Empowering Victims of Racial Hatred by Outlawing Spirit-Murder

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Patricia Williams, writing of her own experience of racism in America, told the following story. Just before Christmas she went shopping, and saw in a shop window a sweater that she thought would make a good present for her mother. There were plenty of customers in the shop, so she rang the buzzer to be allowed in to make her purchase. Buzzers have been installed in many stores to allow the owner to keep out petty criminals — by which is meant black youths wearing sneakers and hooded sweatshirts. A seventeen year old white youth looked her up and down, mouthed "We're closed", then blew bubble gum at her. In the wake of her outrage, Williams came to understand that her exclusion was based on extreme racial stereotyping — that all blacks are dangerous criminals. And, because whites fear for their safety in the presence of blacks, it becomes 'reasonable' to endanger the lives as well as the rights of blacks. The process of reasoning which allows fundamental disregard for others, or spirit-murder, uses the weapon of words to dehumanise outsiders.[1]

Mari Matsuda, a Japanese-American law professor, wrote about arriving in an Australian city and finding a proliferation of posters stating "Asians Out or Racial War" affixed to telegraph poles. Whenever she spoke with clerks or taxidrivers she used her "best, educated inflection", but decided it was safer not to complain when she was overcharged.[2]

The stories of these women are not unique. In their experience of racism, the stories reach out to the reality of many Australians. Muslim women recount stories of having their *hijabs* pulled off in the street, being spat at, and being the subject of verbal abuse. The *National Inquiry into Racist Violence*[3] reported the case of one elderly Melbourne woman who was attacked by an unprovoked Anglo-Australian woman, who ripped off her *hijab* while yelling "Go home you fucking bitch".[4]

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1 P Williams 'Spirit-Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism' (1987) 42 *University of Miami Law Review* 127.

2 M Matsuda 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320, at 2320.

3 Human Rights and Equal Opportunity Commission (HREOC) *Report of the National Inquiry into Racist Violence* AGPS 1991 (NIRV).

4 HREOC n 3, 146

When an electronic media news unit arrived at the scene where a man had gone berserk in a shopping mall, stabbing and shooting six people at random, the police told reporters that "this Lebanese bloke just went berserk and killed 6 people". The news item that went to air that night stated the ethnic identity of the assailant, who had taken his own life at the scene of the incident. He was not Lebanese, but this did not affect the 'reality' of the stereotyping of Lebanese men as mad killers.[5]

A cartoon depicting Aboriginal men who were apparently stoned as a result of smoking rolled $50 notes was not considered worthy of reprimand by the Australian Press Council. Articles racially vilifying Aborigines are not uncommon in Australian print media, and racist words and racist violence directed at Aborigines is so consistent across Australia that the *National Inquiry Into Racist Violence* concluded that "the climate of racist violence against Aboriginal people permeates Australian social life".[6]

A Sydney University newspaper, *Honi Soit*, published a letter containing fabricated quotations from the *Talmud* (Jewish scriptures) which stated that Jews condone rape, cheating and violating three-year-old Gentile girls. The editors of the paper had not checked the authenticity of the letter before publication — they thought that antisemetism and holocaust denial were a legitimate part of academic debate.[7]

A seven year old Perth schoolboy was found by teachers cowering in tears under a portable classroom. Other students reported that he spent every play period that way, after having being subjected to constant taunts for his Asian origins. The boy's self-esteem was extremely low and his school performance poor. This incident was one of many reported after the regular appearance of inflammatory racist posters around Perth and Fremantle. The posters, part of a campaign to ensure a continuing level of racism directed at Asians, "coloureds" and Jews, were placed in large numbers in public places, particularly along school bus routes, and were replaced soon after being removed.[8] The statements contained in the posters included:

Asians Out Or Racial War
700,000 Unemployed 700,000 Asians Why More Asians?
Jews Are Ruining Your Life
No Asians
No Coloureds
White Revolution The Only Solution
Media Cover-Up Holocaust A Lie! Seek The Truth

5 Reported by Steve Mark, then the President of the New South Wales Anti-Discrimination Board, at *Conference on Legal Strategies for the Implementation of Human Rights*, conducted by the Human Rights Centre and the Public Interest Advocacy Centre November 1993.
6 J Earle 'Racist Violence: A Plethora of Proposals for Reform' (1991) 62 *Reform* 97, 98.
7 Reported in *Australian Jewish News* 3 November 1993, 15.
8 Law Reform Commission of Western Australia (WALRC) *Incitement To Racial Hatred* (1989) Project No 86 Issues Paper, ch 1.

The Law Reform Commission of Western Australia was told of jobless young people voicing the slogans of the posters and of incidents of verbal abuse and physically threatening behaviours which were most likely to have been engendered or emboldened by messages conveyed in the poster campaigns.[9]

The prevalence in Australia of racism and other expressions of hatred[10] is well documented. The findings of the *Royal Commission into Black Deaths in Custody*,[11] of Human Rights and Equal Opportunity Commission's *National Inquiry into Racist Violence*, and of the Australian Law Reform Commission's Report on *Multiculturalism and the Law*[12] are well known. We are familiar, too, with evidence about the racism of the police — particularly since *Cop it Sweet*[13] and through instances of unprovoked police violence directed at non-Anglo Australians such as those recently investigated by the NSW Ombudsman.[14] The full spectrum of racist behaviour is directed at Australians. At one end of this scale is the telling of racist jokes — the sort which stereotypes people on the basis of their ethnicity, and portrays all members of a particular group as "dirty", "stupid", "money-grabbing", "lazy" — in any other words as simply *inferior.* Often this sort of racism is thought of as *innocent,* as *private,* as *trivial.* At the other extreme is the perpetration of actual violence - against people or against property — which is motivated by *hate.* In between there is *discrimination* in the allocation of work, services, educational opportunities etc, and also the less obvious discrimination such as that to which members of a schoolboys rugby team was subjected when a list of names circulated to find billets asterisked all those of Aboriginal descent to cater for the inherent racism of those who wished only to billet non-Aboriginal Australians. There is also the propagation of hatred — via literature, drama, religion, pamphlets, or political campaigns — and there is the constant harassment of individuals — name calling, verbal abuse, intimidation — harassment that results in people being afraid to leave their homes, or to walk certain streets or to eat in particular restaurants.

Over the last 20 years there have been various proposals for the introduction of law to address the problem or racial hatred. While New South Wales, Western Australia, Queensland and the ACT have enacted laws which deal with racial vilification, the other States and Territories do not offer the aid of the law to victims

9 WALRC n 8, 6.

10 The paradigm case for vilification is racist speech, but in NSW at least, legislation also includes vilification on the basis of 'ethno-religious' background, homosexuality and HIV/AIDS status, and there is some discussion of including sexual vilification. Some feminists have also suggested that pornography is a type of vilification: see eg C MacKinnon 'Pornography as Defamation and Discrimination' (1993) 71 *Boston Law Review* 793, 804.

11 Australia *Royal Commission into Black Deaths in Custody* (1992) (Conducted by Elliot Johnson) AGPS.

12 Australian Law Reform Commission *Multiculturalism and the Law* (1992) ALRC 57 AGPS.

13 ABC TV March 1992. See also J Chan 'Final Report to the NSW Police Service: Policing in a Multicultural Society — A Study of NSW Police' (August 1992).

14 NSW Office of Ombudsman *Report on Allegations of Police Bias Against Asian Students* Special Report to Parliament (25 June 1993). See also the *Ninth Periodic Report to the Committee on the Elimination of Racial Discrimination.*

of racism.[15] At a Commonwealth level, legislation was first proposed in the original Racial Discrimination Bill 1973, in which clauses 28 and 29 created the offences of 'incitement to racial disharmony' and 'dissemination of ideas based on racial superiority or hatred'. The first of these was omitted from the 1974 Bill, and neither clause was contained in the 1975 Bill which became law. In December 1992 the Federal Government again introduced into parliament legislation to make racial vilification unlawful and to create a criminal offence of inciting racial hatred. Time was allowed for public comment on the Bill, and the Bill was allowed to lapse. In November 1994, legislation to outlaw racial hatred is once again before Parliament.

This paper will assess the proposal for racial vilification law from the perspective of the victim. The victim is not interested in abstract theory nor philosophical meanderings. The victim is not concerned with applications of neutral principles nor with timeless norms. The victim bases her analysis on harsh reality: the concrete current and historical experience of oppression, the exclusion, the reduced status, the effect of not being perceived as a person but as a derogatory stereotype.[16] From the perspective of victims of racism, law must be assessed on its ability to tackle the problem. And the problem of hate speech is a vexed one. Victims want the freedom to express their own identities, and in democratic multicultural Australia the protection of basic human rights such as freedom of speech are greatly valued. Proponents of racial vilification laws are fully versed in the complexities of the hate-speech dilemma.[17] However, it is argued here that by focussing on the rights and needs of victims, rather than on the rights and needs of perpetrators,[18] a resolution is possible. This analysis demonstrates that racial vilification laws are not only legitimate but are necessary.

Constitutional Complications

In Australia the debate is not automatically and unnaturally skewed in favour of the perpetrator by a formal Bill of Rights. We have no history of rugged individualism; we have no illusions as a society that government is a neutral umpire of a level playing field. We have always accepted the importance of government intervention — in provision of services and in the leadership on morals. Any Australian commitment to the principle of freedom of speech has always been conditional upon the acceptance of the regulation of a wide range of activities — from advertising, to sedition or defamation. This is not to say that freedom of speech and representative democracy are not central values. Rather,

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15 *Anti-Discrimination Act 1977* (NSW); *Criminal Code* (WA); *Anti-Discrimination Act 1992* (Qld); *Anti-Discrimination Act 1991* (ACT).

