expression, personal identity, and self-determination for the victims of racial vilification.

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36 Post (1994) 136-8.
37 Sullivan (1998) 181.
38 Norberto Bobbio, *The Age of Rights*, trans. Allan Cameron, Polity Press & Basil Blackwell Ltd, Cambridge, 1996, 19.
39 See for example Fitzpatrick (1995b) 191.
40 Jacoby (1975) 57.

To the extent that self-realisation or personal identity involves harm against others, it is doubtful that there is any value to either the individual or society.[41] Rape and murder might also be true expressions of autonomous individuality, but our social norms do not require us to 'respect' those activities, nor encourage them. Similarly, while self-expression and self-determination are desirable and valuable, they are social values that must be seen in context, and cannot be acceptable if they involve unrestricted rights to harm others.

In Germany, Article 2 of the Basic Law states that the right to "the free development of personality" or self-determination[42] exists only insofar as a person "does not violate the rights of others or offend against the constitutional order or the moral law."[43] The fundamental right under Article 1 of the Basic Law is respect for and protection of human dignity, involving "the free human personality," but the Federal Constitutional Court has made it clear that the right of a person to 'determine and develop himself freely' and to his 'autonomous personality' is not that "of an isolated and autocratic individual, but rather … that of a person related to and bound by the community":

> The individual must accept those limits to his freedom of action that are imposed by the legislature to maintain and support the social community, as long as they are within the boundaries of what is generally reasonable in the specific situation …[44]

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41 Although Post seems to say that racist perspectives could be respected as true expressions of autonomous individuality (1994) 145.

42 Interpreted as giving rights to freedom of action in areas not otherwise constitutionally protected by a basic right, as well as 'personality rights' which include reputational rights, the right not to be forced to disclose personal information, the right to informational freedom, the right to one's own picture and spoken word, and the right to respect for personal honour, the right to knowledge of one's genetic origins, the right to free development in sexual matters, and the right to economic self-determination: see Michalowski and Woods (1999) 109ff, and 116-117.

43 See Eberle (2002) 278 and Michalowski and Woods (1999) 109. Similarly, Dennis Altman argues that identity politics needs to contribute to a larger social good: "(Homo)sexual Identities, Queer Theory and Politics" in Geoffrey Stokes (ed), *The Politics of Identity in Australia*, Cambridge University Press, Cambridge, 1997, 105 at 113.

44 Michalowski and Woods (1999) 100, quoting from the *Life Imprisonment Case* (1977) BverfGE 45, 187 (their translation), available at http://www.hrcr.org/safrica/dignity/45bverfge187.html. Nor can the notion of free speech as a fundamental personal right justify the present application

German expression, says Eberle, is valued more for its ability to create and sustain community, in comparison to the American search for absolute freedom.[45]

Post puts forward one of the more bizarre rationalisations for non-regulation of hate speech in saying that racism, as part of our common historical and cultural heritage, is part of our 'unredeemed identity'. By this he seems to mean a part of our identity that is in the background, perhaps of which we are unconscious, but that is available to us should we choose to take advantage of it. If all Post is referring to are the many ways in which our culture teaches us subsconsciously to be racist, this is reasonable. But the problem comes with the conclusions he then draws. Therefore, he argues, regulation of racist expression would necessarily lead to "the complete legal subjugation of the individual" and "the wholesale abandonment of all principles of freedom of expression." "Any communication can potentially express the racist self," he says, "and thus no communication can ever be safe from legal sanction." That would be an unacceptable result, he implies — therefore there should be no regulation of racist expressions.[46]

These passages are revealing: Post does not see 'our' subconscious racism as something we can choose to put aside. He does not see that those of us who are privileged not to be the victims of racism might have an obligation, as Carbado argues, to expose and challenge our privileges.[47] On Post's arguments, our 'unredeemed' 'racist self' is something that is fixed and that is imposed upon us whether we want it or not and whether we value it or not.[48] At first sight this notion is shocking: this is identity as violence, divorced from concepts of choice and free will, cut adrift from place and from personal values. I have some sympathy with the concept that we cannot easily rid ourselves of racism entirely. It does run very deep in our culture and I know that I have

of the First Amendment to commercial speech and advertising or to corporate speech, in contrast to the situation in European jurisprudence: Barendt (1995) 225.

45 Eberle (2002) 234.

46 Post (1994) 116.

47 Carbado (2002) 222.

48 As George Orwell discusses in *The Road to Wigan Pier,* Secker and Warburg, London, 1969, class-distinctions are very much a part of one's identity. See comments of Farley (2002) 97 at n 153 and related text.

been surprised by racist feelings surfacing when I didn't expect them.[49] However even if it is true that we can't easily eradicate our cultural racism, that in itself is no justification for not regulating racist expression.

More usually, the right to racist speech is seen as a way of exercising one's free will that both conservative and liberal theorists say should not be generally restricted in a democratic society, even though it may be a right they are willing to forgo personally. Just as notions of national identity frequently rely upon the exclusion of a connected group,[50] so notions of individual identity, as posited by the free speech proponents, perhaps rely ultimately upon the existence of the 'other' and therefore the right to racist speech.[51]

It is hard to see how it can be argued that a right which cannot be effectively exercised by all citizens, and which does harm to many, can be said to result in any ideal form of democracy. Racist speech undermines democratic ideals such as equal participation in social, cultural and public life and corrupts the proper workings of a democratic political system, through political scapegoating, intimidation, deception, defamation and denigration. Similarly, the argument that democracy 'requires' absolute free speech (including racist speech), in order to foster identity values and self-determination in some kind of abstract way divorced from social realities, is unlikely to lead to any but a formal notion of democracy, detatched from notions of social good. It is only in a very strained sense of the words that one could call the free market economy 'egalitarian' or 'democratic'[52] where most people's only participation in any type of democratic self-determination is the exercise of their right to vote.

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49 Similarly, see the story told by Thomas Ross, "The Unbearable Whiteness of Being" in Valdes et al (2002) 251 at 253.

50 Fitzpatrick (1995) 23-24.

51 See in this context the comments of Farley as to the 'pleasure of whiteness' (2002) 99ff and his argument that "without the spectacle of black inferiority, whites cannot maintain their whiteness" (132).

52 White (1990) 67.

The right to offend

In 'free speech' arguments, the right to speak in a racist way is regularly classified as the 'right to offend', or the 'right to be wrong', in order to play down the harms involved in racist expression. Hate speech is portrayed as merely offensive, trivialising the harms it causes.[53] Gandhi is often quoted: "freedom is not worth having if it does not connote freedom to err."[54] In the context of speech about opinions or views, that is certainly true. But in the context of statements made either with the intention of causing harm, or in reckless disregard of the harm that could be caused, 'freedom to err' means 'freedom to harm'. In Ron Merkel's view, making unlawful those public acts that are likely to stir up hatred, serious contempt or severe ridicule on grounds of race, colour, national or ethnic origin effectively attacks the expression of genuinely, although mistakenly held, ideas or views. If you do not engage in conduct with the intent of promoting hatred, he suggests, your conduct should not be penalised.[55]

The problem with this argument is the same that exists with the 'defence of sincerity': the more extreme the racist's viewpoint, the more likely it is that his ideas will be sincerely and genuinely, albeit mistakenly, held. A racist may not intend to promote hatred as an immediate aim, but might be concerned only with arguing the validity of his racist ideology. Unfortunately, the consequences of such ideologies are that the mistreatment of other groups is acceptable. It is not sufficient that a person who indulged in racist speech did not intend to promote hatred; if it was reasonably likely on an objective assessment that his speech would promote hatred, or otherwise amount to an offence, then the racist was negligent or reckless in speaking that way. Negligence and recklessness are behaviours which are penalised in other contexts; why not in this context too? Thomas Jefferson said that "error of opinion might be tolerated, when reason was left free to combat it" to which Thomas Paine retorted: "This is sound

53 Schauer (1992) 814.
54 Quoted in Adams (1995a).
55 Merkel (1994).

philosophy in cases of error. But there is a difference between error and licentiousness."[56]

Classic arguments against suppressing false speech, from John Stuart Mill to Voltaire, were formulated in the context of the development of individual rights, but focused upon the general good as well as upon any personal right of self-expression, right to offend, or right to be wrong. Arguments that government should not have the power to limit 'false' speech, that only unfettered discussion will lead to truth, and that given ideas need to be constantly tested by what might at first appear to be 'false' analysis of the *status quo*, were made with a view to the common social good. Those writers often conceded that the liberty of an individual to express any opinion might need to be circumscribed where those expressions cause harm, for example by being "a positive instigation to some mischievous act," according to John Stuart Mill. Similarly, Milton insisted that tolerance of the intolerant would be self-defeating, and was in favour of restricting Catholic speech.[57]

Another argument couched in terms of individualism and self-realisation is that victims may themselves want to use racist speech against their attackers or oppressors — and that the right to do so should not be taken away from them. This is not an argument that is made by minority groups themselves, so one can be suspicious of the *bona fides* of its proponents. Anyhow, notes one writer, "there exists no term to insult Anglo-Saxons with that matches 'chink' or 'slope' in hateful impact." "It is inevitably," he notes, "the most advantaged, powerful social group that our language leaves unvilifiable."[58] "Nigger," agrees William Raspberry, when used by a white person "is almost magical in

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56 Quoted by Robert Pullan, "The threat of a sentence", *The Weekend Australian*, 19-20 March 1994, 22.

57 Keane (1991) 12-13. See also Fish – who notes that at that time Catholic speech was seen, like racist speech, as being fundamentally harmful: interview with Lowe and Jonson (1998) and Brietzke (1997) 953. Nonetheless, such writers are regularly quoted out of context as supporting absolute free speech: see for example Laurence W Maher, "Freedom of Speech and its Postmodern Adversaries" (2001) 8 *Murdoch University Electronic Journal of Law* at http://www.murdoch.edu.au/elaw/issues/v8n2/maher82_text.html

58 Thomas Tan, *Sydney Morning Herald*, 8 May 1995, 14.

its negative power," because it is "a white-created word, expressly designed to show maximum contempt for black people."[59]

Unlimited self-expression in speech and in behaviour is unworkable in any civilised society. For example, Jewish people in Melbourne who are afraid to display Jewish symbols because obviously Jewish facilities have been firebombed and Jewish people have been threatened, have been deprived by such racist activities of their own freedom of speech and expression.[60] In Sir Zelman Cowan's words, "the freedom to swing our fists ends at someone's nose."[61] To put the right of a person to express contempt or hatred ahead of the right of a victim to be protected from its effects is, in itself, an expression of racism, and a limitation upon the victim's democratic rights. In introducing the Racial Hatred Bill 1994 (Cth) to the House of Representatives, former Attorney-General Michael Lavarch made a similar point.

> Laws dealing with defamation, copyright, obscenity, incitement, official secrecy, contempt of court and parliament, censorship and consumer protection all qualify what can be expressed. These laws recognise the need to legislate where words can cause serious economic damage, prejudice a fair trial or unfairly damage a person's reputation. In this bill, free speech has been balanced against the rights of Australians to live free of fear and racial harassment. Surely the promotion of racial hatred and its inevitable link to violence is as damaging to our community as issuing a misleading prospectus, or breaching the Trade Practices Act.[62]

Legislation against racist speech enhances freedom of speech by protecting "the rights of individuals who happen to be of a different racial background from the dominant

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59 William Raspberry, "Disarming the N-word," *Guardian Weekly* 30 April 1995, 19.

60 Lindsay Tanner, *Hansard*, House of Representatives, 15 November 1994, 3355 to 3356.

61 Quoted by Ms Worth, *Hansard*, House of Representatives, 15 November 1994, 3374

62 Former Attorney-General Michael Lavarch, *Hansard*, House of Representatives, 15 November 1994, 3337.

group in the society to be able to live their lives and express their views and their culture without fear of intimidation."[63]

The 'greater harms' arguments

The 'greater harms' arguments are generally put most strongly where they are used against the introduction of racial vilification legislation. To that extent they are not relevant to Australia which now has such legislation. Nonetheless these arguments, and the free speech assumptions upon which they are based, continue to influence popular ways of thinking about free speech and thus judicial interpretation, as we will see in the following Chapters. The arguments rest largely upon the political assumptions discussed earlier as to the harms of government intervention, especially in the context of speech, and upon a refusal to engage with the actual harms of racial vilification. The 'misuse', 'slippery slope' or 'domino effect' and 'chilling effect' arguments all rely upon metaphor and theory to conclude that legislation should not limit public speech because of the supposed adverse consequences for democracy which are assumed to outweigh the harms of racial vilification, which are never examined in the context of these arguments.

It should be noted that the introduction of racial vilification legislation in Australia has not brought about the various harms which that legislation is supposed to cause. Legislation at state and federal level has not given rise to any notable civil liberties problems and has not delivered Australian society into the twilight zone of *samizdat* publications and the thought police. Nancy Hennessy and Paula Smith considered the results of the NSW legislation over the five years to 1994[64] and concluded that an appropriate balance of conflicting rights had been struck and freedom of speech had not been unduly impaired.[65] In his wider review in 2000, in which he considers the outcome

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63 Lindsay Tanner, *Hansard*, House of Representatives, 15 November 1994, 3355 to 3356.

64 Nancy Hennessy and Paula Smith, "Have we got it right? NSW Racial Vilification Laws Five Years On" (1994) 1 *AJHR* 249.

65 Hennessy & Smith (1994) 264.

of the few cases brought under racial vilification legislation, McNamara concludes that racial vilification legislation has not had a chilling effect on free speech.[66]

The 'chilling effect' of regulation

The 'chilling effect' argument against regulating racist speech, says Fish, is that upright citizens will be frightened to speak freely for fear that they will inadvertently infringe the legislation. There is always something in the back of their minds censoring what they would otherwise say. This infringes their right to free self-expression and self-realisation, and is an unwarranted imposition upon both speech and ideas. To which Fish replies: if there were always something in the back of their minds perhaps it is better for it to be the idea that one must not express racism, instead of whatever was in there before.[67] What is chilled is unlikely to be valuable speech, whereas what society is being asked to tolerate is clearly harmful speech. Expression is only likely to be 'chilled' where it is infected with racist assumptions.[68] The real question is the political one of exactly which speech is going to be chilled and, all things considered, it seems a good thing to chill speech like 'nigger', 'cunt', 'kike' and 'faggot'.[69]

Fish is considering direct racist abuse rather than indirect extremist arguments. However the same argument holds true for indirect racist speech. As Colin Rubenstein says,

> We are talking here about people who set out to persuade others that certain ethnic groups deserve to be hated just because of who they are; that you should discriminate against, harass, maybe even expel or kill them. Can anyone think of any occasion where such speech can serve any legitimate purpose in society, or fulfil any genuine right?[70]

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66 McNamara (2002) 305ff.
67 Fish (1994) 111.
68 Moon (1992) 142 and 129.
69 Fish (1994) 111.

Is it not better that racist speech is discouraged than that the victims of racist speech and ideology have their own speech chilled and their own ability to participate in normal activities destroyed? The 'chilling effect' argument is based on the assumptions discussed above that speech should be 'free to be racist', that is, that there is a 'right to be racist' based on individual free will.

In considering the possible chilling effects of legislation, many people seem to have difficulty in contemplating that there could be public speech about people from other countries or backgrounds which is not racist speech. It was suggested that legislation would prevent ethnic minorities speaking about their own history:

> This bill threatens the freedom which underpins Australian life. If this bill were to become law, the right of our ethnic communities to continue their often vigorous rejoicing in their cultural history and heritage would be severely impeded. Rallies by Greek, Vietnamese or African communities, for example, could become subject to prosecution. The use of historic symbols, insignia or flags could also become subject to prosecution. An ethno-specific clergy — be they Jewish, Buddhist or Islamic, for example — could also face the risk of prosecution in certain circumstances.[71]

In considering the ambit of Canadian racial vilification legislation, McLachlin J of the Canadian Supreme Court expressed concerns that the prohibition of hate propaganda might have the result of intimidating scientists from researching topics which suggested 'differences' (presumably biological differences) between ethnic or racial groups.[72] It is hard to imagine any non-racist research which would be discouraged by appropriately drafted regulation as to the expression of hate propaganda. In any case, as Moon says, scientists have an especial responsibility to think twice before making damaging claims

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70 Colin Rubenstein, "Why racial vilification laws enhance a democracy," *Sydney Morning Herald*, 1 September 1994.

71 Ms Worth, *Hansard*, House of Representatives, 15 November 1994, 3375.

72 *Keegstra's Case* (1990) 61 C.C.C. (3d) 1, 120 to 121.

about racial groups, especially in a society that is only too ready to receive 'scientific evidence" of racial differences in intelligence.[73]

Holocaust denier Robert Faurisson argued that French legislation against Holocaust denial restricted his freedom to doubt and his freedom to research. The United Nations Human Rights Committee took the view that any such restrictions were valid and not inconsistent with the (restricted) right to free speech enshrined in the *International Covenant on Civil and Political Rights*. David Kretzmer and Elizabeth Evatt based their individual opinion on the right of individuals to be free from both discrimination and incitement to discrimination on the grounds of race, religion and national origin as set out in Article 7 of the *Universal Declaration of Human Rights* and as implicit in Article 20, paragraph 2 of the *Covenant* (which obliges states parties to prohibit hate speech that constitutes incitement to discrimination, hostility or violence). They regarded Holocaust denial as a form of incitement to antisemitism.[74]

'Chilling' political speech

The strongest argument against the 'chilling' effect of racial vilification is that racist expression should not be restricted because restricting racist expression would limit the advocacy of social change in a racist direction. This argument equates the advocacy of social change in a racist direction with valid political speech and, as Rosenthal notes, is the logical consequence of arguments for absolute freedom of expression. Rosenthal is of the view that limiting racist expressions is entirely justified, given the harms of

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73 Moon (1992) 138. See also Rosenthal (1989 -90) 116, 146. Postings in May 2000 on an Internet chatline loosely associated with the NSW Association for Gifted and Talented Children endorsed theories promoted by members of the American Eugenics Association and failed to recognise the fraudulent basis for those theories, as to which see Jones (1998) 119 ff (discussing the studies of Cyril Burt, William Shockley and Arthur Jensen).

74 U.N. Doc. CCPR/C/58/D/550/1993 (1996) *Robert Faurisson* v. *France*, Communication No. 550/1993, Eckart Klein concurring, available at: http://www.unhchr.ch/tbs/doc.nsf/0/4c47b59ea48f734802566f200352fea?Opendocument

racism: "whatever threat this may pose is a small but necessary price to pay for the guarantee of equal dignity and equal protection of the law to all ... ."[75]

'Chilling' works both ways

As mentioned, without the protection of racial vilification legislation it is the victims of racist speech whose own self-expression is 'chilled'. It is not the regulation of hate speech but the nature of the 'market' itself (a 'rigged game'[76]) which is more likely to have an overall 'chilling' effect. Recent experiences in the United States indicate that conservative political expectations, and sometimes outright threats, 'chilled' the speech of those who disagreed with the United States war on Iraq. In these ways the market devalues valuable political speech.[77]

The slippery slope or domino effect

Assumption of total freedom of expression

Free speech proponents argue that once you start regulating any part of speech because that part has been deemed unrelated to the protection of a set of core values, that sets a precedent for further restrictions of speech, behaviour and even private thoughts. This is an argument which, says Barendt, "has exercised an enormous influence on US free speech jurisprudence," particularly in the areas of obscenity and hate speech.[78] Maher describes the danger as being that "once one set of 'dangerous' ideas or one medium for expression of 'dangerous' ideas is silenced, there is a kind of respectability created for the silencing of other ideas and media."[79] What is at the bottom of the "geographical disaster area"[80] of the slippery slope is not clear: perhaps a tyrannical government which

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75 (1992) 132.
76 Lawrence (1993) 78,79, 83.
77 See further, McNamara (2002) 47-48.
78 Barendt (1995) 221.
79 Maher (1994) 393.
80 Patricia Williams, *The Rooster's Egg*, Harvard University Press, Cambridge Massachusetts & London, 1995, 28.

censors all art and all political dissent. The metaphor presents us with frightening images — which is not to say that they are realistic ones.[81]

This argument seems to require that expression which has little or no value, or which is actively harmful, must be protected to the highest degree in order for other more valuable expression to be effectively protected.[82] The argument also assumes that courts would fail to distinguish the constitutionality of over-broad legislation.[83] The 'slippery slope' argument appeared to be accepted by McLachlin J (subsequently Chief Justice) of Canada's Supreme Court, who in *Zundel's Case*[84] assumed that freedom of expression must be *total* in order to promote truth. McLachlin did not consider whether more limited freedom of expression could achieve the same objects.[85] Her 'domino theory' was that any limit at all on free expression somehow undermines its viability and sets in motion a corrosion of the values underlying the concept of freedom of expression which will ultimately destroy those values.

In *R* v. *Keegstra* (1990)[86] and *R* v. *Zundel* (1992),[87] the Canadian Supreme Court considered hate speech against Jewish people: in *Keegstra*, by a teacher to his students and in *Zundel* in a booklet denying key features of the Holocaust.[88] Some of the judges had difficulty in appreciating the nature and the harms of racist speech, and the judgments demonstrate two opposite perspectives. The majority in *Keegstra* and the minority in *Zundel* appreciated the social consequences of unrestricted hate speech, taking the view that a strict application of American First Amendment principles was

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81 See generally Dennett (1984) on the misleading power of metaphor in philosophical arguments about free will. See also Lakoff and Johnson (1980), Winter (1989) and Frederick Schauer, "Slippery Slopes" (1989) 99 *Harv. L. Rev.* 361, arguing that what often passes for analysis is really metaphor.

82 Moon (1992) 133.

83 Barendt (1995) 221-2.

84 *R.* v. *Zundel* (1992) 95 D.L.R. (4th) 202.

85 Stefan Braun's arguments on this point have the same limitations: in asking "What is to be feared more - State fettering of free expression or the presumed consuming, destructive, proselytic effects of such freedom?" he assumes that expression is completely free or completely fettered and that there is nothing in between: (1988) 476 and 480.

86 (1990) 61 C.C.C. (3d) 1.

87 (1992) 95 D. L. R. (4th) 202.

inappropriate because of Canada's different constitution and its espousal of multiculturalism.

However several of the judges appeared to disregard or to play down the harms of hate propaganda, or to equate it with valid political debate. Canadian jurisprudence follows First Amendment jurisprudence in refusing to consider the content of speech where the constitutionality of legislation that limits speech is in question, and the lack of concern shown by some of the judges for the harms of hate propaganda appeared to be related to refusal to consider the content or consequences of hate speech, coupled with the view that expression should be absolutely free. Refusal to acknowledge the harms of hate propaganda also enabled some judges to maintain that unpopular minority views should be protected, even when the unpopular minority to which they referred was not a minority group which was itself being victimised, but a group of hate propagandists intent on victimising others.

