Censorship and Vilification Legislation

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It is of the essence of a free and mature nation that minorities are entitled to equality in the enjoyment of human rights.[1]

Incitement to hatred, ridicule or violence, or threatening other citizens with violence to their person or property is distasteful, distressing and potentially frightening to those who are its targets. Its consequences can be serious, as psychological studies and personal experience demonstrate. A legitimate end of social justice policy is the elimination of such forms of behaviour. The question is how that end can best be achieved, taking into account the democratic, pluralistic and multicultural values which are the basis of our social fabric. As the *Report of the Committee to Advise the Victorian Attorney-General on Racial Vilification* pointed out in 1992,[2] racial vilification can be tackled either by addressing the underlying causes, to reduce the racism and ignorance that gives rise to abusive and offensive behaviour, or by deterring the conduct, for instance by legislation. Two forms of legislation are available, one that enables the taking of civil action by those damaged by vilifying statements or behaviour, the other that criminalises the behaviour. These forms encapsulate the fundamental dichotomy of legal approaches as to how to ameliorate behaviour — by encouragement and attempts at enlightenment or by coercive attempts at eradication of the problem.

Means of accomplishing change are important, particularly so when the proponents of change assumes the high moral ground in order to promote the change. In the area of human rights, it is a balancing process that must always be undertaken between individuals' and the community's best interests which frequently do not fully coincide. In this instance, the passage of legislation that impedes people's ability to air their views or promote their bigoted opinions serves the purpose of articulating a standard of desired behaviour and making clear that those who do not adhere to the standard will be punished. Arguably it also articulates our community values of tolerance and multiculturalism, or at least, promotes the standards to which we aspire. The question is whether the encroachment upon freedom of expression (residual though such freedom be in Australia and New Zealand as the creature of what is not otherwise proscribed) is justified in order to accomplish the change in values and behaviour that is desired.

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1 *Davis v Commonwealth* (1988) 82 ALR 633 at 657 per Brennan J.

2 Committee to advise the Victorian Attorney-General on Racial Vilification (chairperson: D Dollis MP) *Racial Vilification in Victoria* (1992) Melbourne, 21.

This article assesses the legal approaches adopted in Australian jurisdictions to eliminate racially vilifying behaviour.[3] It deconstructs the motives for the passage of criminal legislation and argues that the blunt instrument of the criminal law is ill-suited to addressing what is, in Australia and New Zealand, fundamentally an attitudinal, not a criminal problem. It argues that racial vilification legislation is ill-conceived, carrying with it the potential for being seriously counter-productive, likely rarely or effectively to be enforced, and emanating from a misconceived notion that governments can cure society's ills and change human behaviour by the mere passage of criminalising legislation.

International Responses

Two key international treaties promote the passage of States' legislation on racial discrimination. Article 4 of the *International Convention on the Elimination of All Forms of Racial Discrimination* (CERD), which Australia signed in 1966 and ratified in 1975, requires its signatories to "undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of racial discrimination and, in particular to create as an offence ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin". In addition, Article 17 of the *International Covenant on Civil and Political Rights* (ICCPR, to which Australia also became a signatory in 1972 (and ratified in 1980), provides that "No person shall be subjected to . . . unlawful attacks on his honour and reputation" and that "everyone has the right to the protection of the law against such interference or attacks". Article 19, which deals with freedom of expression, expressly contemplates qualification of the extent of such freedom by legislation to protect "the rights and freedoms of others". Article 20(2) states that "any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law".[4] Australia's 1980 ratification of the ICCPR reserved the right not to pass legislation implementing Article 20 on the basis in essence that it was not necessary. The 1994 federal bill dealing with racial vilification reverses this stance (as had the earlier 1992 bill) with the focus being in part upon incitement to "racial hatred".

The United States legal position in relation to the constitutionality of racial vilification legislation is not finally determined, although some states have criminal and civil legislation in relation to the incitement to racial hatred.

In England, prior to the *Public Order Act 1936* (UK), there were various common law offences including criminal libel, public mischief and seditious libel,

3 NSW: *Anti-Discrimination Act 1977*; WA: *Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act 1990*; Cth: Racial Discrimination Legislation Amendment Bill 1992; Racial Hatred Bill 1994.

4 See I Boerefijn and J Oyediran "Article 20 of the International Covenant on Civil and Political Rights' in S Coliver (ed) *Striking a Balance* (1992) Article 19, International Centre against Censorship, Human Rights Centre, University of Essex, 29ff.

but prosecutions were rare. The 1936 legislation was aimed principally at the activities of the British Union of Fascists. It made it a offence punishable by up to 3 months imprisonment to use in a public place or at a public meeting "threatening, abusive or insulting words or behaviour, with intent to provoke a breach of the peace or whereby a breach of the peace is likely to be occasioned". It has been held that the audience must be taken as it is found, even if it is atypical of ordinary people,[5] and that for the purposes of establishing a nexus between statement and breach of the peace, a close link in time is necessary.[6] Short-term impact needs to be the focus of examination, rather than long-term repercussions.[7] The orientation of the courts, in general, has been to recognise the impact that the legislation has upon the liberty of the subject to speak as he or she will and to read down the terms of the legislation so as to reduce its impact so far as is consonant with the actual terms of its provisions.

By the *Race Relations Act 1976* (UK), it became an offence under the *Public Order Act 1936* (UK), s 5A to publish or distribute matter which is threatening, abusive or insulting, or to use in any public place or at any public meeting words which are threatening, abusive or insulting where, having regard to all the circumstances, "hatred" is likely to be stirred up against any racial group in the United Kingdom.

Very few prosecutions have ensued and Easton reports that "sentences tended toward leniency".[8] Between 1977 and 1982 there were 21 prosecutions under s 5A of which 13 resulted in convictions. Consent to prosecute from the Attorney-General was required and was refused on some occasions "because the material had been distributed to anti-racist groups and organisations and therefore was seen as unlikely to stir up racial hatred".[9] The *Public Order Act 1986* (UK) s 18 makes a variety of acts and words criminal offences but maintains the qualification that the acts or words only constitute criminal offences if their author intends to stir up "racial hatred" or, in the circumstances, it is likely that such hatred will be stirred up by them.[10] "Hatred" is not defined nor have any decisions thus far given useful guidance upon the meaning to be attributed to the term. As a matter of practicality, it is difficult for prosecuting authorities to prove that hatred "will be stirred up" by utterances because of the predictive nature of the exercise. Oyediran[11] recounts a 1978 case[12] where two men were prosecuted for making grossly offensive speeches in which they referred to black people as

5 *Jordan v Burgoyne* [1963] 2 QB 744.
6 *Brutus v Cozens* [1973] AC 854.
7 *R v Ambrose* (1973) 57 Cr App R 338.
8 SM Easton *The Problem of Pornography* (1994) Routledge London, 161.
9 SM Easton n 8, 162.
10 Section 4 of the Act creates a criminal offence where a person uses toward another person "threatening, abusive or insulting words or behaviour" or distributes or displays such words with intent to cause that person to believe that immediate, unlawful violence will be used against him or her or to provoke the immediate use of such violence or whereby the person is likely to believe that such violence will be used or it is likely that such violence will be provoked: see *R v Horseferry Road Magistrate* [1991] 1 All ER 324.
11 J Oyediran 'The United Kingdom's Compliance with Article 4 of the International Convention on the Elimination of all forms of Racial Discrimination' in S Coliver (ed) n 4.
12 *R v Read* (unreported, *Times* 7 January 1978, C Cr Ct).

"wogs", "coons", "niggers" and "black bastards". The men argued in their defence that sympathy rather than hatred was likely to be stirred up. They were acquitted.

Limited legislation exists in Canada under the Criminal Code to proscribe the advocacy or promotion of genocide[13] and to make it an offence to communicate statements in a public place which incite hatred against any "identifiable group" where such incitement is likely to lead to a breach of the peace.[14] Section 319.2 establishes an intentional offence — to "wilfully promote hatred against any identifiable group" by communicating statements except in private conversation. Four defences are created: that the statements were true, that they were an opinion expressed in good faith on a religious subject, that they were on a matter of "public interest" and that their maker believed them to be true on reasonable grounds and that the statements were intended to point out a matter (so it could be removed) which produces feelings of hatred toward the group. A proceeding cannot be instituted without the consent of the Attorney-General in the province where the incident occurred.

