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Freedom of Speech in the Woke Era: Critical Race Theory and State Neutrality

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ABSTRACT

This chapter advocates for freedom of speech against the kind of post-modern critical race theory that is said to justify serious restrictions on speech relating to race. A liberal democratic society is fundamentally premised on freedom of speech. This should be a neutral political principle, espoused by all sides of politics. And yet, politicians of all political persuasions are being seduced by the woke shutdown, de-platforming vibe. This is undemocratic and those who cherish democratic, free speech principles must fight back with strong speech.

I INTRODUCTION

There have been further recent steps around Australia to impose bans on speech that many would find distasteful and hurtful. Recently, Victoria passed legislation to criminalise the intentional display of

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the Nazi symbol in public.[1] New South Wales and Queensland are considering similar measures. It is understandable that many associate the swastika with the hateful and murderous Nazi regime, under which many suffered, and which was responsible for the murder of six million Jewish people, and others. However, the history of the swastika is complex, as will be shown. An unspoken assumption behind many moves to 'ban' particular things, including speech on particular matters, or the display of particular symbols or signs, is that by banning them, it will stop individuals from believing particular things, or doing particular things. However, that assumption needs to be seriously assessed and proven, rather than simply espoused. The so-called 'woke era' can be seen as part of the postmodern movement of the past 30 years, in particular, and one of its manifestations, critical race theory. This theory is particularly important to some scholars in terms of their justification for banning particular kinds of speech, including speech relating in some way to race. This article will defend freedom of speech against the kind of post-modern critical race theory that is said to justify serious restrictions on speech relating to race. I will use, for the purposes of discussion, the proposed swastika ban as an exemplar of calls to ban speech. It will not consider the constitutionality of this type of law, as I have done this in other work.[2]

Prior to so doing, one acknowledgment is considered necessary. I believe it is necessary to place on the record that I am not a Nazi, or a Nazi sympathiser. Of course, racism is abhorrent in all its forms, and the murder of six million people is disgraceful, and must never

1 Summary Offences Amendment (Nazi Symbol Prohibition) Act 2022 (Vic). It includes defences where the display is for genuine academic, artistic, religious or scientific purposes, genuine cultural or educational purposes, or to express opposition to fascism or Nazism.

2 Anthony Gray 'Racial Vilification and Freedom of Speech in Australia and Elsewhere' (2012) 41(2) *Common Law World Review* 167.

be forgotten. I have visited the Auschwitz death camp on numerous occasions. More than 75 years after it was closed, it still impacts all those who attend it. I doubt that many would forget the experience of having visited it. The mad, murderous regime that it reflects remains hard to fathom. But it stands as a testament to the result when extreme racism and hatred, combined with other factors, forms into a disastrous mix. We must try to continue to learn these lessons and to ward as far as possible against the rise of this kind of ideology. I am sure that those who wish to ban the swastika and other offensive symbols are equally motivated by the desire to ward against the rise of this kind of ideology.

One other preliminary point is that, at least in current times, defence of freedom of speech has come to be associated with the 'right' of politics, in so far as words such as 'left' or 'right' retain a political meaning any more. It is not clear why defence of freedom of speech should be seen as allied with the views of the political left or the political right, or somewhere in between. This is because the idea of freedom of speech is that it is a freedom that everyone enjoys, regardless of their political views. It is against censorship of speech because of viewpoint or content. It is, at least facially, neutral.[3] I am aware that there are some who argue that it is not in fact neutral because the 'system' is loaded in favour of 'privileged' speakers.[4] I will consider this in more detail below.

Somewhat ironically in the current context, where freedom of speech has come to be associated with the political 'right', on many occasions when freedom of speech has been argued, it has in fact involved

[3] Larry Alexander, 'Is Freedom of Expression a Universal Right?' (2013) 50 *San Diego Law Review* 707, 709.

[4] For example, Neil Gotanda claims that a theory of race colour-blindness is really 'a disguised form of racial privileging': Neil Gotanda, 'Failure of the Color-Blind Vision: Race, Ethnicity and the California Civil Rights Initiative (1996) 23 *Hastings Constitutional Law Quarterly* 1135, 1139.

dissenters on the 'left 'of politics, including communist and socialist party members and/or sympathisers.[5] The state has sought to prosecute them for their beliefs, and they have raised freedom of speech issues. Thus, it is somewhat puzzling to me that belief in freedom of speech has come to be associated with the political 'right', and I do not know when it was that defence of free speech ceased to be associated with the 'left', and came to be associated with the 'right', or why. My view is that the essence of freedom of speech is, and should be, neutral as to politics. It is just as valuable to, and should be defended equally by, those on the political 'right', 'left' or anywhere on the spectrum. Equally, and somewhat relatedly, freedom of speech has historically assisted minorities in their causes; ironically now, it is some minority groups in society who call for significant restrictions on speech. As Strossen points out