In *Zundel's Case*, the majority judges purported to ignore the contents of the antisemitic statements in Zundel's pamphlet, while actually re-categorising the statements as ones worthy of protection. They achieved this by effectively equating the statements with 'unpopular minority views'. The majority stated that in Zundel's honest opinion his assertion that there was no Nazi policy of the extermination of Jews in World War II communicated only one meaning: that there was no policy. Against this single (though admittedly hurtful) meaning McLachlin J, delivering the majority opinion, weighed the numerous (presumably beneficial) meanings which she saw as being communicated simply by Mr Zundel's act of free expression:

> that the public should not be quick to adopt 'accepted' versions of history, truth, etc., or that one should rigorously analyze common characteristics of past events. Even more esoterically, what is being communicated by the very fact that persons such as the appellant Mr Zundel are able to publish and distribute

[88] See text in Chapter 3 after footnote 170 and reference there for further details.

> materials, regardless of their deception, is that there is value inherent in the unimpeded communication or assertion of 'facts' or 'opinions'.[89]

The effect of the majority decision in *Zundel* was to protect the contents of a pamplet which included Holocaust denial, implications that Africans and Asians are inferior to Anglo-Saxons, that they are deserving of repression and poor treatment, that they should be deported from Britain and America, and that inter-marriage between them and Anglo-Saxons would result in inferior children, on the basis that the speech merely expressed 'unpopular minority views'. The implication was that these types of harmful speech should be protected so that more valuable speech could also be protected.

Blasi's argument in favour of a 'robust' free speech principle, on the basis that a free speech culture contributes to the control of abuses of power,[90] is similar to the slippery slope argument in assuming that free speech must be absolute to achieve the desired effect. There is no doubt that it is desirable for citizens to be free to speak about government abuses of power. But Blasi appears to assume that any restrictions on speech will eventually prevent citizens speaking against government abuses, and does not consider the economic and social limits on speech against government, nor the manner in which regulation of harmful speech would actually contribute to the encouragement of a substantive, rather than a formal, free speech culture.

MacKinnon notes that it is only the refusal to ignore the purpose and effect of regulation against certain types of speech which allows the 'slippery slope' argument any force at all.[91] After all, almost every new law, however benign, displaces or disappoints existing expectations.[92] It is extremely misleading to pretend that we are at the top of the 'free speech' hill when there are dozens of laws which already restrict free speech, usually

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89 *Zundel*'s *Case*, (1992) 95 D. L. R. (4th) 202, 263.
90 Blasi (1997) generally.
91 MacKinnon (1993) 102 and 103.
92 Shklar (1990) 120.

with justification in terms of some other cost.[93] Our existing freedom of speech is already limited by government prohibitions, social conventions and the economics of the marketplace. Free speech as we know it is already a matter of compromise and conflict between competing interests.

Misuse of Regulation

The 'slippery slope' argument is closely related to the 'misuse' argument that it is dangerous to give the state any power to legislate, in particular in relation to speech, because this may encourage unscrupulous governments to apply the legislation in the future in unacceptable ways, for example to prosecute political dissidents.[94] In Australian Federal Parliament Graeme Campbell, the Member for Kalgoorlie, argued that

> ... free speech ... is the central element upon which our democratic system rests. When it is eroded for reasons as fraudulent as those the proponents of the bill have advanced, we know that our democracy is in danger. While such erosions may suit the commissars in power today, what happens when they lose power, as history shows that inevitably they will? What moral ground will they have to stand on when they have corrupted the political process? What values will they be able to turn to for their own protection?[95]

Concern is expressed that legislation can be selectively enforced and good laws may be used badly[96] against those they were meant to protect, such as South African laws against racial hatred, and Soviet Union laws against defamation and insult — used to silence critics of the state.[97] Legislative measures designed to promote or enhance

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93 Lee (1990) 56. Gates Jr suggests that we are already "somewhere halfway up the side of the mountain" and that our steps might take us uphill and not down (1994) 22-23.

94 Editorial, *Sydney Morning Herald*, 11 November 1994, 12.

95 Mr Campbell, *Hansard*, House of Representatives, 15 November 1994, 3384

96 Mr Forrest, *Hansard*, House of Representatives, 16 November 1995, 3430.

97 Freckleton (1994) 336.

speech are also caught on the basis that government might police them in a discriminatory way, even through 'independent' public authorities.[98] Alternatively, it is argued that legislation will not be enforced at all, and will therefore fall into disrepute.

It is true that there can be a tendency to transform minority protective rules into methodologies that consolidate the dominant group's advantage. Where legislation is aimed at protecting the state, its misuse may be even more likely. During the Third Reich, the judiciary outdid the Nazi government in outrageously authoritarian interpretations of already repressive legislation.[99]

It is also true that racial vilification legislation, like anti-discrimination legislation generally, has sometimes been used against the very groups it was anticipated it would protect.[100] In Australia, the principal case which has involved prosecution of a perpetrator from a marginalised group was *Bell* v. *Brandy.*[101] In 1994, Harry Brandy abused a fellow ATSIC worker, John Bell, who was white. Brandy called Bell 'a rednecked racist cunt' and said that he was preventing an honest Aboriginal person from holding a job with ATSIC. Bell instituted a civil action for the recovery of damages and was awarded $12,500 damages, $10,000 to be paid by ATSIC and $2,500 by Mr Brandy, for suffering racial discrimination in his employment.[102] The racial vilification was evidence of that discrimination, rather than an offence in itself.

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98 Barendt (1995) 222.

99 Criminal charges were imposed upon those who made the slightest reference to the complete overturning of the justice system, even where there was only implicit criticism. Thus a pastor was in 1937 found guilty of a breach of the public peace as a result of asking his congregation to pray for a member of the church who had been detained "although the charges against him have been dropped." See Muller (1991) and Reifner (1986).

100 Gates Jr (1994) 46, 47, Strossen (1994) 186,187, 221.

101 *Bell* v. *ATSIC, Gray and Brandy* H92/003 (1993), available at http://www.law.mq.edu.au/Units/law404/Bell%20v%20ATSIC.htm

102 On appeal, the High Court held that enforcement provisions in the *Racial Discrimination Act 1975* (Cth) were unconstitutional, because they resulted in the Human Rights and Equal Opportunity Commission exercising judicial power: Brandy v HREOC (1995) 183 CLR 245; (1995) 127 ALR 1; (1995) 69 ALJR 191; EOC 92-662.

Unscrupulous governments introduce the legislation they want.[103] It is not proper to reject legislation on the basis that it might be mis-applied in bad faith or not enforced in the future, though of course every care should be taken in drafting legislation to avoid those possibilities.[104] Planning laws, for example, are often enforced in discriminatory ways or not enforced where they should be,[105] yet it is not argued[106] that there should be no regulation of planning. As Fish and Lee point out, such dangers exist whatever the legislation in question. We are all responsible for combatting the defects in the scope and enforcement of legislation through the democratic process.

The assumptions of regression and progression

It is argued on the one hand that governments must not legislate because of the likelihood of future social regression which will lead governments and the judiciary to misinterpret existing legislation for their own unscrupulous purposes, and to introduce and enforce even more repressive legislation. But on the other hand the general 'free speech' argument espoused in the United States assumes a general social progression or 'progressivism' (the latter referring to the American Progressivism movement of the 1920s). [107] The good effects of harmful speech will not be realised immediately, it is said, but only in a future "whose emergence regulation could only inhibit" — that is, in a future driven not by formal law but by social relationships.[108]

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103 Like the legislation passed by the Italian government to the effect that Prime Minister Silvio Berlusconi cannot be prosecuted on corruption charges as long as he is Prime Minister: *Guardian Weekly*, June 26-July 2, 2003, 2.

104 In the context of *Zundel's Case*, Stefan Braun uses a similar argument as to possible mis-application of legislation to support his "domino theory" that any legislation against specific kinds of speech will eventually lead to something akin to totalitarianism: Braun (1988) 475, 478 and 479.

105 See proceedings of the NSW State Parliament Joint Select Committee on Building Standards, July 2002.

106 Except by architects: Anne Davies, "Architects, councils take sides over building approvals," *Sydney Morning Herald*, 16 February 2004, 5.

107 Fish (1994) 119. Compare with Post (1994). The confidence of American authors in social progress would appear to be informed by the Progressive Movement in United States politics between 1900 and 1920. "Progressivism" espoused social reform in many areas but did not question the structure of the economic system and notably failed to improve race relations or civil rights.

108 Fish (1994) 109 and 110. See generally, Post (1994).

The concept that society will be improved through allowing harmful speech is vague and imposes the severe requirement: that victims endure whatever pain racist and hate speech inflicts for the sake of a future "whose emergence we can only take on faith."[109] Such an idealised future requires a degree of justification which has not been met. MacKinnon points out that with speech that promotes inequality, "the problem is not where intervention will end, but when it will ever begin."[110] The general theme of Gates Jr and his co-authors is that the risk of regulating racist speech in the United States is not that speech codes will achieve so little for blacks, but that they risk losing so much.[111] It seems rather that blacks think that they have lost too much already.

As we have seen, laissez-faire economic and property-oriented analogies are often used to support the argument that 'freedom' means freedom from government regulation, and that the more laws that exist in any society, the less free are that society's members. If taken to their logical conclusion, such arguments are obviously wrong. A society with no laws at all would hardly be a 'free' society in any normal sense of the word, because there would be no restrictions against theft, murder or rape, no legislation to regulate democratic elections, and no legislation to control the behaviour of the more powerful individuals and groups in that society. An unregulated society would be one in which the only law would be the 'law of the jungle', and the strong would have power over the weak. While the strong might be free, the weak certainly would not have any freedom. Freedom from government regulation is not freedom from others. It is not real freedom in any but the most theoretical sense.

Legislation provides authority for compliance with desired social norms both through the deterrent effect of penalising those who breach the legislation and through the symbolic and educative effect provided by its statement of norms.[112]

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109 Fish (1994) 109.
110 MacKinnon (1993) 102.
111 Gates et al (1994).

By legislating against racist threats the government is giving the message that racist speech will not be tolerated in this society. When Britain brought in its racial vilification bill, says Ms Deahm,

> there were the same arguments that we are having now, that we would create martyrs, that you cannot educate people to change their attitudes. Of course, you cannot, but you can at least make them know what the consequences will be if they engage in this sort of behaviour. Anything that will make people stop and think about what they are going to do is useful.[113]

In Pat O'Shane's words, "We can't stop the way that people think, but we sure can stop the way that people behave."[114] Or as Martin Luther King Jr put it: "It may be true that the law cannot make a man love me, but it can keep him from lynching me, and I think that's pretty important."[115] Trials can have both an educative and deterrent effect. "Trial is about as much of a public declaration as we can get," says Tatz, "that there are moral and ethical values which society wishes, or needs, to sustain."[116]

Analysis of five years of operation of the NSW racial vilification legislation indicated that such legislation provided a focus for education strategies carried out by the Anti-Discrimination Board which would not be as effective without the civil and criminal sanctions of the racial vilification provisions to back them up.[117] Only legislation can remove a perception in the community that people have the right to behave a particular way.[118] Legislation provides moral support to those people whose natural instincts are

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112 HREOC (1983) noted at 13 that law can change attitude over time, and it is not necessarily the case that an overall attitudinal change has to precede a change in the law.

113 *Hansard*, House of Representatives, 15 November 1994, 3378.

114 quoted by Gibson, *Hansard*, House of Representatives, 15 November 1994, 3350.

115 *Wall Street Journal*, November 13, 1962, at http://quote.wikipedia.org/wiki/Martin_Luther_King.

116 Tatz (1995a) 31-32.

117 Hennessy and Smith (1994).

118 See Marjorie Henzell, *Hansard*, House of Representatives, 16 November 1994, 3420, speaking about legislation which imposes criminal sanctions in the context of the Racial Hatred Bill 1994 (Cth).

against racism.[119] At the moment all one can say in response to racist abuse is that such behaviour is not acceptable to those listening. One is on much stronger ground when one can say that such behaviour is not acceptable *because it is illegal*. The process of defining something legally as unacceptable indicates that the behaviour is both unjust and *alterable*, and encourages people not to put up with that behaviour. While legal rights themselves may be hard to enforce, the process of establishing that one has a right not to be treated in a certain way has, for example in the context of sexual discrimination, changed many people's view of the conduct from "It's only natural" to "That's unacceptable."[120]

We must take responsibility for our expressions, says Fish, and not assume that they are being taken care of by some clause in the Constitution.[121] To promote appropriate legislation against racism is not to abrogate responsibility to politicians, but to take responsibility — because we elect the politicians and because our system enables a fuller democratic participation in society. With responsibility come risks, but they have always been our risks, and no doctrine of free speech has ever insulated us from them. They are the risks of permitting speech that does obvious harm and of shutting off speech in ways that might deny us the benefit of valuable expressions. Nothing can insulate us from these risks and it is impossible to formulate rules that will prevent us making the wrong decisions in the future.[122] But that doesn't relieve us from our responsibilities. And if we frame regulations that are protective; that recognise the harms of racist speech and take steps to remedy those harms, we are more likely to set a desirable precedent for future governments than if we refuse to redress obvious present harms. The fact that some cases may be difficult to decide does not mean that we should give up our responsibilities and refuse to draw the line.[123] As Campbell says,

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119 HREOC (1983).
120 Robert W. Gordon, "New Developments in Legal Theory" in Kairys (1990) 413 at 423.
121 See also Lee (1990) 10 and 130.
122 Fish (1994) 115.
123 Lee (1990) 56.

> if the populace does not retain an idea of and commitment to fundamental rights, courts are in no position to sustain the vitality and force of this essential element of democracy. Democracy was not achieved by judicial activism and is unlikely to be sustained by it. If the people and their representatives do not have a lively sense of human rights, and a strong sense of responsibility towards the values they represent, then fundamental constitutional rights, implied or otherwise, will be ineffective. And so, while it is true that democratic decision-making presupposes democratic process and majority sensitivity to the rights of minorities, it is mistaken to look to the maintenance of democratic culture and process outside of majoritarian electoral process.[124]

Other arguments against legislation

It was said in Australia that the *Racial Hatred Act* would drive racism 'underground', making it harder to combat, and prove socially disruptive because it would anger racists or divide society along racial lines. It was also argued that prosecutions under the Bill would 'martyr' racists and give them good publicity, thus inadvertently encouraging racism.

Once again, these are arguments that would not be put in other legislative contexts. They are also arguments that implicitly acknowledge the bullying aspect of racism; the power relationship that is involved. That commentators apparently fear the consequences of angering racists acknowledges that racists are likely to behave in violent, or at least socially unacceptable ways. The notion that society would be 'divided along racial lines' – that the battle lines would be drawn between racists and their victims – rests upon similar unacknowledged assumptions. And the notion that prosecution of racists would encourage racism in the rest of society surely rests on the premise that the rest of society is likely to be sympathetic to the aims of the racist who is prosecuted. Who suggests that murderers should not be prosecuted for fear of

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[124] Campbell (1994a) 205.

encouraging other potential murderers? While there may be agreement that neither murderers nor racists should receive publicity for their behaviour, to say that they should not be prosecuted is another matter.

If the argument that racial vilification legislation would drive racism 'underground' means only that legislation would have a 'chilling' effect on racist expressions, that is surely a result to be applauded. The argument seems to imply rather that legislation would not affect the existence of racism but might teach racists to be more careful in disguising the reasons for their vilification or their violence. This argument is particularly relevant to jurisdictions in the United States where hate crimes receive enhanced penalties, there is some evidence that racists have learnt to be more circumspect, so that it is harder for their crimes of violence to be identified as having been motivated by 'race.'[125] There are, however, ways in which legislation can take the context of vilification or violence into account, for example by reversal of the burden of proof, where recurring violence or vilification is a problem.

The uses of education

There is no doubt that the 'free speech sensitivities' which McNamara identifies as limiting the scope and interpretation of Australian racial vilification legislation are underpinned both by First Amendment jurisprudence, which holds that it is inappropriate to legislate against racial vilification, and by the argument that education will be more effective than legislation in combatting racial vilification.

Education against racism and racial vilification is highly desirable, but will be insufficient on its own because of the extent to which racism is reproduced and

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125 See for example report in the *Toronto Sun*, 27 February 1998, cited at http://www.canadianfreespeech.com/newsletters/1998/fsm_march.html, that while the police in Toronto have had a serious impact on established hate-crime groups, this has led to numerous splinter groups that are harder to monitor.

encouraged through our culture. That also seems to be the conclusion that Australian legislatures have reached.

Education is seen by many as the most promising method of changing people and of changing social norms. In the debate on the *Racial Hatred Bill*, many federal parliamentarians endorsed media comments[126] that education, rather than legislation, is the proper response to racial vilification,[127] and even to racist violence. Speakers recognised that education would be a slow process (saying that the effects of educating against racism might not be achieved in their own lifetimes[128]), but thought it more 'desirable' than legislation.

Expressions of faith in the superior power of education to change social norms, in the absence of any relevant legislation, are based more upon philosophical ideals than upon sociological evidence.[129] There is no convincing evidence that normal forms of education are effective on their own, either in the short or the long term, in overcoming racist attitudes and behaviour where racism is an existing part of the dominant culture. Normal public education is likely to convey the message of accepting the *status quo*.[130] Traditional education may only result in people "feeling good about feeling bad about doing nothing" about racism — a complaint about many teachings on social issues.[131] At worst, inadequate teaching can actually encourage racism, giving a focus to the many racist signals that society gives us.

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126 Merkel (1994) 13

127 Merkel (1994), David Flint, "Educate towards equality", *Sydney Morning Herald* 17 November 1994, 21, Mr Charles, *Hansard*, House of Representatives, 16 November 1994, 3435 ff.

128 Tim Fischer: "Even if it may not come to pass fully and entirely in our lifetimes, we have made considerable process (sic) without federal legislation," *Hansard*, House of Representatives, 15 November 1994, 3351.

129 The Australian Federal government's push for uniform nation-wide gun laws in the aftermath of the 1996 Port Arthur killings would seem to indicate a belief that legislation is necessary to vary existing social norms and that, at least in the short term, existing norms cannot be changed by education alone.

130 Jane Elliott in *Blue Eyes* (1996) Bertram Verhaag. See also Tatz and Solomon (1995) 11.

131 Erica Simmons, "Sensitivity trainers and the Real Thing" *New Internationalist*, October 1994, 26 at 27.

As mentioned, a high level of education is no guarantee against racism. Racist influences will be strengthened to the extent that racism is socially acceptable, because of the natural human tendency to conform to the mores of one's society. This tendency is even reinforced by the very way in which we receive information, which can be affected by our own expectations, cultural bias and prejudice. Communications theory teaches us how reality tends to be framed according to prior stereotypes and their underlying assumptions, including racist stereotypes, with the mediated imagery becoming the referent with which real events are compared. The effect is to reinforce the ideological assumptions underlying the stereotypes, as well as the stereotypes themselves.[132]

In the case of a person who has strongly held racist views, traditional education faces yet another hurdle. Because racism is not rational, by definition the racist point of view needs to be particularly resistant to reason, and therefore to rational education.

Whatever public and private education against racism there has been in Australia to date, including encouragement of anti-racist norms through Labor federal governments' policy of multiculturalism, has not eradicated racism. The cynical might say that a preference for education as a means of combatting racism enables governments to sweep the issue under the carpet almost indefinitely — because results can't be expected at once. It is also a relatively cheap solution: the teachers are already there. Public education can be confined to the occasional advertising campaign.

Against this it must be said that where the teacher is committed to the aim of opposing racism, their message may be very effective indeed. The Australians against Racism Group has been overwhelmed by the response to their Primary School Project on Refugees. The number of entries has demonstrated strong support of the project by many teachers across Australia.

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[132] Lull (1995) 20-21.

Does education have a role in discouraging racism? Given that only in recent years have governments attempted to counter racism through education, material on this topic is scarce and difficult to assess. Generally, the principal public form that anti-racism education has taken in the past has been through the speeches and publications of non-government groups, in the past being anti-slavery groups, in both America and England, followed by the American civil rights movement. In Australia, Aboriginal groups and Aboriginal support movements have attempted to educate against racism, as has most recently the Australians for Refugees Group. International groups such as Amnesty International have also led anti-racist campaigns.

Anti-racist education has also been carried out through literature, whether the work was written specifically for that purpose (a famous example being *Uncle Tom's Cabin*) or not (*My Place, Benang*) and the cinema.

Despite the enormous commercial gains that were made from the slave trade, the anti-slavery groups finally succeeded, through rational and ethical arguments, in bringing about the abolition of slavery. The civil rights movement succeeded in bringing about the formal abolition of segregation. The success of other groups, with their wider aims, is harder to assess.

The current political environment of racial politics has had significant institutional ramifications for the educative function of the Human Rights and Equal Opportunities Commission. The Commonwealth legislation has traditionally permitted the Human Rights and Equal Opportunities Commission to intervene in relevant litigation. In March 2003 the Commonwealth Government introduced into Parliament the Australian Human Rights Commission Legislation Bill 2003 (Cth) to remove the Commission's existing power to present written and oral argument in legal proceedings with the leave of the Court. This power has been used in approximately 35 cases and the Commission has never been refused leave to intervene. The Bill would require the Commission to obtain the Attorney-General's leave to intervene in such court proceedings, even where

the Commonwealth Government is a party to the litigation.[133] HREOC has expressed the view that such a proposal is inconsistent with the Commission's role as an independent body responsible for monitoring and promoting Australia's compliance with its human rights obligations.[134]

The role of education in counteracting racism will vary enormously depending upon the strength with which a person holds racist beliefs. A personal appreciation of the harms of racism does not necessarily prevent a person from holding racist attitudes towards other groups.

At one end of the spectrum, a racist attitude may be the result of ignorance, and be dissipated when the person takes in new information which persuades them that their previous attitudes were not correct. There is anecdotal evidence that this can happen even where a person holds strong racist beliefs, although the likelihood in such a situation is very remote.

The next category is the person who has imbued racist ideas 'only' through their culture. It is likely that early childhood education against racism would assist in countering this type of racism. This is the view of Dr Paul Connolly, who recommends encouraging children at preschool and beyond to reflect on their attitudes, identities, and their experience of diversity.[135] If the racism is not countered early enough, more intensive types of intervention is likely to be required. Otherwise, even where persons are not themselves intentionally racist, normal education is not generally sufficient to overcome existing cultural propensities to racism. Galbraith's analysis of the 'culture of contentment' explains why it is difficult to educate people to respond to something that

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133 Section 26 of the Bill, inserting new sections 11(5) and (6).