The key case to have proceeded through all levels of the appellate hierarchy is that of *R v Keegstra*,[15] a decision ultimately of the Supreme Court of Canada involving a teacher who taught his students in terms consistent with his anti-semitic views. In *Keegstra* the Supreme Court determined by a majority of four to three that s 319.2 was consistent with the guarantee of freedom of expression in the Canadian Charter of Rights and Freedoms. Chief Justice Dickson found s 319.2 to be proportionate to the legislative objective in enacting it, hate propaganda being inimical to the democratic aspirations embodied in a political system which places a high value on freedom of speech. By contrast, Justice McLaughlin, supported by two other justices, disagreed with the majority's assessment of the magnitude of harm posed by hate propaganda and the impact of the Criminal Code's provisions on freedom of expression. The minority focussed upon the subjectivity inherent in the term "hatred" and its difficulty of definition. They also found that the expression "wilful promotion" did not cure the section's overbreadth because legitimate political speech may include statements which wilfully promote hatred against an "identifiable" group. In addition, the minority focussed upon the inadequate nature of the defences contemplated by the legislation for "artistic communication" and the like. They found the defences to convey little by way of guidance to courts and defendants for the evaluation of reasonableness of different theories and the meaning to be accorded to the key concept of "public interest".

Dickson CJC, who delivered the majority judgment, conceded that with respect to the efficacy of criminal legislation in advancing the goals of advancing equality and multicultural tolerance, the role of the section would be limited. He

13 s 318. See J Manwaring, 'Legal Regulation of Hate Propaganda in Canada' in S Coliver (ed) n 4.
14 s 319(1).
15 (1991) 61 CCC (3d) 1. See also *R v Andrews* [1990] 3 SCR 870.

held that, "[i]t is important, in my opinion, not to hold any illusions about the ability of this one provision to rid our society of hate propaganda and its associated harms.[16] However, he expressed the view that it is worthwhile occasionally to require the use of the criminal law as part of an overall strategy to address the existence of hatemongering in the community.[17] In this regard the minority judgment departed, focussing rather upon the likelihood of the legislation realising its aims, the by-products of its expansive approach and the flaws in its imprecise terminology.

Manwaring has pointedly commented that the 4-3 split in the *Keegstra* decision "does not augur well for the clarity and stability of the Court's jurisprudence. The subsequent resignations of the two "progressive" judges, Chief Justice Dickson and Madam Justice Wilson exacerbate the possibility that the Court's rulings on the constitutionality of the regulation of hateful speech will change with the philosophic make-up of the Court".[18] The case raises even more thoroughgoing concerns, however, given the justices' fundamental division on the operation of the defences and the meaning to be accorded to the concepts underpinning the legislation.

New Zealand and Australian Legislation

In New Zealand, the *Race Relations Act 1971* (NZ) criminalised the publication and distribution of threatening, abusive and insulting written matter, the broadcasting on television or radio of such material and the use of such words in a public place or at a public meeting. The qualification upon criminal liability was that the prosecution had to prove beyond reasonable doubt that the defendant intended to excite hostility or ill-will toward a group of people in New Zealand on the ground of their race or colour or to bring the group into contempt or ridicule. In addition, the prosecution had to prove that the material or words were likely to have these effects. Although there were many complaints between 1971 and 1978, only two prosecutions were instituted. An attempt was made between 1978 and 1989 to address the "problem" by a comparable provision which provided a civil remedy for incitement to racial disharmony. However, the controversial s 9A was repealed in 1989.

In New South Wales, the *Anti-Discrimination Act 1977* (NSW), as amended in 1989, creates a number of civil remedies for vilifying speech, and establishes in addition the criminal offence of inciting toward serious contempt for, or severe ridicule of, a person or group of people on the grounds of race by means which include:

- threatening physical harm toward the person or people, or towards their property; or

16 n 15 at 64.
17 n 15 at 65.
18 See J Manwaring 'Legal Regulation of Hate Propaganda in Canada in S Coliver (ed) n 4, 115.

- inciting others to harm the person or people physically or their property.

The Attorney-General's consent to prosecution is required. Ch'ang in 1992 commented:

> From discussions with the Anti-Discrimination Board's Senior Legal Officer it appears that there have been at least some cases which, on their facts, would constitute serious racial vilification. The main reasons for lack of criminal prosecution include the complainant's unwillingness to participate in the prosecution of the offence, inability to identify the offender, or pursuit of an action for assault or other criminal offence instead of racial vilification.[19]

Between October 1989 and July 1992, 249 written complaints and 825 verbal complaints of racial vilification were made, although assessment of the substance of the allegations made is not possible from the bare records.

In Western Australia, the *Criminal Code Amendment (Racist Harassment and Incitement to Racial Hatred) Act 1990* (WA) created four new criminal offences:

- possessing threatening or abusive written or pictorial material, if they intend to publish, distribute or display the material in order to incite hatred of a racial group;
- publishing, distributing or displaying threatening or abusive written or pictorial material with the intention of inciting racial hatred;
- possessing threatening of abusive written or pictorial material, if they intend to display the material to harass a racial group; and
- displaying threatening or abusive written or pictorial material with the intention of harassing any racial group.

In Victoria, the Committee to Advise the Attorney-General on Racial Vilification recommended the passage of legislation:

- to render it a criminal offence to speak or behave towards another person in a manner that threatens or abuses that person on the ground of their race or religion;
- to render it a criminal offence to put on public display threatening or abusive printed matter with the intention of inciting hatred towards a group of people on the ground of their race or religion;
- to render it a criminal offence to put on public display threatening or abusive printed matter that is intended to intimidate members of a group of people on the ground of their religion or race;
- to render it a criminal offence to possesses threatening or abusive printed matter with he intention of publicly displaying it in order to incite hatred towards, or to intimidate, a group of people on the ground of their religion or race;

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19 See S Ch'ang 'Legislating Against Racism: Racial Vilification laws in New South Wales' in S Coliver (ed) n 4, 99. See also A Scahill 'Can Hate Speech Be Free Speech?' (1994) 4 *Australasian Gay and Lesbian Law Journal* 1.

- to render it a criminal offence to threaten to harm physically a person or group of people on the ground of race or religion, or to damage the person's or group's property, or to incite another person to do so.[20]

The Australian Law Reform Commission in 1992 recommended that an offence of "racist violence" be created to criminalise an act whose commission is already in a relevant state or territory an offence and when the offender intended the act or the threat to cause, or foresaw that it would cause, members of an identifiable group to fear for their physical safety because they are members of an identifiable group, and the act or threat is likely to cause members of the group to fear for their physical safety because they are members of the group.[21] The majority of the Commission recommended that incitement to racist hatred and hostility should *not* be criminalised, preferring the civil remedies such as the creation of orders to restrain the offensive behaviour, public apologies and damages payable to the complainant.

The Racial Hatred Bill 1994 (Cth) which criminalises speech that is reasonbly likely to incite 'racial hatred' and introduces civil procedures in relation to proscribed acts and speech, has just been introduced into federal Parliament at the time of writing.

The Legal Context

This article proceeds on the basis that properly drafted civil remedies should be available for those who are the victims of racial discrimination and of racially motivated incitements toward violence, so long as they can show consequent adverse effects upon themselves. In addition, it accepts that legislation which criminalises the making of threats against persons' property is appropriate, as is incitement to breaches the peace. It is directed primarily to the question whether there is a contemporary justification for the passage of legislation which criminalises racially obnoxious statements. Many of the arguments advanced are equally applicable to the question of whether legislation ought to be passed which criminalises statements which are religiously[22] or sexually[23] obnoxious, in particular statements which incite toward religious or sexual hatred or hold persons up to religious or sexual contempt or ridicule. In respect of each category of vilifying speech (and no doubt other categories will in due course be advanced), the impact of chilling expression of what are currently regarded by most as inappropriate sentiments is the key issue.