16 See M Mastuda n 2; A Freeman 'Anti-Discrimination Law: The View from 1989' in D Kairys (ed) *The Politics of Law* (1982) Pantheon Books.

17 T Massaro 'The Hate Speech Dilemma' (1991) 32 *William and Mary Law Review* 211; cf R Dworkin 'The Coming Battles over Free Speech' *New York Review of Books* (11 June 1992), 56.

18 See R Delgado 'The Imperial Scholar' (1984) 132 *University of Pennsylvania Law Review* 561, 570-571 on the dangers inherent in adopting a perpetrator perspective.

that freedom of speech is not thought of as absolute, and will not be extended to encompass unacceptable incursions on other rights.[19]

However, the High Court has changed the nature of the debate in some recent cases where it has found an implied guarantee of freedom of political speech and communication in the Constitution.[20] The question that therefore remains to be addressed is whether the implied freedom in the Constitution will be interpreted to protect victims of hatred or whether it will be used to invalidate laws which outlaw racist speech. When the High Court is called upon to adjudicate on the question of constitutional legality of racial vilification law, as there is no doubt it will be so called, it should take the opportunity to develop an Australian free speech doctrine, and not be constrained by First Amendment jurisprudence.[21] The Court is free to resist the pitfalls of the (flawed) liberal conception of freedom of speech, for the basis of the constitutional implication is the doctrine of Australian representative democracy as enshrined in the Commonwealth Constitution.[22] It is entirely consistent with the features of Australian representative democracy to outlaw racial hatred. Upholding racial vilification laws is also entirely consistent with the reasoning of the High Court in the free speech cases.

It seems racist speech would most likely be encompassed under the umbrella of freedom of communication.[23] Mason CJ, Toohey, Gaudron and Deane JJ adopt

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19 H Wright analyses Australian reports concerning racism and racist speech and concludes that they all reflect the belief that freedom of speech is "just one of the values the law protects in a democratic society": per ALRC *Multiculturalism and the Law* n 19, para 7.44. He argues that the NSW reports indicate an even greater lack of concern for freedom of speech than the Commonwealth reports. 'Anti-Vilification Laws and Freedom of Speech in Austalia: Legislation of Political Correctness?' (1994) Political Science Honours Thesis.

20 *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 68; 177 CLR 1 (*Nationwide*); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106 (*ACTV*); *Stephens v West Australian Newspapers Ltd* (unreported, High Court, 12 October 1994; FC 94/040) (*Stephens*); *Theophanous v The Herald & Weekly Times* (unreported, High Court, 12 October 1994), (*Theophanous*); *Cunliffe v Commonwealth* (unreported, High Court, 12 October 1994, FC 94/039 (*Cunliffe*).

21 Most members of the High Court go to great lengths to distinguish the emerging Australian doctrine of freedom of political communication and discussion from rights to freedom of speech contained in the US and other Bills of Rights: in particular see *Theophanous* Mason CJ, Toohey & Gaudron JJ at 9; Brennan at 31, 43-46; Dawson at 72. Only Deane J appears to embrace foundational US political theory: see 63.

22 According to Brennan J, "where a representative democracy is constitutionally entrenched, it carries with it those legal incidents which are essential to the effective maintenance of that form of government. Once it is recognised that a representative democracy is constitutionally prescribed, the freedom of discussion which is essential to sustain it is as firmly entrenched in the Constitution as the system of government which the Constitution expressly ordains": *Nationwide* at 705. There is some disagreement between members of the High Court as to which legal ingredients are *essential* to the effective maintenance of representative democracy. It is accepted by the Court that direct regulation of speech which involves information, ideas or argument about government during an electoral period falls foul of the constitutional guarantee: *ACTV*. In two further decisions in which the High Court split 4/3, the constitutional implication of freedom of political communication and discussion was found to extend to insulate from actions for those who criticise politicians during election campaigns and those who criticise high level political figures with respect to their fitness for office: see *Theophanous* and *Nationwide*. A different majority (again 4/3) did not accept that the constitutional implication of freedom of political communication and discussion could be used to invalidate a law which restricted the advice of lawyers to would-be immigrants: *Cunliffe*.

23 There are a number of different formulations of the implied guarantee (which will be used interchangeably here): Mason CJ referred to "freedom of communication, at least in relation to public

a very broad definition of the constitutional guarantee. Mason CJ, Toohey and Gaudron JJ take political discussion to include discussion of the conduct, policies or fitness for office of government, political parties, public bodies, public officers and those seeking public office; and discussion of the political views and public conduct of persons who are engaged in activities that have become the subject of political debate such as trade union leaders, Aboriginal political leaders, political and economic commentators. The concept extends to "public affairs" — "what an intelligent citizen should think about".[24] Justice Deane takes freedom of political communication and discussion to extend to "all political matters".[25] The other Justices adopt much narrower views which may not extend to racist speech,[26] so the question of who becomes the next Chief Justice and who is appointed to the Bench could be of significance here.

Each of the High Court Justices accepts that the right to freedom of political communication and discussion is not absolute.[27] However, for a law directly regulating political speech to be upheld as a valid exercise of legislative power, a high standard of justification is required.[28] In such cases, the justification will need to be compelling,[29] for "in the area of public affairs and political discussion, restrictions of the relevant kind will ordinarily amount to an unacceptable form of political censorship".[30] It will not be justified "unless it can clearly be seen to be serving some overriding and important public interest".[31]

Justice Deane summed up the position:

> [I]n a case where what is involved is a general prohibition or regulation of a particular kind of communication or discussion as such or where there is a likelihood that a prohibition or regulation of a particular kind of communication or discussion will involve a significant curtailment of the freedom of political communication and discussion . . . [then] reconciliation with the constitutional implication will be more

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affairs & political discussion": *ACTV* at 138; Brennan J referred to "freedom of discussion of political & economic matters": *ACTV* at 149 and "freedom to discuss governments and governmental institutions and political matters": *Nationwide* at 51; Gaudron J spoke of "freedom of political discourse": *ACTV* at 214; McHugh J envisaged it as "freedom of participation, association and communication relation to federal elections": *ACTV* at 227; Deane and Toohey JJ referred to "freedom of communication of information and opinions about matters relating to the government of the Commonwealth": *Nationwide* at 73 and the freedom "extends to all political matters, including matters relating to other levels of government": *ACTV* (1992) 177 CLR at 169.

24 *Theophanous* at 8.

25 *Theophanous* at 49-50.

26 Dawson J is very clear that all the Constitution guarantees is a minimal requirement of representative government which does not extend to freedom of speech or freedom of communication: see *Theophanous* at 74. McHugh J adopts a similar position, arguing that representative government is not part of the Constitution independent of the text, and it is wrong to invalidate laws on the basis of a constitutional immunity: *Theophanous* at 78-9. Brennan J accepts the constitutional implication but insists that as it is not a personal right its scope is limited: *Theophanous* at 33.

27 See *Theophanous* per Mason CJ, Toohey and Gaudron JJ at 17; *Cunliffe* per Mason CJ at 13; *Cunliffe* per Dawson J at 78; *Cunliffe* per Toohey J at 96; *Theophanous* per Brennan J at 33.

28 See eg *Cunliffe* per Mason CJ at 13; *Cunliffe* per Gaudron J at 102; *Cunliffe* per Deane J at 51.

29 *Cunliffe* per Gaudron J at 102; *Cunliffe* per Mason CJ at 13.

30 *ACTV* per Mason CJ at 143.

31 *Cunliffe* per Gaudron J at 102.

> difficult. That is also the case where the impugned law prohibits or controls a particular class or type of political communication or discussion which is either inherently political in its nature or is a necessary ingredient of effective political communication and discussion. In those cases, the law will be consistent with the implication only if its curtailment of the freedom of political communication and discussion can, according to the standards of our society, be justified in the public interest for one or other of the possible reasons identified . . . in *Nationwide News*. . . . Those possible reasons are that the curtailment is conducive to the overall availability of the effective means of political communication and discussion in a democratic society or that curtailment does not go beyond what is necessary either for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society.[32]

While generally speaking "paramount weight would be given to the public interest in freedom of communication",[33] it is nonetheless possible to justify such a law by balancing the interest that is being protected against the constitutional implication of freedom of political communication and discussion. A range of different issues are placed in the balance by different judges (and we must bear in mind that Dawson and McHugh JJ consider this balancing out of order as the limitation on freedom of speech does not extend beyond a minimal protection of representative government). What needs to be established is that racial vilification law serves an overriding and important public interest.[34] There must be sufficient evidence that the curtailment of racist speech is necessary both for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity in such a society,[35] and racial vilification laws must be shown to be conducive to "the overall availability of the effective means of political communication and discussion in a democratic society".[36] A law which is upheld must be proportionate to the legitimate end it serves — so laws dealing with racial hatred must be reasonable in the sense that they appropriately address the problem of racism (addressing the problem is required for the "preservation or maintenance of an ordered society under a system of representative democracy and government").[37] Demonstrating that outlawing racist speech is justified "according to the standards of our society"[38] is the purpose of this essay.

