CAN LEGISLATION PROHIBITING HATE SPEECH BE JUSTIFIED IN LIGHT OF FREE SPEECH PRINCIPLES?

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I. INTRODUCTION

Debate surrounding the Federal Government's proposed racial vilification law[1] has centred on the extent to which freedom of speech is likely to be curtailed by a prohibition against incitement to racial hatred. However, it is a debate which has been marked by rhetoric from both sides and in which the proponents have failed to consider the fundamental question of what freedom of speech means in the Australian context.

Racial hatred propaganda is not the only contemporary battleground for the free speech and censorship warriors. If the American and Canadian experience is any guide, demands from feminist groups that pornography be subject to greater legal restrictions will focus even more attention on the limits of free speech. However, racial vilification is arguably the most difficult free speech question to resolve, at least in a culture where the traditional liberal theory still holds sway. If we are to seek to resolve these conflicts, we must surely consider more deeply the philosophy which underpins our 'freedom of speech'. Only then can we begin to determine its proper limits. Why do we think freedom of speech is something worth protecting? What do we hope to achieve by giving speech this protection?

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1 See Racial Hatred Bill 1994 (Cth).

Where do we draw the line and say that the nexus between speech and harm is too close and the speech must be denied protection?

Until recently, these questions were simply a matter of political theory. While liberty of discussion was one of the 'silent principles' of the common law,[2] the question was very much should, rather than can, government restrict the speech of some in order to protect the dignity of others. With no explicit constitutional protection, freedom of speech was at the mercy of parliamentary sovereignty.[3]

Since 1992 when the High Court held there to be an implied guarantee of freedom of political discussion in the Australian Constitution,[4] freedom of speech can no longer be considered in the sole domain of parliament. The appropriate balance between freedom of speech (at least speech relating to political or public affairs) and restrictions upon it imposed by either Federal or state legislation is now a question of constitutional law. However, the scope of this new implied guarantee - not to mention the common law principle of freedom of speech - remains unclear.

The question considered in this paper is whether legislation should be passed to prohibit incitement to racial hatred.[5] Does such legislation, as a matter of political theory, infringe unacceptably on freedom of speech? The traditional civil libertarian response, that such speech is merely offensive and fails to satisfy the harm principle,[6] holds that legislative restrictions on hate speech cannot be justified. The civil rights and critical race theorists who challenge the assumptions on which the liberal theory of free speech is based, contend that hate speech should not be protected as free speech.[7] The High Court will inevitably be called upon to adjudicate on this question and, in doing so, will begin to develop its own free speech jurisprudence. It will be argued in this paper that the approach which most satisfactorily reconciles the competing interests is that suggested by the so-called 'accommodationists', who reject restrictions on group libel whilst allowing for tightly drafted restrictions on hate speech directed specifically at individuals.[8]

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2 I Harden, N Lewis, *The Noble Lie*, Hutchinson (1986) pp 38-9.

3 *Greiner v Independent Commission Against Corruption* (1992) 28 NSWLR 125, per Mahoney JA. See text at note 14 *infra* for a discussion of the challenges to this orthodoxy.

4 See *Nationwide News v Wills* (1992) 177 CLR 1 and *Australian Capital Television P/L v The Commonwealth* (1992) 177 CLR 106.

5 I am not considering the question of provisions such as s 20D of the *Anti-Discrimination Act* 1977 (NSW) which prohibit threats of harm and incitement to make such threats. While s 20D(1)(b) in particular potentially brings the NSW law into conflict with a free speech principle, I am confining my discussion to speech which incites others to adopt the speaker's attitude of hatred, contempt or ridicule towards a group or individual on the basis of race. See for example, *Anti-Discrimination Act* 1977 (NSW), s 20C; Racial Hatred Bill 1994 (Cth), amending *Crimes Act*, s 60(1).

6 See discussion in Part III.

7 See discussion in Parts IV and V.

8 See discussion in Part VI.

II. IS THERE A FREEDOM TO VILIFY?

In NSW, the public incitement of racial hatred[9] is subject to civil sanctions. If the Federal Government is successful in having its Racial Hatred Bill 1994 (Cth) passed by Parliament, the intentional and public incitement of racial hatred will be a criminal offence.[10]

Are these legislative restrictions compatible with freedom of speech?