The article is also written in a context where Australian and New Zealand jurisdictions possess in different forms criminal laws which criminalise:

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20 Report (1992) Victorian Government Printer Melbourne, 64.
21 para 7.37.
22 See SJ Roth 'CSCE Standards on Incitement to Hatred and Discrimination on National, Racial or Religious Grounds' in S Coliver (ed) n 4.
23 See A Scahill 'Can Hate Speech Be Free Speech?' (1994) 4 *Australasian Gay and Lesbian Law Journal* 1.

- threats to kill and threats to inflict serious injury;
- a variety of forms of assaults and batteries;
- threats to damage property;
- wilful or criminal damage to property;
- riots, routs and affrays;
- the use of threatening, abusive or insulting words at a public meeting;
- defamatory, seditious, obscene and blasphemous libel leading to a breach of the peace; and
- engaging in a seditious enterprise or agreeing or undertaking to engage in a seditious enterprise, conspiring with anyone to carry out a seditious enterprise or counselling, advising or attempting to procure the carrying out of a seditious enterprise, defined as an enterprise undertaken to carry out a "seditious intention", defined as inter alia an intention "to promote feelings of ill-will and hostility between different classes of her majesty's subjects so as to endanger the peace, order or good government of the Commonwealth" (*Crimes Act 1914* (Cth) s 24A).[24]

In addition, it is open to a sentencing judge to look at the overall circumstances surrounding the commission of a criminal act and if they are aggravating, such as the infliction of damage to property with the intention of causing racially motivated distress, it is open for such matters to be taken into account as an aggravating feature of the crime.[25] The sentencer is entitled to have regard to the nature of the planning and premeditation involved in the commission of the crime.[26] In addition, the sentencer may take account of whether a particular degree of harm was foreseeable for the victim by the offender because of the circumstances of the crime,[27] as well as whether because of the particular kind of victim, of which the offender was aware, or because of their cultural background, particular distress was likely to ensue because of the commission or mode of commission of the crime.[28]

It is pertinent to note that the Australian Nationalists' Movement leader, Jack Van Tongeren was quite adequately dealt with by the existing criminal law for his campaign of terror in Western Australia. He received an 18 year jail sentence after being found guilty of 19 charges of false pretences, 12 counts of breaking, entering and stealing, 6 counts of unlawful use of vehicles, 5 counts of arson, three counts of theft and single counts of causing an explosion, wilful damage, breaking and entering with intent, attempted breaking and entering and conspiracy.

There is in Australia no such thing as a right to freedom of speech. What may lawfully be said is simply what remains after criminal and civil preclusions upon

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24 See LW Maher 'The Use and Abuse of Sedition' (1992) 14 *Sydney University Law Review* 287.
25 In some jurisdictions in the United States the process has been formalised. Criminal racial intimidation statutes have been enacted to provide for a greater penalty for unlawful conduct if it is found to be racially motivated: see eg *State v Beebe* 680 P 2d 11 (Or App 1984).
26 *R v Rosenthal* (1987) 28 A Crim R 375; *R v Baldwin* (1988) 39 A Crim R 465 at 466.
27 See eg *Boyd v R* [1975] VR 168; *McCormack v R* [1981] VR 104 at 108.
28 See eg *Akkus v R* (unreported, 4 September 1975, Victorian Court of Criminal Appeal).

what may be said in public. The discourse cannot particularly usefully be put in terms of rights and liberties except to the extent that the starting point is that persons may say what they wish unless it falls foul of criminal or civil preclusion. Many preclusions exist, including civil and criminal libel laws; obscenity and indecency laws; restrictions upon what may be said on the telephone and what may be sent through the mail; the existence of criminal laws preventing the making of threats to kill or injure; using threatening, abusive or insulting words at a public meeting, the making of racist statements on the media and so on. In fact an enormous array of legislation regulates what may and may not be said.

Recommendations for criminalising legislation have come from many quarters over the past decade, including the National Inquiry into Racist Violence,[29] the Committee to Advise the Attorney-General on Racial Vilification[30] and the majority of the Australian Law Reform Commission.[31] However, the Royal Commission into Aboriginal Deaths in Custody,[32] despite dealing with the racial group in Australia most unequivocally and historically the victim of racist hatred and prejudice, opposed the creation of criminal sanctions for fear of making martyrs out of bigots.

Notwithstanding the preponderance of recommendations to government on the subject, if the categories of criminal qualification upon freedom of speech are to be increased, the onus should be upon those arguing in favour of the extension of the criminal law, particularly when breach of the criminal law entails the potential for imprisonment. They need to establish that the problem of racist violence following on from racist rhetoric is such that legislation is required to create new criminal offences, that the legislation will effectively address the issue and that it will do so in such a way that its advantages make its disadvantages acceptable.

The Vilification Problem

To a significant extent the question of whether criminal legislation should be summoned to censor vilifying speech and publications depends upon an assessment of whether racially vilifying speech not addressed already by the criminal law, in particular the holding of persons to public ridicule and contempt on the basis of their race and the incitement toward racial hatred, are so prevalent and so problematical as to justify the expansion of the criminal law. Freedom of speech cannot be an absolute precept and historically has not been so regarded by the English, Australian or New Zealand legal systems. The fact that freedom of speech is only a qualified right does not detract from the importance of circumscribing carefully its qualifications. The employment of censorship to

29 Human Rights and Equal Opportunity Commission *Racist Violence: Report of the National Inquiry into Racist Violence in Australia* (1991) AGPS Canberra.
30 n 20.
31 Australian Law Reform Commission *Multiculturalism and the Law* (1992) ALRC 57 AGPS Canberra, para 7.33.
32 Vol 4, 73.

achieve an apparently laudable aim has a poor pedigree. The South African laws against racial hatred were used systematically against the victims of its racist policies[33], just as in the Soviet Union laws against defamation and insult were often vehicles for the persecution of critics of the state.

In determining whether there is a need for a further encroachment on people's entitlement to give vent to their views, the need for the encroachment, together with the potential price of a further fetter upon free speech, are relevant considerations. There can be no doubt that some elements of 1990s Australian and New Zealand society are racist and hold entrenched racist views and attitudes. The Victorian *Report on Racial Vilification*, as well as multiple submissions to the National Inquiry into Racist Violence and the Royal Commission into Aboriginal Deaths in Custody have documented disturbing and diverse examples of racism. Australia's racism evolved with early targeting of Chinese and Islander immigrants, through Italian and Greek "new Australians" to the more recent new wave of antagonism to persons of Asian and to a lesser extent Muslim background. Indigenous Australians and persons of Jewish origin have been discriminated against and attacked on the basis of their race from the earliest days of Australian settlement. Australia's sorriest exhibitions of institutionalised racism were manifested in its genocide of its indigenous peoples and its white Australia policies.

Not surprisingly, these attitudes do not readily dissipate. Significant numbers of persons interviewed in relation to racism have reported that they have been discriminated against at some time. This raises another terminology problem though. All too often proponents of vilification legislation elide general manifestations of discriminatory conduct and speech with the extreme kind of hate rhetoric which would be the subject of vilification legislation. In doing so they only muddy the waters and obfuscate the terms of the debate.

The nature of racist activity of a kind which can be outlawed by criminal legislation is intensely difficult to prescribe with any precision. Assessments tend to be dominated by anecdotes and impressions, and confusion about different levels of racism infects results. For instance, there is a profound difference between a racial slur uttered at a shop counter and a public meeting which incites violent attack upon a particular racial group living in a particular part of a named suburb close by the meeting.

