

FREEDOM OF SPEECH: DO WE KNOW WHAT WE ARE TALKING ABOUT?

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I ABSTRACT

Laws regulating racial vilification, such as those in Part IIA of the *Racial Discrimination Act 1975* (Cth) (RDA), are often attacked on the ground that they limit ‘freedom of speech’. Rarely, however, do those who criticise such laws clearly define what they mean by ‘freedom of speech’. Nor do they explain why this freedom is more important than protecting vulnerable minorities from the serious harms of racist hate speech. This article examines the underlying purposes for racial vilification laws, and also the philosophical basis for freedom of speech. Ultimately, it concludes that racial vilification laws are in fact supported by arguments commonly made in favour of freedom of speech.

II INTRODUCTION

Racial vilification laws, such as those in the RDA,¹ are often said to be contrary to ‘freedom of speech’.² Rarely, however, do critics of these laws articulate exactly what they mean by freedom of speech, or why it is important. This article examines three arguments commonly made in support of free speech. These can be described as arguments based on democracy, personal and interpersonal arguments, and arguments based on the value of inquiry. This article also examines the important purposes served by racial vilification laws, and particularly, the nature of the harms caused by racist hate speech³ – the harms which these laws seek to minimise or prevent. This article argues that, when the scope and nature of freedom of speech, and the purposes of racial vilification laws are both properly understood, it is evident that such laws are not inconsistent with freedom of speech, but that they are in fact justified and necessary in a modern multicultural democracy such as Australia.

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1 See s 18C of the RDA, which renders certain racially vilifying conduct to be ‘unlawful’. See also s 18 D of the RDA, which exempts certain conduct from s 18C. As will be explained, this article takes a philosophical approach to the issues of free speech and hate speech laws. It therefore does not examine the jurisprudence around the Australian provisions in the form of the RDA.

2 The term ‘freedom of speech’ comes from the text of the First Amendment to the United States Constitution. Internationally, the more common term is ‘freedom of expression’. No distinction is made between these concepts in this article. For the sake of brevity, ‘freedom of speech’ is referred to in this article simply as ‘free speech’.

3 The term ‘hate speech’ is commonly used in the United States to refer to what are known as vilification laws in other countries: see Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012). This article focuses on *racial* vilification, although many jurisdictions also regulate vilification on other grounds.

III THE PURPOSE AND NATURE OF RACIAL VILIFICATION LAWS

Most democratic countries, including Australia, have laws regulating racial vilification. The particular standard of conduct captured by such laws varies from jurisdiction to jurisdiction,⁴ reflecting local concerns and conditions regarding this particular type of hate speech.⁵ The particular methods used to enforce these standards also varies, with a combination of civil provisions and criminal sanctions being a common approach. Rather than examining the specific terms of a particular legislative framework, this article will instead outline the general nature and purpose of racial vilification laws. This broader approach enables proper consideration of the most powerful arguments made against such laws – that they are contrary to ‘freedom of speech’.⁶

In general terms, racial vilification laws regulate conduct which encourages or promotes certain attitudes or feelings towards a person or group of people, based on the person or group’s race, colour or ethnic origin.⁷ The promotion of ‘hatred’ is one standard used; however, the type or intensity of the attitudes or feelings that must be promoted to attract legal regulatory sanctions, varies considerably between jurisdictions.

The purposes of racial vilification laws are directly linked to the harms which such laws seek to prevent. As will be outlined later in this article, racial vilification can cause serious and enduring psychological harm to the individuals and groups that it targets.⁸ It also promotes racist attitudes in the community, which can lead to acts of discrimination, prejudice and violence against people of certain races.⁹ In this way, racial vilification undermines the tolerance and acceptance of racial and ethnic diversity which underlies a democratic, multicultural society.¹⁰ Although freedom of speech is often presented as an important individual right, racial vilification laws also promote core liberal values; they protect the dignity or equal standing of all members of society, and, in particular, members of vulnerable minorities.¹¹

IV FREEDOM OF SPEECH: CONTESTED AND AMBIGUOUS

Although freedom of speech is often invoked against racial vilification laws,¹² it is in fact a ‘highly contested’ concept in several significant respects.¹³ In particular, the existence and scope of exceptions to the principle, are hotly debated. More fundamentally, however, there is disagreement on whether free speech is merely a restriction on government action, or whether it is also a justification for certain positive action by government. Traditionally, free speech was