134 See AHREOC Media Release 27 March 2003: "Human Rights Bill Threatens Human Rights Commision's Independence" at http://www.hreoc.gov.au/media_releases/2003/16_03.html and Media Release 29 April 2003: "Senate Inquiry: Australian Human Rights Commission Legislation Bill 2003", available at at http://www.hreoc.gov.au/media_releases/2003/25_03.html As of the end of February 2004, the Bill has not been passed, although the second reading speech was in June 2003.

135 Interviewed on "Bigotry" programme with Geraldine Doogue, 25 September 2002, ABC Radio.

does not affect them. Self-regard is, he says, the controlling mood of the contented majority. This becomes evident when public action on behalf of those outside the privileged group is in issue. If it is to be effective, such action is invariably costly and so is regularly resisted "as a matter of high, if sometimes rather visibly contrived, principle."[136] Then there is the avowed racist who sincerely believes in (for example) neo-Nazi white superiority and the various lies that surround it, such as blood libels, white Americans being the real 'children of Israel' and so on, and who associates or corresponds with others having similar beliefs. Education will be useless in countering these beliefs, which are not amenable to reason. The psychological problems that caused the racist to seek comfort in racism will need to be addressed. Extremists can't, says Schmidt, simply step out of the spiral of violence and hatred and repression.

> Prohibitions can be tempting. Arrests follow, then hearings, then frustration, violence, more arrests, more frustration, more violence. The battle lines and enemies are fixed and clear: the leftists, of course; the police; the state security forces; and the Verfassungsschutz (the internal intelligence service) ... the enforcers of the detested democracy, which supposedly gives the leftists more breathing room than the rightists. ... In any case, for them it is always an honor to come into conflict with the law. After all, Adolf Hitler was once in jail ... .[137]

Where racist acts have another purpose, as in the use of racist scapegoating to increase a group's political power, the racist behaviour is less likely to be diminished by legislative norms, especially in the short term, and 'martyrdom' is more likely to be sought.

It seems likely that at the extreme end of the spectrum is the person who does not believe in the lies that surround neo-Nazism, but as a leader of neo-Nazi groups is prepared to foster those lies to gain personal and political power. Education is not likely to be useful in such a case.

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136 Galbraith (1992) 17.

137 Schmidt (1993) 32 and 38.

Lack of restrictions would encourage extremist behaviour: failing to legislate is not the answer.

Legislation could be better framed so as to limit public expressions of racist ideology, such as public rallies and marches, and to ban publication of racist literature. Whether penalty enhancement would have an additional educative effect is hotly debated.[138] No such provisions currently exist in Australia. A 2002 NSW Opposition plan to increase all penalties for crimes including murder, rape, assault, robbery and attacks on places of worship if they were proven to be motivated by hate was dismissed by the President of the Law Society and the State Attorney-General.[139]

Discouraging racism would seem to depend upon some combination of:

- changing peoples' personal characteristics by persuading them to replace a racist mindset with some alternative view of reality;
- changing the social responses and social expectations that exploitation, slavery and racism have historically given us, as supported by religion and philosophy. This could be done, for example, by encouraging better individual and group communication, encouraging increased personal responsibility for others, encouraging people to see groups that they perceive as different as requiring support and assistance, not denigration and maltreatment; and
- changing existing social structures so that the situations in which people are given power over others or are forced to compete for social goods are avoided.

Whether we are ready to take any of those steps, and (if so) whether they would be effective, is another matter. Most discussions about combating racism are concerned with changing people (through education or psychiatric treatment) or with changing

138 See for example Gilmour (1994).

139 Stephen Gibbs, "Move to add penalties for hate crimes 'dangerous,'" *Sydney Morning Herald*, 19 July 2002, 8. The Attorney General called it 'electioneering' and the Law Society President said, curiously, that it was "potentially discriminatory" and had "the potential to whip up community hatred."

social norms (through education and/or legislation). Zimbardo suggests that rather than educating, treating, isolating, imprisoning or destroying 'problem people'[140] — the more blatant racists — we should look for ways to change 'problem situations' that might lead any of us to behave in undesirable ways.[141] He sees legislation as essential to overcoming prejudice and racism, because legislation can create a new social norm, which then becomes a powerful influence on individuals to conform to the new pattern.[142]

There is one context in which Zimbardo supports 'changing people' — in developing the pride and self-image of victims of prejudice. Young people who are targets of prejudice may, he suggests, be 'inoculated' against the crippling psychological effects of prejudice, and thus helped to develop their real potential, through being encouraged to have a sense of pride in their origins, history, group identity, and thus in themselves.[143]

The option of changing social structures is not normally seriously considered because it is so far-reaching. It involves reshaping societies around cooperation rather than competition, eliminating, or evening the distribution of, personal privileges,[144] and ensuring a (higher) minimum standard of living for all people, so that economic competition would decline as a source of racial conflict (summed up in J.K. Galbraith's phrase: "the good society has no underclass"). We can treat differences as a pervasive feature of communal life and consider ways to structure social institutions to distribute the burdens attached to difference.[145]

Education and legislation should be used together to establish behavioural limits and social sanctions against racism, to change social expectations and perceptions over time

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140 See Adams (1994b) who suggests that bigots should be treated as having a mental health problem.
141 Zimbardo (1979) 8.
142 Zimbardo (1979) 641.
143 Zimbardo (1979) 641.
144 Godrej (1994) 7.
145 Minow (1990) 11.

and develop public values. "There can be no doubt," said Lindsay Tanner, that "legislation by itself will be less effective unless it is also accompanied by a serious, substantial, well funded education strategy. The two go together. It is important to have both of them."[146]

Educating through feelings

Education which aims to change people through emotions, not reason, by responding directly to the level at which racist views are held, seems to have more immediate and perhaps more lasting effects than traditional education in countering racism. This is logical, given the psychological level at which racism appeals and the relationship between social conformity and social acceptance of racism. This is a form of education which has not, to my knowledge, been used with active racists such as white supremacists, rather with ordinary people whose culture has taught them racist attitudes.

Role playing

Jane Elliott found that the experiment of alternatively favouring and mistreating primary children divided into 'blue eyes' and 'brown eyes' brought home the realities of subordination and discrimination in a way that lectures or discussions could not achieve. Her later workshops with adults, documented for television, have been similarly effective. Other role-playing experiments of a similar nature have also 'worked' with adults — at least temporarily. In 1973, staff members at Elgin State Hospital in Illinois took the role of mental patients for three days. In a short time, they began to act like real patients: six tried to escape, two withdrew into themselves, two wept, and one came close to having a nervous breakdown. They reacted particularly strongly to being treated as incompetent, having their privacy invaded, and being obliged to conform to the arbitrary rules of the 'staff'. After the weekend was over, staff members were inspired to improve their relationships with patients, one commenting: "I used to look at

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146 Lindsay Tanner, *Hansard*, House of Representatives, 15 November 1994, 3358.

the patients as if they were a bunch of animals; I never knew what they were going through before."[147]

Jane Elliott initially found it more difficult to educate adults against racist discrimination through drama in a classroom or meeting situation. It seemed that the experience needed to be felt as realistic and threatening in order to successfully enable the participant to identify with the ways in which other people experience discrimination and racism.[148] Over twenty five years Jane Elliott has refined her anti-racism workshops to the point where they appear to have a profound effect upon the participants.[149]

The evidence as to the long term effect of such experiments and workshops can only be anecdotal. However it is promising. Some of the children who took place in Jane Elliott's early classroom experiments are on record as saying that the experience changed the way they perceived racism for the rest of their lives.[150] Psychodrama comes closest to the Elliott and Zimbardo experiments, which would probably not now be repeated with children or young students in similar form because of concerns as to their traumatic effects.[151] Of juveniles imprisoned on murder charges who took part in a sixteen week psychodrama course offered in a Texas juvenile detention centre only 17 percent reoffended, as opposed to a normal 60 to 70 percent amongst convicted criminals in Texas.[152] 'Shock treatment' education also appears to have been effective in changing behaviour, such as showing drink drivers or speeding offenders graphic film of car accidents, and involving them in discussions with people whose family members were killed in car accidents.[153]

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147 Zimbardo (1979) 628, citing research of Norma Jean Orlando.

148 See generally Peters (1987).

149 *Blue Eyes*, Bertram Verhaag, 1996.

150 *A Class Divided*.

151 Zimbardo (1979) Chapter 21.

152 Anna Blundy, "Turning murderers back into children", *Sydney Morning Herald*, 19 March 1994, 27.

153 Victoria's Transport Accident Commission's Road Safety Campaign produced significant reductions in the road toll: Joseph Wakim, letter to *Weekend Australian*, 25-26 March, 1995.

While it may indeed be possible to combat harmful racist behaviour through role-playing, psychodrama, or (with prisoners) some other interventionist form of judicially-sanctioned education,[154] in effective and long-lasting ways, this is clearly an intensive form of education that would be very costly and that is dependent upon highly trained and effective facilitators.

Working together

Psychological experiments showed that groups of 12 to 14-year-old boys who had become hostile whilst striving to achieve incompatible goals, became friendly again with the subsequent introduction of a goal achievable only through cooperation between the groups. Psychological studies confirm that cooperation towards a common goal produces positive feelings, even drawing together people who were previously in conflict.[155] Terkel records the experiences of a Ku Klux Klan member, C.P. Ellis, and a black woman, Ann Atwater, who worked together on a local community project to help solve racial problems in the schools.[156] Ellis was from a poor family and his father had been a Klansman. He and Atwater were nominated as co-chairs of a key committee and reluctantly began to work together. The experience changed Ellis' perspective and he came to identify with Martin Luther King's teachings.

In South Africa non-governmental organisations are involved in numerous projects that tackle racism in communities, in the army and police force and in the workplace.[157] Workshops encourage people to question their assumptions in a non-threatening way. 'A part not apart' is their catchphrase.

Zimbardo warns, however, than mere exposure does not help, and is more likely to intensify existing attitudes. Contact between antagonistic groups can promote better

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154 Such as the extensive re-education involving electronic monitoring, group counselling and drug and alcohol treatment routinely ordered by a specialist Florida court which deals only with domestic violence: Nancy Banks-Smith, "A cooling-off period", *Guardian Weekly* 16 July 1995, 26.

155 Zimbardo (1979) 636, discussing the Robber's Cave experiment of Sherif et al.

156 Terkel (1993) 271 -288.

157 Ferial Haffajee, "More than Jimmy's taxi", *New Internationalist*, October 1994, 8 –10.

intergroup relations and lessen existing hostilities only when the contact is rewarding rather than thwarting, when a mutual interest or goal is served, when status is equal, and when the participants perceive that the contact was the result of their own choice.[158]

Conclusion

It can be seen that the 'greater harms' arguments that legislation restricting racist speech would cause some greater harm, rely upon metaphor and theoretical arguments rather than any real examination of the respective harms of racial vilification and of legislation against it.

Free speech theorists propose no alternate solution to critical race theory proposals in relation to free speech issues, relying instead on the notion that there will be a natural social progression towards a more moral (and presumably less racist) society.[159] This is perhaps a reflection of their laissez-faire attitude that everything works out for the best in the end.[160] Unfortunately, they have no suggestions for hastening this improved social state, and have few ideas about what to do in the meantime until it arrives. The arguments from personal identity and self-determination are purely formal arguments which promote certain values irrespective of whether, and by whom, they can be achieved. More extreme arguments suggest that allowing (and encouraging?) racist expressions will hasten social progress because it will give society something to oppose.[161] One cannot help suspecting that the free speech theorists are not unhappy with the *status quo*.[162]

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158 Zimbardo (1979) 641.

159 See Post (1994) 129.

160 See Galbraith (1992) 51ff for a critique of this attitude.

161 Strossen (1994) 188: "reinforcing society's commitment to tolerance and mobilizing its opposition to intolerance." See also Post (1994) 142.

162 Similarly, one suspects that another noted legal theorist, Richard Posner, is not unhappy with the *status quo* when he says that we should not fool ourselves that profound social problems are actually solvable: "Us v. Them", *New Republic*, 15 October 1990, at 47,50, cited in Lively (1994) 188.

In Australia, more emphasis is put on education against racism than social progression and more faith is expressed in education than legislation. But given the current use of race politics to divide the community, and the anti-Muslim culture that followed September 11, it seems likely that more than traditional education will be needed to promote an effective anti-racism.

Chapter 9: The limits of present legislation

Unable or unwilling to respond directly to the larger problem of the imbalance of communicative power and the rise of advertising as the paradigm of public communication, legislatures and courts address the worst and most obvious excesses of public discourse by supporting content restrictions on 'extreme' expression. This response leaves the larger problems with public discourse substantially untouched.[1]

Australian legislation has been drafted so as to impose deliberately high thresholds for the offence of racial vilification. And, the current political climate is one in which such thresholds are likely to be interpreted strictly.

Notwithstanding that obstacle, the question remains whether it is constitutionally possible to take a different approach to racial vilification in Australia. It is to this issue that this thesis turns in Chapter 10. In this Chapter, the limitations of the present legislation are examined.

It may be that Australian racial vilification legislation in its present form is doomed even before it has really started. Generally, both State and Federal legislation depends upon the perpetrator vilifying the victim on the basis of specific characteristics of the victim, and causing a certain type of negative response amongst a particular audience[2] However the 'new' racism is careful not to identify its subjects on the basis of race or even ethnicity, pointing rather to purported differences in culture or values. It is therefore arguable that Australia's current racial vilification legislation is likely to be increasingly irrelevant.

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1 Moon (2000) 147. Gaudreault-DesBiens (2001) at 1134 argues that nonetheless, legislation against extreme speech can have a symbolic impact and shape the "legal-normative consciousness of individuals and groups." However his comments are made in the context of jurisdictions which acknowledge the right to dignity.

2 This discussion and much of the following draw upon Solomon (1994). See also the text of relevant Commonwealth and NSW provisions in Appendix 2, and the earlier discussion of the ambit of the various legislation in Chapter 5 under the heading 'The scope of current legislation '.

Much will depend upon the ability of courts and tribunals to see the 'new' racism in context, and to understand that it is racism in another guise. But the legislation is not helpful. State legislation does not focus on the harm to the victim and the attack on the victim's dignity. Lacking the legal concept of human dignity, Australian racial vilification law focuses on the perpetrator's intent and his or her perception of the victim. State legislation also adds a further test relating to the ability of the perpetrator to arouse some type of direct or immediate response from third parties. Complex exemptions also apply.

It is submitted that increasing the lists of victim characteristics or refining the scope of the exemptions is not the answer. A new way of considering racial vilification in the context of the particular situation, as an attack on something that is more akin to the notion of human dignity, or what the NSW Law Reform Commission calls "the emerging right to equality"[3] is more likely to provide a useful way forward.

Differences between State and Federal legislation

State legislation is directed towards the effect of the vilification upon third parties who are the real or notional audience to the public statements or conduct, rather than to the effect upon the victim or victim group, and to that extent is aimed at indirect racist abuse. However, the victim must also show that there is a connection between the particular behaviour, and the victim's own characteristics, which is more likely to be an element of direct racist abuse.

Generally, the States require a higher threshold for the offence of racial vilification than does the Commonwealth.[4] The Commonwealth requires a public act that is *reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate* another person or a group of people and which is done because of their 'race'. The States generally

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3 NSW Law Reform Commission (1999) par 7.62 and see Chapter 3.

4 However even Commonwealth legislation, including the Racial Discrimination Act 1975 (Cth), is recognised as inadequate in addressing systemic discrimination: Saku Akmeemana and Teya Dusseldorp, "Race Discrimination: Where to from here?" (1995) 20(5) *Alt L J* 207.

require a public act that *incites hatred, serious contempt or severe ridicule* on the basis of 'race'.

The Commonwealth test comes closer to European notions of an attack on one's personal dignity, and is more likely to catch incidents of direct abuse. What is seen as relevant is the harm to the victim. The State tests appear to be aimed more at indirect extremist abuse such as white supremacist hate propaganda, and to be more difficult to apply because of the higher threshold in terms of both consequence and *mens rea*. Such tests are also less obviously applicable to direct abuse. What is seen as relevant is the effect that the perpetrator has on the reputation of the victim or their group, or the negative effect that the perpetrator's conduct has or could have on the public,[5] not the direct hurt to the victim.

Under both State and Commonwealth legislation a number of exemptions apply for public discussions which are justified on the basis of an artistic or scientific purpose, or the like, or on the basis of public interest. These exemptions have been interpreted so widely that it is unlikely that any racial vilification which can be viewed as 'political' will be caught.

In some States (but not the Commonwealth), the offence becomes a criminal offence if it involves threatening the person or property of an individual or group of persons; or inciting others to do so.

Under both State and Commonwealth legislation, the concept of the reasonable victim standard is relevant – with the problems that this entails.

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[5] This is the interpretation of the NSW Law Reform Commission, which comments that while public insult is more serious than private insult, it is "incitement of third parties" to which the NSW legislation is directed "which is a more serious matter": (1999) par 7.109.

Problems with particular legislative features

Characteristics of the victim

The misconception that 'racism' can be logically identified and categorised according to the characteristics of the victim has led to errors in drafting 'dedicated' legislation against racist expression. In legislating against racial discrimination, vilification and violence, most countries describe the proscribed behaviour *by categorising the victim* in accordance with the characteristics of "race, colour, descent or national or ethnic origin" laid down in Article 4 of the *International Convention on the Elimination of all Forms of* Racism. 'Race' is popularly used to refer to descent, and ethnicity to refer to the culture, of the victim.[6] Most anti discrimination legislation appears to use the words 'race' and 'ethnicity' or 'ethnic origin' in those popular terms. NSW speaks of 'ethno-religious' origin. That term has been interpreted as requiring "a strong association between a person's or a group's nationality or ethnicity, culture, history and his or her religious beliefs and practices."[7] Victoria, Tasmania Queensland and the Northern Territory add the concept of vilification (in the Northern Territory, harassment) of persons on the ground of religious belief or activity, or refusal to engage in religious activity. The Northern Territory legislation specifically includes Aboriginal spiritual belief or activity as 'religious' belief or activity. South Australia adds the useful concept that the vilification could be caused by the nationality, country of origin, colour or ethnic origin either of the victim, or of another person with whom the victim resides or associates.[8] Tasmania adds the concept of discrimination on the basis of the victim's status of being or having been an immigrant (as part of the definition of 'race').

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6 Castles (1996) 28, citing David Theo Goldberg, *Racist Culture, Philosophy and the Politics of Meaning*, Blackwell, Cambridge Mass and Oxford, 1993, 76.

7 *Khan* v. *Commissioner, Department of Corrective Services and Australasian Correctional ManagementPty Ltd* [2002] NSWADT 13, par 20. See also Gelber (2002) 13ff.

8 Racial Vilification Act 1996, s 3.

The dilemma for legislators is how to help overcome past racism on the basis of perceived group differences without utilising those perceptions as the very basis for legislation, and so effectively legitimating them.[9]

Defining 'racist' offences in accordance with specific characteristics of the victim has the unintended effect of 'blaming the victim'. It encourages the notion that the offence is caused by the victim's characteristics. But classifying racist behaviour by reference to the victim ignores the fact that perpetrators' categorisations of their victims are not always rational or 'correct' social constructs. As discussed previously, it is the perception that some difference or differences exist, rather than the particular type of differences, that motivates many perpetrators. To define racist activities as acts against a victim 'on the ground of', or 'because of', specific characteristics of the victim is to attempt to put into neat categories actions that are basically illogical, and to ignore the intersectionality of race with such other factors as gender, class and sexuality. To require connections between a perpetrator's behaviour and specific characteristics of the victim does not reflect the reality of racist behaviour and leads to problems in applying the legislation. When a woman wearing a veil is verbally abused while she is walking along a Sydney street, it might be because she is female, because she is wearing a veil, because the perpetrator thinks he knows what country she comes from, because he thinks she is Muslim, or because of the colour of her skin. It might be a combination of all of these things.[10] It is likely that he does not rationalise the basis for his abuse. He abuses the woman because he perceives her as different. Any difference will do.[11]

Where legislation relies on a connection with the characteristics of the victim to establish a basis for an offence, the list of characteristics must be sufficiently wide to comprehend all the different rationales that the perpetrator might adopt in order to differentiate the victim from the perpetrator. If religion is not one of the list of characteristics, the perpetrator can say that he vilified the woman because he thought she

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9 Minow (1990) 23, 47 and generally.

10 I first made this point in Solomon (1994) and found it endorsed in Fraser et al (1997) 75.

was Muslim, and he will have committed no offence under this type of legislation. Most State legislation goes some way to remedying this problem in providing that while the proscribed conduct must be 'on the ground of' the characteristics of race or religious belief or activity, that characteristic does not have to be "the only or dominant ground for the conduct, so long as it is a substantial ground."[12] It is not enough, however, that a characteristic such as race 'is merely part of the circumstances that form the background" — there must be proof of a 'causal connection'.[13] Thus Easter and Christmas celebrations at a NSW school were held not to be discrimination 'on the ground of' the complainant's 'ethno-religious' characteristics as the father of Jewish pupils, but discrimination on the grounds of 'religion', which is not covered by the NSW Anti-discrimination Act.[14]

At the same time, it has been suggested that it is important not to require a second test (that the perpetrator's motivation be shown to be connected to specific characteristics of the relevant person or group), when the very thing complained of is the vilification of persons by express reference to their race or ethnicity.[15] In such a case, the connection "may readily be inferred" said Commissioner Beech in *Feghaly* v. *Oldfield*.[16] However, that inference was not made by Commissioner Nader in W*alsh and others* v. *Hanson,*[17] where Pauline Hanson's book attributing negative attributes to Aboriginal people was said not to have been written 'because of' the race or ethnic origin of the Aboriginal

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11 See Levin & McDevitt (1993) 58 and comments on intersectionality in HREOC (2001b).

12 s 9 (2) Victorian *Racial and Religious Tolerance Act 2001*.

13 *Bryl and Kovacevic* v. *Nowra and Melbourne Theatre Company*[1999] HREOCA 1, (1999) EOC 93 -022; see however *Hobart Hebrew Congregation and Jones* v. *Scully* (2000) EOC 93-109; [2002] FCA 1080; (2002) 120 FCR 243; (2002) 71 ALD 567, contra.

14 *A obo V & A* v. *Department of School Education* (2000) EOC 93-039. Similarly the NSW Tribunal held at first instance that a prisoner denied Halal food in a privately run prison was discriminated against on the ground of his religion, rather than his ethno-religious origin, (discrimination on that basis not being in breach of the law in NSW): *Khan* v. *Commissioner, Department of Corrective Services and Australasian Correctional ManagementPty Ltd* **[**2000] NSWADT 72, [2001] NSWADTAP 1 [2002] NSWADT 13.