The Victorian *Report on Racial Vilification* has argued that:

> The evidence indicates that racial vilification is common, but far from universal. It is reported by many people from a range of ethnic groups, but not all members of affected groups directly experience it. . . . Our impression is that most people experience very few if any incidents directed against them personally, or against people they know, and that many of the incidents are relatively minor in effect (eg being subjected to words

33 See the *Native Administration Act 1927* (SA) and its successors; see also GL Marcus 'Racial Hostility: the South African Experience' in S Colver (ed) n 4, 214-219.

which are offensive but not threatening). Many more people are affected by statements which relate to or reflect upon their group generally, and which are generally not intended to reflect adversely upon it (eg as a result of media reporting of crime).[34]

However, the Committee concluded its evaluation of the incidence and extent of the problem by maintaining that "for a substantial minority, vilification is a major problem, because it is common (experienced personally or by members of their community known to them), or of a serious nature (eg involving threats) or both".[35] Data simply do not exist on the numbers of prosecutions that could theoretically be brought under any mooted or existing form of vilification legislation. The most significant deficiency in existing data, however, is the dearth of information about whether threats to persons or property on the basis of race or incitement to racial hatred or contempt are increasing or receding as a social phenomenon. What is known is that human rights and anti-discrimination legislation of the previous two decades are now widely known throughout the community, and that a variety of forums for expression of complaints about racism now exist.

The nature of the problem is also significant. Essentially, racist violence in Australia and New Zealand has been acknowledged even by proponents of vilification legislation as the product of spontaneous and unorganised expressions of antagonism rather than of orchestrated campaigns directed to encouraging fear and apprehension.[36] The only exception is the small number of extremist groups from the racist right whose members probably number fewer than 1000 in Australia and which has received serious setbacks in recent years by the gaoling of some of its notorious and more violent activists. There is currently no equivalent of the Ku Klux Klan in Australia or New Zealand nor is there widespread antagonism of the type which exists toward immigrants in Europe in the 1990s.[37] Moreover, it is going too far to claim that there is a crisis in community relations within Australia or New Zealand or that there is major interracial tension of the kind that exists in a great many other western societies. As the Victorian *Report on Racial Vilification* conceded, "it is easier to find good than bad relationships between members of Victoria's multiracial, multicultural community — at work, at leisure, in education, and in other settings".[38] There is no authoritative evidence that organised or unorganised racial vilification is increasing. The opposite may be the case. Racist violence does, however, tend more often to be reported by the media than it was in the past; this attests to nothing other than a more sensitised fourth estate.

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34 at 13. Note, however, *National Inquiry into Racist Violence* n 29 Findings 1-5 which found racist violence, intimidation and harassment of Aboriginal people to be an endemic social problem resulting from racist attitudes and practices which pervade public and private institutions.

35 n 34.

36 See eg *National Inquiry into Racist Violence* n 29, 221; Victorian Report on Racial Vilification, 15.

37 See S Coliver (ed) n 4, 15; K Mahoney 'Hate Vilification Legislation with Freedom of Expression: Where is the Balance?' (1994) Australian Institute of Jewish Affairs Brisbane, 17.

38 n 29, 20.

Proponents of racial vilification legislation frequently assert a continuum of racial prejudice: expression of prejudicial attitudes, avoidance, discrimination, principal attack and extermination.[39] They put this argument in order to contextualise the problem and to establish the need to intervene early lest the later parts of the continuum follow the earlier and the historically disastrous aspects of racism ensue. The problem though is similar to that involving the use of heroin — most heroin users have previously used marijuana, but most marijuana users never try heroin. Many Australian and New Zealanders to some degree harbour racist attitudes, but few give other than private expression to them. However, those who commit racist acts of violence undoubtedly have previously given expression to racist sentiments. There is a correlation between the two phenomena in the vast majority of instances but the one does not necessarily follow the other.

The position in sum is that in both Australia and New Zealand there are pockets of unpleasant racism. However, the problem must be seen in perspective. Both countries' societies are by world standards very harmonious. There is in Australia and New Zealand widespread appreciation of the values of tolerance and respect for minorities' cultural practices. The racism that does exist for the most part bears few hallmarks of violent, organised racial bigotry such as characterises such sentiments in many other countries. This is not an argument for devaluing the seriousness of vilifying behaviour and speech where it does take place. Nor is it an argument for complacency. It does, however, suggest that there are few reasons at present to extend the criminal law when a major social problem, that cannot be addressed by existing legislation, has not unequivocally been demonstrated.

Free Speech

The input of multiple voices into the democratic process is fundamental to the integrity of governmental decision-making. Expression is an integral part of the development of ideas, of extending the boundaries of knowledge and of understanding the human condition.[40] It is vital that dissenters, in particular dissenters whose discord is politically unwelcome or iconoclastic, not be suppressed from involvement in the process. Once the freedom to contribute to public debate is significantly restricted, the integrity of the democratic fabric loses a vital element. Commentators such as Mahoney repudiate the importance of free speech by focussing upon the quality of some of its expressions. They argue that obnoxious racist rhetoric cannot properly "be characterised as either elemental to the structure of democracy, or an advancement in the protection of freedom".[41] They argue that by prohibiting "the public, wilful promotion of group hatred on the basis of race, religion or ethnicity or the violent, degrading or dehumanising

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39 See eg K Mahoney n 37 citing G Allport *The Nature of Prejudice* (1954) Addison-Wesley, 14-15.

40 See the arguments of TI Emmerson 'Toward a General Theory of the First Amendment' (1963) 72 *Yale Law Journal* 877, 879 et seq.

41 K Mahoney n 37, 12.

sexual exploitation of women and children, the government advances the interests of the disadvantaged on the one hand as against the hatemongers on the other".[42] The problem is that this argument misses the point. Few would champion the content of hate rhetoric. However, the danger is that when the criterion for censorship becomes the quality or the political acceptability of its content, constantly changing as these standards are, the era of the thought and speech police has arrived. Inevitably it will be cultural and political demagogues who are the self-appointed arbiters of acceptability. The next step is censorship of ideas that are inconsistent with government policy, in order to quash political dissidence, speech offensive to the majority of citizens[43] or words assessed as likely to provoke civil unrest.

The obnoxious utterances from the bigot matter, but the vital issue is whether the cost of quashing their utterance by using as coercion new provisions of the criminal law will come at too high a price. Intellectual pluralism, tolerance and humility are values which enable us to transcend both the errors and delusions that we may identify in the articulation of views anathema to our own, and the temptation to foist our own misguidedness upon others.[44] The alternatives at a fundamental level are those of intellectual arrogance on the one hand in viewing it as possible to classify certain kinds of utterances as of no value and worthy only of censorship and a confidence that human fallibility can be accommodated and discerned by those made privy to it on the other.

A further problem exists in relation to the definitional uncertainty that pervades much vilification legislation.[45] It appears that liability may attach to the engendering of dislike and obloquy or the creation of ridicule against certain persons or groups. The absolute essence of vilification laws is that they deny the ability to criticise intemperately and to speak freely. The problem is that passionate denunciation or the use of caricature can easily enough merge into the giving of offence, the exposure to ridicule and the expression of reasoned and unreasoned intolerance. The line between criticism and abuse all too often is blurred. A danger that exists in this regard is that vilification laws may be used by subgroups within racial minorities to suppress proper expression of disagreement. In a context such as this, the problem engendered is that criminal liability under vilification legislation also becomes uncertain. The repercussions of this are twofold — that the legislation has a chilling effect upon public debate

42 K Mahoney n 37, 12.

43 See *Cohen v California* 403 US 15, 21 (1971): which speaks of the danger of censorship empowering "a majority to silence dissidents as a matter of personal predilections". See also W Sadurski 'Offending with Impunity: Racial Vilification and Freedom of Speech' (1992) 14(2) *Sydney University Law Review* 163.

44 Two key United States decisions are consistent with this approach: "The public expression of ideas may not be prohibited merely because the ideas are themselves offensive to some of their hearers" (*Street v New York* 394 US 576, 592 (1969)); and "[T]he fact that society may find speech offfesnive is not a sufficient reason for suppressing it, Indeed, if it is the speaker's opinions that gives offence, that consequence is a reason for according it constitutional protection" (*FCC v Pacifica Foundation*, 438 US 726, 745 (1978)).

45 See below.

and political dissent, comparable to the use of stop-writs in defamation cases, and the likelihood that the legislation will fall into public disrepute.