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- 4 See Sandra Coliver (ed) *Striking a Balance: Hate Speech, Freedom of Expression and Non-Discrimination* (Article 19, International Centre Against Censorship, Human Rights Centre, University of Essex, 1992) for a survey of such laws.
 - 5 See Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Institute of Criminology Sydney, 2002) 14-5, 22, as to the need for racial vilification laws to reflect local concerns and conditions.
 - 6 A philosophical approach to the analysis of free speech issues is commonly adopted in the relevant literature: see Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge University Press, 1982).
 - 7 See Coliver, above n 4.
 - 8 Richard Delgado and Jean Stefancic, ‘Four Observations about Hate Speech’ (2009) 44 *Wake Forest Law Review* 353.
 - 9 McNamara, above n 5, 22-3.
 - 10 Ibid, 18-20.
 - 11 Waldron, above n 3.
 - 12 Freedom of speech is also invoked against other laws, such as sedition laws, and laws restricting access to pornography: see Eric Barendt, *Freedom of Speech* (Oxford University Press, 2005).
 - 13 Owen Fiss, *The Irony of Free Speech* (Harvard University Press, 1996).

regarded as merely a restriction on state power.¹⁴ This is based on the classic liberal assumption that individual freedoms are maximised by limiting state power over the actions of individuals. However, in modern societies, the harms caused by private speakers may be more serious than the dangers of a powerful state. Therefore, the state may have a legitimate role in regulating harmful conduct, such as racially vilifying speech.¹⁵ This article will now examine three types of arguments commonly made in favour of free speech, to determine whether racial vilification laws are in fact contrary to these arguments.

V POLITICAL ARGUMENTS FOR FREE SPEECH

Particularly in the American context, arguments have been made that free speech is essential to democracy or ‘self-government’. Free speech, meaning the absence of government restrictions on the dissemination and discussion of ideas and information by members of the public, is essential to voting and the notion that ultimate political power resides in the people, not their government.¹⁶

Although these arguments are often used to criticise racial vilification laws, on closer analysis, they may in fact justify regulation of certain types of speech. For example, if free speech is said to promote citizens’ ability to make ‘informed’ voting decisions,¹⁷ then it must be recognised that the actions of private individuals can also interfere with informed decision-making. State regulation may therefore be justified, in order to prevent certain voices from ‘drowning out’ others.¹⁸ This is particularly important if one accepts that free speech exists primarily for the benefit of the public,¹⁹ rather than for the benefit of individual speakers. Also, state regulation may be necessary to ensure that no one is effectively ‘silenced’, or excluded from participating in public debate.²⁰ Victims of racially vilifying speech are often too afraid to participate in public discussion of issues. Also, because vilifying speech denigrates their worth, the views of these people ‘lack authority’ in the eyes of other members of society.²¹

Contemporary opponents of racial vilification laws regard the coercive power of the state as the primary threat to individual liberty, particularly when the ‘censorship’ of particular speech is seen as the expression of majority opinion. Ronald Dworkin has popularised the view that racial vilification laws illegitimately silence individuals who are in fact protesting against race-based policies, such as affirmative action or anti-discrimination laws.²² In this way, Dworkin characterises *all* forms of racial vilification as contributions to political debate, which (he argues) cannot be suppressed in a democratic system of government. Undeniably, a main purpose of free speech is to ensure that government is responsive and accountable to the public.²³ However, not every vilifying statement can be regarded as a legitimate political contribution. Racial vilification laws are focused primarily on extreme forms of abuse.²⁴ As mentioned above, racially vilifying

14 Michael Chesterman, *Freedom of Speech in Australian Law: A Delicate Plant* (Aldershot Ashgate, 2000) 39-44.

15 Fiss, above n 13.

16 Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (The Law Exchange Ltd, 1948).

17 Ibid 25.

18 Fiss, above n 13, 17.

19 Meiklejohn argued that free speech exists so that every individual can receive and consider all information and opinions: see Meiklejohn, above n 16, 63, 77. This is a listener-oriented approach, rather than a speaker-oriented approach to free speech.