The free speech principle - that limitations on speech require a stronger justification than limitations on other forms of conduct[11] - did not, until 1992, have the status in Australia of a specific limit on legislative action.[12] However, freedom of speech was, and still is, a guiding common law principle, derived from the concept of the rule of law. As Justice Toohey noted in 1992:

> the expectation of the (early) common lawyers was that Parliament would leave the central features of the common law largely untouched, so that the common law of the constitution would continue to guarantee individual liberty, liberty of discussion, freedom of assembly and rights of property.[13]

This 'expectation' is reflected in the principle of statutory interpretation that in the absence of a clearly stated intention, parliament will not be presumed to have intended to infringe common law rights and liberties, including freedom of speech.[14]

However, whilst the common law in Australia recognises free speech as a fundamental principle, in order to decide how the principle should be applied - for current purposes, whether it is undermined by legislation prohibiting incitement to racial hatred - the philosophy underpinning it must be understood.[15]

Kathleen Mahoney warns those embarking upon this task against "reliance on traditional abstract values" such as truth, self-autonomy and self-governance at the expense of testing racial hate propaganda against "other values deeply cherished in

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9 *Anti-Discrimination Act* 1977 (NSW), s 20C.

10 See note 5 *supra*.

11 F Schauer, *Free Speech: A Philosophical Enquiry*, Cambridge University (1982) p 8.

12 Compare with the US First Amendment.

13 Justice Toohey, "A Government of Laws, and Not of Men?", presented at Conference on Constitutional Change in the 1990's, Darwin, 4-6 October 1992, p 5, quoting from note 2 *supra*, pp 38-9. See also E Barendt, *Freedom of Speech*, Clarendon, (1985) p 1: "Even in Britain, where such liberties [as freedom of speech] lack constitutional protection, politicians and law reformers regard freedom of expression as a basic value which should be respected... [P]owerful reasons are generally required before its restriction by legislation is accepted as justified." Although, compare the far more restrictive view of the common law's treatment of freedom of speech in AV Dicey, *Introduction to the Study of the Law of the Constitution*, ECS Wade, Macmillan (10th ed, 1964) Ch 6.

14 *Balog v Independent Commission Against Corruption* (1990) 169 CLR 625 at 635-6. While the orthodox view prior to August 1992 was that any liberty of discussion which the common law recognised was completely at the mercy of any legislature which expressed a clear intention to override it - no matter how "against common right or reason" - Justice Toohey, for one, questioned the absolute nature of parliamentary sovereignty in a speech delivered shortly after the High Court handed down its decisions in *Nationwide News* (note 4 *supra*) and *Australian Capital Television* (note 4 *supra*). He pointed to obiter dicta of New Zealand judge Sir Robin Cooke suggesting that fundamental rights might, on occasions, override parliamentary sovereignty, as well as the dicta by Street CJ in *BLF v Minister for Industrial Relations* (1986) 7 NSWLR 372 at 387 that he had a "strong affinity for the judicial philosophy revived by Sir Robin Cooke" as evidencing "a revival of natural law jurisprudence": Justice Toohey, *ibid.*

15 Note 11 *supra*, p ix.

a free and democratic society - particularly the value of equality".[16] This passage illustrates one of the major battle lines between the civil libertarians and their chief opponents, civil rights and critical race theorists. Another point of disagreement is the degree and nature of harm in hate speech. The classic liberal approach to the question - while still dominating First Amendment jurisprudence - is coming under increasing challenge in the USA.[17] Australia, unencumbered by the rich, if somewhat stifling, free speech jurisprudence which has developed in the USA is well placed to "accommodate the worthy passions"[18] of both the liberal and civil rights theorists and, hopefully, strike a balance which seeks to avoid the worst harms of racial hate speech whilst remaining faithful to the principle of free speech. In searching for such an accommodation, we would do well to heed the recent advice of Eric Barendt:

> Australian lawyers should always consider what the US Supreme Court says about freedom of speech, but it would also be advisable for them to consider other approaches to an understanding of that freedom.[19]

III. THE CIVIL LIBERTARIAN ANALYSIS

The hate speech dilemma brings into conflict two fundamental principles of liberal theory: "that truth is discovered in, or whatever results from free and open discourse..." and "that individual freedom is subject to restriction when it causes harm to others".[20] The first of these principles underlies the two most pervasive liberal arguments for free speech: the so-called marketplace of ideas rationale,[21] and the argument that free speech is an essential tool of democratic self-governance.[22] However, when confronting the hate speech question, liberals side-step the obvious difficulty of reconciling these two principles by rejecting the psychological and emotional harm caused to the victims of hate speech as warranting restrictions on speech. Thus, Massaro asserts that "[l]iberals...tend to presume that all people have or should develop the fortitude for penetrating, destabilizing and invasive verbal volleys".[23] They also fear the so-called 'slippery slope'. They maintain that a rule which allowed for regulation of racial hate speech on the basis that it was psychologically wounding would be difficult to confine.

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16 K Mahoney, *Hate Vilification Legislation with Freedom of Expression: Where is the Balance?* Ethnic Affairs Commission of New South Wales and the Ethnic Affairs Bureau of Queensland, (1994) p 20.