The minority judgment in *R v Keegstra* makes this point powerfully. It argues that the legislation aimed at proscribing hate rhetoric in Canada had prior to 1990 "provoked many questionable actions on the part of the authorities".[46] They observed that in effect it had operated as a licence for intrusions by regulators into freedom of speech which would never previously have been feasible. They instanced calls on the basis of the legislation for the banning of Leon Uris' 1984 novel, *The Haj*, on the basis that it was pro-Zionist, works such as Salman Rushdie's 1988 novel *Satanic Verses* being stopped at the Canadian border on the basis that it violated s 319.2, and films being excluded, as happened with a film entitled 'Nelson Mandela', ordered as an educational tool by a tertiary institution. They noted that arrests had even been made for distributing pamphlets containing the words, "Yankee Go Home"[47] — "Experience shows that many cases are winnowed due to prosecutorial discretion and other factors. It shows equally, however, that initially quite a lot of speech is caught".[48] In the process of suppressing hatemongering, a chilling effect spreads out into forms of expression that are beyond the scope of what properly can be termed hate-inducing speech and writing. At least at this point, well-intentioned attitudinal change has ended and censorship plain and simple has begun.

The Role of the Criminal Law

In determining the advisability of invocation of the criminal law in relation to vilifying speech, it is necessary also to consider practical outcomes of criminalising legislation. How effective is the criminal law as a means of changing values and standards? In the Labor Government's Second Reading Speech, when the *Racial Discrimination Legislation Amendment Bill 1992* (Cth) was introduced into the House of Representatives, it was claimed that:

> The role of law as an educational force is often underestimated. The simple fact that an act is known to be unlawful will dissuade most citizens from performing that act unless they have a strong economic or personal interest in doing so. Laws can also change attitudes over time and it is not necessarily the case that an overall attitudinal change has to precede a change in the law.

The difficulty with these beguiling claims is that they are tilting at windmills instead of addressing the real problem. Most people would not offend against the proposed and existing vilification legislation. It is only a very few who would, and they would be persons with bigoted and obnoxious views. The evidence that these persons will refrain from uttering their views simply because they risk the possibility of fines and jail is singularly absent, as is the evidence to justify the proposition that the criminal law can effectively regulate morality.

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46 (1991) 61 CCC (3d) 1 at 120.
47 n 46 at 121: see *Globe and Mail* 4 July 1975, 1.
48 n 46 at 121.

During the latter part of the nineteenth century in England social changes had wrought a widespread perception of industrial, economic and moral crisis. It was a time which had many parallels to the final stages of the twentieth century. Social commentators, such as Dickens and Booth, chronicled urban problems, while moral reformers, confronted with religious insouciance, industrial decline and escalating poverty, blamed a deterioration in moral and ethical standards.

Law journals were filled with debates about the separation between law and morality[49] and many then, as now, advocated legal intervention to cure the decline in moral fibre. John Stuart Mill and James Fitzjames Stephen took up cudgels about the extent to which the law should attempt to shape morality, while other commentators sided with the contention later to be championed by Durkheim that the state should be the supreme organ of "moral discipline".[50] In 1896, for example, Frederick Pollock, Professor of Jurisprudence at Oxford, maintained in his student textbook that the rule of law had the potential to exercise "an effective influence in maintaining, reinforcing, and, even elevating the standard of current morality".[51]

Campaigns were directed at quashing the incidence of public drunkenness, gambling and prostitution, as they had been in Cromwellian days but with similar lack of success.[52] In the end the conjoint efforts of legislators, police and moral reformers "affected the locations and forms of those practices, but hardly affected their ubiquity and frequency".[53]

Supporters of state intervention to maintain "established morality" and stand in the path of the "loosening of moral bonds"[54] are still influential. Devlin, for instance, in his important work, *The Enforcement of Morals*[55] maintains that without the law protecting society's moral code, disintegration may follow. The criterion for what fits within the moral code is described by him as something about which "any twelve men or women drawn at random might after discussion be expected to agree".[56] Outside the code lies conduct which, whether practised in public or in private, would be regarded as wrong by people of "right-mindedness"57. He proclaims that the law must not only protect the individual

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49 See RA Cosgrove 'The Reception of Analytic Jurisprudence: the Victorian Debate on the Separation of law and Morality 1860–1900' (1981-2) *Durham University Law Journal* 49; S Petrow 'The Legal Enforcement of Morality in Late-Victorian and Edwardian England' (1992) 11 *University of Tasmania Law Review* 59.

50 E Durkheim *Professional Ethics and Civic Morals* (1957) Routledge & Kegan Paul London, 72.

51 F Pollock *A First Book of Jurisprudence: For Students of the Common Law* (1896) MacMillan London, 45ff.

52 See EJ Burford *The Bishop's Brothels* (1993) Robert Hale London, 178ff.

53 VAC Gatrell 'Crime, Authority and the Policeman-State' in FML Thompson (ed) *The Cambridge Social History of Britain 1750-1950* (1990) Cambridge University Press Cambridge, vol 3, 289. The same might well be said of the failed attempts to prohibit the use and distribution of alcohol during "The Prohibition".

54 See eg P Devlin *The Enforcement of Morals* (1962) Oxford University Press Oxford, 12-13.

55 P Devlin n 54.

56 P Devlin n 54, 15.

57 P Devlin n 54, 17.

from harm but must also protect "the institutions, the community of ideas, political and moral, without which people cannot live together".[58]

However, the fact is that moral stances are constantly in a state of change. Haste catalogues an instructive tally of failures during the 1980s to stamp out "immorality" in Thatcher's England and concludes her 1992 work, *Rules of Desire*:

> The State has not relinquished its powers to censure, coerce, restrain or direct behaviour. It continues to enforce rules of morality.... So far, despite attempts to coerce society back into a conservative morality, the impulse to personal responsibility and private freedom of choice has shown itself to be strongly rooted after decades of often painful adjustments to changing sexual norms.[59]

Petrow sums up attempts in many contexts to legislate and enforce morality well: "[N]oone could discount the power of the criminal law, most spent at least some of their time outwitting it, many endured arrest, but it changed the behaviour of relatively few."[60] Frequently, the criminal law has intruded upon people's behaviour in response to "moral panics" that have had more to do with contemporary political circumstances than with increases or declines in proscribed activity. Ultimately, such intrusions have been unsuccessful but society has not disintegrated.

Whether the allegedly growing incidence of racial vilification is properly described as a "moral panic" of a kind comparable to the phenomena of "hooliganism" and "thuggery" in times gone by remains to be seen. For the moment the evidence is not in. What can, however, be said is that the criminal law has proved to be a singularly ineffective and inflexible means of regulating morality. All too often its bludgeoning has succeeded only in creating martyrs and imprisoning those with a low order of moral culpability in the overall scheme of criminal behaviour. There is minimal evidence to suggest that in Australia and New Zealand criminal legislation above and beyond that already existing is required to arrest the degradation of standards of everyday life or to protect "the quality of public discourse".[61] What continues to be required is sensitive, consistent application of the criminal law to ensure that the offences which currently exist to protect both people's physical and proprietorial integrity are properly enforced.

A key element of the majority decision in *Keegstra* was an analysis of the role of the criminal law in the passage of vilifcation legislation. The majority held that it "serves to illustrate to the public the severe reprobation with which society holds messages of hate directed towards racial and religious groups".[62] Dickson CJC repeated what he had held in an earlier case, that the criminal law is a "very

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58 P Devlin n 54, 22.
59 C Haste *Rules of Desire* (1992) Chatto & Windus London, 306.
60 S Petrow n 49, 74.
61 See K Greenawalt 'Insults and Epithets: Are they Protected Speech?' (1990) *Rutgers Law Review* 287, 302.
62 (1991) 61 CCC (3d) 1 at 53 per Dickson CJC

special form of governmental regulation" expressing society's disapprobation of certain forms of behaviour.[63] The legislation is thus portrayed as denunciatory of certain forms of conduct, proclamatory of standards and aspirational in terms of setting standards for behaviour. The question that arises in the wake of the majority judgment, though, is whether denunciation of hate speech, proclamation that it is wrong and uncivilised, and the expression of a wish that it not take place in a mature society actually reduces its incidence to any meaningful degree.