15 *Hobart Hebrew Congregation and Jones* v. *Scully* [2002] FCA 1080; (2002) 120 FCR 243; (2002) 71 ALD 567 and see (2000) EOC 93-109; (2001) 113 FCR 343; [2001] FCA 879, followed in *Jones and Executive Council of Australian Jewry* v. *Toben* (2002) 71 ALD 629, [2002] FCA 1150, (2002) EOC 93-247.

16 EOC 93-090. See also *Korczak* v. *Commonwealth* (2000) EOC 93-056.

complainants but because "the respondents were of the opinion that the Aboriginal community as a whole were being unfairly favoured by governments and courts" — a subtle distinction which, as McNamara points out, effectively introduces a subjective test as to the perpetrator's motivation, despite the purportedly objective nature of section 18C. The Victorian *Racial and Religious Tolerance Act* 2001 seeks to avoid this type of anomaly by stating that the motives of the person carrying out the prescribed conduct are irrelevant.[18]

Similarly in *Creek* v. *Cairns Post Pty Ltd*,[19] Kiefel J dismissed the complaint on the basis that it was not shown that the race of the complainant was a motivating factor in the respondent's decision to publish the photograph of the complainant, an Aboriginal person, in a bush setting which was implied to be their primary residence. "The context of the article is of course race," he said, and the photograph was not motivated by considerations of race. It is hard to see how this conclusion could be reached when the brunt of the article was that the Aboriginal complainant should not be given custody of an Aboriginal child who had previously been fostered with a white couple (photographed in superior housing). As McNamara says, the Aboriginality of the complainant was clearly at least one of the reasons for the publication of the photograph, even if not the only reason.[20]

In *Hagan* v. *Trustees of the Toowoomba Sports Ground Trust*, the Full Court of the Federal Court considered that the words 'because of' necessitated a consideration of the reasons for which the act in question was done.[21]

McNamara recommends that the test for connection between the behaviour and the victim's characteristics should be that the conduct in question was "directed at a person

17 (Unreported 2 March 2000).
18 s 9.
19 (2001) 112 FCR 352; (2001) EOC 93-168; [2001] FCA 1007.
20 McNamara (2002) 94.
21 [2000] FCA 1615.

or group's racial or ethnic identity" rather than being directed at them because of their personal characteristics.[22]

The Victorian *Racial and Religious Tolerance Act 2001* provides that "it is irrelevant whether or not the person made an assumption about the race or religious belief or activity of another person or class of persons that was incorrect at the time that the contravention is alleged to have taken place."[23] It is arguable that 'made an assumption' is not a completely adequate explanation of the prejudices and motives of a racist, which are thereby categorised as a rational (although incorrect) decision. However the section certainly gives assistance to judges in finding that a proscribed act has been carried out, even where a defendant argues that they acted on an incorrect belief as to the victim's characteristics. Section 49ZXC of the NSW Anti-discrimination Act, relating to serious vilification of persons thought to have HIV/AIDS, specifies that the provision applies whether or not the persons *actually* have HIV/AIDS. However there is no such clarification in relation to other characteristics such as 'race', nor in relation to the offences of serious homosexual vilification in section 49ZTA and serious transgender vilification in section 38T.

Given the intersectionality of factors involved in any kind of discrimination or vilification, a further problem can, depending on the degree of *mens rea* required by the legislation, be the difficulty of ascertaining whether the perpetrator's intent was completely or predominantly 'racist'. This might be met with legislation which deems certain activities, such as painting swastikas on synagogues, to be *prima facie* racist. Such a reversal of the burden of proof (in that the perpetrator would then need to prove that his act was not racially motivated) is not generally regarded as desirable, although it does exist in some areas of legislation, notably taxation law. Drafting dedicated legislation so as to catch reckless as well as intentional behaviour or, as has been done in Victoria, providing that the motives of the perpetrator are irrelevant, would go some

22 McNamara (2002) 93.
23 ss 10 and 26.

way towards redressing this problem. The problem seems to be that judges are not convinced of the causal link between racist speech and harm, which 'chills' their interpretation of the legislation.

The Northern Territory legislation in relation to sexual discrimination is interesting in providing a list of relevant features which should be taken into account in considering whether discrimination has occurred in any particular context. Critical race theory similarly suggests a contextual approach, and recommends that legislation should focus on the social characteristics of the victims as members of a traditionally subordinated group.[24]

Offensiveness

The words *offend, insult, humiliate or intimidate* have been interpreted in some cases in a narrow way. In *Bryant* v. *Queensland Newspapers Pty Ltd*[25] Sir Ronald Wilson was influenced by the heading of Part IIA, which refers to the prohibition of offensive behaviour based on 'Racial Hatred', taking it to mean that the vilification must be extreme before the offence is made out, and implying that "the section allows a fair degree of journalistic licence, including the use of flamboyant or colloquial language." As McNamara says, this conclusion, and the subsequent decision of Wilson in *Combined Housing Organisation Ltd* v. *Hanson*[26] (which seems to have relied on similar assumptions) reflect a 'somewhat curious' method of interpretation, given that normal rules of interpretation require reference to headings only to resolve ambiguity in the wording of the section, and given that journalistic licence is more properly considered in the context of the exemptions, rather than in considering the narrative of the speech in question.[27] In the later case of *Creek* v. *Cairns Post Pty Ltd*,[28] Kiefel J of the Federal Court emphasised that the words of the offence refer to "profound and

[24] See for example Matsuda (1993) 36.
[25] [1997] HREOC 23.
[26] [1997] HREOC 58.
[27] McNamara (2002) 82 and 83.
[28] [20001] FCA 1007.

serious effects, not to be likened to mere slights" but stressed that the reference in the heading to 'hatred' did not impose a higher threshhold.[29]

In *Combined Housing Organisation Ltd* v. *Hanson,* Wilson implied that section 18C has no role to play in cases of political opinion, dismissing the complaint that was made on the grounds of unlawful discrimination and vilification on the basis that the comments did not constitute racial discrimination. The decision has been praised as supporting a right of free political speech.

Incitement

This thesis has argued that racial vilification is particularly harmful because it encourages racism, inequality and discrimination in the rest of the community against the victim group. That is, both the immediate hurt to the victim or victim group and the harm caused to the wider community are important. The way in which the wider community is influenced by racist statements is an indirect and incremental process. However the language of State legislation does not adequately describe the more indirect results of hate speech. It is a common requirement of State legislation that it be proved that the perpetrator intends to 'stir up' or 'incite' hatred or some similar reaction, or was 'likely, in all the circumstances' to achieve that effect. However the requirement is capable of being interpreted as meaning that the perpetrator should obtain some immediate reaction from his specific audience, and has often been interpreted in that way. Such interpretation means that an additional barrier to establishment of the offence is created, because immediate incitement is only likely to occur in the most extreme 'rabble-rousing' situations. In 1988, statements described as "among the most shockingly anti-Semitic ever to be uttered publicly by a religious leader in Australia" were made to a group of Muslim students at Sydney University. The Ethnic Affairs Commission found that the speech 'justified' but did not 'incite' violence towards Jews — an interesting distinction which presumably stems from the lack of any violent

[29] See McNamara (2002) 84.

reaction on the part of the audience.[30] Similarly, in *Wagga Wagga Aboriginal Action Group* v. *Eldridge*, the Tribunal took that view that section 20C of the NSW legislation does not make unlawful the use of words that merely 'convey' hatred towards a person, or express serious contempt or severe ridicule on the ground of race. It held that 'incitement' required more.[31]

Where the phrase 'stirred up' is used,[32] it is not clear who is to be stirred up — whether it is sufficient that a small distinct group is likely to be 'stirred' to hatred, or whether the likelihood relates to the much more stringent test of arousing the community as a whole to hatred.[33] 'Stirring up' is not an adequate description of the possible effect of public hate propaganda. It could imply that the hatred needs to exist already, or that the act must have caused immediate and perceptible responses — or that the subjective intention to cause an extreme outcome must have existed.[34] Initiating and encouraging racial hatred are equally offensive and such acts should still be penalised even if they have no immediately perceptible consequences. The Zionist Federation of Australia suggested that 'promote or increase' be included in Commonwealth legislation against racial vilification in addition to the phrase 'stir up'[35] and in the 1994 Bill, 'stir up' was replaced by 'incite', meaning "to urge on; stimulate or prompt to action."[36] 'Promote' is used in section 281.2 (2) of the Canadian *Criminal Code* of 1970. Use of the words 'expose', as in the Manitoba *Human Rights Act 1974*,[37] and 'excite' as in the New Zealand *Race Relations Act*, would seem to be desirable additions. However the original Anti-Discrimination (Racial Vilification) Bill 1989 (NSW) contained the words

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30 Jacqui Seemann, "Racial Vilification Legislation and Anti-Semitism in NSW: The Likely Impact of the Amendment" (1990) 12 *Sydney Law Review* 596, 602, citing Paolo Totaro, Ethnic Affairs Commission of NSW, *S.16(a) Investigation into Certain Utterances of Imam Taj Eldine El-Hilaly, Chairman's Report to the Minister*, 11 November 1988.

31 (1995) EOC 92- 701.

32 proposed Section 58 of the *Crimes Act* contained in the 1992 Bill and the definition put forward by the HREOC (1991) 14.

33 See on a similar point Seemann (1990) 607.

34 McNamara (2002) 10.

35 Submission of the Zionist Federation of Australia reported at page 5 of *The Australian Jewish News*, Sydney Edition, 12 February 1993.

36 this being the *Macquarie Dictionary* (1985) definition which was adopted in *Harou-Sourdon* v. *TCN Channel Nine Pty Ltd* (1994) EOC 92- 604.

'promote or express' which were removed in favour of the higher standard of 'incitement' which Parliament apparently intended to refer to 'actual' incitement.[38]

While incitement is required for both the civil and criminal offences under the NSW legislation, in the Second Reading Speech the then NSW Attorney General, the Hon John Dowd, said that the criminal provisions required intent to incitement to be proved, but not the civil provisions.[39] While no NSW case has yet considered the criminal offence, it has been held in W*agga Wagga Aboriginal Action Group* v. *Eldridge* and *R* v. *D and E Marinkovic* that the civil offence does not require proof of intent to incite, nor proof that any person was actually incited.

The question of 'who must be incited' is considered further below.

Hatred

The simple word 'hatred' also creates problems of interpretation. The word 'hate' is used in racial vilification legislation in Australia,[40] Canada, Bulgaria, Dominica, Germany, Mexico and the Netherlands.[41] Members of the Canadian Supreme Court have held different interpretations of the concept of wilful promotion of hatred.[42] In *R.* v. *Keegstra*,[43] McLachlin J. referred to political name-calling as being easily 'described as 'promoting hatred'.[44] She held that to ban the wilful promotion of hatred would also proscribe such activities as the promotion of 'active dislike'.[45] This is to give the word virtually no meaning. In the same case the majority determined that the term 'hatred' should be interpreted in the relevant context only to cover "the most intense form of

37 Seemann (1990) 608.
38 NSW Law Reform Commission (1999) par 7.115.
39 NSW Law Reform Commission (1999) par 7.119 footnote 121.
40 NSW: *Anti-Discrimination Act* 1975 ss 20B, 20C, 20D; Queensland: *Anti-Discrimination Act* 1992 s 126; Western Australia: *Criminal Code* ss 77,78, ACT: *Discrimination Act* 1991 ss 66, 67.
41 Centre for Human Rights, Geneva, *Second Decade to Combat Racism & Racial Discrimination*, United Nations, New York, 1991, 43, 32, 81, 94, 115/6, 117.
42 The decision related to Section 319(2) of the Canadian *Criminal Code*, R.S.C. 1985, *c*.C-46.
43 (1990) 61 CCC (3d) 1.
44 99.
45 116 to 118.

dislike"[46] as connoting "emotion of an intense and extreme nature that is clearly associated with vilification and detestation,"[47] "a most extreme emotion that belies reason; an emotion that, if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation."[48] Again, from the earlier Chapters we can see that it is not certain that 'hatred' is the best description of a racist's 'scorn for the subhuman'. The wording is derived from the concept of sedition against the monarchy and is not entirely appropriate to describe the concept of group vilification.

In NSW, the term 'hatred' has been interpreted narrowly, according to its dictionary meaning, and it is emphasised that hatred, serious contempt, and severe ridicule are alternatives.[49] In *Kazak* v. *John Fairfax Publications,*[50] the Tribunal cited approvingly the Supreme Court of Canada's discussion of the concepts of hatred and contempt in *Taylor* v. *Canadian Human Rights Commission,*[51] and agreed that the use of the word 'hatred' creates a high threshold. The Tribunal disagreed with the implications in *Bryant* v. *Queensland Newspapers Pty Ltd*[52] that "flamboyant or colloquial language cannot incite hatred."

Other legislation contains possible alternatives to what may be a stringent test of proving 'hatred'. The wording of Section 9A of the New Zealand *Race Relations Act 1970*[53] refers to communications "likely to excite hostility or ill-will against, or bring into contempt or ridicule, any group of persons ... ." The Victorian *Racial and Religious Tolerance Act 2001* refers to the basic offence of conduct that "incites hatred against, serious contempt for, or revulsion or severe ridicule" of another.[54] However it also proscribes, as serious racial vilification, conduct on the basis of race that is intentional,

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46 60.
47 59.
48 59 and 60.
49 *Harou-Sourdon* v. *TCN Channel Nine Ltd* (1994) EOC 92- 604.
50 [2000] NSWADT 77.
51 (1990) 75 D L R (4th) 577.
52 [1997] HREOC 23.
53 Centre for Human Rights (1991) 121.
54 s 7.

and that the offender knows is likely to incite hatred and "to threaten, or incite others to threaten, physical harm towards that other person or class of persons or the property of that other person or class of persons."[55] It also includes, although in the context of victimisation,[56] the concept of conduct that causes some 'detriment', including 'humiliation and denigration'.

Section 20C of the NSW *Anti-Discrimination Act* contains the concept of inciting serious contempt for, or severe ridicule of, a person or group, including by threats or incitement of harm (Section 20C). The German *Penal Code* includes not only 'inciting hatred' but also as alternatives: 'urging violence or arbitrary acts' and 'insulting, maliciously ridiculing or defaming' particular groups, in each case involving an attack on the 'human dignity of others'.[57] Austria, Byelorussia SSR, Cyprus, Trinidad and Tobago and the Ukrainian SSR and USSR all legislate against acts arousing or exciting some or all of: hostility, enmity or ill-will.[58]

Less stringent criteria are imposed by legislation which concentrates upon threats, slander, abuse or insult to a victim or group.[59] 'Contempt' and 'ridicule' are often used in this context, for example in New Zealand and Mexican legislation.[60] France and Germany recognise in their legislation the useful concepts of group defamation, and insult to dignity, neither of which is generally accepted in English-speaking jurisdictions.[61]

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55 s 24 (1).

56 s 14. This unusual section proscribes victimisation of persons who have brought complaints under the legislation, given evidence or information in relation to proceedings under the Act, or refused to act in contravention of the Act.

57 Centre for Human Rights (1991) 94.

58 Centre for Human Rights (1991) 27, 35, 68, 152, 161, 167.

59 Centre for Human Rights (1991) 88 (Finland), Germany (94), Netherlands (117), Poland (134).

60 Centre for Human Rights (1991) 121,115/6.

61 Centre for Human Rights (1991) 90, 94.

Motive and reasonableness

NSW case law has diverged on the issue of whether under section 20C(1) the relevant public act must be done with the intention of inciting the particular result amongst third parties, or whether it will be sufficient if the conduct is likely to have that effect. In *Wagga Wagga Action Group* v. *Eldridge*, the Equal Opportunity Tribunal held that it was not necessary to establish that the respondent intended to incite racial hatred, nor that such a result was achieved. This was followed by the Administrative Decisions Tribunal in *Kazak* v. *John Fairfax Publications Ltd*, and by *WALS* v. *Jones and 2UE* (where the Administrative Decisions Tribunal noted that "the human rights of members of the vilified group are diminished regardless of whether the maker of the statements… intends to bring about that result or not.")[62]

As McNamara notes, the concept that specific intention to incite is not required is consistent with the parliamentary intention of the legislation, and is a point that the Law Reform Commission has suggested should be clarified in the legislation.[63] It is a point made specifically in the Victorian legislation.

However in the cases concerning disputes between the Greek and Macedonian communities in Australia over the meaning of 'Macedonia',[64] the Tribunal effectively required intentional racial vilification to be established. It seemed very clear, given the particular comments made,[65] that the respective communities fully intended to incite serious contempt or severe ridicule of each other, if not hatred. However the Tribunal displayed a strong free speech sensitivity to a discussion that could be characterised as 'political' and found this not to be established, claiming in *Hellenic Council of NSW (No*

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62 par 92, approved in *Russell* v. *Commissioner of Police and others* [2001] NSWADT 32 at par 107.

63 McNamara (2002) 183 and 185. See also Law Reform Commission (1999) 544, Recommendation 93.

64 *Hellenic Council of NSW* v. *Apoleski and Macedonian Youth Association (No 1)* [1995] NSWEOT (25 Sept 1997) 10/95, *Hellenic Council of NSW* v. *Apoleski (No 2)* 1995] NSWEOT (25 Sept 1997) 9/95 and *Malco* v. *Massaris* [1996] NSWEOT.

65 that "the Greeks have brought to mankind everything that is today considered to be evil" and are 'blood suckers' and 'thieves'.

1) that it could not find an intention to incite hatred unless the individual concerned had given evidence that such was their intention. The cases concerning the Greek/Macedonian dispute reflect the strong desire of the Tribunal not to be caught up in a dispute between the relevant communities (or, as McNamara says, that this was "an inappropriate forum for continuing this debate") rather than apply the law. This perhaps was also the underlying reason for the Tribunal, in those cases, considering first the exemptions under section 20C(2) and deciding that, because those exemptions applied, it was not necessary to consider whether the offence had been made out under section 20C(1). As McNamara points out,[66] this is not the correct order in which the sections should be applied, and the unfortunate effect of those cases is that the scope of the application of the legislation has been narrowed.

There has been a degree of uncertainty concerning the question of whether the perpetrator's conduct was 'reasonably likely' in all the circumstances, to offend, insult, humiliate or intimidate the victim. 'Reasonable likelihood' is an objective test. However, Sir Ronald Wilson, in stating that use of words such as 'Pom' or 'Pommy' would be unlikely to be regarded as racial vilification unless the words were used in a malicious manner, or were 'designed to foster hatred or antipathy' appeared to be giving undue weight to the motivation of the perpetrator.[67] Similarly in *Shron* v. *Telstra*,[68] Commissioner Innes observed that in considering the context in which a swastika was displayed, the '*Bryant*' interpretation of section 18C was relevant. Telstra's depiction of World War II fighter planes (one of which bore a swastika) was different in nature from "some form of depiction or publication which was plainly malicious or scurrilous, designed to foster hatred or antipathy in the viewer." In McNamara's words, "unarticulated notions of what constitutes legitimate expression" have narrowed the

66 188 to 191.

67 *Bryant* v. *Queensland Newspapers Pty Ltd* [1997] HREOC 23. The case concerned newspaper articles headed "Filthy Poms" and "Poms fill the summer of our discontent" which blamed English tourists for littering were accepted by the HREOC as complaints and settled through conciliation, with the newspapers publishing apologies: http://www.humanrights.gov.au/raciaql_discrimination/racial_hatred_act/index.html.

68 [1998] HREOCA 24.

interpretation of section 18C. It should be stressed that the third parties or audience who are to be 'stirred up' are not the same third parties considered in the related test as to who would reasonably find the particular racial vilification offensive.

Where courts have held to the concept of an objective test in relation to third parties, they have expressed different views as to whether the notional person who is reasonably likely to be offended should be considered as a person from the target group, or from the general public. [69] The answer to that would seem simple, in that persons not from the target group are unlikely to be hurt or intimidated by abuse that is inapplicable to them. This is not necessarily the view that courts have adopted — Sir Ronald Wilson was presumably considering the view of the general public when he said that 'Pom' or 'Pommy' would not be offensive. Many English immigrants might disagree, especially depending upon the context of the remarks, even where no malicious intent was intended.

In *Corunna* v. *West Australian Newspapers Ltd*, Commissioner Innes, following US and Canadian cases, and taking account of the Australian literature, specifically adopted the test of the 'reasonable victim', intending to avoid "continuing the dominance of the dominant class or group" and at the same time recognising that the views of a hypersensitive victim should not prevail.[70] In *Creek* v. *Cairns Post Pty Ltd*, Kiefel J considered that the reasonable victim should be considered to be in the same circumstances as the victim. The test is more difficult where there is no clear group against which the act is directed. In the Federal Court, Drummond J found no evidence that others in the Toowoomba Aboriginal community, apart from the complainant and his family, were offended by the public naming more than 40 years before of a grandstand as the "ES 'Nigger' Brown Stand." He also found that the name was not

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69 Thornton identifies the 'hypothetical benchmark figure' as a conceptual flaw in much discrimination legislation: (1990) 1. As to the related issue of whether a 'reasonable person' must be aware of the fact that racial discimination exists, see Carol A. Aylward, "Take the Long Way Home: R.D.S. and Critical Race Theory" (1998) 47 *University of New Brunswick Law Journal* 249 at 302ff.

70 Unreported, 12 April 2001; see McNamara (2002) at 88.

intended to be racist, Mr Brown not being Aboriginal. He therefore found that the use of the name was not reasonably likely to be offensive, despite the word 'nigger' generally being regarded by both Aborigines and (to a large extent) non-Aboriginal Australians as an offensive word.[71]

What is really involved here is a two-step process: on the one hand, the test clearly has to be whether a notional person from the same group as the victim would be likely to be offended. The further, implicit, test — which it is likely that all judges will apply although not necessarily acknowledge — is whether it is considered reasonable by the general public (that is, the dominant cultural group) for the victim group to find the conduct offensive, humiliating or intimidatory. Obviously the feeling is that white Australian immigrants from Britain should not find 'Pom' or 'Pommy' offensive — irrespective of the degree to which such name-calling is rightly or wrongly perceived by those people as indicating a hurtful lack of acceptance by the dominant group. Similarly, while Muslim women who wear head scarfs or refuse to wear revealing clothing might find it offensive to be told they should adopt different styles of dress, it is unlikely that such statements would be regarded by Australian tribunals as 'reasonably likely' to cause offence or humiliation.

While McNamara[72] and the NSW Law Reform Commission[73] argue that the conduct in question needs to be considered in context, and therefore that the nature of the audience to be affected should be taken into account when the offence involves bringing about a certain result in relation to third parties (such as 'inciting hatred'), there are problems with this approach. In England, racist comments made to blacks or to non-racist audiences were held not to be likely to incite racist feeling.[74] The perpetrators had therefore not committed an offence. While this is logical, given the similar wording of

71 *Hagan* v. *Trustees of the Toowoomba Sports Ground Trust* [2000] FCA 1615.
72 McNamara (2002) 186.
73 (1999) par 7.123 ff.
74 See Anne Twomey, "Laws against Incitement to Racial Hatred in the UK" (1994) 1 *AJHR* 235.

the English legislation, the result is obviously inconsistent with the whole purpose of racial vilification legislation.