17 See M Matsuda, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 *Michigan Law Review* 2320; T Massaro, "Equality and Freedom of Expression: The Hate Speech Dilemma" (1991) 32 *William and Mary Law Review*, 211; R Delgado, "Words That Wound: A Tort Action For Racial Insults, Epithets, and Name Calling" (1982) 17 *Harvard Civil Rights-Civil Liberties Law Review* 133.

18 T Massaro, *ibid* at 213.

19 E Barendt, "Free Speech in Australia: A Comparative Perspective," (1994) 16 *Sydney Law Review* 149 at 165.

20 T Massaro, note 17 *supra* at 229.

21 An idea that is traced back to Justice Holmes' judgment in *Abrams v United States* 250 US 616 at 630-1 (1919): "[T]he best test of truth is the power of the thought to get itself accepted in the competition of the market."

22 Associated most strongly with A Meiklejohn, *Free Speech and Its Relation to Self-Government* in A Meiklejohn, *Political Freedom: The Constitutional Powers of the People*, Oxford University Press (1965).

23 T Massaro, note 17 *supra*.

Allowing vicious hate speech is the price the community pays for the protection of other types of speech - such as civil rights protests - which might be vulnerable if we were to legislate to prevent sensibility harm.[24] Liberals accept government regulation only when speech is directed at a particular individual in a face-to-face confrontation which is likely to inspire an immediate physical retaliation.[25]

Such a theory is obviously unable to accommodate the sort of anti-vilification laws that NSW has and the Federal Government is proposing. To the extent that these provisions allow for the prohibition or punishment of public communications, in the absence of any clear and immediate danger of retaliation by an individual to whom the communication was directed, the Australian provisions fail the test imposed by the harm principle.[26] A further liberal objection is the implicit viewpoint expressed by the governments enacting the provisions.[27]

In considering the application of liberal theory to the question of hate speech regulation outside of the USA, however, two considerations need to be kept in mind. First, the American jurisprudence is very much a product of that country's political history. The mistrust of government restrictions on speech - to be found in the principle of content-neutrality[28] as well as the 'slippery slope' argument - is a major theme of American liberal free speech writing. So too, the idea that truth should be determined in the marketplace. However, as Barendt has noted:

> these features of US free speech theory are obviously connected with US history and politics. Americans have always been distrustful of government, an attitude rooted in the origins of the country, the gaining of its independence from a remote and ineffective British regime, and later the pioneering spirit of the nineteenth century.[29]

Barendt warns those contemplating the import of American free speech jurisprudence to remember that much of it rests on controversial principles (such as the marketplace of ideas concept), as well as a deep mistrust of government intervention, "no matter how beneficent it may appear".[30] This warning is

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24 In relation to the argument that it is 'we', as in the general community, who pays the price of a robust protection for speech, see M Matsuda, note 17 *supra* at 2323: "Tolerance of hate speech is not tolerance borne by the community at large. Rather it is a psychic tax imposed on those least able to pay." See also F Schauer, "Uncoupling Free Speech" (1992) 92 *Columbia Law Review* 1321 at 1355: "All too often, those who defend the existing approach (to hate speech) by saying 'this is the price we pay for a free society' are not the ones that pay very much of the price." Schauer urges a re-thinking of the preclusion of compensation required by the First Amendment in relation to defamation as well as hate speech. In relation to defamation, he suggests the possibility of a scheme similar to those which compensate victims of crime. He proposes no solution for the hate speech dilemma, but notes at 1356: "...the fact that the cost of a constitutional right is being borne disproportionately by victims of its exercise ought at least to occasion more thought...even if First Amendment doctrine emerged unchanged from such rethinking, and even if the costs of the First Amendment must remain borne overwhelmingly by its victims, then at least we could say there was no alternative, rather than that it was the first approach that came to mind".

25 T Massaro, note 17 *supra* at 229, quoting from R Smolla, "Rethinking First Amendment Assumptions About Racist and Sexist Speech" (1990) 47 *Washington & Lee Law Review* 171 at 198.

26 To the extent that this principle fails to recognise sensibility, as opposed to relational harms.

27 For discussion of the liberal content/viewpoint neutrality principle see immediately below.

28 "If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea itself offensive or disagreeable." *Texas v Johnson*, 109 S Ct 2533 at 2544 (1989).