20 Fiss, above n 13, 15, 83.

21 Ibid 16.

22 Ronald Dworkin, Foreword, in Ivan Hare and James Weinstein (eds) *Extreme Speech and Democracy* (Oxford University Press, 2009).

23 See Barendt, above n 12.

24 Waldron, above n 3, 194.

statements can effectively exclude individuals and entire groups from public debate and from influencing political decision-making on issues which impact on their daily lives. Therefore, arguments based on democratic legitimacy may in fact justify state regulation of such speech.

VI PERSONAL ARGUMENTS FOR FREE SPEECH

A second set of arguments for free speech focus on the *personal* benefits of speech and communication. John Stuart Mill presented an early and powerful version of these arguments in his work *On Liberty*. Mill argued that the process of expressing ideas and opinions, and being exposed to the widest possible range of ideas and opinions, promotes the full development of an individual's personality.²⁵ Mill particularly focused on the interests of the general public in being able to receive ideas and opinions without restriction. He argued that restrictions on speech were not merely a 'private injury' to the speaker, but were contrary to the public interest in receiving the widest range of views on any given topic.²⁶

Specifically, Mill argued that individuals develop to their full potential by exposure to the opinions of 'wise...individuals',²⁷ such as Socrates, Galileo and Christ. By being exposed to 'the best men [sic] and the noblest doctrines',²⁸ ordinary individuals would themselves develop fully. Importantly, Mill did not argue for unrestricted speech on all matters. Because of his emphasis on human development, Mill was particularly concerned that discussion of the 'highest subjects',²⁹ the 'greatest questions'³⁰ and 'large and important'³¹ issues, not be restricted. Mill was not so much arguing for unrestricted speech, as he was seeking to prevent ignorance, mediocrity, and slavish acceptance of official dogma and 'received opinion'.³² Mill's arguments were based on a particular historical narrative; he pointed to several instances where the wisest people – to whom society *should* listen – were persecuted, and their views suppressed, to the great detriment of society.³³ Mill emphasised the important role of critics of 'received opinion', who publicly challenge orthodox views and conventional modes of thought.³⁴ Mill thus drew a strong connection between individuals with dissenting views, and the benefit to society of not silencing these views. It should also be noted that Mill was not concerned exclusively (or even primarily) with the effect of laws and other forms of formal regulation on speech; he argued that public opinion 'is as efficacious as law' in silencing dissenting voices.³⁵ In fact, Mill emphasised the negative effects of social stigma on an individual's ability to communicate, and he argued strongly for public toleration of those with 'unconventional' views.

Mill drew a strong contrast between the situation of the lone dissenter, who was 'fearless', 'unconventional' and 'courageous', and the ordinary public, which consisted of 'many foolish individuals'.³⁶ He argued that members of the public, due to their fear and ignorance, were often

25 John Stuart Mill, *On Liberty*, in Alan Ryan (ed), *Mill: Texts, Commentaries* (W W Norton, revised ed, 1997) 43. Katharine Gelber also emphasises the developmental importance of speech and communication: see Katharine Gelber, *Speaking Back: The Free Speech versus Hate Speech Debate* (John Benjamins Publishing Company, 2002).

26 Ibid, 53.

27 Ibid, 59.

28 Ibid.

29 Ibid, 66.

30 Ibid, 67.

31 Ibid.

32 Ibid, 79.

33 Ibid, 62-3.

34 Ibid, 59.

35 Ibid, 65

36 Ibid, 56.

and easily driven to persecute the few wise individuals, and that ‘truth would lose something by their silence’.³⁷ The relationship between ordinary members of the public, on the one hand, and gifted individuals, on the other, was one of the main pillars of Mill’s conception of free speech.

In emphasising the benefits of free speech, Mill barely acknowledged the harms which speech can cause. Mill seemed to assume that the only or main harm, was the *restriction* of speech (whether by laws, or by public opinion), which he described negatively as ‘censoring’ or ‘suppression’. In his writing, Mill referred repeatedly to speech as ‘opinions’; this emphasised the positive role of speech in the dissemination of ideas. However, proper recognition of the harms caused by certain speech acts, is central to proper consideration of the merits of regulating racial vilification.³⁸