In this regard the decision of the minority is important. McLaughlin J noted that a person charged with the offence of spreading false news under the Canadian *Criminal Code* subsequently claimed that his court battle had given him "a million dollars worth of publicity".[64] As His Honour also noted, "[t]here is an unmistakable hint of the joy of martrydom in some of the literature" in respect of which the defendant in another celebrated Canadian case had been prosecuted: "[t]he Holocaust Hoax has been so ingrained in the minds of the hated "goyim" by now that in some countries . . . challenging its validity can land you in jail".[65]

It is difficult to imagine persons such as these defendants being persuaded by any court's sanctions that their conduct was inappropriate and effectively being deterred by the passage of legislation that criminalises statements which would otherwise largely have gone unnoticed. The threshold question has to be asked whether the criminal law serves any useful purpose in intruding into such forms of expression, or whether better means of reducing its incidence exist.

Rendering the Bigot into a Martyr

A danger attendant upon the passage of legislation that criminalises certain kinds of utterances is that it will provide a platform for a bigot much more substantial than he or she would otherwise have been able to mount. To change the metaphor, by wrapping themselves in the cloak of the martyr, the risk exists that bigots will be enabled to portray themselves as defenders of rights and liberties rather than as out-of-touch extremists. The content of their racist views will thereby be accorded a level of respectability and a level of attention which they would never have been able to orchestrate without the ham-fisted attempt of the state to prevent their speaking at all.

An example of the unwanted attention which the involvement of the legal system can bring to bigots occurred in the light of the decision of *Collin v Smith*.[66] In that case, the Federal Court of Appeals for the Seventh Circuit invalidated an ordinance in the town of Skokie, Illinois, proscribing demonstrations by persons wearing certain military-style clothing or uniforms. The result was that the American Nazi Party was allowed to march following the Government's and the

63 n 62 at 53, referring to *R v Morgentaler* (1988) 37 CCC (3d) 449 at 476.
64 n 62 at 115: *Globe and Mail* 1 March 1985, P1.
65 *R v Andrews* (1988) 43 CCC (3d) 193 at 197.
66 578 F 2d 1197 (7th Cir 1978).

Anti-Defamation League's attempts to prevent the demonstration. Some 2000 onlookers assembled to view a rag-bag of some 20 Nazis walking down the main street. What would otherwise have been a non-event received national attention. There were more media representatives than marchers. Closer to home, the insistence by the Australian government that holocaust-denying historian David Irving should be denied a visa has made a discredited and almost unknown activist a household name in Australia and has done nothing to address the substantive debate. As Maher[67] has pointed out, "[o]pposition to Irving's entry to Australia will probably do as much to promote him in the eyes of those profoundly misguided individuals who want to believe that the Holocaust did not happen or who thrive on the Hitlerite assessment that all that is wrong with the world can be laid at the door of some vast Jewish-Bolshevik conspiracy."

The Catholic Church at one time established a register of proscribed books. Adolf Hitler and others have had ceremonies in which unwelcome literature was put to the torch. Ayatollah Khomeni sentenced Salman Rushdie to death for expressing views that he found offensive. There is a long history of attempts to curb freedom of expression by proscribing the articulation of unwelcome sentiments. They have rarely succeeded for long, but what they did was to establish a focal point for opposition to those responsible for the censorship and ultimately to discredit the beliefs advanced to legitimise the censorship.

In Australia and New Zealand much of the speech that might well qualify under vilification legislation emanates from those sympathising with relatives and friends involved in overseas struggles. However, prosecuting Macedonians for denouncing Greeks, Eritreans for deprecating Ethiopians, Croats for reproving Serbs, Kuwaitis for censuring Iraqis, black South Africans for expressing their detestation for Afrikaner supporters of apartheid or Tutsis for fulminating against Hutus can only conduce toward importing foreign conflicts to local shores. Brennan has made the telling point that there could have been all too many defendants in the course of 1993's divisive debates about the Mabo legislation:

> For every elected politician who said that Aborigines had not evolved to the stage of developing the wheeled cart, there was an Aboriginal leader fulminating that white public servants were using word-processors as the modern-day equivalent of strychnine to exterminate his people. For every mining magnate who claimed the Aborigines were stone-age people with uncivilised ways, there was an Aboriginal leader alleging that white members of the Liberal Party were like members of the Ku Klux Klan crusading for blood.[68]

It need scarcely be said that prosecution of any of the participants in the Mabo debates would inevitably have provoked further entrenched antagonism and anger rather than generating a message about the proper limits to civilised debate.

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67 LW Maher 'Controls and Free Speech: the Case of David Irving" (1994) 16 *Sydney University Law Review* 358, 392.

68 F Brennan 'Thought Police and Racial Vilification' (August 1994) 4(6) *Eureka Street* 4, 5.

Any decision to prosecute under vilification legislation is highly politically sensitive. The actual decision to prosecute will also be politically driven. Inevitably, those few prosecutions that are instituted are selective, probably directed toward high profile community figures, rather than drunks in the local hotel, and most likely pointedly consonant with current political ideology. For instance, it is hard to contemplate a prosecution of Kuwaitis during the Gulf War, or of Bosnians during the Sarajevo siege. Even more difficult to contemplate is the prosecution of Maori or Aboriginal extremists for racial vilification at any time. And yet theoretically, proscribed utterances may come from such sources. The result is legislation which can only be recognised as intensely political in its functioning, defendants who are proceeded against because of specially "unattractive" qualities that they possess from the government of the day's point of view and infractions of the law which will go unprosecuted and unpunished. None of these phenomena are likely to lead to respect for the rule of law.

Changing Attitudes

Given that the criminal law has a poor track record in accomplishing changes in attitudes, what is the alternative? It lies principally in counter-speech and in re-education through informed discourse and the exposure of bigoted views for what they are. This traditionally has been the approach of the United States Supreme Court — the appropriate remedy to offensive speech has been held to be not censorship but exercise of one's own speech rights. For example, in *Texas v Johnson*[69] the Court urged this counter-speech strategy upon Americans appalled and offended by "desecration" of their flag: "[t]he way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong".

There is a fear among many who propound the propriety of censorship of unpleasant attitudes and erroneous versions of history that the mere expression of bigoted and socially destructive views will command credibility. They argue that the "view that the truth will always win out in a free marketplace of ideas, is at best ignorant and at worst naive, disingenuous and dangerous".[70] The crucible of public opinion is often maligned as being undiscriminating and controlled by the media and sectional interests: people are sheep without critical faculties.

Such a stance, however, is paternalistic in its orientation and fails to accord respect to the ordinary person's powers of discernment and critical evaluation. More credibility is given to the purveyors of ludicrous views that the Holocaust did not take place by attempting to silence them, than by allowing the purveyors a soapbox and then erecting a rival one from which the historical facts are made known. The querulent ranter in the mall claiming to be experiencing a vision from God is given little attention by passers-by. But when the authorities intervene to silence his flow of rhetoric, people do stop and listen to his expostulations.

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69 491 US 397 at 419 (1989).
70 K Mahoney n 37, 13-14.

Commentators such as Mahoney argue that the marketplace of ideas is not equally accessible to all and that those who become the victims of vilifying speech are often ill-positioned to counter. While at an individual level this may be so, support groups and advocacy groups command considerable access to the media in the 1990s in Australia and New Zealand. It simply is not true to say that the victim of vilification is profoundly disempowered from the ability to expose and reciprocate. Recent examples in the context of rape victims who have taken exception to ill-chosen judicial words provide a clear example. It has proved possible for a number of the women involved, coming from a profoundly disempowered position, to have made their way onto the front pages of newspapers enabling them to verbalise the impact that the judicial words have had upon them. History is replete with examples of "do good" laws being used by the powerful or the temporarily in power for their private motives of repression. Laws like this are the fodder for dangerous moral evangelists to whom tolerance is all too often an alien concept.