It is submitted that the 'reasonable person' test is more appropriate (although not without problems) where it relates to the 'reasonable victim' — that is, where the test is generally whether the particular reaction would be reasonably likely to be the reaction of a reasonable person having the same characteristics as the complainant.

Where the test is of arousing a particular reaction amongst third parties (for example, inciting hatred) it is harder — indeed illogical — to argue that any reasonable person would, by definition, actually be moved to the negative feelings such as hatred, contempt or ridicule, unless one allows for a degree of racism in the 'reasonable person'. Tests proposed in NSW have been that the 'reasonable' third party should be anyone "who might be inspired to treat the targets with hatred or contempt,"[75] that is,

> not … a person peculiarly susceptible to being roused to enmity, nor one who takes an irrational or extremist view of the relations among racial groups … [but] an ordinary, reasonable person not immune from susceptibility to incitement, nor holding racially prejudiced views.[76]

The NSW Law Reform Commission noted that once it is agreed that there is no need to prove that any actual incitement occurred, "it is clear that the focus of the test is on the capacity of the conduct or communication to have that effect" on a potential audience with some degree of susceptibility to be incited.[77] The Commission recommended that the capacity to incite "should be assessed in the circumstances of the particular case and

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75 See NSW Law Reform Commission (1999) par 7.124, footnote 127.

76 *Kazak* v. *John Fairfax Publications Ltd* [2000] NSWADT 77, and see [2002] NSWADTAP 35. See NSW Law Reform Commission (1999) par 7.123 and footnote 125.

77 See NSW Law Reform Commission (1999) par 7.125.

without assuming that the audience is either malevolently inclined or free from susceptibility to prejudice."[78]

While this test was followed in *Kaszak* v. *John Fairfax Publications*, the cases *Harou-Sourdon* v. *TCN Nine* and *WALS* v. *Jones and 2UE* followed the test of the 'ordinary reasonable person' as representative of 'a substantial and respectable group of the community'.

These tests of course argue that a single incident can incite. The analysis in the previous Chapters indicates that it is rather an aggregation of incidents that is more likely to cause serious harm, and that incitement of a notional or actual audience is a problematic concept. The test should rather be as to whether the speech encourages racist attitudes. No specific consequence should be required.

It is hard to escape the conclusion that the offence of racial vilification under State law has become so redefined as to be virtually useless. It is quite inappropriate to limit the scope of racial vilification offences by reference to the presumed attitudes of a supposed audience. As the NSW Law Reform Commission noted, in most cases there will be no evidence of the identity of persons who may have received the communication or observed the conduct, and there are 'significant difficulties' for a tribunal in assessing likely responses.[79] To consider the attitudes of a supposed or actual audience is also to give 'incitement' quite a different meaning than it is normally given in law. Where an undercover policeman is asked to carry out a murder, the defendant will not be able to plead that he was not able to incite any criminal offence because the policeman would not have been incited to commit the crime. The actual response of the other party is irrelevant. So should it be in the case of racial vilification.

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78 Recommendation 94, following par 7.126.

79 (1999) par 7.126.

Public or private acts?

All Australian legislation requires the racial vilification to be a public act, no doubt because of the difficulties of proving private conversations, and also by analogy with defamation law, involving some degree of publication. McNamara queries the requirement under Commonwealth legislation for the offence to be committed in public, given that the Commonwealth legislation focuses on the direct harm to the victim, and not upon the arousing or incitement of any response in third parties. He argues that including a requirement for the racial vilification to be a public act demonstrates the legislators' tendency to include 'safeguards' against free speech encroachment in the legislation itself.[80]

The Commonwealth legislation requires the vilification to be public conduct, which is defined in section 18C(2)-(3). Acts are taken not to be done in private if they cause words, sounds, images or writing to be communicated to the public; or are done in a public place; or in the sight or hearing of people who are in a public place. 'Public place' includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place. The inclusion of a reasonably wide definition of public conduct is a significant advance, says McNamara, on the situation in NSW where the absence of statutory guidance as to the meaning of 'public' has created difficulties in determining the limits of the racial vilification provisions. The NSW legislation refers to communications 'to the public' and conduct 'observable by the public'. The latter has been held to include comments shouted in the stairwell of a block of home units and a confrontation on the street.[81] It is unclear, as the NSW Law Reform Commission noted, whether 'observable' means actually observed or capable of being observed.[82] It is submitted that the latter is a more accurate interpretation of 'observable'[83] although this is not the

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80 79 to 80.

81 *Anderson* v. *Thompson* [2001] NSWADT 11.

82 (1999) par 7.101.

83 and is in accordance with meanings given to 'the public' in other contexts: see NSW Law Reform Commission (1999) 7.103 and the cases cited there: footnotes 108 to 112.

interpretation of the Anti-Discrimination Board.[84] In the light of the problems previously identified in the public/private dichotomy under First Amendment doctrine, it is submitted that it is preferable that 'public' is given a wide meaning.

In *Hellenic Council of NSW (No. 2)*[85] the Tribunal relied upon the concept of 'a member of the public' in determining whether comments in a Macedonian newspaper amounted to a public act — the distinction being that while the newspaper was not directed to the public as a whole, but only to a particular audience, any person not part of that audience could still buy the paper. The way in which the NSW cases have been interpreted confirms the findings of the NSW Law Reform Commission that the test should not be whether the act or communication is to 'the public' but whether it is a 'public communication'[86] or made to some sector of the public. However the Commission ignores the harm to the group or person being vilified and focuses on the damage to reputation or effect on others in the community, by regarding the concept of public communication as "one which is intended or likely to be received by someone other than a member of the group being vilified."[87]

'Public act' is defined simply in Tasmania as including any form of communication to the public, any conduct observable by the public, or the distribution or dissemination of any matter to the public. There is a very comprehensive definition in the ACT legislation of 'public act' which includes "any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material" and any other conduct observable by the public, including "actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia" as well as the distribution or dissemination of any matter to the public.

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84 Law Reform Commission (1999) par 7.101, footnotes 106 and 107.

85 [1995] NSWEOT (25 Sept 1997)

86 see McNamara (2002) 175 discussing *Patten* v. *NSW* [1995] NSWEOT (21 January 1997).

87 (1999) par 7.111 844 845.

'Public act' is defined in section 20B of the NSW legislation as including

> (a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and
>
> (b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures an the wearing or display of clothing, signs, flags, emblems and insignia, and
>
> (c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

Section 12 of the Victorian legislation provides an exception for racial vilification which amounts to private conduct. The offender must establish that they engaged in the conduct "in circumstances that may reasonably be taken to indicate that the parties to the conduct desire it to be heard or seen only by themselves." The exception does not apply where "the parties to the conduct ought reasonably to expect hat it may be heard or seen by someone else." This is a narrower exception than applies under other Australian legislation.

'Public act' is defined in section 4A of the Queensland legislation in much the same way as the South Australian legislation with, however, an exception for distribution or dissemination of any matter by a person to the public if the person does not know, and could not reasonably be expected to know, the content of the matter (Section 4A(2)).

The workplace has been considered a public place in a number of cases, not necessarily consistently with the legislation.[88] Under the federal legislation, public place includes any place to which the public have access 'as of right or by invitation' (section 18C(3)). Thus a retail store would be a public place, but a factory floor would not be likely to come within the definition. Nonetheless, it was assumed to be a public place in *Rugema* v. *J Gadsten Pty Ltd and Derkes*,[89] and in *Jacobs* v. *Fardig*[90] a council meeting not open to the public and attended only by the complainant, the respondent and two council employees, was regarded as a public place. This interpretation is preferable to the narrow viewpoint taken under the First Amendment doctrine.

Less controversially, racial vilification on internet sites has been regarded as "otherwise than in private."[91] An argument between neighbours outside their homes was held to be conduct in a public place.[92] Commissioner Innes commented in *Korczak* v. *Commonwealth* that the meanings given to 'otherwise than in private' in sections 18C(2) to (3) were not exhaustive, and that account should be taken of the broad concept of 'public life' used elsewhere in the *Racial Discrimination Act 1975* (Cth). He also took into account the aim of the *International Convention on the Elimination of All Forms of Racial Discrimination* to eliminate discrimination in employment.[93] However vilification by a correctional services officer of a prisoner in a prison 'accommodation office' was not regarded as being 'otherwise than in private' unless members of the public (and not other prisoners or officers) were present or within earshot.[94] The magistrate commented that the perpetrator had intended the statement to be a private one, although as McNamara comments, this is strictly irrelevant to the lawfulness or otherwise of the vilification.[95]

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88 McNamara (2002) 79, considering *Rugema* v. *J Gadsten Pty Ltd and Derkes* [1997] HREOCA 34, (1997) EOC 92 -887, *Jacobs* v. *Fardig* [1999] HREOCA 9, (1999) EOC 93-016.

89 [1997] HREOCA 34, (1997) EOC 92 -887.

90 [1999] HREOCA 9.

91 *Jones and Executive Council of Australian Jewry* v. *Toben* (Unreported 5 October 2000).

92 *McMahon* v. *Bowman* [2000] FMC 3

93 Unreported 16 December 1999 and see McNamara (2002) 80.

94 *Gibbs* v. *Wanganeen* [2001] FMC 14 (6 March 2001).

95 McNamara (2002) 81.

Standing

The concept that only the actual targets of racial vilification, or those sharing the same characteristics, have sufficient interest in the matter to have standing to invoke the legislation is also problematic in that it "reinforces a disturbing conception of whose problem racism is."[96] Such legislative limits on standing deny the possibility that racial vilification is an issue of concern to the whole of society. Representative actions cannot be brought in NSW in relation to vilification complaints unless, according to section 88(1D), "each person on whose behalf the complaint is lodged (a) has the characteristic that was the ground for the conduct that constitutes the alleged contravention concerned, or (b) claims to have that characteristic and there is no sufficient reason to doubt that claim."

The decision at first instance in *Executive Council of Australian Jewry and Jones* v. *Scully* by Commissioner Nettlefold was that Jeremy Jones, as Executive Vice-President of the Council which represented 85% of the Jewish population of Australia, did not have standing to bring an action on behalf of the Hobart Hebrew Congregation which represents the Jewish community throughout Tasmania, because Jones was 'a Jewish Australian living in Sydney' and his connection with Launceston (where hate propaganda material was being distributed) was too remote. Wilcox J found however that Jones should not be considered in his personal capacity but as a representative of the Executive Council, and that both the Hobart Hebrew Congregation and Executive Council had standing to represent the members of the Launceston Jewish community who were affected by the hate propaganda.

That Commissioner Nettlefold could ever have come to his original decision indicates that there are serious difficulties with the whole concept of representative actions in racial vilification matters. Nettlefold did not see the offences as relevant to all Jewish people in Australia, let alone to the rest of the Australian community. He considered the

[96] McNamara (2002) 138.

direct victims in Launceston as the only persons aggrieved, and (by what McNamara describes as 'perverse irony') did not even recognise the interests of their community representatives at State or Federal level, despite these being the very bodies most appropriate to bring representative proceedings, overcoming the problem of lack of personal and financial resources likely to affect the ability of individuals to take action.[97]

McNamara notes that in *Warner* v. *Kucera*,[98] Commissioner Johnston also took a wider view of standing, regarding an Aboriginal leader in the Geraldton community as having standing to bring a complaint about vilification of a specific group of Aboriginal youths, despite not being within that sub-group himself.[99]

The fact that under NSW legislation incorporated bodies cannot bring an action (because under section 88(1D) the complainant has to have "the characteristic that was the ground for the conduct that constitutes the alleged contravention") effectively reinforces, says McNamara, the burden imposed on individuals in relation to complaints of racial vilification. In *Jones and 2UE* v. *Western Aboriginal Legal Service Ltd*[100] it was held that an Aboriginal legal service could not, as an incorporated body, itself have the characteristic of being Aboriginal. On occasion, the Tribunal has permitted complaints to be amended to permit an incorporated body to bring a representative action.[101] This would appear to be the preferable procedure.

Exemptions

Section 18D of the Commonwealth legislation provides exemptions or exceptions for anything said or done *reasonably* and *in good faith*:

(a) in the performance, exhibition or distribution of an artistic work; or

97 McNamara (2002) 78.
98 Unreported, 10 November 2000.
99 McNamara (2002) 78.
100 [2000] NSWADTAP 28 at par 17.
101 *Wagga Wagga Action Group* v. *Eldridge* (1995) EOC 92- 701.

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

In South Australia, Queensland, Victoria, the ACT and NSW[102] exceptions exist for publication of 'a fair report of the act of another person', publication of material where there would be a defence of absolute privilege in proceedings for defamation, or 'a reasonable act, done in good faith' for academic artistic, scientific or research purposes or for other purposes 'in the public interest'. The latter is said to include 'reasonable public discussion, debate or expositions'.

Before the Senate Standing Committee the Australian Arabic Council observed in relation to the proposed Commonwealth *Racial Hatred Act* that:

> Exemptions under section 18D present many problems, as the effects of the actions exempted are no less serious than the racist actions, and the grounds for exemptions do not mitigate the effect that the bill is ostensibly trying to address.[103]

The Committee recognised the validity of the argument in terms of the harm caused to victims of racial vilification but supported the exemptions on the basis that they were

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102 Subsection 20C(2).

103 Senate Legal and Constitutional Legislation Committee, *Report on Racial Hatred Bill 1994*, Parliament of the Commonwealth of Australia, Canberra, March 1995, 23.

"necessary to support the constitutional validity of the Bill,"[104] again demonstrating a 'free speech' sensitivity to the then recent concept that a right to freedom of communication in certain circumstances is implicit in the Australian Constitution.

Section 18D of the Act limits the scope of the proscription of racial vilification by providing that 18C does not render unlawful anything said and done 'reasonably and in good faith' where the act can be considered to belong to one of the specified categories (s18D(a)-(c)). In practice, the categories are not always considered in isolation, and concepts of genuine belief, good faith and reasonableness tend to overlap and support each other. Margaret Thornton points out that the general effect of the exemptions is that elite racist discourse continues to be protected.[105]

It was argued in *Bryl and Kovacevic* v. *Nowra and Melbourne Theatre Company*[106] that a comedy about the serious events in Sarajevo caused gross injury and offence to Bosnians and Herzegovians and was not done reasonably or in good faith, thus preventing reliance on the exemption for artistic works. Commissioner Johnson decided the case on the basis that no offence was made out under section 18C. Nonetheless, he also considered section 18D from the point of view of free speech, referring to the leading First Amendment decision of *New York Times* v. *Sullivan.*[107] He argued that the 'common law' tenet of freedom of expression required all statutes impinging on free speech to be construed strictly. He therefore interpreted the exemptions very broadly, requiring 'something that smacks of dishonesty or fraud', or 'culpable reckless and callous indifference'. 'Mere indifference' and 'careless lack of concern' were not enough, in his view, to show bad faith. While the decision was in the context of artistic expression, Commissioner Johnston's comments were of course relevant to other exemptions, all of which must demonstrate good faith. Again, a subjective element has

104 Senate Legal and Constitutional Legislation Committee (1995) 23.
105 Thornton (1990) 50, citing the example of Geoffrey Blainey's comments on Asian immigration.
106 [1999] HREOCA 1, (1999) EOC 93 -022
107 376 U.S. 254, 279 (1964)

been imported into what was meant to be an objective test.[108] Johnston's comments were followed in *Corunna* v. *West Australian Newspapers Ltd*, where Commissioner Innes endorsed a broad interpretation of section 18D, considering malice, dishonesty or fraud lacking (and therefore good faith established), and concluding that the cartoon in question was both an artistic work, irrespective of its content, and "published in the course of encouraging public discussion" about the return of an Aboriginal head to Australia, despite the fact that the cartoon was clearly racist and disparaging to Aborigines.

Similarly in *Walsh and others* v. *Hanson*, Commissioner Nader determined that the conduct did not fall within the section 18C definition of unlawful racial vilification. He expressly identified free speech, and specifically the need to protect political speech "at the extreme ends of the political spectrum of ideas" as a reason for broadly construing the exemptions in section 18D. McNamara points out that any such interpretation would severely restrict the scope of the federal racial vilification legislation — adding a further level of free speech sensitivity to legislation that has already, in creating the exemptions, taken free speech issues into account.[109] Extremist racist ideas are exactly what should be caught by the legislation. To protect expressions just because they are 'extreme' undermines the whole purpose of the legislation.

The final category of exemptions is the most problematic. Section 18D(c)(ii) provides that section 18C does not render unlawful anything said or done reasonably and in good faith which can be characterised as a "fair comment on any event or matter of public interest if the comment is an expression of a *genuine belief* held by the person making the comment."[110]

The inclusion of a 'genuine belief' defence seriously undermines the capacity of the *Racial Hatred Act* to achieve the key objective of extending protection to victims from

108 See McNamara (2002) 98.
109 McNamara (2002) 98.

the harm caused by racist speech and conduct. 'Genuine' and widely accepted scientific theories have been used to justify the genocide of European Jews, the enslavement of Negroes in the Americas and the oppression, dispossession and extermination of indigenous peoples in almost every region of the world. The inclusion of a genuine belief defence would seem to be based on the erroneous assumption that there is a relationship between 'sincerity' and truth, or between 'genuine' motivation and minimisation of harm to the victims.

Yet, when it comes to the promotion of racial hatred or myths of racial inferiority there is only an inverse correlation between the sincerity of the perpetrator's beliefs and either the harm suffered by the target group or the value of the speech to the wider community. Arguably, the more sincere the perpetrator, the more likely his speech is to be harmful.

Commissioner Nader appeared to have been strongly influenced by the notion of genuine belief, and a very broad interpretation of 'good faith', in relation to the concept of public interest, saying in *Walsh and others* v. *Hanson* that if racist expressions were part of 'genuine political debate' then the statements 'must' be regarded as "done reasonably and in good faith for a genuine purpose in the public interest."[111] Similarly in *Deen* v. *Lamb*[112] the Queensland Tribunal found that a pamphlet saying that Muslim people are unable to obey secular laws which conflict with their religion was 'done reasonably and in good faith' for a political purpose as part of a federal election campaign.

The question arises, obviously, as to how one can identify political debate that is not 'genuine', or how incorrect statements have to be to be found 'unreasonable' or *male fide*. The assumption seems to be that statements about any matter of social or political interest, no matter how hurtful or harmful the expression or how manipulative the motivation, will necessarily be seen as valid political speech in the context of the racial

110 Emphasis added.
111 Unreported, 2 March 2000.

vilification exemptions. This is despite the fact that in the context of defamation, the High Court has traditionally taken a narrower view as to the scope of the public interest defence/ exemption.

Thus in *Lang* v. *Willis* it held that election speeches made to large audiences of unidentified persons are not necessarily privileged even if the speeches deal with matters of general interest to the electors.[113] While in *Lange*[114] the High Court took the view that the implied constitutional freedom of communication now extends the categories of qualified privilege to "all communications to the public on a government or political matter" irrespective of their content, the Court also considered that the extended category was conditional.

It is notable that the gloss put on reasonableness by defamation law — that a defendant will not be able to prove it acted reasonably in publishing defamatory material unless it establishes that it was unaware of the falsity of the matter, and did not act recklessly in making the publication[115] — seems absent from racial vilification decisions. It will also not be able to avoid liability if the publication is actuated by malice, which the High Court in *Lange* considered signified a publication "not for the purpose of communicating government or political information or ideas, but for some improper purpose."

Fortunately, not all courts have taken such a broad view of the scope of valid political speech. In *Jones and Executive Council of Australian Jewry* v. *Toben*, Comissioner McEvoy took the view that it would be hard to see racially vilificatory material such as that on the Adelaide Institute website as being in the public interest, following the

112 [2001] QADT 20.

113 (1934) 52 CLR 637.

114 (1997) 189 CLR 520; (1997) 145 ALR 96; (1997) 71 ALJR 818.

115 *Theophanous* (1994) 182 CLR 104 at 137, see however *Lange v ABC* (1997) 189 CLR 520; (1997) 145 ALR 96; (1997) 71 ALJR 818 where the High Court did not regard these requirements as necessary conditions on the "expanded common law defence of qualified privilege."

Hobart Hebrew Congregation and Jones v. *Scully* definition of 'good faith' and concept of reasonableness.[116] Links to white supremacist sites were not a reasonable manner of contributing to legitimate academic and political debate regarding the Holocaust, as the respondent claimed. In *Hobart Hebrew Congregation and Jones* v. *Scully*, Commmissioner Cavanough attributed a narrow scope to section 18D, saying that a racial vilifier should not be able to claim a 'good faith' defence because he or she honestly or sincerely believed in racist ideas.[117] While Cavanough noted that racial vilification legislation should be constructed conservatively because of the legislation's impact on the constitutional freedom of political communication, and because of "the value currently given by the common law to freedom of expression," he decided that he had to accept that Parliament had taken free speech values into account in framing section 18D. Therefore section 18D did not need to be broadly interpreted because, as McNamara notes,[118] the influence of free speech sensitivity was already embodied in the formulation of the section.

The 'belief in truth' exemption constitutes a possible escape route for respondents that is both unnecessary and open to abuse. Preoccupation with the respondent's subjective state of mind is both inconsistent with the objective nature of the primary inquiry required by section 18C ('reasonable likelihood') and incompatible with the overall aim of the legislation. It reflects a liberal preoccupation with the individual subject, at the expense of a broader consideration of harm.

Part 5 of the Tasmanian anti-discrimination legislation deals with a large number of exceptions for various conduct. Division 4 includes exceptions relevant to race. Although not directly relevant to racial vilification, section 40 is interesting because it invokes the concept of redressing disadvantage. Discrimination on the ground of race is permitted "in relation to the use of any benefit provided by a club" so long as it is for the

116 [2002] FCA 1080; (2002) 120 FCR 243; (2002) 71 ALD 567 and see (2001) 113 FCR 343; [2001] FCA 879.

117 [2002] FCA 1080; (2002) 120 FCR 243; (2002) 71 ALD 567 and see (2001) 113 FCR 343; [2001] FCA 879.

purpose of preserving a ‘minority culture’ or preventing or reducing “any disadvantage that may be suffered by a member of that race.” Similarly, section 42 permits discrimination on the ground of race in relation to places of cultural or religious significance if the discrimination is in accordance with the customs of the culture, or the doctrines of the religion and “is necessary to avoid offending the cultural or religious sensitivities of any person of the culture or religion.”

Conclusion: Does Australian legislation meet the problem?