Contemporary opponents of racial vilification laws base their arguments on concepts such as human dignity and the importance of preserving individual autonomy. Thomas Scanlon, for example, argues that individuals must be treated as ‘sovereign in deciding what to believe and in weighing competing reasons for action’.³⁹ He regards it as an interference with a person’s autonomy for the state to determine which ideas and information are dangerous, or even false. These judgements, he argues, should be made by individuals, rather than by the state.⁴⁰ Thomas Nagel also argues that the state must ‘trust’ individuals to make up their own minds – and that racial vilification laws do not do this.⁴¹

The arguments presented by Scanlon and Nagel are persuasive, insofar as they affirm that individual autonomy and dignity are important human values. However, a person’s ability to make decisions regarding their own life can be limited by factors other than by state regulation. As will be outlined shortly, racially vilifying speech may limit the choices and opportunities available to the people at whom it is directed. Preserving the dignity and the autonomy of the victims of hate speech, may justify state regulation of such speech.

VII CONSIDERING THE HARMS OF HATE SPEECH

The serious and long-lasting harms caused by hate speech have been documented by prominent critical race theorist Richard Delgado. Delgado argues that hate speech can cause immediate and long-lasting psychological and physical harm to its individual victims.⁴² He emphasises that racial insults concern an ‘unchangeable personal characteristic’, and one which is central to the person’s identity and sense of worth.⁴³ He argues that the effect of individual incidents of hate speech must be viewed in light of the ‘entire history of discrimination and violence’ experienced by that particular group.⁴⁴ Delgado emphasises that the victims of hate speech are often the ‘least powerful’ and most vulnerable members of society.⁴⁵ Often, this is due to the historical treatment of the particular racial group including, for example, slavery, segregation, genocide and other forms of oppressive and dehumanising treatment.⁴⁶ Delgado argues that speech by which particular races are ‘demonised, marginalised, stereotyped, reviled and excluded’ often

37 Ibid, 78.

38 Waldron, above n 3.

39 Thomas Scanlon, ‘A Theory of Freedom of Expression (1972) 2 *Philosophy and Public Affairs* 204. See Sarah Sorial, ‘Free Speech, Autonomy and the Marketplace of Ideas’ (2010) 42 (2) *Journal of Value Inquiry* 167, for a critique of Scanlon’s arguments.

40 Ibid, 217-8.

41 Thomas Nagel, ‘Personal Rights and Public Space’, (1995) 24 (2) *Philosophy and Public Affairs*.

42 Richard Delgado and Jean Stefancic, *Understanding Words That Wound* (Westview Press, 2004), 12.

43 Ibid, 5, 16.

44 Ibid, 16.

45 Ibid, 35, 39.

46 Ibid, 23, 39, 50, 176.

lays the groundwork for other forms of dehumanising treatment. Racial vilification stigmatises entire groups of people, and it reinforces and normalises their inferior status.⁴⁷ Such speech is used by dominant groups to maintain power and control over members of less powerful groups. On a personal level, hate speech causes individual victims to suffer stress and anxiety, and to perform poorly in, and to avoid, situations, such as school, university, or the workplace, where they are likely to experience further abuse.⁴⁸

VIII FREE SPEECH AND THE VALUE OF INQUIRY

A final set of arguments for free speech concern the importance of preserving an open ‘marketplace of ideas’.⁴⁹ According to these arguments, ideas and opinions must compete with each other and be ‘tested’ by public debate and discussion. A major thrust of this argument is that the state must remain ‘neutral’ in relation to public debates, by not favouring or suppressing any idea or opinion.⁵⁰ On this view, any regulation of speech potentially jeopardises state neutrality and risks ‘distorting’ debates from the course they would otherwise take.

John Stuart Mill championed the concept of a marketplace of ideas, particularly in *On Liberty*.⁵¹ Public competition between ideas was the means, according to Mill, by which individuals could reach their full intellectual and moral potential. Mill’s arguments were based on *laissez faire* economic principles, which emphasise the benefits of ‘free’ (or unregulated) competition in a marketplace. According to these theories, unregulated competition results in the best outcomes for all involved. On the other hand, government intervention in the marketplace is said to result in inefficiencies and artificial ‘distortions’. Mill’s arguments were based on methods of scientific inquiry which were emerging at the time of his writing. Mill was extremely sceptical of ‘received opinion’ (or currently dominant ideas), and he argued that all ideas should be continually tested, to see whether they are justified by logical reasoning and empirical evidence. He argued that moral and intellectual progress was achieved, at an individual and a societal level, by open discussion and debate. Mill argued that false ideas were exposed and rejected through discussion, rather than through persecuting people who express ‘dissenting’ or ‘unpopular’ views.⁵² As mentioned above, Mill referred to progressive thinkers, such as Socrates, Galileo and Christ, who were persecuted for their unorthodox views.⁵³ Mill highlighted the dangers of powerful institutions, such as (in the time when he was writing) the established church, which persecuted individuals whose ideas and opinions challenged its authority.