29 E Barendt, note 19 *supra* at 157.

30 *Ibid* at 165.

reinforced by Mahoney. In the context of western democracies in the twentieth century, she says:

> ...the proposition that governments are a constant threat to the freedom of the citizens; that they are perpetually hostile and aggressive towards individuals and society...is overplayed.[31]

The second point critical to an understanding of American liberal free speech theory and its applicability to the Australian hate speech dilemma is the exceptionally strong emphasis which the Americans place upon individual freedom from the dominant community. Post identifies individualism as the pervading theme in First Amendment jurisprudence, following an analysis of the alternative means by which a legal order might be structured for a heterogeneous society:

> assimilationism, which seeks social uniformity by imposing on all individuals the values of the dominant cultural group; pluralism, which nurtures social diversity by protecting the values of competing cultural groups; and individualism, which favours the choices of individuals over the values of any cultural group.[32]

Assimilationism gets a look-in; decisions such as *Cantwell*[33] have justified limits on individual freedom of speech in order to protect public safety and order. Pluralism, on the other hand, rarely makes an appearance. *Beauharnais*,[34] a rare exception, is dismissed by Post as a "ripple on the surface of a deeper and more powerful current of individualist decisions".[35]

It is this strong individualist assumption underlying the liberal free speech theory which has posed such problems for those who would seek to restrict hate speech in the USA. However, is it realistic, asks Post, to assume that racial groups are determined by processes of individual decision making?[36] Is individualism compatible with the regulation of public discourse in order to prevent harm to racial groups? After all, surely in the case of race, group identity is hardly a matter of choice. In answering these questions, Post borrows from feminist jurisprudence distinguishing 'sex', which refers to biological facts, from 'gender', which refers to a social construct:

> The political point of the distinction is to keep perpetually open for discussion and analysis the social meaning of being born female and included within the group 'women'.[37]

The social meaning of gender - and, as Post extrapolates, the social meaning of race - are political issues, and as such it is imperative that the "individualist premise of public discourse" ensures that this meaning remains open to democratic constitution.[38]

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31 Note 16 *supra*, p 11.

32 R Post, "Cultural Heterogeneity and the Law: Pornography, Blasphemy and the First Amendment" (1988) 76 *California Law Review* 297 at 297.

33 *Cantwell v Connecticut* 310 US 296 (1940).

34 *Beauharnais v Illinois* 343 US 250 (1952), the group libel decision which dates back to a period when First Amendment jurisprudence treated certain types of speech as taboo and is generally thought to have been wrongly decided.

35 Note 32 *supra* at 321.

36 R Post, "Racist Speech, Democracy and the First Amendment" (1991) 32 *William and Mary Law Review* 267 at 295.

37 *Ibid.*

38 *Ibid* at 296-7.

In stark contrast is the approach in Canada, where a stronger emphasis on collective rights has influenced government and courts in that country engaged in the hate speech/free speech line drawing exercise.[39] Individual expression has taken a backseat to protection of group identity. With no developed free speech jurisprudence in Australia, it is not altogether easy to discern which of these approaches has - or will - influence Australian courts and legislatures in their approach to the free speech question. Certainly the NSW racial vilification provisions, and the proposed Federal race hate law are pluralist in their approach. However, in carving out Australia's own free speech jurisprudence, we should be wary of taking too pluralistic an approach to the free speech question - not, as liberal theory would argue, in order to dismiss the significance of group affiliation. As Massaro points out, to do that is to miss the true harm of group vilification.[40] But rather, as shall be argued in more detail below, because regulating discourse relating to groups undermines the strongest rationale for protecting speech - that it is necessary in order to further democratic self-governance.

IV. THE CIVIL RIGHTS ANALYSIS

The most striking aspect of the civil rights approach to the hate speech question is the chord it strikes with most of its 'opponents': the civil libertarians. It seems intuitively right. Liberal free speech theory is far more palatable when it is employed to protect unpopular or dissenting views from suppression by an offended or outraged dominant group than when it is used to defend vicious racist slurs. The hate speech question requires that the theory be adapted to a majority versus minority clash. As Sadurski states:

> The silencing involved in enforcing anti-racial-vilification law is not the kind of silencing associated with majoritarian oppression. Groups that seek help through anti-racial-vilification laws are precisely the sorts of groups which have traditionally been seen by liberals as deserving special legal protection against possible majoritarian oppression: powerless, subordinated and disadvantaged minorities.[41]

The starting point for the civil rights theorists is that equality as a fundamental democratic value trumps freedom of speech.[42] Legal restrictions on hate speech are seen as one means of redressing the inequality which is a feature of race

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39 See comment to this affect by K Mahoney (as a speaker), "The James McCormack Mitchell Lecture - Language as Violence v Freedom of Expression: Canadian and American Perspectives in Group Defamation" (1988/89) 37 *Buffalo Law Review* 337 at 345. See also Canadian Criminal Code RSC 1985, ch C-46, s 319(2) which prohibits the public expression of ideas intended to promote hatred against an identifiable group. In *R v Keegstra* [1990] 3 SCR 697, the Canadian Supreme Court focused on harm caused by hate propaganda to competing constitutional values such as equality as well as the harm caused to the target group to find that this provision of the Criminal Code did not violate the constitutional guarantee of freedom of speech in the Canadian Charter of Rights.