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32 *Cunliffe* per Deane J at 51. See also *Cunliffe* per Toohey J at 61-62: "Such a curtailment of the freedom of political communication and discussion is consistent with the implication only to the extent to which it can, according to the standards of our society, be justified in the public interest either for the reason that it is conducive to the overall availability of the effective means of political communication and discussion in a democratic society [see eg *Miller v TCN Channel 9 Pty Ltd* (1986) 161 556 at 567, 591, 597-598, 629-630; *Red Lion Broadcasting Co v FCC* (1969) 395 US 367 at 375-377] or it does not go beyond what is necessary either for the preservation of an ordered society or for the protection or vindication of legitimate claims of individuals to live peacefully and with dignity in such a society."

33 *ACTV* per Mason CJ at 143.

34 *Cuncliffe* per Gaudron J at 102. Deane J characterises this as a law which is "necessary" in the sense of their addressing an existing and pressing social need.

35 *Cuncliffe* per Gaudron J at 102.

36 *Cunliffe* per Deane J at 51.

37 *Cunliffe* per Mason CJ at 13. Toohey J commented that "[p]roportionality is concerned, not with absolutes, but with the reasonableness of the balance struck by the legislation". *Cunliffe* at 96. Justice Gaudron held in *Cunliffe* (at 102) that even if there were strong grounds for promoting legislation interfering with freedom of speech, the law would be invalid if the public interest could be served by less drastic measures. Another method of establishing that proposed law is

Beyond all else, the High Court's analysis of the constitutional implication of freedom of political communication and discussion makes one thing clear. That is that "[t]he public interest to be served [by implying a right to freedom of speech] does not warrant protecting statements made irresponsibly".[39] There can be nothing responsible about the expression of racist ideas or ideology. Whatever impact the curtailment of speech may have on the perpetrator of racist views, a society which acts responsibly will not permit the dignity and integrity of minority groups and individuals to be undermined.

A Victim's Perspective on Hatred

In order to understand the extent of the irresponsibility of leaving racists free to propagate hatred, we must come to appreciate the position of those who are targeted by racial vilification. More than anything else, members of ethnic minorities[40] want to lose their status as victims. Victims wish to stop being targeted, in order to get on with living their lives; they want to participate fully in society as people rather than as racial stereotypes; they want society to stop being colour-blind, and to start being colour sensitive. Members of groups which are subject to hatred merely want for themselves and their children exactly what all other members of society desire — a safe environment in which they and their children are able to live free from fear of violence or intimidation. This will only be possible once the harm of racism is accepted, and the expression of hatred delegitimised.

Those who would otherwise be 'victims' need to know that they are valued and respected members of the Australian community, and that the state does not endorse the racism of their assailants. Minority groups who are subjected to racial hatred want public recognition of their pain and want an understanding by the rest of the community that complaints about racial vilification are not trivial.

Those who are not victims, and even those who believe themselves to be 'innocent perpetrators', will have to make some basic changes. First, they must

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proportionate to the legitimate purpose of dealing with racist speech is to argue by analogy with existing law. Justices Deane and Toohey argue that if "a law prohibiting conduct that has traditionally been seen as criminal (eg conspiring to commit, or inciting or procuring the commission of, a serious crime) [then] will readily be seen not to infringe an implication of freedom of political discussion notwithstanding that its effect may be to prohibit a class of communications regardless of whether they do or do not relate to political matters": *Nationwide* at 77; see also a similar statement in *ACTV* at 169. It would seem that the treatment of racist speech as criminal (in other jurisdictions including Australian jurisdictions) could provide evidence of the appropriateness of the introduction of such law. Similarly, Brennan J considers censorship in wartime, the law of treason and the law of sedition to be examples of means appropriate to achieving a legitimate purpose: *Theophanous* at 33. It is hard to imagine that these laws could not offend the constitutional implication if there was any possibility that racial vilification laws could.

38 *Cunliffe* per Deane J at 51.

39 *Theophanous* per Mason CJ Toohey and Gaudron JJ at 12.

40 I use this term very loosely to include Aborigines, people of non-English speaking backgrounds, Jews, Muslims and others identified by the racist as belonging to such a group, whether or not the victim claims membership of the group.

recognise that what we are dealing with is not just 'words'. Secondly, society must be prepared to disregard the counter-intuitive belief taught to us by our parents, that 'sticks and stones may break my bones, but names will never hurt me.' We were told this to help us be strong in the face of school yard taunts, by disguising the pain. But the pain didn't go away and it doesn't for victims of racism who are often confronted with racial slurs and insults on a daily basis. Thirdly, it must be acknowledged that this pain is serious and causes significant harm to both the individual and the group to which they belong. It must be understood that racism silences the speech of victims and that victim groups inevitably become subordinated and devalued members of our community.

It's Only Words

Let us begin with words, which can never be 'only words', for words are never spoken in isolation. Expressions of hatred, racial taunts and racist jokes go hand in hand with other discriminatory tools to keep victims in inferior positions. Racial vilification involves a ritual assertion of superiority, coupled with an arrogant comfort in the other's inferiority.[41] When words are spoken they impart meanings well beyond the conjoining of syllables.[42] Words take their meaning from history and context, so that when a Jew is denied access because there is 'no entry', it is quite different from the denial due to a proclamation of 'no Jews'. The *National Inquiry Into Racist Violence* reported that racist graffiti was specifically designed to maximise the potential psychological impact on the owner or occupier of the property or those who see it. The use of a Star of David and the word 'Juden' on businesses owned by Jewish people is clearly intended to engender the fear of the Nazi holocaust; the daubing of a wall with the words 'Necklace a Nigger' is similarly intended to maximise the threatening effect of the words.[43]

The effect of pretending all words are only words is that the reaction of hurt or fear has then to be interpreted as the fault of the target groups — who shouldn't be so sensitive; who should learn to take it like men [White Anglo men, that is]. Alternatively, if consequences follow from the expressions of racism, it becomes legitimate to blame the victim: "you shouldn't walk down that street — you are asking for trouble".[44] Pretending that all words are only words denies the victim the reality of her own experience.[45] The *National Inquiry Into Racist Violence* reported on the low self-image of Aborigines moulded by perpetrators of racist speech: "Evidence collected for the Inquiry by the Commission's Darwin office showed many people have grown so used to being verbally abused and called by

41 See R Delgado and J Stefancic 'Images of the Outsider in American Law and Culture: Can Free Expression Remedy Systematic Social Ills?' (1992) 77 *Cornell Law Review* 1288. D Kretzmer 'Free Speech and Racism' (1987) 8 *Cardozo Law Review* 445, 459.

42 See eg J Austin *How To Do Things With Words* (1962) OUP, who brings philosophical attention to bear on the pragmatic status of speech as an interpersonal force in the real world.

43 NIRV, 155.

44 P Williams n 1.

45 See C MacKinnon *Only Words* (1993) Harvard University Press.

insulting names over the whole period of contact with whites that they tended to focus their complaints upon physical harassment and discriminatory exclusion from social venues".[46] On the other hand, the *Royal Commission into Aboriginal Deaths in Custody* noted that constant verbal abuse by police was a feature of many Aboriginal communities, and commented that "within the systematic discrimination that Aboriginal people receive from the police, language is one of the forms of violence that has most impact on relations between the two".[47] This spirit murder is clearly culpable in the degrading treatment which Aboriginal people have suffered for over two hundred years.

Words that vilify constitute forms of 'pyschic violence' and emotional abuse that undermine a victim's right to subjective integrity and/or sense of self. Alice Miller, for example, argues that there is a parallel between child abuse, the treatment of women and racism in that all three involve massive external intrusion into the victim's psyche such that the view the individual holds of herself is not self-referential, but is constructed from the perspective of the dominating power to such an extent that the victim becomes self-hating, believing that she is somehow deserving of the abuse she suffers.[48] In the context of child abuse, Andrew Vachss comments that "[e]motional abuse is the systematic diminishment of another. It may be intentional, subconscious or both, but it is always a course of conduct, not a single event. . . . When it comes to damage, there is no real difference between physical, sexual and emotional abuse".[49]

Chief Justice Dickson of the Canadian Supreme Court commented in the context of antisemitic speech that "[t]he message of [racial vilification] is that members of identifiable groups are not to be given equal standing in society, and are not human beings equally deserving of concern, respect and consideration".[50] The process of dehumanisation of Jews allowed "civilised" Germans to participate in the Holocaust, and decent Christians to engage in wholesale murder of Aborigines.[51] In Australia there is now significant evidence of the role that racist speech has played and continues to play in creating relationships of domination and subordination.[52]

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46 NIRV, 16

47 *Royal Commission into Aboriginal Deaths in Custody* Vol 4, 71.

48 A Miller *The Drama of the Gifted Child* (1984). See also P Williams n 1.

49 *Sydney Morning Herald* 22 September 1994, 13.

50 *R v Keegstra* [1991] 2WWR 1 at 50.

51 C Rowley *Outcasts in White Australia* (1971) ANU Press.

52 This harm is hard to quantify in terms of traditional liberal conceptualisations of harm. However, the parallel with the function of pornography in the structural inferiority of women in society is overwhelming. In most cases the direct effect on an individual may be hard to gauge, but the evidence of the damage to women generally from the availability of pornography is extremely strong. See C Pateman 'Sex and Power' (1990) 100 *Ethics* 398 at 405; MacKinnon n 45; D Dyzenhaus 'Pornography and Public Reason' (1994) 7 *Canadian Journal of Law and Jurisprudence* 261, 268. Adrian Howe argues that a notion of social injury may be a better descriptor of the problem than the idea of harm. See 'Social Injury' Revisited: Towards a Feminist Theory of Social Justice' (1987) 15 *International Journal of the Sociology of Law* 423, 430.