Maher[71] also argues that racist speech can serve to reinforce community disgust and to galvanise a a community in its fortification to "fight back with the truth". He instances the assertive and organised response of the Australian Jewish community to the historiography of David Irving, and other of a similar persuasion. In doing so he repudiates the contention that the inevitable impact of racial vilification upon its target is stigmatised disempowerment.

Success of Vilification Prosecutions

Racial vilification legislation differs from jurisdiction to jurisdiction. However, it is characterised by expressions which are profoundly uncertain in their ambit. The result is unfairness wrought upon those endeavouring genuinely to estimate what legally they can say, and profound unfairness for those who end up charged with vilification offences.

Some legislation employs the term "vilification" which includes "defaming", "traducing" or "speaking evil of another". For instance, on 26 May 1992 the Victorian Government introduced into Parliament the *Racial and Religious Vilification Bill 1992*. Among other things, it sought to proscribe acts and statements that "vilify or threaten people" and empower the courts to make orders prohibiting a person from "harassing another person on the ground of that other person's race or religion". The Bill contained no definition of what constituted "vilification", the only apparent indication being a press release on 20 July 1990 from the Committee to Advise the Victorian Attorney-General which had indicated that by "racial vilification" what was referred to was "spoken or published statements which offend or insult racial and ethnic groups, or provoke hatred towards them". The Committee's Report defined racial vilification as "a statement which expresses or promotes hatred, contempt or ridicule of a person or

71 LW Maher n 67, 385.

group of people on the basis of the person's or group's race".[72] The breadth of such a concept and the number of utterances and publications that could offend it is breathtaking in its extent.

Similarly the concepts of "incitement to hatred",[73] "stirring up hatred",[74] and "racial hatred"[75] are integral to the framing of vilification legislation but so broad as to defy clear definition. The expressions, "exposure to contempt or ridicule",[76] "incitement to serious contempt or severeridicule"[77], are also so amorphous as to preclude clear interpretation. Pagone put the matter well when he argued that:

> the concept of "vilification" is capable of having too broad and imprecise a meaning to be suitable as a determinant for punishment and legal sanction. Words and conduct which are objectively likely to cause violence or breaches of the peace are matters where society has an undoubted right to interfere. But if society now asserts a claim to prevent injury to feelings and sensibilities, it must not leave any doubt about the conduct that is exposed to penalty".[78]

The problems encountered in interpreting s 29 of the South African *Native Administration Act 1927* are significant in this regard, as is the fact that it broke the ice for a series of highly repressive forms of regulation. Section 29 proscribed the uttering of any word or doing of any act "with intent to promote any feeling of hostility between natives and Europeans". The Act proved the forerunner to other enactments which inter alia proscribed gatherings and publications calculated to engender feelings of "racial hostility",[79] enabled deportation of persons promoting feelings of "hostility between European and non-European residents",[80] prohibited any gathering where there was reason to apprehend that feelings of hostility would be engendered,[81] banned printing or manufacture of "undesirable publications" which were defined as bringing the inhabitants of the Republic of South Africa into "ridicule or contempt, or were harmful to relations between any sections of the inhabitants of the Republic",[82] and proscribed under cover of terrorism the committing any act or inciting, encouraging or aiding it which caused, encouraged or furthered "feelings of hostility between the white and other inhabitants of the Republic".[83]

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72 Recommendation of Committee to Advise the Victorian Attorney-General on Racial Vilification, iv.
73 n 72, 64.
74 *Racial Discrimination Amendment Act 1992* (Cth), cl 59(1); see similarly *Race Relations Act 1976* (UK), s 5A; *Public Order Act 1986* (UK) s 18.
75 *Criminal Code (Racist Harassment and Incitement to Racial Hatred) Act 1990* (WA) s 78; Racial Hatred Bill 1994 (Cth) s 60.
76 *Race Relations Act 1971* (NZ) s 25.
77 *Anti-Discrimination Act 1977* (NSW) s 20C.
78 GT Pagone 'Vilification Laws: Why Not?" Paper delivered to the Rationalist Society Melbourne 21 October 1992, 11.
79 *Riotous Assemblies Amendment Act 1930* (SA) s 4(10).
80 *Riotous Assemblies Amendment Act 1930* (SA) s 4.
81 *Riotous Assemblies Act 1956* (SA) s 2(4).
82 *Publications and Entertainments Act 1963* (SA) s 5(1)(a).
83 *Terrorism Act 1967* (SA) s 2(1)(a), 2(2). See also *Second General Law Amendment Act 1974* s 1 which extended the *Native Administration Act* to criminalise the uttering of words or the performance of acts with intent to cause or encourage or foment feelings of hostility between different population groups" and *Internal Security Act 1982* (SA).

Although repressive legislation proliferated subsequent to the first preclusion upon acts and speech whose intent was to engender feelings of hostility, courts struggled to interpret the provisions and forged a number of protections for those charged, an approach which militated in some cases against the harshest elements in the legislation. Thus in *R v Thaale*,[84] a decision dealing with a speech by the president of the Western Cape of the African National Congress, a court declined to judge "natives" by "our standards" and elected only to impose a fine, while in *R v Sutherland*[85] the appellants were acquitted on the basis that a cartoon was to be regarded as no more than a symbolic expression of opinion, not to be taken literally. As Marcus[86] has recognised, the courts held that the absence of actual intent to promote feelings of hostility constituted a complete defence, notwithstanding that objectively viewed the words had that effect.[87] The courts distinguished "between an attack upon an individual of a particular race and an attack upon the race as a whole, holding that only the latter fell within the ambit of the prohibition. Finally, the courts recognized that a measure of latitude must be allowed for freedom of expression on matters of public importance".[88] Thus ironically, the *Native Administration Act 1927* (SA) failed to deliver uniform deterrence for those found guilty of stirring up racial hostility but the discomfort of the courts with the terms of the legislation led to selective and unpredictable findings of guilt following on from what was already selective prosecution.

The most substantial attempt to come to grips with the meaning to be attributed to the word "hatred" came in the case of *R v Keegstra*[89] where the majority found that it was "predicated on destruction". They held that "hatred against identifiable groups therefore thrives on insensitivity, bigotry and destruction of both the target group and of the values if our society".[90] Hatred in this sense was found to be a "most extreme emotion that belies reason, an emotion that if exercised against members of an identifiable group, implies that those individuals are to be despised, scorned, denied respect and made subject to ill-treatment on the basis of group affiliation".[91] The response of the minority to the majority's rhetoric was to find the concept of "hatred" unacceptably broad and subjective. They also perceived a danger that the only convictions for offences involving racial hatred would result where the actual words that were indulged in happened to be unpopular among those trying them.

Racial vilification legislation frequently creates "artistic" exceptions to ease what would otherwise be its repressive effects. The *Racial Discrimination Amendment Bill 1992* (Cth), for instance, excepted from liability for racial vilification anything said or done:

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84 1930 CPD 332.
85 1950 (4) SA 66(T) at 74 (A).
86 GL Marcus n 33, 218-219.
87 See *R v Bunting* 1929 EDL 326.
88 GL Marcus n 33, 218-219.
89 (1990) 61 CCC (3d) 1 at 59-60.
90 n 89.
91 n 89.

reasonably and in good faith:
(a) in the performance, exhibition or distribution of an artistic work; or
(b) in the course of any statement, publication, discussion or debate made or held for an academic, artistic or scientific purpose or any other purpose in the public interest; or
(c) in making or publishing a fair report of, or a fair comment on, any event or matter of public interest.

The major change orchestrated in this regard by the Racial Hatred Bill 1994 (Cth) is the qualification that the purpose of the statement, publication, discussion or debate must be "genuine". However, this defence only exists in relation to matters referred to conciliation before the Human Rights and Equal Opportunity Commission and in due course to the Commissioner.