Although Mill’s arguments have wide popular appeal, they have a number of flaws. The economic principles on which Mill’s ‘marketplace of ideas’ is based have long been rejected in developed democracies. Governments regularly intervene in the economic marketplace, in order, for example, to protect consumers from deceptive marketing and other abuses of market power. Due to the common occurrence of ‘market failures’, the state often intervenes in order to protect the interests of vulnerable parties.⁵⁴

47 Ibid, 221.

48 Ibid, 14-6, 112.

49 The ‘marketplace of ideas’ analogy is usually attributed to Justice Holmes, and particularly his dissent in *Abrams v United States* 250 U.S. 616 (1919).

50 Waldron, above n 3.

51 Mill, above n 25.

52 Ibid.

53 Ibid.

54 Paul Brietze, ‘How and Why the Marketplace of Ideas Fails’ (1997) 31 (3) *Valparaiso University Law Review* 951, 961.

Mill also assumed that citizens can and will decide rationally and logically as between various publically available ideas and opinions. However, in modern society, a small number of powerful and self-interested voices often dominates debate on particular topics.⁵⁵ The existence of entrenched inequality in society means that the harms of unregulated competition are likely to be suffered by members of society who are already disadvantaged and marginalised.⁵⁶ Unregulated competition will therefore compound their disadvantaged status. In these circumstances, the state may legitimately intervene – as it does in the economic market – in order to protect vulnerable members of society, such as racial minorities. Also, the utility of on-going debate on certain topics is open to question. In relation to racial vilification, for example, the state has a legitimate interest in restricting the promotion of the view that certain races are superior to others. Scientifically speaking, this debate is over: there is no evidence supporting theories of racial superiority or inferiority.⁵⁷ Furthermore, the harms caused by promoting such views, including the serious harms to individuals and to social cohesion in a multicultural society, justify restricting such speech.

IX CONCLUSION

This article argues that free speech protects and promotes a range of important values and interests. First, it promotes political values, such as facilitating the formation of informed opinions and full participation in public decision-making, which are necessary for democratic self-government. Second, it promotes personal values, such as enabling self-expression and the full development of the human personality. Finally, free speech promotes the value of inquiry, which facilitates individual and social progress. Each of these arguments justify certain restrictions on government regulation of speech. However, each of these arguments also supports regulation of certain speech acts, in some circumstances.

Some scholars argue that free speech is an absolute right with no exceptions.⁵⁸ However, many forms of speech, such as defamatory speech, seditious speech and verbal sexual harassment, are currently regulated, and, in many cases, this regulation is uncontroversial.⁵⁹ The more accepted position is that speech can be regulated when it causes harm to other people.⁶⁰ It is sometimes stated that the harms caused by hate speech are trivial and merely ‘upset feelings’. However, as this article has shown, the harms caused by racial vilification, particularly to its direct victims, are serious and long-lasting. These harms are socially and politically significant, because the victims of hate speech are often highly disadvantaged and marginalised members of society.

In light of the clear recognition of the harms of hate speech, the arguments commonly made *against* regulation of such speech lose much of their force. In fact, these arguments may support regulation of racial vilification. This is because allowing racially vilifying speech is contrary to enabling all citizens to fully participate in political discussion and decision-making, as it prevents the full development of an individual’s personality, and because it does not contribute to forms of inquiry which promote social progress.

55 Stanley Ingber, ‘The Marketplace of Ideas: A Legitimizing Myth’ (1984) 1 *Duke Law Journal* 1.

56 *Ibid.*

57 Waldron, above n 3.

58 C Edwin Baker, ‘Harm, Liberty and Free Speech’ (1996-7) 70 *California Law Review* 979.

59 See Barendt, above n 12.

60 See Mill, above n 25.