The dehumanisation of target groups is not the only problem of racist speech, although all other aspects of the harm of racism feed back into the problem of power relations. On one level, the problem for someone confronted by racist statements parallels with the problems of injury to reputation (defamation).[53] Justice Deane, of the Australian High Court, described the common consequences of serious injury to reputation as "devastating hurt, distress and even physical illness".[54] Defamation mediates between "the right of expression and the implicit right to a measure of personal integrity, peace of mind, and personhood".[55] Society recognises that defaming people limits "their opportunities, their self-worth, their free enjoyment of life"; recognises the harm that ridicule and belittling can cause to a person. How much greater this harm must be when it is not an isolated incident and is a challenge that goes to the very core of the victim's being — not just to reputation but to identity.

Sadurski notes that the 'psychic injury' of racist speech is upset, distress, anger, deep offence and humiliation.[56] Matsuda argues that harm to identity is far greater than this:

> [v]ictims of vicious hate propaganda have experienced physiological symptoms and emotional distress ranging from fear in the gut, rapid pulse rate and difficulty in breathing, nightmares, post-traumatic stress disorder, hypertension, psychosis, and suicide.[57]

Failure to appreciate that racial vilification causes greater harm to a person's identity than traditional defamatory statements is "selective vision."[58]

Another perspective on the question of the regulation of harm arises upon consideration of who should bear the cost of free racist speech. In the context of finding an immunity from prosecution for defamation of holders of high public office (judges, politicians, senior public servants), Justice Deane argued that it was important not to deny the harm caused by the offending speech. However, because of the nature of their status and the commitment to the structure of Australian democracy, high office holders must be taken to be willing to shoulder the burden of the pain.[59] However, Deane J is careful to point out that this would

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53 Catherine MacKinnon argues, in the context of pornography, that vilification is better understood as a form of discrimination than as defamation. The former can focus on impact of statements rather than their truth or falsity — which is not really the issue in racial vilification. See C MacKinnon 'Pornography as Defamation and Discrimination' (1993) 71 *Boston University Law Review* 793, 804.

54 *Theophanous* per Deane J at 66.

55 M Matsuda n 2, 2355. See also Hafner 'Psychological Disturbances Following Prolonged Persecution' (1968) *Social Psychology* 79.

56 W Sadurski 'Offending with Impunity: Racial Vilification and Freedom of Speech' (1992) 14 *Sydney Law Review* 163, 186. See also W Sadurski 'Racial Vilification: Psychic Harm and Affirmative Action' Paper presented at Seminar *Freedom of Communication in Australia: A Study in Applied Philosophy* ANU (6-8 August 1993).

57 M Matsuda n 2, 2336. In a footnote she adds: "Effects of racial prejudice include displaced aggression, avoidance, retreat, withdrawal, alcoholism and suicide".

58 M Matsuda n 2, 2376.

59 *Theophanous* at 66-67. For this reason Deane J preferred to reject the *Sullivan* exceptions to immunity from defamation (actual malice or reckless disregard for the truth), although ultimately accepts the view of Mason CJ, Toohey and Gaudron on this. He considers that it is essential that the threat of

not necessarily be the case for a low level political functionary. Further, speech directed at those holders of high public office can be taken as central and essential to the function of Australian democracy, whereas speech directed elsewhere, even speech directed at other levels of government or instrumentalities of the state, should not necessarily be insulated as it is less significant to democratic processes. On this analysis, it is clear that racist speech should not be valued in the same way as the core political speech identified by Deane J. It is also clear that members of ethnic minorities are neither willing nor able to bear the cost of a tolerant society. There are no benefits commensurate with the costs of racist speech.

The Chilling Effect Of Hate Speech

Beyond the harms to reputation and of insubordination, racist speech has an impact on the ability of victims to fully participate in Australian democracy. A person who feels disempowered is unlikely to act as a committed, dedicated member of a group. Just as the racist speech denies to the victim the reality of her world-view, the racist speech impedes the expression of any account of self or of the validity of the victim's perspective on the world.[60] Delgado and Stefancic comment that "[e]ven when minorities do speak they have little credibility. Who would listen to, who would credit, a speaker or writer one associates with watermelon-eating, buffoonery, menial work, intellectual inadequacy, laziness, lasciviousness, and demanding resources beyond his or her deserved share?"[61] Lawrence argues that as a result of the effect of racist speech on victims, "racist speech decreases the total amount of speech that reaches the market".[62] Further, "the idea of the racial inferiority of non-whites infects, skews, and disables the operation of the market (like a computer virus, sick cattle, or diseased wheat)... racism makes the words of blacks and other despised minorities less saleable, regardless of their intrinsic value, in the marketplace of ideas".[63]

It is not only the free speech of victims that is interfered with by racist speech. Victims are restricted in the exercise of personal freedoms. To avoid being confronted with messages of hate, victims alter their lifestyles: they are sometimes force to leave their jobs; they drop out of educational programmes; they move house or stay indoors; they avoid certain streets and public places. A Sydney woman told the *National Inquiry Into Racist Violence* that after she displayed a

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financial ruin is not used to chill political debate — even where the speech is wrongheaded or misplaced. Unfortunately the Court does not consider that alternative remdies for defamation — such as declaration of truth or right of reply — may inhance rather than chill political debate.

60 C MacKinnon *Feminism Unmodified* (1987) Harvard University Press. Even some of those scholars who object to the use of law concede this point: see eg R Post 'Racist Speech, Democracy, and the First Amendment' (1991) 32 *William and Mary Law Review* 267, 310 which argues the fact that racist speech silences victims, doesn't justify legislating against it because silencing happens mostly through structural racism not through speech.

61 Delgado and Stefancic n 41, 1287.

62 CR Lawrence III 'If He Hollers Let Him Go: Regulating Racist Speech on Campus' (1990) *Duke Law Journal* 431, 471.

63 CR Lawrence III n 62, 468.

"Don't Buy Apartheid" sticker her tyres were slashed 13 times and her windscreen was smashed. No similar damage was inflicted on other vehicles parked in the vicinity, but the police refused to believe that she was being targeted deliberately. She removed the sticker and moved house.[64] A man of Asian descent spoke of how a group of Australia kids spat in his face through his car window. As a result he no longer winds down the window of his car.[65] The *National Inquiry Into Racist Violence* also reported campaigns (including verbal abuse, graffiti, dumping of rubbish on property, interference with mail and electricity and damage to property) against specific families over long periods of time. The families reported serious consequences to their health and well-being. In many cases the families were dependent on public housing, so the option of moving to another area was not readily available.[66]

Sometime the victim has no choice, so attempts to 'grin and bear it' (no doubt while thinking of England). If the victim is taunted once too often and so lashes out, then the victim discovers that it is she, alone, who is guilty of unacceptable behaviour. One man recounted to the *National Inquiry Into Racist Violence*:

> I used to work in a bakery and the foreman there used to harass me and call me names. He gave me the dirtiest and heaviest work to do. One day he said, "You black bastard, hurry up". Then I could not contain my anger so I knocked him unconscious. I told the police what had happened and I was warned not to do it again. However, I lost my job.[67]

The speech of victims is so resoundingly silenced by racism that it even interferes with legal rights. The *National Inquiry into Racist Violence* noted the "closure and silence" around police violence.

> In addition to all the reasons for *not* reporting police assaults such as lack of knowledge, fear intimidation and resignation, it is clear that when complaints are made the legal system itself appears to ensure that, *on the basis of the most beneficial outcome to the client*, it is a matter which is best left quite.[68]

The Double Jeopardy Of Tolerating Intolerance

On top of the pain and distress of being racially vilified, victims of racism suffer an additional indignity — that of dispossession. As Matsuda writes:

> However irrational racist speech may be, it hits right at the emotional place where we feel the most pain. The aloneness comes not only from the hate message itself, but also from the government response of tolerance. When hundreds of police officers are called out to protect racist marchers, when the court refuses to redress racist insult, and when

64 NIRV, 193-194.
65 NIRV, 168.
66 NIRV, 154.
67 NIRV, 160-161.
68 NIRV, 111 (emphasis in original). Cf P Davis 'Law as Microaggression' (1989) 98 *Yale Law Journal* 1559, 1568; and P Williams 'Alchemical Notes: Reconstructing Ideals from Deconstructed Rights' (1987) 22 *Harvard Civil Rights — Civil Liberties Law Review* 401 comments (at 405): "It is my belief that blacks and whites do differ in the degree to which rights-assertion is experienced as empowering or disempowering".