Section 20C of the New South Wales *Anti-Discrimination Act 1977* similarly creates an exception where the proscribed activity takes place "reasonably in good faith for academic, artistic, scientific or research purposes or for other purposes in the public interest". It remains to be seen what the courts will determine is in the public interest but it cannot be disputed that there is ample room for argument in relation to every element of the exception and that inherent in a determination of whether the exception is properly invoked is a highly degree of subjectity.

Section 319.2 of the Canadian legislation creates a defence that the maker of the otherwise proscribed statement believed its contents to be true on reasonable grounds. To say that these defences are manna from heaven for lawyers is an understatement. They also create significant opportunities for those responsible for the utterances to defend them and justify them on the stage of the witness box in the public spotlight. It is difficult to conceive of any public statement of a racially obnoxious kind in respect of which some plausible attempt could not be made to assert that it was done reasonably in the circumstances and bona fide in making a fair comment on a matter of public interest and controversy. Easy enough it would also be for the racial bigot to argue at length about the justification and reasonableness of his or views about racial purity. And what a platform is thereby erected for the bigot to argue his or her views in the full glare of the media! The unfairness perpetrated by such a situation is apparent; the prospective defendant is unable to determine what conduct will or will not breach the legislative proscriptions and the actual defendant is denied the ability to know whether a plea of guilty or not guilty should be entered to the charges.

The Racial Hatred Bill 1994 (Cth) is particularly problematical in this regard because s 18C(1)(a)–(b) renders it unlawful for a person to do an act in public that is "reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or group of people" when the act is done because of the race, colour or national or ethnic origin of the other person, or some or all of the people in the group. The width of the speech or behaviour which could offend or intimidate others partly because of their ethnic origin in staggering. Any argument between Serbs and Croats, Iraquis and Iranians or Israelis and Palestinians, for instance, would be in danger of falling into the prescribed

category. But, to compensate for this width, the defence legitimising debate "in the public interest" (s 18D) renders the preclusion almost completely unpredictable. It is hard to imagine any defendant who could not, with some degree of plausibility, maintain that their utterances were in good faith and in the public interest. A better soapbox for a bigot could scarcely be imagined than a high profile hearing before the Race Discrimination Commissioner! The down side is that the genuine iconoclast or the debater who inadvertently offended may be faced with a substantial award of compensation to those who have taken offence or been intimidated by the content or mode of delivery.

In addition, a sentencing problem exists in relation to vilifiers. It may well be that there will be an overrepresentation among potential defendants to vilification charges of persons with antisocial personality disorders and borderline personality disorders, not to mention individuals suffering from paranoid ideation as a result of schizophrenia. At the least they are likely to be persons of a crusading mentality, ill attuned to logical influence. These persons are most unlikely to be deterred from their utterances by the potential for being prosecuted for them. Rather, the possibilities of self-promotion and self-portrayal as victims are likely for these individuals to function as inducements to behaviour which will result in the preferring of charges. If technically, they are accounted mentally unwell, sentencers of those found guilty of vilifying speech would be obliged to apply the *Mooney*[92] principle — that such offenders may not legitimately be used as vehicles for deterring others from similar conduct. In addition, the psychiatric state of such offenders may persuade sentencers of the inappropriateness of giving punishment a major role in the sentencing process because of the offenders' lack of insight into their conduct as result of their mental ill-health.

The Balancing Process

There is a great temptation to pass legislation that is aspirational — that sets a standard for civilised behaviour. This is an explicit rationale for the Racial Hatred Bill 1994 (Cth), the Attorney-General likening it to legislation covering domestic violence which, he has said, has raised awareness of the problem.[93] However, if the enforcement of legislation is selective, erratic and infrequent, the danger is that the honourably espoused sentiments in the legislation will fall into public disrepute.

Another temptation is to pass legislation to set standards and parameters of socially acceptable conduct. Desirable in principle as specific state guidance may be, legalising of morality unavoidably takes on an entirely different character

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92 *R v Mooney* (unreported, 21 June 1978, Supreme Court of Victoria); see also *R v Anderson* [1981] VR 155; *R v Man* (1990) 50 A Crim R 79 at 82-3; *R v Letteri* (unreported, 18 March 1991, New South Wales Court of Criminal Appeal); I Freckelton 'Sentencing the Substance Dependent Offender' (1994) 1(1) *Psychiatry, Psychology and Law* 11, 13.

93 *The Age* 9 November 1994, 6.

when it prescribes penalties of incarceration for infranction of its "guidance"; it becomes socially dictatorial in the extreme.

Another temptation is to pass legislation which is prescriptive — to criminalise conduct which is socially unacceptable and personally hurtful. People really should be thoughtful and sensitive towards each other. Perhaps if it becomes a criminal offence to be nasty and insensitive, people's behaviour will improve? The problem is that what empirical evidence does exist suggests that if anything unrealistic legislation is counterproductive. Vilification legislation seeks to "stop the deliberate public encouragement of racial hatred against ethnic minorities"[94] but the targets are said to be "extremist fringe groups"[95] whose membership is far from rational or responsive to the heavy hand of the state.[96] It is most unlikely either that racism will dissipate because of criminalising legislation or that extreme racist behaviour will disappear simply because of the passage of additional criminalising legislation when any major form of damage to persons or property can readily enough already be made the subject of criminal charges. The irony is that the extremist racists are already within the purview of the criminal law, without the need for passing criminalising vilification legislation. Thus it appears that, politicians' rhetoric notwithstanding, the major target of vilification legislation is not the extremists subject to the criminal law but those whose conduct otherwise falls short of criminal activity.

The danger of the vilification legislation is that it commences a process by which the expression of currently unpopular views on matters on race, religion or sex can be made the subject of criminal sanction. It is only a short step from this regulation of speech to utter totalitarianism in which the utterance of any sentiment which is not consistent with the prevailing political ideology will result in policing by arms of the state. We shall then descend into the autocracy of cultural correctness or the ill-fated misconception that social problems can be cured by legislation and regulation such as followed the *Native Administration Act 1927* in South Africa.

Ironically the aims of those supporting and opposing vilification legislation for the most part are similar. They would seek to "strengthen the rights of [citizens], the rights to live free from fear, from harassment, from discrimination and free from hatred"[97] — to reduce the incidence of obnoxious and hurtful words directed at the vulnerable and the disempowered. The question is the means by which empowerment can take place and the employment of such words can be reduced. In relation to the former, the creation of means of civil action by which damages actions can be pursued in certain limited circumstances is a partial

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94 C Rubenstein 'Anti-racist Laws Will Not Restrict Responsible Debate on Society' *The Age* 21 September 1994, 16. Incitement of racial hatred is the cornerstone of the Racial Hatred Bill 1994 (Cth).

95 C Rubenstein n 94.

96 See the unidealised portrait of the National Front by D Greason 'I Was a Teenage Fascist' (1994) McPhee Gribble Melbourne.

97 R Castan 'Racism Law Strengthens Rights in Stand Against Hatred' *The Australian* 19 September 1994.

solution, as is racial discrimination legislation. The criminal law already has many and flexible teeth to punish and deter those who actually assault citizens' persons or their property, particularly when these attacks are done with a particularly premeditated and pernicious purpose.

The politically attractive solution to reducing the incidence of hateful rhetoric is the adamantine instrument of the criminal law, just as it is increasing police powers and sentences of imprisonment when the incidence of crimes of violence is seen to rise. However, these responses do little to address the reasons for the unacceptable conduct and ultimately the incidence of such conduct. For that resources need to be made available for community education in schools and local communities, as well as for improving the conditions which give rise to the alienated and the angry who in recent times have turned in despair to the blusterings of the racists of the far right. A quick-fix is not available and most certainly will not be supplied merely by passing new legislation to outlaw the unsatisfactory behaviour.

A measure of the truly mature pluralistic society is the capacity to meet intolerance with tolerance, to endure erroneous claims and vile invective, which do not otherwise breach its criminal laws of conduct, and to allow such words to self-destruct in the crucible of informed public debate. If racial hatred and racist vilification are to be transcended, ultimately it will be through gradually wrought attitudinal change throughout the community rather than through the superficially tempting intrusion of the criminal law. Racial hatred legislation is not the answer.