40 T Massaro, note 17 *supra* at 235.

41 W Sadurski, "Racial Vilification: Psychic Harm and Affirmative Action" in T Campbell, W Sadurski (eds), *Freedom of Communication*, Dartmouth (1994) 79.

42 Mari Matsuda, a leading critical race theorist, remarked at a hate speech/free speech symposium: "If I were to give primacy to any one right...I would put equality first, because the right of speech is meaningless to people who don't have equality." M Matsuda (as a commentator), "The James McCormack Mitchell Lecture - Language as Violence v Freedom of Expression: Canadian and American Perspectives on Group Defamation" (1988/89) 37 *Buffalo Law Review* 337 at 360.

relations in both the USA and Australia. Some, such as Amar, shift the focus from the First to the Thirteenth and Fourteenth Amendments in order to argue that, at least in the American context, race hate speech laws can be justified as attacking unequal treatment and the "badges and incidents of slavery".[43] The civil rights theorists confront directly the argument, often heard from liberals, that minorities, as much, if not more, than the dominant group, risk being gagged by hate speech laws.[44] The answer, they say, is 'one-way' hate speech laws which punish only speech directed at an historically disadvantaged and subordinated group.[45] This context-driven approach to the hate speech question - which focuses on substantive rather than mere procedural equality - openly rejects neutrality as an appropriate position for government. Why should governments avoid taking sides in inter-group hostilities, they argue, when we know, from our 'collective historical knowledge' that racial hate speech is wrong?[46] Failure on the part of government to make assessments between competing group claims is an avoidance of the responsibility to "maintain social harmony in society".[47]

Another theme in civil rights theory is a rejection of the liberals' strong attachment to the value of individualism. The harm caused by racism can only be understood, they argue, when the importance of group affiliation to human personality is acknowledged.[48] This argument - one which Mahoney urges on Australia[49] - is wider than Matsuda's claim that the harm of race hate speech can be understood once seen in the context of a history of oppression. The focus is on harm flowing from an insult against a person qua member of her or his group,[50] rather than on harm which is to be found in the context of history.

As already stated, the arguments are compelling. The liberal refusal to acknowledge the nature of the harm flowing from hate speech; the categorisation of such speech as 'merely offensive' and causing only sensibility, as opposed to relational harm, is clearly a weakness in the theory. As Sunstein states:

> No one should deny that distinctive subjective and objective harms are produced by racial hate speech, especially when directed against members of minority groups. It is only obtuseness - a failure of perception or empathetic identification - that would enable someone to say that the word 'fascist' or 'pig' produces the same feelings as the word 'nigger'.[51]

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43 AR Amar, "The Case of the Missing Amendments: *RAV v City of St Paul*" (1992) 106 *Harvard Law Review* 124.

44 See *ibid* at 154-5, noting the ordinance in question in *RAV v St Paul* 505 US 377 (1992) as interpreted according to First Amendment principles, and in particular, equally posed as much threat to the freedom of African-Americans as it did to the white bigot asserting his free speech rights. The dissenting judgment of Justice Black in Beauharnais sums up this argument: "If there be minority groups who hail this holding as their victory, they might consider the possible relevancy of this ancient remark: 'Another such victory and I am undone.'"

45 M Matsuda, note 17 *supra* at 2357.

46 *Ibid* at 2359.

47 Note 16 *supra*, p 12.

48 T Massaro, note 17 *supra* at 237.

49 Note 16 *supra*, p 12.

50 See W Sadurski, "Offending with Impunity: Racial Vilification and Freedom of Speech" (1992) 14 *Sydney Law Review* 163 at 191.

51 C Sunstein, "Word, Caste, Conduct" (1993) 60 *University of Chicago Law Review* 795 at 814.

However, as Sadurski[52] and Massaro[53] have so forcefully argued, acknowledging the harm caused by group libel is one thing - deciding that it tips the scales in favour of regulation is quite another. The real chink in the armour of the civil rights theory, as applied to hate speech directed at groups, is that the theory fails to show that the harm which flows from such speech - the epitome of political speech - outweighs the harm of suppressing it. The theory is unconvincing in its attempts to trounce the strongest rationale which the liberals put forward for protecting speech: that free public discourse is essential to democratic self-governance.