> racist attacks are officially dismissed as pranks, the victim becomes a stateless person. Target-group members can either identify with a community that promotes racist speech, or they can admit that the community does not include them.[69]

This has been the experience for many Australians. The *National Inquiry Into Racist Violence* reported that during the Gulf War threats were received by an Arab welfare organisation in Sydney from an individual claiming to be a soldier and to have a 300-name Arab hit-list which would be used to avenge any Australian casualties in the Gulf. The message was clear: "just because you live here and may have done so for years or for generations, you are not Australians and will never be accepted as part of this community". Other incidents cited by the *National Inquiry Into Racist Violence* report involved messages to members of ethnic communities to the effect that they should 'go home' as they are not wanted here. One woman reported to the Western Australian Law Reform Commission that:

> . . . I went shopping with my husband on a Thursday night. My husband stopped at traffic lights and as we turned left a car turned towards us and blew its horn. . . . In the other car there were three children and two women, one mature lady and one about 20 years old. They stopped next to our car and shouted very loudly at us "Go back to your country!" They kept following us and yelling "You have to go back to your country". We wanted to reply something, but we couldn't because the three children in the car were still shouting at us.[70]

A Community Response

How then, as a community, should we respond to the level of racism in this country? One possibility it to defend racist speech because it *is* speech, and because speech is inherently valuable. On this scenario, we wait until the violence occurs before we intervene; we allow deaths in police custody, or the violence preceding it, rather than proscribing the mere words of abuse which institutionalise the process. And, should the violence or breakdown in public order involve the target group responding to the expressions of hatred, we act to constrain the hostility of the crowd and to protect the right of the speaker.[71] On this scenario we are prepared to accept that the nexus between the racial hatred and the breach of public order is not sufficiently proximate to warrant interfering with freedom of speech. However, the empirical link between speech and subordination, between hate and the ultimate expression of that hatred through violence, has been well documented.[72] As such, the appropriate response is to turn to the government and to the law to address the problem.

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69 M Matsuda n 2, 2322.

70 WALRC n 9, 6.

71 It is interesting that the idea of the heckler's veto was developed when courts wished to protect the rights of civil rights campaigners to protest against racial discrimination: see W Sadurski n 56, 181. Similarly, the case which represented the high water mark of First Amendment (free speech) jurisprudence, *NY Times v Sullivan* was a case where the free speech in question was that of a left-wing newspaper which had attacked the racist/discriminatory conduct of a white Southern mayor. On the irony of this, see C MacKinnon n 60, 78ff.

72 The problem here is one of proving the causal link between racist words and 'real' harm. However, the empirical link between speech and subordination, between hate and the ultimate expression of that hatred through violence, has been demonstrated by the *Royal Commission Into Aboriginal Deaths*

Law is the mechanism available to governments to accommodate the quite reasonable demands of victim groups and to provide the climate in which target groups are able to fully participate in Australian representative democracy. Philip Adams, representing the media at a conference on Racism and Antisemitism in Australia, had the support of other journalists when he said that the problem of racism was a problem of social health and therefore was not amenable to legal regulation.[73] It must be noted, however, that in Australia we do not leave recognised health problems untreated in the hope that they will go away. We do not say to cancer sufferers that their only remedy is preventative community education. Education is essential to protect against such problems as melanoma (through a campaign regarding sun awareness), but it is absurd to pretend that existing illness can be addressed by adopting preventative measures. This is far too late for the victim of disease.

If racial vilification were a medical matter we would expect our doctors to first ease the symptoms, by stopping further invasion of the offending microbes, for example. After the symptoms have subsided, we would expect the doctor to consider the systemic damage and take whatever moves possible to rectify the situation. Only at that point would we consider the appropriateness of educating the victim and the rest of community about necessary lifestyle changes. When the issue is a medical one, we expect a doctor to prescribe medicine or to use other tools of her trade to relieve the symptoms. The tools of trade of government, who are charged with protecting the social health and well-being of the community, is law and legal regulation. Just as it is the responsibility of the doctor to prescribe medicine and treat illness, it is the responsibility of the government to take the rights of victims seriously.

The Role of Law

Those who fear resort to law expect at once too much and too little of law. On one hand they see law as of no value, for it is clear that law can't solve the problem of racism or even make it go away. On the other hand, they see racial vilification laws as a dangerous threat to the nature of society as we know it. Yet law is neither so weak nor so powerful. Law can play a significant role in empowering victims of racism, without making dramatic inroads into the way we operate as a society. For 'law' is not a monolithic being, but a creature of many facets and with many functions. Further, 'law' does not necessarily involve courtrooms and juries or lawyers and expense. It is possible to use law creatively, to invoke a range of legal forms to address different aspects of the problem. The function required of law may be symbolic, educational, deterrent, remedial or punative. As such, a range of appropriately tailored legal strategies may need to be adopted if the law is

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In Custody; the National Inquiry into Racist Violence. See also NSW Anti-Discrimination Board *Discrimination, The Other Epidemic* (1992) (with respect to vilification and violence directed at members of the gay and lesbian community).

73 Conference *Without Prejudice: Racism & Antisemetism in Contemporary Australia* (June 1994) Melbourne.

to meet the needs of victims while protecting the rights of individuals and the community at large.

The law should be invoked, at the very least to overcome the double jeopardy of racist speech. Enacting law, particularly criminal law, proscribing racial hatred will have a very important and immediate effect.[74] It will convey a message to victims that they are valued members of the community whose dignity is protected by law. It will convey a message to the perpetrators of racism that their behaviour is unacceptable. The Commonwealth Advisory Council on Multicultural Affairs commented that:

> Tacitly to allow such behaviour implies tolerance, to the point of acceptability. It could even encourage illegal and perhaps violent reprisals. Outlawing such behaviour may prevent reactions of this kind. It may eliminate provocation, reinforce the unacceptability of such behaviour, and other individuals to live without overt prejudice, fear of harassment or unfair stereotyping.[75]

A law outlawing racial vilification will send a message to the rest of the community that the values of Australian multicultural representative democracy encompass the rights of all members of the community to live in peace and safety.

It is appropriate to use the criminal law to make a public declaration of this nature. However, it does not follow that we should sent to prison all those who were 'just kidding' when they express racist views, or those who didn't intend that their words would cause pain.[76] It does not mean that every expression of racist sentiments would fall foul of the law, or that we would all live with the threat of being prosecuted for some minor incursion of the law. In many jurisdictions, prosecutions for racial vilification can only be instituted with the consent of the Attorney-General. In New South Wales, for example, there are criminal penalties for the more serious acts of racial vilification, particularly where there is a threat of physical violence or incitement to violence. The fact that to date there have been no prosecutions (although three matters have been referred from the Anti-Discrimination Board) is not evidence of the failure of the law. It is, as likely as proof of failure, evidence of success of the law. If the criminal law has the effect of deterring racists from expressing their hatred, or inclines publishers to act responsibly, the law must be commended. As Sterling and Mason point out "deterrence is not the sole purpose of criminal law, and no one suggests that there should not be penalties for murder or rape simply because these fail to deter.

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74 See 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.

75 Advisory Council on Multicultural Affairs *Towards a National Agenda for A Multicultural Australia* (1988) Discussion Paper.

76 From the victim's point of view the damage of racist speech exists independent of the intention of the speaker to cause harm. However, when we are invoking *criminal* law, questions of mens rea are of particular importance to safeguard the rights of the speaker. That is why it is essential to adopt a package of laws. See also C Lawrence III 'The Id, the Ego and Equal Protection: Reckoning with Unconscious Racism' (1987) 39 *Stanford Law Review* 317, 335; and Delgado n 18.

Criminal penalties serve the purpose of vindicating the victim and expressing social disapproval of the crime".[77]

From the victim's point of view, punishment of perpetrators of racist propaganda is not at the top of the list of desired outcomes of law. In cases of repeated virulent expressions of hatred spoken by unrepentant racists this may be the only solution. But it is the more subtle achievements of outlawing racial vilification that are most greatly appreciated by victims. The statement of full inclusion of minority groups into Australian society that is inherent in the very act of passing the law is more important that jailing recalcitrants. Beyond this, the fact that racial vilification law makes it clear that decent treatment of all members of the community is a basic premise of our society provides a basis for educating the community about the unacceptability of racism. The law may even function proactively, by serving as an impetus of formal educational activity such as curriculum development, which will not only disallow the teaching of racial stereotypes or racist sentiments, but will also provide positively for a society where individuals recognise the inherent dignity of each other and take the provision of human rights to be fundamental.[78]

While punishing those who engage in racist speech may not be high on the agenda of the victim, the possibility of remedial measures is. Victims want to be able to have their experiences validated by a legal authority, perhaps but not necessarily the police, who will deal with the problem on the victim's behalf. There are a range of possible legal means of providing this for victims — from the summary offence model, where the police intervene; to the group defamation model, where the courts are called upon to validate the victims' reality; or to the conciliation model, where an umpire mediates the claims of the victim and takes into account the full position of the perpetrator. Despite the problem that the conciliation model fails to take account of the inequality between the parties,[79] the flexibility of the conciliation model as it operates in New South Wales is of great value to victims.[80]

As a result of 1989 amendments to the *Anti-Discrimination Act 1977* (NSW), the Anti-Discrimination Board (ADB) is able to handle complaints from about racial vilification — the term 'race' extending to 'ethno-religious' groups. Cases which can not be conciliated can proceed to the Equal Opportunity Tribunal or be

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77 K Sterling and D Mason 'Racism in the Media: If Legislation, What Kind?' (1988) *Migration Monitor* 16, 17.

78 To deal with the problem of racism it would be desirable to stomp out friendly (or even not-so-friendly) banter or to jokes or to artistic works. But lawmakers and human rights advocates do not even suggest that law could change social behaviour at this level. Law needs to be coupled with anti-racist education, such that the racist jokes are no longer funny and are therefore not worth telling; so that the racist 'art' is shunned as being of little merit or at least recognised for what it is; so that people who are the targets of teasing can *believe* that nothing sinister lies behind the racist remarks.