While there is no doubt that racial vilification is inherently harmful because of its ability to encourage racism in the wider community, the present legislation is not well drafted in focusing not so much on the harm to the victims, or the encouragement of racism in society as a whole, but rather on an unclear 'public order' harm to an undefined audience . Free speech sensitivities appear to have resulted in legislation which is neither one thing nor the other; which supports content restrictions on ‘extreme’ forms of indirect hate speech expression, while at the same imposing tests which are more appropriate for direct 'face to face' racial vilification.[119]

Racial vilification legislation should focus on the nature of the message conveyed, and not on its immediate 'public order' effect on any specific audience. It should be drafted widely, to cover vilification of people who share a common religion, but it should not be drafted in a way that penalises disagreement with the tenets of the religion itself. It could even be drafted so as to cover vilification of people who share common political beliefs, but such legislation is, realistically, unlikely to be passed in cultures such as ours where political campaigns regularly involve denigration of political opponents. Whether this is a good thing or not is an interesting question which space does not permit me to address. Where there is direct harm caused to the victim or victim group, this should also be a separate offence. It seems that where racial vilification cases have

118 McNamara (2002) 99.
119 Moon (2000) 147.

been concluded successfully in Australia, this is more in spite of the legislation than because of it.

It should be acknowledged that State and Commonwealth racial vilification legislation is comparatively little used, and generally only at the level of informal conciliation. The primary remedy in most States, following NSW, is 'private' conciliation. There have been no prosecutions in any State under the criminal provisions for serious racial vilification. Racial vilification legislation has rarely been considered in reported court cases or tribunal decisions. Few cases come that far. Partly it is because complainants generally need to initiate complaints themselves and to have the energy and resources to follow through.[120] There is no government body which can pursue a complaint on behalf of a terrified victim.[121] While the lack of court and tribunal decisions might indicate the success of informal conciliation, the legislation does not appear to have had a substantial impact on decreasing the level of racial vilification in the community. This may be because private conciliation does not have the symbolic and educative effect of public court cases.[122] It may also be because of the increase in cultural encouragements to racism, touched on in relation to the contemporary Australian context.

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120 See generally Anna Chapman, "Discrimination Complaint-Handling in NSW: The Paradox of Informal Dispute Resolution," (2000) 22 *Syd Law Rev* 321, particularly as to asymmetrical bargaining positions and status of complainants and respondents (345). As to the possibility of a 'culture of rights' promoted not just through legislation but alternative dispute resolution and other processes, see Daniel Nina, "Rights vs Reconciliation" (1995) 20 *Alt L J* 63.

121 Wainwright (2002).

122 I agree with Gaudreault-DesBiens (2001) that the very existence of legislation still has symbolic importance, but not with his conclusion that a legal norm purporting to be effective should only target extremist speech: 1130ff.

Chapter 10: Constitutional boundaries

The free speech jurisprudence which the High Court has begun to develop in recent years needs to examine the various unstated assumptions of 'free speech' discourse if it is to offer a solid foundation for challenging the unsophisticated and slogan-like manner in which opponents of racial vilification laws have appropriated the language of 'free speech'.[1]

… rights do not negate the prevailing society, but affirm and extend it.[2]

In the *Australian Capital Television* case[3], the High Court held that the freedom of political speech which it found to be implied by sections 7 and 24 of the Constitution may be validly restricted only if the limitation is "reasonably necessary in a democratic society," and if the measures adopted to achieve that objective are proportionate to the problem to be addressed.[4]

In adopting the first of these tests the High Court imported a restriction that is contained in documents enshrining human rights such as the European *Convention for the Protection of Human Rights and Fundamental Freedoms*, the European Union *Charter of Fundamental Rights*, and the Canadian *Charter of Rights and Freedoms*. However in those documents, the restriction is read in the context of competing rights (as touched on in Chapter 6). Its interpretation in a country which has no Bill of Rights necessarily results in that restriction being interpreted in a different way.[5] Even in the context of the Canadian *Charter of Rights and Freedoms*, against a (brief) tradition of balancing competing rights, the Canadian Supreme Court demonstrated in *Zundel's case* (concerning the legality of hate propaganda publications) that notions of proportionality can be misapplied. In that case members of the Court failed to take the content of the

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1 McNamara and Solomon (1996) 283.
2 Jacoby (1975) 113.
3 *Australian Capital Television Pty Limited* v *Commonwealth (No.2)* (1992) 177 CLR 106; (1992) 108 ALR 577; (1992) 66 ALJR 695.
4 Cass (1993) 233.
5 See Campbell (1994a) 195.

speech sufficiently seriously, or were influenced by popular First Amendment assumptions as to the primacy of 'free speech', more than by civil law concepts of the balancing of rights, in concluding that the relevant legislation had an unreasonably 'chilling' effect.[6]

The tests in *Australian Capital Television* have now been refined in *Lange* v. *Australian Broadcasting Corporation*.[7] While the High Court accepted in *Lange* that the common law should be seen as developing in accordance with the constitutional freedom of political discussion,[8] the Court has not yet developed an appropriate balancing test which fully takes substance, more than form, into account in assessing the legitimacy of the legislative objective and the proportionality between the legislative end and the legislative classification selected to accomplish it. Nor has it yet developed, as part of the implicit right to free political speech, appropriate guidelines as to the extent to which any Constitutional right needs to define its content and limits by reference to other rights and social interests.

The Australian right to freedom of expression in a political context

A true constitutional law is one concerned with reality.[9]

Setting limits on the right to freedom of political communication

In *Lange*, following *Cunliffe*, the primary test was said to be whether the law effectively burdens freedom of communication about government or political matters in its terms,

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6 See generally Solomon (1995). An outline of the case is given in Chapter 3 - see text around footnote 172.

7 (1997) 189 CLR 520; (1997) 145 ALR 96; (1997) 71 ALJR 818.

8 Elisa Arcioni notes that while the *Lange* test is generally accepted as the authoritative approach in determining the validity of legislation and interpreting the common law in relation to freedom of political communication from legal restraint, there is scope for disagreement as to its application. There is also scope for departure from *Lange* by the High Court itself since only three of the judges who decided that case are still on the Court, and Justices Heydon and Callinan have publicly criticised the line of authority: "Politics, Police and Proportionality – An Opportunity to Explore the *Lange* Test: *Coleman v Powe*r" (2003) 25 *Syd L. Rev.* 379 at 381.

9 Detmold (1990) 567.

operation or effect. The second test, adopted in lieu of the 'proportionality' restriction,[10] was whether the law was "reasonably appropriate and adapted" to serve

> a legitimate end the fulfilment of which is compatible with the maintenance of the constitutionally prescribed system of representative government and the procedure prescribed by s 128 [of the Constitution] for submitting a proposed amendment of the *Constitution* to the informed decision of the people.[11]

How these tests will be applied in the context of hate speech remains to be seen. In his dissenting judgment in *Cunliffe* v. *The Commonwealth*, then Chief Justice Mason appeared to be influenced by the refusal of First Amendment jurisprudence to consider the content of speech. Mason's view was that "a law which targets information or ideas or which prohibits or regulates the content of communications ... would require compelling justification to sustain its validity."[12] As Glass notes, Mason thereby effectively imposes a higher level of scrutiny and proof upon laws which restrict the content of ideas.[13]

The 'compelling justification' test has been held applicable to legislation which has as its object the restriction of the freedom, while a less stringent test appears to be required where the restriction is only the incidental effect of the legislation's operation.[14] It is arguable that the distinction is not justified, and in any case in practice merely reflects the ways in which judges prioritise the freedom and the purposes of the legislation.[15]

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10 Although the court commented that in the particular context there was little difference between the tests of proportionality and that of "reasonably appropriate and adapted": (1997) 189 CLR 520 at 562.

11 (1997) 189 CLR 520 at 567-8.

12 (1994) 182 CLR 272 at 299.

13 Glass (1995) 33.

14 Arcioni (2003) at 386 notes that the distinction emerged before *Lange* in *Nationwide News Pty Ltd* v. *Wills* (1992) 177 CLR 1; (1992) 108 ALR 681; (1992) 66 ALJR 658 but has been applied since, in *Kruger* v. *The Commonwealth* (1997) 190 CLR 1; (1997) 146 ALR 126; (1997) 71 ALJR 991 and *Levy* v. *Victoria* (1997) 189 CLR 579; (1997) 146 ALR 248; (1997) 71 ALJR 837.

15 See Arcioni (2003) at 386-7.

A relevant, often unacknowledged, underpinning of proportionality tests is identified by Gaudreault-DesBiens as the existence of different views as to the degree of causation required to legitimize restrictions on speech. The causationist approach is that a direct unmediated causal link needs to be found between the prohibited expression and the harm caused by that expression. This is exemplified by the "clear and present danger" test. The correlationist approach is that a strong rational correlation should suffice. This test supports legislative intervention where the harm, such as that of hate propaganda, is more indirect.[16] In the light of the conclusions of Part 1 that the harms of racist speech are most dangerous in their indirect effect, I agree with Gaudreault-DesBiens that the correlationist or 'risk management' approach, which acknowledges less tangible forms of harm, is preferable. However the tendency of the High Court appears to be to follow a traditional causationist approach.

In *Nationwide News* Brennan J suggested a number of relevant considerations such as whether the legislation attempts to balance the legislative aims with an appropriate limit on the relevant freedom, as well as the temporal and spatial nature of the restrictions, and the form and quality (and by implication, content) of the communication being restricted.[17] While his suggestions are useful, they still stem from a presumption that freedom of communication should not be limited by legislation, rather than taking account of other relevant and competing rights, in the manner of the German Constitutional Court.[18]

Although many members of the High Court have linked the right to free political communication with representative democracy, they have not detailed their understanding of that concept. Brietzke argues that the very concept of political speech is incoherent because it is wholly dependent upon the unjustified assumptions of the marketplace of ideas metaphor: that the relevant information is produced, received, and

16 Gaudreault-DesBiens (2001) 1119-1120.
17 *Nationwide News Pty Ltd* v. *Wills* (1992) 177 CLR 1 at 51 and 53.
18 See Chapter 6.

used as a basis for democratic decision-making.[19] Williams argues that unless the freedom is tied closely to a defined concept of representative democracy it will become recognised not as freedom of political discussion, but as a more general freedom of expression which lacks a sound constitutional basis.[20] Another way of fleshing out the concept of political speech is to consider, as does Jeremy Kirk, the other constitutional implications that one could make from the existence or ideal of representative democracy.[21]

In countries with a Bill or Charter of Rights, the balancing of competing statutory rights, or at least of competing limits on rights, necessarily leads to the development of such guidelines, with more or less assistance from the text of the Bill or Charter itself. But the High Court has no such assistance in respect of implied Constitutional rights, for which it must also determine implied constitutional limitations. The limitations may be flexible, as with the 'sliding scale' approach promoted by Mr Justice Marshall of the United States Supreme Court, according to which the degree of judicial scrutiny of legislation in question would differ according to context. This would mean that legislative ends could validly be something other than 'legitimate', 'important' or 'compelling', and the congruence between means and ends could be something other than 'rational', 'substantial' or 'necessary'.[22] Contextual tests also mean that limits, rather than rights as such, could be balanced. Instead of a court being required to decide whether racial equality is more important than sexual equality in all situations, the issue would be rather whether a particular limit on equality was reasonable in the light of the

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19 Brietzke (1997) 958. He also argues that effective political speech is essentially commercial speech which logically, according to First Amendment theory, should receive less protection: 962.

20 George Williams, "*Engineers* is Dead, Long Live the Engineers!" (1995) 17 *Sydney Law Review* 62, 86.

21 Jeremy Kirk, "Constitutional Implications from Representative Democracy" (1995) 23 *Federal Law Review* 37.

22 See Anne F. Bayefsky "Defining Equality Rights under the Charter" in Martin and Mahoney (1987) 106 at 112.

rationale for imposing that limit[23] and, following civil law's contextual balancing, in the light of the particular context.

Catharine MacKinnon has suggested focusing upon whether the policy or practice in question has the effect of integrally contributing to the maintenance of an underclass or a deprived position because of the victim's particular status.[24] Gibson suggests that what the complainant must prove in an equality case is that the different conduct they have received is unreasonable and unfair in its impact — that is, that a person would not, in normal circumstances, be expected to endure such hurtful differential treatment. The respondent must prove that there are special circumstances that render such treatment justifiable and reasonable in the particular situation.[25]

Traditional nature of limits

In *Lange* it was recognised that modern developments in mass communications, especially the electronic media, now demand the "striking of a different balance from that which was struck in 1901" by the common law between freedom of communication about government and political matters and the protection of personal reputation.[26] And McHugh J in *Levy*'s *Case* noted the 'unique communicative powers' of television and the importance of ensuring citizens' access to the media.[27] Despite these occasional expressions of understanding as to the role of the media in political communication, the High Court has been reluctant to draw any new legal conclusions. It has neither protected citizens' access to the media nor held media corporations in any way responsible for their activities as notional public institutions.[28]

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23 Dale Gibson, "Canadian Equality Jurisprudence: Year One" in Martin and Mahoney (1987) 128 at 129.

24 Wendy W. Williams, "American Equality Jurisprudence" in Martin and Mahoney (1987) 115 at 121 citing MacKinnon, *Sexual Harassment of Working Women: A Case of Sex Discrimination* (1979) 117.

25 Gibson (1987) 139.

26 (1997) 189 CLR 565.

27 (1997) 189 CLR 579, 624.

Gaudron J indicated that limits on free speech in areas "in which discussion has traditionally been curtailed in the public interests as, for example, with the law of sedition" would be most likely to be acceptable, saying that beyond that point, "some pressing public interest would have to be shown for the law to be valid."[29]

However there is no philosophical nor legal justification for any test of 'reasonable' or 'appropriate' restrictions to be limited to 'traditional' restrictions. As Kathleen Mahoney has noted, social and political functions of speech have changed, and the principle of free speech may require new content and meaning from that which it was given by nineteenth century thinkers.[30] 'Traditional' restrictions on free speech have not been imposed in accordance with any consistent ideal, but have developed in a piecemeal manner over the centuries. Restrictions initially protected the government (sedition, treason) and the church (blasphemy), and individuals whose reputation was injured (the common law action of defamation). Only more recently have restrictions on speech been aimed at protecting those who through inequalities in wealth or access to information might suffer from fraudulent or misleading speech (trade practices legislation, corporations legislation). Even more recent is the development of protecting members of victimised groups from the effects of undesirable speech, demonstrated in sexual discrimination legislation and, most recently, legislation against homosexual, transgender, religious and racial vilification.

As Brennan J says, it is necessary to look at the political conditions in which free speech operates to determine the nature of the link between free speech and democracy.[31] What is protected depends on the political goal that is desired at the particular time.[32] Thus to class all existing restrictions upon speech as equally desirable or equally appropriate —

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28 Boehringer (1998) 144.

29 Similarly in *Australian Capital Television* she considered that what was a reasonable restriction would largely depend upon what has been traditionally permitted as limiting free speech by the general law: (1992) 177 CLR 106, 218.

30 Mahoney (1994) 20.

31 *Australian Capital Television* (1992) 177 CLR 106, 158-9.

32 I.E. Bloustein, "The Origins, Validity and Interrelationship of the Political Values Served by Freedom of Expression" (1981) 33 *Rutgers Law Review* 372 at 396.

or as the 'final word' on describing the ambit of 'free speech' — cannot be correct, and is not helpful in the interests of developing views about the contemporary meaning of democracy.

Assumptions about the purpose and extent of federal power

Decisions about the constitutionality of any legislation in the context of the implicit right to freedom of political speech described by the High Court do not rest simply upon the particular theory of constitutional interpretation followed.[33] Such theories are informed by different political ideals about the nature and limits of government power, and differing views as to the role of legislation in Australian society — the way in which the content, effect and even aims of the particular legislation are classified or categorised by the High Court, the assumptions made as to the nature of the democracy which we have in Australia, and the assumptions made about the interrelationship between democracy and freedom of speech. It is argued here that some of the decisions of members of the High Court in relation to freedom of political speech in Australia have been based upon erroneous assumptions about the purpose and extent of federal power, and as to the appropriate limits of free speech in Australia.

The assumptions made by the High Court in the 'freedom of speech' cases are inevitably affected by the individual judges' views as to whether the Federal Parliament should have the capacity to legislate in relation to all areas not specifically within the legislative power of the States. The situation would be different if the Australian Constitution were underpinned by a Bill of Rights, in which case it would be clear that legislation would only be authoritative if it did not unduly or inappropriately restrict the 'rights to' and 'rights from' identified in the Bill. In the absence of that Bill, Tom Campbell argues that the role of the High Court is to assess which of the Federal or State parliaments have the power to legislate in relation to any particular matter, not to limit the Federal Parliament from legislating where the legislation is within its federal powers. The

Federal Parliament is now the sovereign lawmaker. Since the Parliament of the United Kingdom has ceased to have any law-making power over Australia, with the passing of the *Australia Act 1986*, the former interpretation of the limitations of federal law-making power as ultimately subordinate to that of the British Parliament is no longer appropriate. There is now no logical reason why the Federal Government should not have complete power to legislate as it chooses, subject to the powers reserved in the Constitution which are to be exercised by the States (although the ideal solution would be for a new constitution to be adopted to reflect the change in circumstances), and subject to the principle of constitutional self-defence (that no constitution can legitimately anticipate or authorise its own self-destruction).[34]

While it might be theoretically desirable for the High Court to be able to limit inappropriate federal legislation which restricts citizens' fundamental rights (in Tom Campbell's words, "to formulate a list of fundamental rights which they can then use to invalidate otherwise authoritative legislation"[35]), Campbell suggests that it is too dangerous for such power to be in the hands of unelected permanent appointees because it would allow "the use of background common law principles as ways of introducing fundamental rights as legally superior even to unambiguous and democratically endorsed legislation."[36] He does however believe that it is desirable that there is some 'institutional procedure' to provide an external check upon compliance with electoral rules and procedures and to limit the capacity of a democracy to resile from democratic norms. There should be some democratic limits, he says, upon what majorities may do in order to protect vulnerable minorities.[37] It is more likely, one would have thought, that majorities would not hasten to protect vulnerable minorities.

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33 as to which see generally: Michael Stokes, "Constitutional Commitments not Original Intentions: Interpretation in the Freedom of Speech Cases" (1994) 16 *Sydney Law Review* 250.

34 See John E. Finn, *Constitutions in Crisis: Political Violence and the Rule of Law*, Oxford, Oxford University Press, 1991, 170ff discussing Carl Schmitt's defence of implicit constitutional principles in the context of the Weimar Republic and Hans Kelsen's "equal chance" doctrine.

35 Campbell (1994a) 197.

36 Campbell (1994a) 198.

37 Campbell (1994a) 204; see also Boehringer (1998).

Glass goes further, saying that the review of legislation in the light of a Constitutional right raises many issues which the Court is not competent to assess.[38] A related argument, advanced by Dawson and McHugh JJ in *Theophanous*,[39] is that to imply rights from the Constitution is extra-constitutional, and inconsistent with the framer's intentions and actions in not including a bill of rights — a view dismissed specifically by Deane J as depriving "what was intended to be a living instrument of its vitality and its adaptability to serve succeeding generations."[40]

Assumptions about the nature of human rights and free speech

As shown by the Canadian Supreme Court decisions of *Zundel* and *Keegstra*, there are many ways in which the characteristics of a particular piece of legislation can be recategorised in considering its constitutionality, including by use of inappropriate analogies. It can be said that legislation unreasonably or disproportionately restricts free speech, on the assumption that free speech must be absolute.

Deborah Cass and Tom Campbell identify several unexamined assumptions made by various members of the High Court in *Australian Capital Television Pty Ltd* v. *The Commonwealth*[41] which Campbell suggests demonstrate "a limited, negative, property-oriented and unimaginative approach to the articulation of fundamental rights"[42] on the part of the High Court. This may lead the High Court to strike down "genuinely democratically led human rights developments."[43] He concludes that for the High Court "it is formal, negative freedom that counts when fundamental rights are at stake."[44]

In *Australian Capital Television*, the High Court held that prohibitions of political advertising on radio or television during an election period, which still allowed politically oriented radio programmes and involved the allocation of free television time

38 Glass (1995) 35-6.
39 (1994) 182 CLR 104; (1994) 124 ALR 1; (1994) 68 ALJR 713; (1994) 34 ALD 1.
40 See Stokes (1994) discussed in Williams (1995) 69-70.
41 (1992) 177 CLR 106.
42 Campbell (1994a) 195.
43 Campbell (1994a) 212.
44 Campbell (1994a) 208.

for political parties, were entirely invalid because of their "severe impairment of the freedoms previously enjoyed by citizens to discuss public and political affairs and to criticise federal institutions"[45] — thus effectively categorising paid political advertising as a substantial part of 'freedom of discussion by citizens'. The plaintiff media owner(s) submitted that the provision of free time was a violation of its/their property rights, and although this issue was not explicitly addressed by the court, it seems (as Campbell comments) that the Court was probably receptive to the argument.[46] One wonders how it has come to pass that the provision of free airtime (in the sense of not costing anything) is regarded as inconsistent with the right to 'free speech'. Presumably this is a result of the pervasive influence of popular notions of free speech as underpinned by the 'marketplace of ideas' doctrines. The Court held that there is implied in the Australian Constitution a right of 'free' political communication, as being indispensible to representative government, and that that right was unacceptably infringed by Part IIID of the *Broadcasting Act* 1942 (Cth). However the Court failed to define the nature or content of the implied right of free political communication which it discovered, apparently merely equating the implied right with the *status quo* prior to the introduction of Part IIID. In Campbell's words: "the assumption is made that *existing* laws and practices represent a bundle of free speech rights which are the measure of what is justified in this sphere" — even though the existing laws and practices gave no specific right to political speech that was both formally and effectively free, being communicated to the public without cost to the speaker.[47] In this decision the judges appeared to follow American First Amendment jurisprudence. The judges differed as to the degree of justification required for legislation which on the face of it limits (existing) free speech rights, with Mason CJ and McHugh J considering, in line with American case law, that a higher or compelling standard of justification is required for restrictions which target the content of ideas, rather than the method of communication, whereas Brennan J regarded the law in question as valid if its effect is proportionate to the

45 (1992) 177 CLR 106.
46 Campbell (1994a) 208.
47 Campbell (1994a) 208.

legitimate interests which the law is intended to serve, allowing the legislature a "margin of appreciation."[48]

Toohey and Deane JJ placed more weight on the character of the law under consideration, taking the view that law directly restricting political communication is harder to justify than law which only indirectly affects political discourse, although both can be justified if they are conducive to free speech or do not go beyond what is reasonably necessary for the preservation of an ordered and democratic society, or for the protection of the right to dignity and to be free from attack.[49] Gaudron J implied that a challenged law would be more likely to be considered as reasonable and appropriate if it dealt with the subject matter generally — which as Glass says is unsatisfactory given that all laws deal only with some aspects of the relevant subject-matter.[50]

Glass points out that the court made unstated assumptions not only about the nature of free speech and the effect of the legislation, but about which standard of proof was relevant and which party was responsible for proving particular issues.[51]

The Court disregarded the corruption of the political process brought about by existing inequalities in access to public political advertising which arise from the enormous cost of that advertising.[52] The removal or diminution of such inequalities would be in the interests of both the electorate and of potential political candidates and therefore, one would have thought, would contribute to, not detract from, the existence of representative democracy in Australia. The Court failed to analyse the content of the implied right to freedom of political communication or the concept that television

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48 (1992) 177 CLR 106 at 159: for the analysis of the different positions see Glass (1995) 32-34.