V. DEMOCRATIC SELF-GOVERNMENT - THE STRONGEST RATIONALE FOR PROTECTING GROUP VILIFICATION

What is it about the democratic process that justifies subjecting speech to a closer than usual scrutiny?[54]

In answering this question, it is necessary to say something about the meaning of the term 'democracy'. Schauer discusses the 'paradox' of the argument for a free speech principle emerging from democracy. If the people, collectively, are sovereign, then surely they have the power to restrict liberty of speech.[55] Post, on the other hand, approaches the question by distinguishing between 'autonomy', a system of government whereby laws are made by the same people to whom they apply, and 'heteronomy'; a system whereby the lawmakers are different from those to whom the laws are addressed.[56] If by democracy, autonomy or self-determination is meant, then government restrictions on speech become much harder to justify. Borrowing from Kelsen, Post writes:

> The will of the community, in a democracy, is always created through a running discussion between majority and minority, through free consideration of the arguments for and against a certain regulation of the subject matter... A democracy without public opinion is a contradiction in terms.[57]

On this analysis, self-determination can only be achieved by ensuring that the channels of public discussion are kept open.

Sadurski, in his explanation of the self-government rationale for protecting public discourse, focuses on footnote 4 in the *Carolene Products* decision, in particular the second paragraph which held that legislation could be subject to more exacting judicial scrutiny when it "restricts normal democratic processes by interfering for instance, with freedom of the press" or, presumably, freedom of speech generally.[58] So, like Post, who argues that discourse relating to group identity must be kept open in order to prevent the law from hegemonically

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52 W Sadurski, note 50 *supra*.

53 T Massaro, note 17 *supra*.

54 Note 50 *supra* at 178.

55 Note 11 *supra*, p 40.

56 Note 36 *supra* at 280.

57 *Ibid* at 281, quoting from H Kelsen, *General Theory of Law and State* (A Wedburg translation, 1961) pp 287-8.

58 Note 50 *supra* at 177-8. See also *United States v Carolene Products* 304 US 144 at 152, n 4.

imposing the perspective of only some members of the group,[59] Sadurski states that:

> legislative restrictions upon freedom of speech, even if properly expressing current societal preferences, contain a high risk of distortion of preference-formation and preference-expression in the future.[60]

Restrictions on speech distort not only the process of democracy, but the input of the process:

> [L]awmakers obtain a distorted picture about the actual distribution of various preferences...restrictions on public concern speech pose a higher risk for the overall democratic process than many other restrictions do.[61]

On the question of what speech falls within this category of political or public speech and what speech falls outside it - a question the High Court will increasingly be called upon to answer - Sadurski offers no definition. He suggests, however, that speech offensive to groups - speech which, although distasteful and often vicious, is nevertheless "meant to express an idea about the nature of society in the future" - would certainly seem to fit the category.[62] As Sunstein has argued, "[m]uch racist speech belongs at the free speech core because it is a self-conscious contribution to social deliberation about political issues".[63] "[It] is often part and parcel of the debate on public issues."[64]

However, what of the argument put by some of the civil rights theorists, including Matsuda, that race speech is best treated as a sui generis category;[65] that the pretence of neutrality is discarded and the particular, undeniable harm caused by hate speech be acknowledged? This argument contends that people know from their collective historical knowledge, that slavery, the Holocaust and apartheid are wrong.[66] International condemnation of racism, as evidenced in human rights treaties and covenants, would seem to support such a view.[67] Once again, the argument is compelling, particularly in the light of Matsuda's powerful narrative on the harms of race hate speech. However, quite apart from the practical problems of deciding which racial groups were deserving of this protection[68] and which were not, any attempt to carve out of free public discourse an exception for racial vilification would be highly politically questionable. As Sadurski illustrates, attempts so far to distinguish between sensibility harms which warrant protection against group vilification and those which do not have been largely unsuccessful.[69] He discusses the communitarian approach to the problem - an appeal to distinguish between 'instrumental' and 'constitutive' communities and to protect from

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59 Note 36 *supra* at 296.
60 Note 50 *supra* at 178.
61 *Ibid* at 179.
62 *Ibid.*
63 Note 51 *supra* at 796.
64 *Ibid* at 813.
65 M Matsuda, note 17 *supra* at 2357.
66 *Ibid* at 2359.
67 See, for example, International Covenant on Civil and Political Rights, Article 20(2); Convention on the Elimination of All Terms of Racial Discrimination, Article 4.
68 See M Matsuda, note 17 *supra* at 2363 for discussion of the problems associated with hate speech directed at one subordinated group by another. Consider also the question of deciding who is subordinated. What criteria should apply?
69 Note 50 *supra* at 188-9.