79 M Thornton *The Liberal Promise: Anti-Discrimination Legislation in Australia* (1990).

80 The other models of law are not discussed further here. On the range of available strategies, see M Jones 'Using the Law to Combat Hate Speech' (1994) 7 *Without Prejudice* 14.

referred to the Attorney-General for criminal prosecution. The ADB is a more approachable body than either the police or the courts. It is possible for someone on the receiving end of racial abuse to ring the ADB, to have a sympathetic ear, and to be given advice as to how to proceed. Some examples of the Board's success stories are illustrative of the way in which law can address the individualised instances of racist behaviour.[81]

In one instance, a number of complaints were received from individuals and from a gay and lesbian organisation about an anti-Asian letter published in a gay magazine. After the Board's intervention, the magazine published an apology and an article on racism in the gay community.[82] In another matter the Board received complaints about a racially vilifying slogan which was displayed on a billboard. After discussing the possibility of an interim order from the Equal Opportunity Tribunal, the offending words were removed.[83] A similar result was achieved when the Board approached a public authority which was responsible for the maintenance of a public utility which was 'decorated' with antisemitic graffiti. The Jewish complainant had had no success in having the offending words removed when she attempted to deal with the matter, but the authority acted quickly when approached by the Board.[84]

The value of having the authority of the law, and a state instrumentality involved, is demonstrated in another case where self-help was not a satisfactory remedy for a victim of racist speech. A Lebanese woman approached the ADB for help. She had taken out restraining orders against a new neighbours who had moved into the flat below hers and who racially harassed and threatened her and her young children, but the harassment and threats of violence continued. The woman had also approached the owners of the building, but they claimed that the situation was a private dispute and so they refused to take any action against the neighbour or to assist the woman to relocate. When the ADB intervened, the owners assisted the woman to relocate to another premises that they owned, and evicted the harassing tenant for breaching the terms of their lease.[85]

In many cases the appropriate remedy is not jailing or even fining the perpetrator, for the main concern of victims is to have an end to the situation. Another example of this, and of the value of flexible remedies, involved the handling of 3 separate complaints which were made to the ADB. It transpired that a person with a history of verbal abuse and violence against non-Anglo Australians resided in a typical multi-racial suburb of Sydney. Over a period of some months he had racially abused his Vietnamese next door neighbour, an Islamic woman walking past his house wearing a *hijab*, the Pakistan-born

81 It would be näive to assume that the Board is always able to deal satisfactorily with complaints. In many reported instances the complainants chose not to pursue a matter further even when dissatisfied with outcome of the case, indicating that the ADB is an imperfect solution to the problem.
82 NSW Anti-Discrimination Board *Annual Report 1992-1993*, 28.
83 NSW Anti-Discrimination Board *Annual Report 1992-1993*, 28.
84 NSW Anti-Discrimination Board *Annual Report 1990-1991*, 24.
85 NSW Anti-Discrimination Board *Annual Report 1991-1992*, 27.

newspaper delivery person and an Aboriginal family living down the block. The police had been called on many occasions, but declined to become involved saying that there is nothing that could be done until an offence had been committed. The ADB handled the situation by calling two community meetings of all the neighbours in the area who had experienced similar problems, having liaised with the Community Justice Centre and the police to explore options with them. This resulted, according to the ADB "in the community feeling able to tackle their problems more directly and confidently knowing precisely what role each of our different agencies could play in the event of any future incidents".[86]

Where the racism is potentially ongoing, the remedy required will be one which addresses the relationship between the victim and the potential perpetrator. The possibility of this type of resolution was exemplified in the case of vilification of Australian Arabs in a number of newspaper articles, letters and editorials appearing in a daily newspaper. The Australian Arab organisation which brought the complaint alleged that the vilification was based on inaccurate translations of articles appearing in Arabic newspapers. A solution was found in the holding of regular meetings between the two organisations, and in the running of general information sessions for newspaper staff.[87]

There are, of course, some cases in which an apology, a right of reply or community education will not be a sufficient remedy. In one such case, after the ADB followed up a complaint about an article in a country newspaper that racially vilified Aborigines, the newspaper and the author offered the local Aboriginal community and the complainant financial compensation.[88]

What these cases demonstrate is that law is not a monolithic monster, more threatening than the racism which it seeks to address. Law can be drafted to empower victims, to recognise their rights and their pain. At the same time law can be drafted to 'fit the crime' — to punish where punishment is due, but more often act to overcome the problem retaining the dignity of all involved.

Free Speech and the Freedom to Express Hatred

Despite the legal possibilities, and despite acknowledging that racist speech causes harm, the civil libertarian position remains that it is impermissible for law to be invoked to prohibit racist speech. This is because, independent of its content, racial vilification is taken to be 'speech', and speech must be left free. Freedom of speech is valued as an essential element of liberal democracy — where the search for truth is the key to progress; the assertion of individualism respected; and the political arrangements reflect the requirement of self-government. Those in favour of racial vilification laws accept the centrality of free speech to Australian democracy; no doubt is cast upon the importance of individualism; and while

86 NSW Anti-Discrimination Board *Annual Report 1989-1990*, 17.
87 NSW Anti-Discrimination Board *Annual Report 1990-1991*, 24.
88 NSW Anti-Discrimination Board *Annual Report 1990-1991*, 24.

there may be some scepticism about the attainment of truth and progress, even these ideals are allowed to remain in place. The difference between civil libertarians and proponents of legislation revolves around the limits of the doctrine. Not even the most extreme proponents of free speech believe that freedom of speech is absolute, the issue is where it is appropriate to draw the boundaries of freedom of speech — what speech should be protected by the principle and which speech should fall outside the protected realm.

Traditional versions of freedom of speech have been derived from political thinking of the 17th century, so it should not be surprising that free speech principles are based on 17th century assumptions about man (sic). First there is an assumption of atomistic individual autonomy. This assumption is complemented by a notion of neutrality of law and of the state. There is a further assumption that the state is powerful and a greater threat to individuals than people are to each other. It is assumed that, just as trade should be left to find its own level, allowing an unregulated market place of ideas will lead to the dominance of truth. It is assumed that the media should be treated as an individual, being a mouthpiece for the expression of individual ideas. And there is an assumption that 'sticks and stones will break my bones, but words will never hurt me'. Many of these ideas are noble and superficially attractive. The assertion that government should not dictate morals; the idea that individuals should be encouraged to develop of strong sense of self-worth; the idea that thoughts abhorrent to a free society will wither when aired but fester if suppressed. However, these views naive and even dangerous. This view of the world entrenches the freedom of the powerful to remain powerful (it is their conception of morality which is already dictated by the state); and allows the cost of tolerance to be borne by those least capable of bearing it. A brief response to this position is in order.

There is general agreement that a limit to freedom of speech is provided by the harm principle. This is predicated on the distinction between self-regarding and other-regarding conduct. According to John Stuart Mill, the only occasions when it is legitimate for the state to interfere with the words or actions of citizens is when the behaviour concerned causes harm to another. The civil liberation position is that words *by their nature* are self-regarding, and therefore can do no harm. This is just simply wrong. The parallel with another activity which has been thought of as self-regarding is irresistible.

Cigarette smoking, until recently a socially acceptable leisure activity, was thought of as self-regarding conduct. Just as in the case of racist speech, education could be used to try to change social attitudes, but the concern for the rights of smokers resulted in only minor regulation. It is now recognised that tobacco smoking is the largest single cause of preventable death and disease in Australia. To add fuel to the fire, it transpires that the self-regarding expression of personal preference and individuality — the free choice to slowly kill oneself — is in fact other-regarding conduct which can cause significant harm to others. There is now substantial evidence that passive smoking causes a wide range of illnesses

in young children and has significant adverse health effects in adult non-smokers.[89] These are significant costs to be borne by the innocent victims of someone else's freedom of expression.

The actual, physical and emotion harm inflicted by racist speech has similarly been well documented. Yet until we can find some direct link between racial vilification and harm in the nature of physical violence, liberals will not accept that there is sufficient proximity between the speech and the harm to justify curtailing the speech. The work of Gordon Allport[90] is often cited as demonstrating a link between vilification and violence. According to Barendt[91] there are two conflicting possibilities for racist speech and public order. On the one hand, "to tolerate speech abusing racial, ethnic or religious groups is to lend respectability to racist attitudes, which in their turn may foster an eventual breakdown of public order". On the other hand, "suppression of [racist] propaganda is in the long run more likely to expose society to the risk of violence than its dissemination". As it is unknown and unknowable which of these positions is correct, it is better to focus on immediate question of rights of victims and deal with problems of public order when they arise. After all, if racism goes undeterred another dimension may be needed to the public order analysis — that of retaliation not only by victim groups, but by members of the community who are sickened by being expected to tolerate intolerance. Unlawful actions may well be spurred by failure to regulate racist propaganda. One relatively minor example of this was reported by the Western Australian Law Reform Commission, who were concerned about the unlawful acts of spraying out racist messages and of removing racist posters committed by otherwise law-abiding citizens.[92]

To my mind, establishing a link to a breakdown in public order is, anyway, quite unnecessary.[93] The harm to victims outlined earlier in this essay should be enough to convince any but the most hard hearted that we are dealing with the

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89 For example, in Australia it has been found that exposure to smoke at home is associated with a doubling of the risk of myocardial infarction or coronary death among non-smoking women: K Steenland 'Passive smoking and the risk of heart disease' (1992) 267 JAMA 94-99. Early childhood illnesses including, glue ear, bronchitis, pneumonia, chronic cough, persistent wheeze and other lower respiratory illnesses are more common in children who have smoking parents than in those who do not. Passive smoking increases the risk of death from SIDS (sudden infant death syndrome): KC Schoendorf and JL Kiely 'Relationship of Sudden Infant Death Syndrome to Maternal Smoking During and After Pregnancy' (1992) 90 *Paediatrics*; R Scragg et al 'Bed sharing, smoking, and alcohol in the sudden infant death syndrome' (1993) 307 *British Journal of Medicine*. Passive smoking is thought to play a role in triggering asthma attacks in both children and adults; and there is some evidence that exposure to passive smoking is a risk factor for the development of cancer of the cervix ML Slattery, LM Robinson, KL Schuman et al 'Cigarette smoking and exposure to passive smoke are risk factors for cervical cancer' (1989) 261 JAMA 1593.