49 Glass (1995) 34.

50 Glass (1995) 35.

51 Glass (1995) 36.

52 See in this context J. Skelly Wright, "Politics and the Constitution: Is Money Speech?" (1976) 85 *Yale L.J.* 1001 and "Money and the Pollution of Politics: Is the First Amendment an Obstacle to Political Equality?" (1982) 82 *Colum.L. Rev* 609, arguing that failure to limit campaign contributions leads to the distortion of political perceptions and the subversion of democracy, and Baker (1998) 1.

advertising might be a limited or trivialised form of political communication. This was despite the considerable evidence presented to the Senate Select Committee (which recommended the legislation) that political advertising deliberately trivialises political discussion, aiming at emotional manipulation rather than providing information.[53] The Court dismissed out of hand the possibility that giving political representatives limited cost-free access to the media, even where coupled with a general restriction on political advertising for a specific period, enhances rather than reduces freedom of communication.[54] even though Deane and Toohey JJ recognised that small groups might need to band together to buy television time and Mason CJ noted that news outlets are controlled by powerful interests.

The Court did not therefore consider the best possible resolution of the sometimes conflicting but often coinciding interests of prospective political candidates (whose access to the public is limited by the high costs of public advertising, particularly television advertising, and whose effective free speech rights are thereby limited) and of the electorate. The electorate wishes to receive a maximum amount of political information and which at the same time requires some degree of government regulation, especially during the period immediately prior to the election, when rebuttals of false speech may not be received in time, to ensure that the information it is given is not deceptive or misleading). Nor did the Court consider any distinction between 'electoral speech' and 'political speech'.[55] Cass points out how restrictions on access of wealthy groups which otherwise dominate the political process could enable dissenting voices to be heard during election campaigns, and how advertising restricts, not enables, effective dissent.[56] Glass considers that a more appropriate way of considering the application and ambit of the Constitutional right of free political speech is by asking not whether the

53 Cass (1993) 240, citing *Report of Senate Select Committee on Political Broadcasts and Political Disclosures*, Canberra, November 1991.
54 Campbell (1994) 202.
55 Baker (1998) 1.
56 Cass (1993) 243.

right is infringed but whether it is *unduly* infringed.[57] However he does not consider the scope of the right.

Cass goes beyond this to identify the unstated assumptions of the High Court as being that the 'free market' of political speech is an essential aspect of democracy — that the free market and therefore democracy is best served by 'more speech' rather than by regulation, and that a free market of political speech aids the voters' choice by facilitating truth.[58] Tom Campbell summarises the case as a victory of assumptions over analysis, saying that the case nicely illustrates the way in which, when articulating the content and form of fundamental rights, courts permit their own unargued assumptions to fill the "epistemogical vacuum surrounding the discourse of human rights."[59] Similarly, Jacoby points out that in practice the content of any right will be dictated by the economic and social structure of society, not by formal and abstract notions. So while the contents of any right might represent some social progress, it is unlikely that rights will be given effect in such a way as to negate the prevailing society; they are more likely to "affirm and extend it."[60]

In *Theophanous* v. *H & W Times*, [61] the Court overturned State defamation legislation in holding that certain categories of public figures (the list itself is questionable) may not bring defamation proceedings for speech against them which would otherwise be classed as defamatory. In coming to this decision the judges placed particular importance upon the protection of political speech. The problem is the limited assumptions about what is 'political' speech. As Fish argues, all speech is ultimately political; intended to persuade, to move people in particular ways. And much 'robust' criticism of public figures is not addressed to rebutting their opinions, or even questioning their fitness for office, but at hurting them and harming their reputations. An imaginary interview with Jerry Falwell (right wing preacher), printed in *Hustler*

57 Glass (1995) 32.
58 Cass (1993) 239 and 240.
59 Campbell (1994a) 204.
60 Jacoby (1975) 113.

magazine in 1983, suggested that he had had sex with his mother in an outhouse when they were both drunk. The Supreme Court held that the publication was a constitutionally protected instance of free speech and that Falwell could not recover damages for libel, invasion of privacy, or intention to inflict emotional harm. The Court said that Falwell as a public figure accepted that he could be the target of 'robust' criticism, and that the parody interview was part of the free flow of ideas on matters of public interest and was analagous to a political cartoon or caricature. Fish notes that cartoons normally exaggerate existing traits and do not invent deeply hurtful lies.[62] He warns that refusal to consider even political speech in context, according to its content and consequences, results in opinions that are "superficially cogent but deeply incoherent" such as *Hustler/Falwell*[63] and *American Booksellers Association* v. *Hudnut* (striking down an Indiannapolis ordinance against pornography).[64]

The Constitutionality of racial vilification legislation

This issue of the constitutionality of racial vilification legislation has been raised in relation to both Commonwealth and State legislation. In *Jones and Executive Council of Australian Jewry* v. *Toben,*[65] Commissioner McEvoy took account of the High Court's decision in *Lange* v. *ABC,*[66] as to the implied Constitutional right of free political speech. He considered that the implied right of free political speech was relevant in construing the scope of the offences in sections 18C and 18D of the Commonwealth racial vilification legislation.[67] A similar approach was taken by Commissioner Cavanough in *Hobart Hebrew Congregation and Jones* v. *Scully.*[68]

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61 (1994) 124 ALR 1.

62 Fish (1994) 120 and 121.

63 485 U.S. 46,53 (1988) cited in Fish (1994) 124.

64 (1985) Seventh Circuit, cited in Fish (1994) 124.

65 (2002) 71 ALD 629, [2002] FCA 1150, (2002) EOC 93-247.

66 (1997) 189 CLR 520.

67 See McNamara (2002) 74 and 75.

68 [2002] FCA 1080; (2002) 120 FCR 243; (2002) 71 ALD 567 and see (2001) 113 FCR 343; [2001] FCA 879.

In NSW, it was argued in *Harou-Sourdon* v. *TCN Nine*[69] that section 20C of the *Antidiscrimination Act* was invalid in so far as it purported to regulate racial vilification in television broadcasting that was already covered by the Commonwealth *Broadcasting Act* 1942. However the Tribunal found that the Commonwealth had not shown any intention to 'cover the field' in the *Broadcasting Act* and so did not need to decide the issue.

In *Wagga Wagga Action Group* v. *Eldridge,*[70] section 20C was argued to be unconstitutional as it derogated from the right to free speech. In that case, the Equal Opportunity Tribunal adjudicated on several complaints against a Wagga Wagga City Councillor, Jim Eldridge. On at least two occasions in June 1993, Eldridge had, at public events, including the local launch of the United Nations International Year for the World's Indigenous People, made comments which were considered to amount to vilification of Aboriginal persons. Eldridge was ordered to refrain from continuing or repeating any unlawful conduct under the *Anti-Discrimination Act* 1977, publish an apology, and pay $3000 damages. The respondent argued that section 20C of the *Anti-Discrimination Act* 1977 should be considered invalid or unconstitutional on the basis that it derogated from the right to free speech. The Tribunal rejected this argument on the basis that 'free speech' was not an exception under section 20D to an action under section 20C. The Tribunal noted that the racial vilification legislation had been drafted so as to avoid the likelihood of interference with freedom of expression, and that, in any event, the right to free expression "has never been an absolute or unequivocal right."

In *Kazak* v. *John Fairfax Publications Ltd*[71] it was argued that section 20C was inconsistent with the implied constitutional guarantee of freedom of communication. The Tribunal applied the test in *Lange*, and found the limit in section 20C to be "reasonably appropriate and adapted to serve a legitimate end, the fulfilment of which is

69 (1995) EOC 92- 604.
70 (1995) EOC 92- 701.
71 [2000] NSWADT 77.

compatible with the maintenance of the constitutionally prescribed system of representative and responsible government."

In a different context, the Queensland District Court found that the *Vagrants Gaming and Other Offences Act 1931* was not unconstitutional by virtue of its restrictions on 'insulting words' because it did not effectively burden freedom of communication about government or political matters.[72] The Court of Appeal differed, and concluded that the prohibition of using 'insulting' language was constitutionally invalid.[73] The case is to be heard by the High Court.

Lower Courts and Tribunals appear to be generally reluctant to entertain arguments about the constitutional invalidity of racial vilification legislation, or to embark upon any detailed analysis of the competing values and rights. This is fortunate in that the High Court's decisions in the area of political communications have not provided much guidance for lower courts. Many *obiter* indicate that the conclusions drawn by members of the Court rely heavily upon popular free speech notions about the primacy of free speech or free communication, irrespective of the content of the expression, and irrespective of the harm it causes. In assessing the appropriateness or propotionality of the legislation to the legislative aims, the Court has not emphasised the nature or extent of the harms that the legislation might seek to avoid. As Cass and Campbell point out, the Court has addressed these issues at an abstract level. It has not focused upon competing rights.

Opinion of Sir Maurice Byers

Shortly after the Racial Hatred Bill was passed by the House of Representatives (16 November 1994) *The Australian* sought a legal opinion as to the constitutionality of the Bill from the late Sir Maurice Byers, a former Solicitor-General who had appeared before the High Court in the case of *Australian Capital Television Pty Ltd v.*

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[72] *Coleman* v. *Power* [2001] QDC 27; (2001) 189 ALR 341. The case concerned dissemination of a pamphlet complaining about specific police officers, and a public statement to one of them that he was 'corrupt', both of which were held to be 'insulting'.

Commonwealth of Australia.[74] Sir Maurice concluded that the Bill was unconstitutional on the basis that it infringed the implied freedom of communication confirmed by the High Court in *Theophanous* v. *Herald & Weekly Times.*

Sir Maurice referred initially to the decision of *Cole* v. *Whitfield*[75] which affirmed the constitutional guarantee of freedom of inter-state intercourse, including a guarantee of personal freedom "to pass to and fro among the States without burden, hindrance or restriction." If persons may cross, said Sir Maurice, it is clear that messages may also cross without hindrance. The passage of newspapers, magazines and radio messages across borders is protected by section 92, he said "whether or not it contains messages which otherwise might be prohibited by the Racial Hatred Bill." However this is a curious statement. If a magazine is categorised as a proper subject of censorship in any State, if a newspaper infringes the Official Secrets Act, if a T-shirt is printed with material that infringes copyright, then there is no absolute right to sell that magazine, newspaper or T shirt in the State, and copies may be impounded by the police. Is Sir Maurice saying that even in such cases the police would be constitutionally prevented from impounding the offending goods, so long as they were intended to be taken inter-state? At what point would the constitutional prohibition 'cut in'? When the intention was formed to take the goods to another State? When the goods are put on the trucks? When the trucks actually cross the border? When the trucks arrive in the other State, it is quite possible that similar, or federal, legislation operating in that other State could equally enable the goods to be impounded. If relevant federal legislation applies in both States so that the goods cannot be sold and can be impounded, does section 92 protect them only for the instant that the border is crossed?

Sir Maurice then refers to the cases of *Australian Capital Television Pty Ltd v. Commonwealth of Australia* and *Theophanous* v. *Herald & Weekly Times*, saying that it is difficult to see what the limits to political discussion and public affairs may be.

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73 See generally Arcioni (2003).

74 Byers (1994) 11.

Discussing the width of the government's taxation powers, he implies that because governments can legislate in relation to every area of life, then every area of life must be political. Sir Maurice concludes that those cases imply "that the freedom of communication on public affairs and political discussion is, in truth, no different from freedom of speech."

This conclusion was specifically rejected by the majority in *Theophanous* v. *Herald & Weekly Times*. While Mason CJ, Deane Toohey and Gaudron JJ, held that Victorian defamation legislation unacceptably limited the implied Constitutional right to freedom of communication in relation to government and political matters, and must be struck down, they limited the scope of the implied right and made it clear that it was not the same as absolute freedom of expression. Subsequent cases have not changed that position.

"When the Constitution mandates a representative parliamentary democracy," says Sir Maurice, "it guarantees at the same time and without the necessity for express mention the freedoms which characterise it and which are essential to its existence and to its working. ... Since these freedoms are constitutionally guaranteed any inconsistent measure, no matter how desirable, must give way to them." [76] While Sir Maurice is speaking in the context of the implied right to political speech, his logic must be correct also in relation to other rights implied by the Constitution, and the consequence of his argument is that what the High Court should focus on is the balancing of competing implied rights. The Constitution refers expressly neither to the right to freedom of expression, nor to the right to be protected from racist abuse or violence. At the time the Constitution was framed, the latter right would probably not have been accepted by its draftsmen. Certainly the former would not have been accepted in relation to all Australian residents. The right to freedom of expression in a political context has been held to exist on the basis that (some degree of) free speech is necessary to the proper

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75 (1988) CLR 360.

76 Byers (1994).

working of representative democracy as we know it. Logically, the High Court should also consider whether freedom from racist abuse and violence is necessary to the proper working of representative democracy. This thesis argues that it is.

A representative democracy cannot work effectively where racist intimidation disempowers groups and terrorises individuals from participation in the political process. It is therefore perfectly possible for the High Court to find an implied Constitutional right of freedom from racist abuse and violence. Should the right to freedom of expression in a political context conflict with the right to be free from racist abuse and violence, there is no logical reason why freedom of expression in a political context should be regarded as being of greater value nor as worthy of primacy.

While Sir Maurice notes that freedom of speech does not enable anything and everything to be said with impunity, he redefines sedition, blasphemy, pornography etc as worthy of prohibition or punishment "since they fall outside the normal meaning of expression." If expression is thus to be redefined as meaning only 'acceptable forms of expression', why then should not racist abuse, according to this test, also 'fall outside the normal meaning of expression' and be capable of prohibition or punishment without infringing the general right to free (political) expression which Sir Maurice sees as virtually unlimited? Because prohibition of speech, continues Sir Maurice, will normally be the opposite of freedom of speech, the High Court's adoption of the principle of freedom of speech means that prohibition of speech 'has been forever rejected.' This is obviously not the case, because neither the Commonwealth Government nor the High Court are about to overturn Commonwealth Official Secrets Acts, trade practices and securities legislation against misleading advertising, legislation against inciting a crime to be committed, or defamation law. The High Court judges expressly referred to the nature of free speech as a limited right. The statement that the prohibition of speech has been rejected by the High Court is also inconsistent with Sir Maurice's previous acknowledgement of the limitations society requires upon free speech, although the inconsistency is purportedly overcome by his redefinition of

sedition, blasphemy and pornography as not being real speech; as not being within the normal meaning of 'expression'.

Sir Maurice seems to regard threats against the property or person of another (he gives the example of a member of the Palestinian Liberation Organisation in Australia threatening Israelis or property in Israel) as an acceptable mode of political discourse which should be upheld by the High Court against the possible limitations of the Racial Hatred Bill. Following the comments made by the minority of the Canadian Supreme Court in *Keegstra's Case*, he argues that the use of the word 'hatred' makes the legislation unconstitutionally wide, because hatred can cover feelings "as diverse as ill will, detestation, enmity and malevolence."[77] He continues:

> if speech is to remain free, offence, insult or humiliation cannot be banished. A certain force of expression and intensity of feeling are the inevitable characteristics of many forms of free expression and especially where political questions or historical antagonisms are being discussed or lie behind what is being discussed.

In making such comments Sir Maurice repeats common misunderstandings about the nature of racist abuse and attacks, which are directed against a person for what they *are*, not for what they have *said*. He also ignores the real harms of racism to the individual, his community, and to society. Perhaps underlying his comments are notions of individual identity as discussed in Chapter 8. It is possible to have "a certain force of expression and intensity of feeling" in one's speech without participating in racist abuse, and without using expressions calculated to insult, offend or humiliate a person because of their 'race'. It is possible properly to limit the expression of racial hatred without unduly limiting free speech. There is no reason in principle why appropriate legislation against racial vilification should be seen as chilling free speech in the political or any other arena.

In suggesting how the Racial Hatred Bill could be framed so as not to infringe the right to political speech, Sir Maurice suggests that the legislation should outlaw specific types of racism, for example, antisemitism, or language derogatory of Aborigines. But the proposed legislation, he complains, "covers language about every race, every colour, every nationality and every ethnic group whether or not they may ever have had any relation with this country." That groups seen as worthy of protection should themselves be identified according to race is in itself a racist concept. It ignores the illogicality and mythological aspects of racism; the way that racism invents victims and chooses its targets not on the basis of their real characteristics, but on the basis of their perceived 'otherness'. The concept of the relevant group having to prove some relationship with Australia is also a strange one. The implication that it is justifiable to vilify people from other ethnic backgrounds (unless they have an association with Australia) is perhaps informed both by the 'new' racism and 'clash of cultures' arguments that it is justifiable to criticise cultural differences. The suggestion that vilification of people from other ethnic groups might not be justifable where they have an association with Australia is harder to pin down. It suggests an insecure nationalism whereby 'Australians' are worthy of protection from harm, but not 'outsiders'.[78]

Lastly, Sir Maurice complains that the legislation will, if it becomes law, "make such speech unlawful, that is, unutterable." The legislation does not, and cannot, make any words physically unutterable. What is does is to inform people what the consequences will be if they choose to utter such words. Sir Maurice's comments are of particular concern in the way they demonstrate the widespread acceptance in Australia, even at the highest legal levels, of popular 'free speech' arguments derived from First Amendment jurisprudence. His comments act to foreclose more critical debate and influence the political landscape. Unfortunately, the media has a vested interest in repeating the popular 'free speech' arguments and not examining them too closely. The First Amendment approach best protects the media from defamation actions. Conversely,

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[77] See *Keegstra* (1990) 61 C.C.C. (3d) 1, 117.

racial vilification legislation that is appropriately drafted and enforced would be likely to chill the media's ability to comment in a racist way, as touched on earlier in Chapter 4.

The international affairs power

The Federal Government's power to legislate in relation to racist behaviour rests upon its constitutional powers in relation to international affairs to legislate in relation to the matters covered by the *International Convention on the Elimination of All Forms of Racial Discrimination*, and therefore rests squarely upon its adoption of the *Convention.* This means that Federal Government legislation against racial vilification cannot go beyond the meaning of the *Convention* without the likelihood of being held to be unconstitutional. The difficulty is that the *Convention* condemns racist behaviour in very general terms, leaving it to the signatory states to legislate in more detail.

Early in October 1994, fears were expressed that the Federal Government's proposed racial vilification legislation exceeded the *Convention*, and was thus unconstitutional, because it "included a ban on 'imputing' a race to a person."[79] That particular wording was not ultimately included in the Bill.

This is an unnecessarily narrow interpretation of the wording of the *Convention.* At first sight Article 4 might seem to be worded more narrowly in relation to racial hatred offences than in relation to racial discrimination. Paragraph 1 of Article 1 of the *Convention* defines the term 'racial discrimination' as meaning restrictive or exclusive behaviour "based on race, colour, descent, or national or ethnic origin" which nullifies or impairs the victim's human rights. Most legislation enacted by signatory states to the *Convention* uses the same or similar list of characteristics of the victim group not only to define 'racial discrimination', but also as part of the definition of acts of racial vilification. However Article 4 does not use the same list of characteristics as Article 1

[78] As to the irrationality of similar arguments about the need for legislation to restrict or protect Australians see Tatz (2003) 136 ff.

in condemning racial hatred and theories of racial superiority, but refers simply to "any race or group of persons of another colour or ethnic origin."

The wording of Article 4 is deliberately general, for example condemning supremacist theories "which attempt to justify or promote racial hatred and discrimination *in any form*," and that it should not be read down by comparison with Article 1. Article 4 itself calls for a broad interpretation in that it specifically states that in adopting measures to eradicate racist discrimination and racist incitement to hatred 'due regard' must be had, by the states which are parties to the *Convention*, to the principles embodied in the *Universal Declaration of Human Rights* and to the rights set forth in Article 5 of the *Convention*. Article 5 includes "the right to security of person and protection by the state against violence or bodily harm" (paragraph (b)). The focus of Article 4 is therefore upon proscribing activities, in whatever form, which threaten the security of any person (such as hate propaganda aimed at terrorising members of the targeted group or their supporters) or which disseminate theories of racist supremacy (such as hate propaganda aimed at persuading the public to adopt a racist point of view). Thus both Articles 1 and 4 should be interpreted broadly. Where there is no definition of 'racial hatred' in the *Convention* itself it is inappropriate to read into Article 4 the requirement that particular (limited) characteristics of the victim must be present for 'racial hatred' to exist, merely by analogy with the definition of 'racial discrimination' in Article 1.

The general right to freedom of speech is recognised in Article 19 of *the Universal Declaration of Human Rights*. Article 19 (3) of the *International Covenant on Civil and Political Rights* provides that the exercise of the right to freedom of speech "carries with it special duties and responsibilities" which do not apply to the other rights protected by the Covenant. These special duties and responsibilities mean that the right may be restricted by law to protect public health or morals, the rights or reputations of others, or to protect national security or public order. Article 20 (2) of the Covenant states that

[79] Margo Kingston and Sonya Voumard, "Government forced into redraft of race law," *Sydney Morning Herald*, 6 October 1994, 3.

"any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law" and this also should be taken into account: it can be argued[80] that although the international community places considerable value on freedom of speech, the protection of individuals from racial hatred is of overriding concern.

Conclusion

There is no reason in principle why limiting racist speech should not be constitutional, especially if one adopts the view that constitutional interpretation should not restrict the Federal Government in the exercise of its sovereign powers. Even on the traditional tests of necessity, reasonableness and proportionality it is appropriate to limit racist activities because of the harms they cause not just to individuals but to the democratic process, in intimidating people from participating in public life or in politics, in denigrating scapegoat groups and opponents, and in deceiving electors as to the real aims of racist ideology. Unfortunately, the High Court has generally avoided a contextual assessment of the harms to which the particular legislation was directed, and it is unlikely that the High Court as it is presently constituted will develop less abstract guidelines than those provided in *Lange*.

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[80] Melinda Jones, "Racial Vilification Laws: A Solution for Australian Racism?" (1994) 1 *AJHR* 140, 144 to 145.