vilification only the latter - but concludes that the line drawing exercise in such an approach, far from being clear and neutral, is in fact based on a distinction "between those communities of which we approve, and those of which we do not".[70] A more honest approach, according to Sadurski, would be to abandon this rather meaningless distinction between "mere offensiveness" and "offensiveness that directly implicates ones own identity", and accept that "the severity of sensibility harm is in the eyes of the beholder".[71] All sensibility harm is therefore recognised by the law, but since discourse about groups is public or political speech, "in order to win legal protection, a claim for group vilification must pass strict scrutiny of the speech-harm relationship".[72]

VI. THE ACCOMMODATIONIST APPROACH TO RACE HATE SPEECH

Increasing dissatisfaction with the strict liberal approach to the hate speech question has spawned an emerging 'accommodationist'[73] theory on the question of racial vilification laws. Such theorists accept and acknowledge the real harm caused by race hate speech and other identity-implicating insults and would allow regulation of hate speech targeted at individuals in a face-to-face encounter. They draw the line, however, at regulation of group libel.

A leading accommodationist proposal is that drafted by Grey for Stanford University.[74] The policy would regulate speech or expression that:

(a) is intended to insult or stigmatize individuals or a small number of individuals on the basis of protected characteristics;[75]
(b) is addressed directly to those insulted or stigmatized; and
(c) makes use of insulting or 'fighting' words, defined as words which, by their very utterance, inflict injury or tend to incite an immediate breach of the peace.[76]

Sadurski proposes a similar approach to the hate speech question. Influenced by Strossen's campus hate speech proposal,[77] he would allow regulation of verbal assaults: motivated by racial (or other group based) hatred; in face-to-face situations; where the victim has little or no opportunity to avoid the assault; and where the point of such a 'message' is not to persuade anyone to the speaker's view about the group depicted in the statement.[78]

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70 *Ibid.*
71 *Ibid* at 190.
72 *Ibid.*
73 T Massaro, note 17 *supra.*
74 *Ibid* at 252, quoting from T Grey, "Responding to Abusive Speech on Campus: A Model Statute" (1990) *Reconstruction* 50. Stanford University, being a private university, is not bound by the First Amendment, but the drafters of this speech code have been influenced by First Amendment jurisprudence and have attempted to work closely within its limits.
75 These include sex, race, colour, handicap, religion, sexual orientation, or national and ethnic origin.
76 *Ibid.*
77 N Strossen, "Regulating Racist Speech on Campus: A Modest Proposal?" (1990) *Duke Law Journal* 484 at 524.
78 Note 41 *supra* at 88.

The immediate aim of speech regulated by such proposals is to intimidate or provoke the victim, rather than to communicate public message as to the speaker's opinion of the group to which the victim belongs.[79] Far from having a right to be protected from the knowledge that others have a low opinion of us, or the group to which we belong, Sadurski suggests that we are entitled to know that some people hate our race, religion, or sexual orientation. "The government suppression of hate speech deprives us of this important, if distressing, knowledge."[80] People do, however, have a right to be protected from assaults which provoke them to fight or are intimidating. Furthermore, vilification directed at individuals personally, in a face-to-face confrontation, should be analogised to assaults rather than to communicative statements.[81]

Sadurski's proposal is both narrower and wider than Strossen's. It is narrower in the sense that he requires that the speech be addressed to an individual unable to avoid the message; a requirement intended to avoid an overly expansive interpretation of regulable speech by shifting the burden onto the audience to take all reasonable steps to avert its attention from unwanted messages.[82] However, Sadurski, free of the constraints imposed by First Amendment jurisprudence, endorses a more expansive approach than Strossen and Grey to the characterisation of the sort of utterance which can be regulated. While the two American writers have obviously tailored their proposals to bring them within the USA's Supreme Court's 'fighting words' doctrine,[83] Sadurski argues that a personal face to face assault which otherwise satisfies the 'fighting words' doctrine should be liable to suppression if it has a tendency to frighten or intimidate.[84] The requirement in the fighting words doctrine of a clear and present danger of reactive violence "privileges those who tend to respond to offences in a 'macho' manner, and disregards the interests in tranquillity of those groups where the average recipients tend to abstain from any counter attack".[85]

The arguments of the 'accommodationists' are the most convincing attempt to address the very real problem of confronting racism in a pluralistic society committed to democratic self governance. The Sadurski proposal - free of the shackles imposed by the fighting words doctrine - would seem best suited for a country like Australia which is free to develop its own fine tuning of the free speech principle. By definition, the NSW and proposed Federal racial vilification laws, which focus not on individual victims of hate speech, but rather the

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79 *Ibid.*

80 *Ibid.*

81 *Ibid.*

82 *Ibid.*

83 This doctrine, as re-stated in *Cohen v California* 403 US 15 (1971) requires a verbal attack, directed at a particular individual, in a face-to-face confrontation that presents a clear and present danger of a violent physical reaction.