90 See eg Delgado (1984) n 18, 140. Delgado cites two works by G Allport *The Nature of Prejudice* (1954) and *The Bigot in Our Midst* (1944). The debate over proving a link between vilification and violence has also been conducted in the context of feminist arguments that pornography leads to the assault and rape of women. For an argument that such a link exists see M Baxter 'Flesh and Blood' (May 1990) *New Scientist* 5. For a liberal view that the evidence for such a link remains insufficient, see S Berns 'Pornography, Women, Censorship and Morality' (1990) 7 *Law in Context* 30.

91 E Barendt *Freedom of Speech* (1985), 162.

92 WALRC n 8, 9.

93 See Kretzmer n 41, 498.

infliction of real and substantial pain. The assumption that it is a reasonable cost for the victim to bear depends on an unrealistic account of human nature which permeates liberal accounts of the free speech principle. This is the assumption that we are atomistic individuals for whom personal autonomy is a fundamental aspect of personality. Yet the fictional nature of this sort of account has long been exposed. The works of Marx, Engels, Weber, Durkheim exploded the myth of separateness. Realist accounts of political and social organisation focus on the complexities of relationships and interdependence. Feminist scholarship, in particular, has demonstrated the interconnectedness of people and how our sense of who we are is, in part at least, determined by our location in and our relationship to society.[94]

The focus on individualism creates a new form of tyranny of the majority. Assuming the formal equality of each individual results in an equality of power between individuals means that we fail to accord equal dignity to the disempowered. Consider the equality of a victim of racism and John Laws, a racist talkback radio host, who calls himself the "doctor of democracy". Laws has a forum from which to propagate his ideas, and the power of the beeper to silence the speech of anyone who disagrees with him. Yet within liberal free speech principles the media is to be accorded the same rights and freedoms as individuals!

Sadurski dismisses the claim that 'psychic harm' (the harm to identity and personal dignity which results from racist speech) requires protection on the assumption of formal equality. He considers that the harm to the identity of a victim of racism is no different from the harm to the identity of, for example, an insulted member of the Ku Klux Klan.[95] Yet, as there can be no parallel between the harm constituted by an attack on a member of a powerful white organisation and the harm directed at a disempowered member of an historically oppressed minority.[96] Stanley Fish argues that:

> [t]hose who blink at this fact and argue that insults directed at white males should be met with the same disfavour and penalties as insults directed against minorities are working, whether they know it or not, to preserve the lines of power and cultural authority as they have existed in the past. By insisting that *from now on* there shall be no discrimination, they leave in place the effects of the discrimination that had been practiced for generations.[97]

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94 See eg C MacKinnon n 60; C Pateman *The Sexual Contract* (1988) Polity Press.

95 W Sadurski n 56, 189. On Klan activities in Australia, see *NIRV* 78-9, 118.

96 To overcome these problems of taking harm to identity seriously, Sandel suggests that a distinction needs to be made between aspects of one's identity which is constitutive of the person (race, religion, sexual preference, gender) and those aspects which are instrumental (political affiliations, club memberships etc): M Sandel *Liberalism and the Limits of Justice* (1992) Cambridge University Press, Cambridge, 147-150. There is a parallel with the function of pornography in the structural inferiority of women. In most cases the direct effect/harm on an individual may be hard to gauge, but the evidence of the damage to women generally from the availability of pornography is extremely strong: C MacKinnon n 45. See also C Lawrence III n 62, 443.

97 S Fish *There's No Such Thing As Free Speech And It's A Good Thing, Too,* OUP, New York, 76 (emphasis in original). See also R Dworkin n 17.

This suggests that the protection against racist speech should be designed to advantage the disadvantaged, not to further established power structures. Racial vilification should be a form of affirmative action, and not available for powerful groups to use as further weapons of oppression. This has happened with respect to sex discrimination laws — where, for example, it was argued that it is discrimination against men to establish women's health centres even though this involved an attempt to shift the traditional focus of medical research and practice from men *towards* equal treatment for women.[98] Given that the purpose of laws regulating or proscribing hate speech is to remove institutionalised harm directed at oppressed minorities, it is inappropriate to employ the same law to address offensive speech directed at members of dominant groups.

If it is accepted that racist speech causes harm, it is uncontroversial *within* the liberal account of freedom of speech that this speech is amenable to legal regulation. As a matter of principle, the limits to free speech are reached where harm exists. When this is accepted, liberals shift their defence of freedom of speech from principle to policy.[99] The policy considerations involve the question of whether suppressing speech will solve the problem of victimisation. One formulation of this policy question is the 'fresh air approach' to racist speech, an approach developed by analogy with the argument from truth. The other formulation assumes that the suppression of racist speech will lead to the creation of martyrs, which will have the effect of increasing racial hatred rather than overcoming it.[100]

The 'fresh air approach' to speech involves the belief that allowing the process of exposing racist views to public scrutiny will result in the rejection of those ideas and in the social isolation of racists; that denying racists airtime will result in a powerful black market of hate, where racist beliefs will spread and ignite the passion of a dangerous underclass. This assumes the operation of the free market of ideas where each idea can be debated, and where truth will ultimately win. However, the liberal account of markets, which is derived from the artificial account of equality described above, has been rejected as being invalid both descriptively and normatively. It was long ago acknowledged that free markets assume level playing fields, and that without government intervention the distribution of power is skewed. This is true for ideas as well as trade. Proponents of the liberal conception of free speech fail to take account of the power imbalance and structural subordination of some members of society. The speech of the powerful is not countered by the voice of the victim. As we have already

98 *Re Proudfoot* (1991) 100 ALR 557; D Broom 'With Friends like These!' (1992) 17 *Alternative Law Journal* 142. See also K Crenshaw 'Race, Reform and Retrenchment: Transformation and Legitimation in Anti Discrimination Law' (1988) 101 *Harvard Law Review* 1331; Freeman n 16; Thornton n 79.

99 Kretzmer n 41, 450, 451.

100 cf M Gale 'Reimagining the First Amendment: Racist Speech and Equal Liberty' (1991) 65 *St John's Law Review* 119, 140.

noted, a speaker who has access to the media cannot be equated with one who does not.[101]

Further, history and experience belie the 'fresh air' argument which is directed against racial vilification legislation. As Lasson points out,[102] however,

> [t]o believe that all ugly ideas wither when aired is the height of naivete. It casts contempt upon history and ignores the most frightening paradox of our time: that Nazi philosophy was born as a legitimate expression of political thought . . . and that it was embraced by the highly sophisticated German people.

We are well aware that despite allowing racism to flourish in Australia, the air is far from fresh. In fact, it is reasonable to assume that giving racist speech a public platform provides the oxygen necessary for the ideas to grow. We also know the dangers associated with breathing polluted air. While there is a great deal of evidence of the link between racist speech and racist violence, there has been no research which establishes the danger to victims of outlawing racial hatred. There is, of course, a great deal of assertion that this is the case.

The problem of creating martyrs also seems to be somewhat misplaced. The argument is essentially that where racist speech is outlawed, racists will be able to use the courts and the media as forum from which to propagate their ideas with much greater impact than they could normally be expected to have. They will become martyrs because they will gain a sympathetic following of others who will consider that it is the racist who is being victimised for simply expressing his opinion. It is certainly true that in some jurisdictions the racist ideas of those being prosecuted have been given a lot of airtime — and in one Canadian case a dangerous precedent was set when a Court refused to take judicial notice of the Holocaust and gave revisionist 'historians' a credibility that they wouldn't otherwise have had.[103] However, whether this sort of problem has even the potential to arise depends both upon the law that is drafted and the manner of its implementation.

The possibility of introducing law where the racist gets no day in court and no easy route to media publicity is demonstrated above. In New South Wales we have both criminal and civil proscriptions of racial vilification, but we have created no heroes. In most cases, the racist isn't after publicity anyway. Where a criminal is brought to trial it is always possible for that person to gain the sympathy of some sectors of the community. The fact that many men feel entitled

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101 See D Partlett 'From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech' (1989) 22 *Vanderbilt Journal of Transnational Law* 431, 459.

102 K Lasson 'Racial Defamation As Free Speech: Abusing the First Amendment' (1985) 17 *Columbia Human Rights Law Review* 11, 54.