Conclusion: The way forward

The world may have reached the stage at which people must learn to do a great deal more for their own personal and social guidance that they have hitherto left to the supernatural.[1]

...democracy is more than a product of utilitarian considerations only in those places where the courage exists to believe in it as something indispensable for the dignity of man. If this courage exists, we should also have the courage to be intolerant towards those who wish to use a democratic system in order to kill it off.[2]

Justice is one fundamental moral thing.
Good, the real resting-place of freedom, is the other.[3]

Racist behaviour and speech have not traditionally been regarded as a government responsibility in Australia. As mentioned previously, Shklar analyses how harmful consequences are generally categorised either as natural 'misfortunes' for which no person can be blamed, or as 'injustices' which are the result of negligent omission or of some ill-intentioned or reckless human act. She notes that where the line is drawn between misfortune and injustice depends very much upon ideology, and that advocates of minimal government define justice narrowly, leaving little scope for government action, while defining 'misfortune', for which governments are expected to have little or no responsibility, as correspondingly expansive.[4]

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1 J.B. Rhine, "Parapsychology and Man", in Ervin Laszlo and James B. Wilbur (eds), *Human Values and the Mind of Man*, Gordon and Breach Science Publishers, New York, 1971, 17 to 18.

2 Carlo Schmid, quoted in Finn (1991) 189.

3 Detmold (1990) 568.

4 Shklar (1990) 117. Similarly Galbraith points out that while government support and subsidy of the impoverished is "seriously suspect as to need and effectiveness of administration and because of their adverse effect on morals and working morale" this is rarely the view taken of government support to the comparatively well-off — citing the rescue of the failed savings and loans associations in America — who can apparently withstand the adverse moral effect of being supported by the government: (1992) 14-5.

The traditional liberal model which is generally endorsed by Australian court-based approaches to the definition of human rights[5] is that human rights involve the rights to certain social goods (the 'prerequisites of rational autonomous agents'), as opposed to a model of human rights which focuses upon the group more than the individual, which is concerned with eliminating suffering and which includes the right to be protected from harm by others.[6] The *Australian Rights Congress* held in Sydney in September 1994 identified in its official programme twenty-six different types of rights. The only rights to be free from actions of others related to freedom from censorship, discrimination and arbitrary detention/ arrest/ exile. No right to be free from racist actions or racial vilification was mentioned.

In introducing racial vilification legislation, Australian States and Territories have made rational choices about the kind of social behaviour that is desirable or undesirable, and about the role of government and legislation in describing and enforcing those choices.[7] It is generally recognised that extremist hate speech hurts the groups it is directed towards and hinders democracy. However the legislation is difficult to interpret and is reliant on cases being brought by individuals or occasionally ethnic groups, rather than the state. Given that the legislation focuses on speech that relates to the victim's characteristics, it is not readily applicable to situations of indirect group defamation involved in extremist speech. The legislation may be largely ineffective in catching the more subtle and indirect forms of 'new racism' and media stereotyping. The legislation is also limited in its application because of the general tendency for courts and tribunals to take account of popular notions of 'free speech', as well as First Amendment jurisprudence in determining cases involving 'speech'.

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5 Campbell (1994a) 199.

6 Campbell (1994a) 199.

7 see Matsuda (1993) 47ff. On the other hand, Martha Albertson Fineman claims that law reform "cannot in and of itself be effective as a catalyst for more generalized reforms" although she agrees that law can be valuable for its symbolic power: (1995) 17.

While Australia's High Court has not considered the racial vilification legislation directly, it has defined the parameters of a right to free political speech, and this has been influential in racial vilification cases. However that right as it is presently articulated is also imbued with the many social and political assumptions of First Amendment jurisprudence, rather than with alternate concepts of free communication and of human dignity.

The legal principles of First Amendment jurisprudence are not inevitable, especially in an Australian context. Similarly, the popular notions of 'free speech' derived from that jurisprudence are not the only way of perceiving communications rights or the right to be free from racial vilification. In European law, freedom is seen as inextricably linked to equality, and both values are seen as contextual and substantive, not as formal. While the Canadian case law does not go so far, there is certainly a balancing of rights and a clearer understanding of the need for substantive and not just formal rights. As Barendt warns:

> When one legal system contemplates adopting concepts and perspectives from another, it should be aware that these ideas are very likely to be contested in their home jurisdiction. Moreover, … the interpretation of freedom of speech as a constitutional right is as much dependent on historical and underlying social factors as it is on legal precedent and abstract argument. … judges and legislators should always examine what the Supreme Court says about freedom of speech, but should also see what other approaches are possible before its jurisprudence is imported.[8]

At first sight, it might seem progressive for Australian courts to take the 'right to free speech' into account, even though we have no Bill of Rights and no such right under our own Constitution. But if Australian courts have regard only to the popular notion of 'free speech', without appreciation of the full complexities and flaws of First

Amendment jurisprudence, other potential rights (such as the right to be free from racial vilification) are thereby unreasonably 'chilled'. The same unfortunate result will occur if Australian courts fail to consider how the High Court's notion of free political discourse might conflict with other rights.

In 1966 the Special Committee on Hate Propaganda in Canada studied "the power of words to maim, and what it is that a civilized society can do about it," saying that every society from time to time draws lines "at the point where the intolerable and the impermissible coincide" and concluding that

> in a free society such as our own, where the privilege of speech can induce ideas that may change the very order itself, there is bias weighted heavily in favour of the maximum of rhetoric whatever the cost and consequences. But that bias stops this side of injury to the community itself and to individual members or identifiable groups innocently caught in verbal cross-fire that goes beyond legitimate debate.[9]

McNamara suggests that this is exactly what has happened in the interpretation of racial vilification legislation. Because we have no specific 'rights to' or 'rights from' under our Constitution, we have not appreciated the complexities involved in protecting some rights and not others. If we had constitutionally embedded rights, we would discover that those rights can come into conflict, and must be balanced against each other. We would discover that government can have a role in fostering those rights and that in doing so it can enhance democracy. We would realise that democracy, like law, is not static and that courts should not assume that the parliamentary and administrative structures we now have represent a democracy which is ideal in every respect.

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8 Barendt (1995) 232.

9 Quoted by Chief Justice Dickson, *Keegstra* (1990) 61 C.C.C. (3d) 1, 20. See also Theophanous, *Hansard*, House of Representatives, 16 November 1994, 3435.

Some argue that to a large extent the regulation of hate propaganda is fundamental to the realisation of human rights.[10] True progress in the area of legislating against racist speech and behaviour would be to look towards the European analysis of human rights, which aims to limit that speech and behaviour, rather than to the First Amendment jurisprudence, which justifies government non-intervention and entrenches the power of already dominant groups. In time, European human rights jurisprudence will be imported into Australian common law through the common law of the United Kingdom, as a result of that country's entry into the European Union and the application to the United Kingdom of European human rights law. Australian courts have already recognised notions such as human dignity and equality which have a long history in European philosophy, politics and law but are recognised in United States law, if at all, only in formal and not substantive terms.

Australia should also look to adopt a Bill of Rights which may assist in focusing attention upon the relationships between different rights, and the need to balance them.

Kathleen Mahoney sums up the role of legislation in opposing racist speech as follows:

> Modern democracies that respect equality and multiculturalism have accepted as a fundamental principle that legislative protection and government regulation are required to protect the vulnerable. To use the free speech doctrine as an instrument to permit disadvantaged or vulnerable groups to be seriously harmed by more powerful groups misunderstands the proper role of governments and free speech ... Governments must speak on behalf of those who cannot be heard, to facilitate the expression of their ideas and to promote the interests of tolerance, pluralism and individual autonomy. All constitutions in free societies embody this concept by permitting limitations

[10] Gaudreault-DesBiens (2001) at 1123 ff.

> on speech activity if those limitations are justified, reasonable and prescribed by law in the democratic context.[11]

It is said that Australian culture has a unique ability to "adopt, absorb and change outside influences."[12] This is exactly what should be done in relation to First Amendment jurisprudence. In developing an individual free speech or communications jurisprudence Australia should move beyond the limitations and complexities of First Amendment doctrines, which are founded upon social, economic and political assumptions that reflect a superficially similar but fundamentally very different society.

Specifically, the following principles are suggested for the interpretation of racial vilification legislation in Australia:

- the legislation should be interpreted as a form of anti-discrimination law, which aims to promote substantive rather than formal equality;
- primacy should be given to 'good'; to the redressing of harm, remembering that racial vilification hurts individuals, groups, and the whole of society through undermining democratic values and structures;
- in considering the impact of racial vilification upon democracy, democracy should be seen as involving substantive rights rather than simply formal ones;
- in considering the impact of racial vilification legislation upon 'free speech' and communications, 'free speech' should not be seen as an absolute, either theoretically or in practice. It must be recognised that limiting racist speech will encourage others' speech and communications. Racist speech aims to silence individuals, their groups, and their supporters.

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11 Ms Henzell, *Hansard*, House of Representatives, 16 November 1994, 3418, quoting Kathleen Mahoney, reproduced in *Quadrant*, November 1994.

12 Elaine Thompson, "Political Culture" in Bell and Bell (1998) 107.

- the content, context and consequences – that is, the real harm — of the racial vilification should be considered, bearing in mind that no incident of racial vilification should be considered as an isolated incident;
- an Australian 'free speech' or 'free communication' jurisprudence should take account of values which are fundamental to European concepts of human rights, and which are regularly contrasted with the limited right of free speech, particularly equality and human dignity;
- the assumptions underlying First Amendment 'free speech' discourse should be analysed in the light of modern understandings of mass communication as to how information is disseminated and received;
- the role of government in protecting 'freedoms from' and in protecting the communication of information as a primary, communal, good which is essential to democracy should be acknowledged. It must be realised that that *status quo* is not necessarily the most perfect form of democracy, and that government may have a role in protecting and improving democratic structures.

Freedom from Racial vilification as an aspect of communication

Another way of thinking about the free speech versus hate speech debate is to consider the role of communication – which is necessarily contextual — as opposed to 'speech' which can be discussed theoretically, without consideration of how and when the message of the speech is received. It is generally agreed that open speech and communication are necessary for the maintenance of democracy. Visualising the communication of information as a primary, communal, good which is essential to democracy casts light upon the useful role that government can play in enhancing communication for all citizens. In European political thought a connection is recognised between the development of public opinion through a free (that is, not monopolised, and therefore regulated) press and the phenomenon of social development. Bobbio points out that civil society cannot exist without the effective expression of public opinion concerning institutions and their activities through the press, radio and television, so that public opinion and social movements will develop

together and influence each other.[13] We need to recognise the inherent danger for social development that results from a media oligarchy which supports reactionary rather than progressive attitudes and presents comforting 'infotainment' rather than any analysis of real issues.[14] Neither American nor Australian judgments appear to take account of these issues.

Because of the restrictions that racism imposes upon the free speech and political and social participation of target groups, equality of speech requires protection from hate speech. Government regulation of deceptive or otherwise harmful expression is more likely to result in truthful information being obtained than any unregulated 'market', and is therefore more likely to support a democratic political system than is the 'free market', which allows manipulation of the political process through false and harmful speech in order to disempower selected groups. Government restrictions upon hate speech enhance public debate by encouraging more general participation, more respect for the voices of different groups, and more reasoned contributions.

Freedom from racist speech as a value and human right

It is not enough for rational choices about the nature and extent of legislation to be based only upon the *status quo*; there is a need for existing values to be re-examined, and for new values to be consciously chosen. In this way we improve our society and perhaps even our chances of survival. We cannot afford to neglect the questions of our values and their justifications[15] in an age which has experienced a range of genocides and which has the potential for global self-destruction. The most important instruments of survival are ultimately our values.[16]

Bobbio (1989) 26.

See generally Collins and Skover (1993).

15 Strawbridge (1988) at 114.

16 Joseph Wilder, "Psychoanalysis and Values" in Laszlo and. Wilbur (1971) 50 to 51.

Identification of common values[17] is not enough. Values held in common must still be tested by some other criteria. Racism of one form or another is common to most groups of people, but one would not therefore argue that it is a value which should be encouraged in a multicultural society. We still have to select the good values from the bad values. We still have to avoid the situation where humanity may decide that it would be better, as Arendt warns, for "the whole to do without a certain part."[18]

The substantive values and principles capable of sustaining our common values need to be able to take account of circumstances, conditions and culture without being relativistic.[19] A philosophy which promotes human rights is likely to best provide chosen values for a plural society. The promotion of rights requires no religious underpinning: human rights, unlike divine commands or natural law, necessarily exist because we inhabit the earth together with other men and women.[20] Campbell argues that "the articulation and defence of human rights ought to be a central task of any democratic process which regards the equal right of all to participate in political decision-making as fundamental."[21]

Human rights need to be seen, not just as negative liberties (freedom from government regulation), but also as positive rights which involve the government in a duty to take protective action. This is already accepted in European civil law jurisdictions, but unfortunately is not a concept that has found its way into Australian or American jurisprudence, based as they are upon English and not European law.[22]

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17 Feibelman tests the strength with which values are held according to whether those values are ones which "the members of the society accept in their beliefs, embody in their artifacts, and aim at in their actions": James K. Feibleman, *Justice, Law and Culture*, Martinus Nijhoff Publishers, Dordrecht, 1985, at 25.

18 Arendt (1951) 437 to 438.

19 David Clough, Department of Religious Studies, Yale University, in letter to *The Guardian Weekly*, 18 August 1996, 2.

20 Arendt (1951) 437.

21 Campbell (1994a) 199.

22 See generally Kinley (1995) and Kommers (1989).

Today we know, said Noberto Bobbio in 1967, that so-called human rights are the product of human civilization, and are therefore susceptible to transformation and growth. Bobbio identified three stages in the development of human rights: the first affirming rights to liberty, which tend to restrict the power of the state, granting an area of freedom *from* the state to the individual or particular groups. The second stage identifies "political rights which perceive freedom not only negatively as non-interference, but positively as autonomy or liberties *within* the state," including the concept of involvement in the process of political power. He identifies the final stage as proclaiming social or economic rights which express new values relating to wealth and equality that are substantive rather than formal. He calls these: liberties *through or by means of* the state.[23] Similarly, other writers have identified "third generation collective rights such as the right to development, identity, and environment," which focus on the concept of fraternity.[24]

All these stages of human rights identified by Bobbio have been recognised by the United Nations in its Declaration of Human Rights, and Declaration of Social and Economic Rights. But, as Bobbio points out, there is an inevitable distinction between what people see as rights which should be recognised by society, and the political will to give and enforce those rights. Over 30 years later, the 'Free Speech Theorists' have not progressed much beyond the first stage of human rights described by Bobbio.

In the context of racist activities, the right to be free from harm should be seen as a positive right which involves the government in a duty to prohibit racist harms and to act to protect victim groups. We have the responsibility to protect those in our midst who do not enjoy the same opportunities or circumstances as ourselves.[25] As a society,

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23 Bobbio (1996) 18ff.

24 See Gaudreault-DesBiens (2001) 1135 citing M. Borgetto, *La notion de fraternité en droit public français: le passé, le présent et l'avenir de la solidarité*, L. G. D. J., Paris, 1993 and C. D. Gonthier, "Liberty, Equality, Fraternity: The Forgotten Leg of the Trilogy, or Fraternity: The Unspoken Third Pillar of democracy" (2000) 45 *McGill L.J.* 567.

25 Garrie Gibson, quoting his 1990 maiden speech: *Hansard*, House of Representatives, 15 November 1994, 3348.

as a community, and as individuals, say Levin and McDevitt, we must be willing to take some responsibility for making changes[26]. Sadurski argues that the protection of minorities is compatible with liberal conceptions of legal neutrality because the different social consequences that flow from immutable personal characteristics are objectively ascertainable. Legislative response to them can therefore be regarded as 'neutral'. He cites *Carolene Products* v *US* (1938) as providing an 'insight' that in a democratic state the law must protect more stringently those groups which, because of the current social consequences of their members' personal characteristics, cannot protect themselves politically.[27]

The problem is, as Campbell notes, that in common law jurisdictions positive rights "are not those with which courts deal routinely and reflect a creative community-oriented ideology which is not dominant within the legal profession."[28] There is presently no agreement as to the exact political or legal nature of human rights,[29] only "a common cherishing of certain very important human interests which we value highly, and a commitment to some form of human equality and a highly unspecific notion of what is fair." Such broad ideals are almost meaningless, comments Campbell, until they are worked out in detail in relation to different areas of activity and competing priorities are brought into some form of working relationship.[30]

This also raises the question of who will have the power to delineate the content of rights? Understandably, there is considerable opposition to the judiciary or the parliament having that power. But as Minow notes, the problem of needing others

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26 Levin & McDevitt (1993) xi.

27 Wojciech Sadurski, *Moral Pluralism and Legal Neutrality*, Kluwer Academic Publishers, Dordrecht, 1990, 142-148. *Carolene Products* v *US* 304 U.S. 144 (1938) concerned a legislative ban by Congress of the interstate shipment of skimmed milk with added vegetable oil, which was upheld by the Supreme Court. However an interesting footnote to Mr Justice Stone's opinion suggested that prejudice directed against discrete and insular minorities might call for "more searching judicial inquiry."

28 Campbell (1994a) 208.

29 Campbell (1994a) 198.

30 Campbell (1994) 201.

(to apply rights and determine them), while at the same time fearing their exercise of power, occurs in any intellectual effort to articulate the scope of a right.[31]

Those who oppose racial vilification legislation generally have no model for social development but that of the unfettered free market, which hardly promotes substantive equality. They base their arguments that such human rights as free speech are best promoted by social activity, not government regulation and judicial enforcement, upon classic Liberal theory and upon an assumption of general social progressivism which is hardly borne out by experience. Free speech discourse argues from principles of rationality for the protection of racist speech that is inherently irrational and "demands the right to deny the plurality of individuals and groups within society in the name of the pluralism of ideas."[32] Free speech theorists often seem to confuse disagreement about ideas with abuse of people because of their very existence, and in thus the United States commentators often seem to have difficulty in imagining the possibility of an interpretation of their Constitution which would both protect civil rights demonstrations and allow hate speech legislation.

Because of the far-reaching personal and social harms of racism, and especially its attacks upon democracy, it is necessary to discourage racism by every possible means. We need not only education but also legislation to counteract the many ways — religious, scientific, economic, artistic, political and philosophical — in which racism has become part of our cultural heritage in Australia. As Patricia Mann says, we need to decide what to do when the oppressive speech that we hate is neither eccentric nor unpopular, but habitual and accepted.[33] Kretzmer argues that a society committed to the ideas of social and political equality cannot remain passive in the face of "the indignity of living in a society in which such speech is protected."[34]

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31 Minow (1990) 166.
32 Gaudreault-DesBiens (2001) 1132.
33 Mann (1995) 264.
34 Kretzmer (1987) 456.

Democratic society is not bound to tolerate some of its members actively inciting their fellow citizens to disrespect and demean other members of the same society, and ultimately to inflict harm on them.[35] As Gaudreault-DesBiens argues, "the idea of constitutional democracy cannot be reconciled with the radical denials of the humanity of some of its citizens" because to do so would entail an 'intolerable indifference' to the citizens' victimization.[36]

The talent displayed by Australian culture in a variety of areas to appropriate and adapt outside influences should be exercised in relation to First Amendment jurisprudence as a matter of urgency.

35 Gaudreault-DesBiens (2001) 1127.
36 Gaudreault-DesBiens (2001) 1136.

APPENDIX 1

Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination

State Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:

(a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof;

(b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;

(c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

APPENDIX 2

Extracts from relevant legislation referred to in the text

Federal Legislation : Racial Discrimination Act 1975 (Cth)

18B Reason for doing an act

If:

(a) an act is done for 2 or more reasons; and

(b) one of the reasons is the race, colour or national or ethnic origin of a person (whether or not it is the dominant reason or a substantial reason for doing the act);

then, for the purposes of this Part, the act is taken to be done because of the person's race, colour or national or ethnic origin.

18C Offensive behaviour because of race, colour or national or ethnic origin

(1) It is unlawful for a person to do an act, otherwise than in private, if:

(a) the act is reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people; and

(b) the act is done because of the race, colour or national or ethnic origin of the other person or of some or all of the people in the group.

(2) For the purposes of subsection (1), an act is taken not to be done in private if it:

(a) causes words, sounds, images or writing to be communicated to the public; or

(b) is done in a public place; or

(c) is done in the sight or hearing of people who are in a public place.

(3) In this section:

"public place" includes any place to which the public have access as of right or by invitation, whether express or implied and whether or not a charge is made for admission to the place.

18D Exemptions

Section 18C does not render unlawful anything said or done reasonably and in good faith:

(a) in the performance, exhibition or distribution of an artistic work; or

(b) in the course of any statement, publication, discussion or debate made or held for any genuine academic, artistic or scientific purpose or any other genuine purpose in the public interest; or

(c) in making or publishing:

(i) a fair and accurate report of any event or matter of public interest; or

(ii) a fair comment on any event or matter of public interest if the comment is an expression of a genuine belief held by the person making the comment.

State Legislation: Anti-Discrimination Act 1977 (NSW)

s. 4(1)… race includes colour, nationality, descent and ethnic, ethno-religious or national origin.

20B **Definition of "public act"**

In this Division, ***public act*** includes:

(a) any form of communication to the public, including speaking, writing, printing, displaying notices, broadcasting, telecasting, screening and playing of tapes or other recorded material, and

(b) any conduct (not being a form of communication referred to in paragraph (a)) observable by the public, including actions and gestures and the wearing or display of clothing, signs, flags, emblems and insignia, and

(c) the distribution or dissemination of any matter to the public with knowledge that the matter promotes or expresses hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

20C **Racial vilification unlawful**

(1) It is unlawful for a person, by a public act, to incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group.

(2) Nothing in this section renders unlawful:

(a) a fair report of a public act referred to in subsection (1), or

(b) a communication or the distribution or dissemination of any matter comprising a publication referred to in Division 3 of Part 3 of the Defamation Act 1974 or which is otherwise subject to a defence of absolute privilege in proceedings for defamation, or

(c) a public act, done reasonably and in good faith, for academic, artistic, scientific or research purposes or for other purposes in the public interest, including discussion or debate about and expositions of any act or matter.

20D **Offence of serious racial vilification**

(1) A person shall not, by a public act, incite hatred towards, serious contempt for, or severe ridicule of, a person or group of persons on the ground of the race of the person or members of the group by means which include:

(a) threatening physical harm towards, or towards any property of, the person or group of persons, or

(b) inciting others to threaten physical harm towards, or towards any property of, the person or group of persons.

Maximum penalty:

In the case of an individual—50 penalty units or imprisonment for 6 months, or both.

In the case of a corporation—100 penalty units.

(2) A person shall not be prosecuted for an offence under this section unless the Attorney General has consented to the prosecution.

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