84 Note 41 *supra* at 89.

85 *Ibid*, quoting from K Greenwalt, "Insults and Epithets: Are They Protected Speech?" (1990) 42 *Rutgers Law Review* 287. As K Mahoney points out (note 16 *supra*, p 15) the clear and present danger test, like the self defence doctrine, is very much a male norm: "It is highly unlikely that women victims of hate propaganda would ever be provoked to physical violence because of it."

likelihood that a third party will be persuaded to share the speaker's view of the victim or victim group, would fall outside the accommodationist proposal.[86]

VII. ASSUMING SUCH AN ACCOMMODATIONIST APPROACH TO RACIAL VILIFICATION WAS CONSIDERED APPROPRIATE FOR AUSTRALIA, SHOULD THE LAW BE DRAFTED SO AS TO SUPPRESS SPEECH DIRECTED ONLY AT MINORITIES?

This question is not one which turns on an understanding of freedom of speech, but it is nevertheless an important question for any government proposing to legislate to prohibit vilification. Civil rights theory and its focus on substantive rather than merely procedural equality favours a 'one-way' vilification law. The main argument advanced is that the harm of race hate speech can only be understood in a social context; that of a history of domination and oppression.[87] The epithets "you black bastard" and "white trash", it is argued, convey messages which not only differ greatly in the degree of harm they inflict on their victims[88] but are in fact quite different in meaning.[89] The one-way argument is attractive - after all, as Sadurski has noted:

> what does the wounding is the fact that some words come in a package recognisable both by the speakers and the hearers as conveying contempt, hostility and domination.[90]

In practice, however, the proposal raises problems. The first, as Massaro has suggested, is the likely public response to an anti-vilification law which seems, on its face, to favour one sector of society over another. Massaro quotes one of her students:

> There is no way, in the high school I attended, that the students would accept a rule that said blacks could call the white's racist names, but the whites could not call the blacks racist names. The students would laugh in your face, or worse.[91]

Secondly, Massaro suggests that a one-way law might collide with American constitutional principles.[92] In this regard, it is arguable that such a law might offend the "doctrine of legal equality" which Justices Deane and Toohey held to be an unstated principle of our Federal Constitution in *Leeth v Commonwealth*.[93] A final objection is the difficulty of determining exactly who is oppressed and who

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86 See, however, the proposed amendment to *Racial Discrimination Act* 1975 (Cth), s 18C(1), creating a civil offence of offensive, insulting, humiliating, or intimidating behavior on the grounds of race. To the extent that this provision was directed to speech aimed directly at individuals rather than groups, it would seem to come within the accommodationist approach. Query, however, whether speech likely to merely offend or insult is speech which should be categorised as a 'verbal assault'.

87 M Matsuda, note 17 *supra* at 2362.

88 The Matsuda argument in *ibid.*

89 The Sadurski argument in note 41 *supra* at 91.

90 *Ibid.* The key word, of course, is domination. Hate speech aimed at the dominant majority will usually convey both contempt and hostility - what is missing is the message of domination.

91 T Massaro, note 17 *supra* at 215.

92 *Ibid*, referring to *Loving v Virginia* 338 US 1 (1967) in which Justice Stewart held: "[I]t is simply not possible for a state law to be valid under our constitution which makes the criminality of an act depend upon the race of an actor."

93 (1992) 174 CLR 455 at 483-7.

is not. In particular, when the speech is directed at one minority by another, what criteria should apply? It would seem that the best approach would be that of the Stanford proposal - a law drafted in terms which allows for speech at any racial group to be regulable. The practical reality, as both Massaro[94] and Sadurski[95] note is that the severity and harm of the epithet will be defined in its social context, with the result that in practice, the law will generally only be available against the dominant group.

VIII. CONCLUSION

Race hate speech - without doubt - poses one of the most intractable problems for free speech theory; but perhaps part of the problem to date has been that the argument has been framed in a way which precludes resolution. The traditional liberal denial of the harm caused by this speech has not only detracted from the persuasiveness of the liberal theory; it has also meant that liberals and civil rights theorists have been arguing within a completely different framework. The attraction of the 'accommodationist' argument is its willingness to acknowledge the harm caused by race hate speech, along with all other identity implicating insults. Racial vilification is more than just offensive, it is psychologically wounding; often deeply so. However, when the vilification is aimed at groups, its protection would deny not only individual members of the group knowledge about how they were regarded, it would - more importantly - interfere unacceptably with the on-going process of self-government.

94 T Massaro, note 17 *supra* at 257.

95 Note 41 *supra* at 91.