103 *Re Zundel* 35 DLR (4th) 338 at 398. D Fraser 'It's Alright Ma, I'm Only Bleeding' (1989) 14 *Legal Service Bulletin* 69 argues that this case points to the inapproriateness of law in regard to racist speech: it potentially provides a forum from which sophistocated racists, such as those who engage in holocaust denial, are able to disseminate and legitimise their views, and it adds to the victim's burden by putting the burden of proof onto the plaintiff. Both these problems arise from the drafting of the law, rather than because law is inherently incapable of addressing the problem.

to bash their wives, may result in support for a man who is prosecuted through the courts after an episode of serious domestic abuse. A gang leader who is jailed for killing the head of the opposing gang may become a hero to the rest of his gang. The moral crusader who is sentenced for 'cleaning up the streets' by assaulting drug addicts or gay men may be thought of as a martyr by those who shared his view of the world. But none of this hero-worship results in the courts or the legislature in refusing to prohibit harmful action or to punish those who break the law. Why, because of the link with speech, we should feel differently about racists who threaten violence or who incite others to violence is hard to understand. It appears to be a form of moral paralysis — that we are too scared to call a racist a racist, and to deny the legitimacy of his point of view.

When the liberal conception of harm is found lacking, and the fresh air approach to free speech is seen to have no validity, and the problem of the creation of martyrs turns out to not be such a problem, there is nothing of substance left of the tradition liberal rejection of racial vilification laws. What is more, the liberal account of freedom of speech has been rejected in the international arena. Although the government has failed to pass legislation pursuant to Article 20(2) of the *International Covenant on Civil and Political Rights* (ICCPR) or Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), on 25th September 1991 Australia acceded to the First Optional Protocol to the ICCPR (which took effect on 25th December 1991),[104] and on the 13th January 1993 Australia made a Declaration under Article 14 of CERD. Both these moves, intended to demonstrate Australia's "continued commitment to ensuring the highest standards in the observance of human rights", provide individual Australians with the opportunity to bring complaints about racist speech to international bodies for determination.

The effect of signing the First Optional Protocol is that the Human Rights Committee, set up under ICCPR, is competent to receive and consider communications from individuals who claim to be victims of a violation by the State of any of the rights set out in the Covenant.[105] Applicants must first exhaust domestic remedies, but the Committee has taken the view that only remedies which are available & effective need to be exhausted. Whether the Committee would accept that a State has violated an individual's rights by failing to enact legislation, and thereby provide remedies as obliged to under the ICCPR, is hard to say.[106] Two communications from Australia are known to have been lodged with the Human Rights Committee. In December 1991 a Tasmanian gay activist lodged a communication challenging a State law which makes homosexual

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104 For a discussion of the implications of this, see C Caleo C 'Implications of Australia's Accession to the First Optional Protocol to the ICCPR' (1993) 4 *Public Law Review* 175.

105 The Declaration made by Australia under Article 14 CERD is likely to have a similar impact to accession to the First Optional Protocol. The effect of that Declaration is that individual Australians can make complaints to the Committee for the Elimination of Racial Discrimination. At this stage there have been no Australian applications under the Declaration, but it would seem that the jurisprudence of that body is similar to the Human Rights Committee.

106 States are expected to act in good faith in the implementation of treaty obligations.

sexual activity an offence in that State.[107] In what is now know as the *Toonen Case*, the Human Rights Committee found that ss 122(a), 122(c) and 123 of the Tasmanian *Criminal Code* was in breach of Articles 17(1) and 2(1) of the ICCPR.[108] This has caused the Australian Government considerable embarrassment, and the federal government is now accepting its responsibility to ensure that the offending Tasmanian law is not allowed to remain in place.

The Human Rights Committee's method of determining the (in)validity of the legislation is similar to the approach of the High Court to the application of the constitutional implication of freedom of communication. The Committee argued that the requirement of reasonableness implies that "any interference with privacy must be proportional to the end sought and be necessary in the circumstances of any given case".[109] The Tasmanian Government had argued that the laws were justified on public health grounds as they were intended in part to prevent the spread of HIV/AIDS. The Committee considered the legislation in question disproportionate to this aim. However, in two other cases the Human Rights Committee has accepted that legislation proscribing racial hatred was justified as proportionate to the end of balancing freedom of speech and the principle of equality.[110] This was the case even where the speech proscribed was clearly political speech: the speech of a racist political party in a liberal democratic society. The State action of proscribing such racist speech was held to be an appropriate and legitimate restriction on freedom of speech, as Articles 19 of the ICCPR which protects freedom of speech needs to be interpreted in the light of Article 20 which protects potential victims against racism.[111] The reasoning in the *Toonen* decision suggests that laws which outlaw racist political parties or organisations may involve interference with freedom of association and be disproportionate to the aim of preventing the spread of racist ideology, but a law which directly addresses the issue of racism and racist speech would be proportionate to the social evil addressed by the law.

Australia has a very strong public interest in the introduction of racial vilification laws. While findings of the either Committee are not legally binding on party States, and Australia could therefore choose to ignore or implement any recommendations, failure to act upon a finding by the Committee that there has been a breach of international obligations is likely to attract severe criticism. And this is something that would be likely to trouble Australian governments, for although we may not have the most impressive record of human rights protection,

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107 The second communication was lodged in June 1993 by a Cambodian boat person, who was detained in custody since his arrival in Australia in 1989, alleging that Australia's practice of detaining boat people is in breach of the ICCPR. The result of this is as yet unknown.

108 Article 17(1) prohibits arbitrary or unlawful inteference with privacy; Article 2(1) prohibits discrimination on certain grounds including 'sex'. See R Croome 'Australian Gay Rights Case Goes to the United Nations' (1992) 2 *Australian Gay and Lesbian Law Journal* 55; A Funder 'The Toonen Case' (1994) 5 *Public Law Review* 156.

109 Communication 488/1992 para 8.3 cited by Funder n 108.

110 *JRT & WG Party v Canada* Doc A38 40 at 231; *MA v Italy* 114 90.

111 *JRT & WG Party v Canada* n 110.

we have a significant international face to save. From the victims' point of view the existence of international law remedies may be of some assistance, but for the great majority of those who are targets of racial hatred the fact that the rest of the world is concerned about their plight when their own community is not, simply adds insult to injury.

Empowering Victims of Racial Hatred

The case in favour of laws outlawing racial vilification is overwhelming. The fact that almost every jurisdiction in the world has racial vilification laws is indicative of a general presumption that law is of some value in the battle against racism, and Australia has accepted an international obligation to enact racial vilification laws. The case in favour of legislating against racial vilification takes as its starting point the belief that all members of society are to be valued equally. The free speech proponents will say that they too are concerned with racism, but when striking the balance the right of freedom of speech is more important than the right to be treated with equal concern and respect; more important than being able to live free of daily threat and abuse; more important than empowering those who have been victims and who on their own are unable to transcend their situation. 'Striking the balance' assumes that the position of the perpetrator of hate and the target of racism are somehow commensurate; that by pretending that the interest of one in the freedom of self-expression is equivalent to the interest of the other in self-respect the less of two evils is done by doing nothing. It is, in the end, a matter of perspective. The case in favour of legislation values victims by taking the impact of racism seriously.

The very act of introducing law empowers victims of racism. It lets minority groups know that the dominant groups in society accept their version of the truth; accept the reality of their pain and accept that they are entitled to the dignity and respect due to all members of the community. It further communicates to victims the message that it is desirable that their voices be heard and that their participation in the society is valued. The law will also send a message to perpetrators of racial hatred and to educators and others in the community in a position to improve the life of victims by freeing them from daily instances of abuse and negation of selfhood. Both the legislature and the Courts have a role to play in this. It is essential that the High Court accept the role of moral leadership which they have taken on for themselves to ensure that the protection of freedom of speech does not extend to the dissemination of hate.

From the perspective of victims, the target of racism, it is essential that the law acts clearly and decisively. If the state sees racism as an unacceptable mode of operation, it must say so in the strongest possible terms. It must pronounce loud and clear for all the world to hear that expressions of racial hatred are not the Australian way. This means using the type of law that is used whenever a matter is to be taken seriously: the criminal law. The law deals with the abuse of property rights by application of the criminal law of theft. The law deals with threats to the sanctity of the Australian state with the criminal law of sedition. Statements in

the law that a matter is one of high concern to the community are always contained in the criminal law — so it is essential that the expression of racial vilification is treated as a criminal offence. However, as victims want more than statements of support, it is essential that the criminal law be supplemented with law that will allow the victims to be compensated or which will allow for some other form of rectification. As the Australian Law Reform Commission noted:

> [i]n a tolerant society people are entitled to be protected against serious attempts to undermine tolerance by stirring up hatred between groups. Laws prohibiting incitement of racist hatred and hostility protect the inherent dignity of the human person. In a multicultural society, values such as equality of status, tolerance of a wide variety of beliefs, respect for cultural and group identity and equal opportunity for everyone to participate in social processes must be respected and protected by law.[112]

While those who are victims of racism see themselves and are treated as 'other' the High Court's notion that Australian representative government encompasses a principle of self-government is a non sequitor. If the constitutional implication of representative government is meaningful, then the concept of freedom of political communication and discussion must be interpreted to maximise the representation of all members of the Australian community. The state must act to protect the rights of ethnic minorities, and to empower them to overcome their status as victim. This requires the enactment of racial vilification laws.

112 ALRC 57 n 12, para 7.44.