> Just as free speech has always been the strongest weapon to advance equal rights causes, censorship has always been the strongest weapon to thwart them ... (those who wish to curb hate speech) contend that racial and other minorities, including women, are relatively disempowered and marginalised. I agree. However, it is precisely for that reason that censorship is not a solution. To the contrary, the government is likely to wield this

[5] In the United States, classically *Schenck v United States* 249 US 47 (1919); *Debs v United States* 249 US 211 (1919) and *De Jonge v Oregon* 299 US 353 (1937); *Dennis v United States* 341 US 494 (1951); *Barenblatt v United States* 360 US 109 (1959) and *Scales v United States* 367 US 203 (1961), and in Australia *Burns v Ransley* (1949) 79 CLR 101 and *R v Sharkey* (1949) 79 CLR 121 (convictions for sedition for those who expressed support for communist Russia upheld, though freedom of speech was not considered as a possible defence). The implied constitutional freedom of political communication would only be recognised in Australia in 1992: *Australian Capital Television Pty Ltd v Commonwealth* (1922) 177 CLR 106. Further, as Augusto Zimmermann and Lorraine Finlay have pointed out, 'the oppressed people of countries with official Marxist ideologies have never achieved any reasonable form of free speech': 'A Forgotten Freedom: Protecting Freedom of Speech in an Age of Political Correctness' (2014) 14 *Macquarie Law Journal* 185, 189.

> tool ... to the particular disadvantage of already disempowered groups. Laws that censor ... hate speech are inevitably enforced disproportionately against speech by, and on behalf of, groups that lack political power ... including ... members of the very minority groups who are the law's intended beneficiaries.[6]

In this context, it is something of a mystery as to why freedom of speech has come to be associated with any particular political view, but most especially why it has come to be favoured by the 'right', and disfavoured by (at least some on) the 'left', when its essence is neutrality as to political view.

II FREEDOM OF SPEECH – BRIEF HISTORY AND THEORETICAL BASIS

Freedom of speech would take some time to be established in the common law tradition.[7] It was a serious offence to commit treason, which included 'imagining' the death of the monarch.[8] It was extended to include criticism of members of the royal family. The law recognised a system of 'prior restraint', under which anyone who sought to publish anything first required the consent of a government official or church

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[6] Nadine Strossen 'Freedom of Speech and Equality: Do We Have to Choose?' (2016) 25 *Journal of Law and Policy* 185, 214.

[7] See for more detail Anthony Gray *Freedom of Speech in the Western World* (Lexington Books, 2019) ch 1.

[8] *Statute of Treasons 1352* (Eng).

officer.[9] In 1606 the court recognised an offence of seditious libel.[10] This included publishing criticism of the government or public office. Truth was no defence. Inevitably it was used to discourage dissent. It is notable that the offence was created by the Court of Star Chamber, notorious for its secretive, inquisitorial processes. That Chamber was abolished in 1641, and unsurprisingly, following its abolition, the volume of publications about the government, including criticism, increased dramatically. This was during and after the English Civil War and in the years leading up to the Glorious Revolution, when political discussion would obviously have been vociferous.

These censorious times reflect a society about which Thomas Hobbes wrote. At this time, it was thought that individuals were somewhat primitive, and prone to violence and unrest. It is understandable that there was a felt need for strong government, able to put down rebellion or rebellious talk, which was seen to threaten the established system of government. Obviously, government itself in England during these times was somewhat shaky, with tension between the monarchy and parliament, disagreement about the respective roles of each, tension over who was entitled to be crowned the monarch,

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[9] In 1643, a Board of Licensors was established to consider whether works should be published; this was continued by the *Publishing Act 1662* (Eng). This system would finally lapse in 1694. Sir William Blackstone claimed that freedom of speech was adequately secured by the demise of the system of prior restraint: 'the liberty of the press is indeed essential to the nature of a free state, but this consists in laying on previous restraints upon publications; and not in freedom from censure for criminal matter when published. Every free man has an undoubted right to lay what sentiments he pleases before the public; to forbid this is to destroy the freedom of the press; but if he publishes what is improper, mischievous or illegal, he must take the consequences of his own temerity ... to punish ... any dangerous or offensive writings which (are) ... of a pernicious tendency is necessary for the preservation of peace and good order': *Commentaries on the Laws of England 1765-1769* (Clarendon Press, 1769) 152.

[10] *De Libellis Famosis* (1606) 5 Co Rep 125a; 77 ER 250.

and republican sentiment. In this volatile climate, an attempt to stifle dissent is understandable, if not defensible.[11]

In any event, over time the system would stabilise. The Glorious Revolution would establish the supremacy of parliament over the monarch. Different theories of government emerged, including that of John Locke and his social contract theory, emphasising the parliamentarian as representative of the people. In such an environment, albeit slowly, the importance of freedom of speech was recognised.[12]

Philip Hamburger notes an important change in view occurred in the early part of the 18th century. His quote also reflects that, at one time, government censorship seems to have been connected with politics of the 'right':

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[11] An example appears in the judgment of Holt CJ in *R v Tutchin* (1704) KB 424, 424-425; 90 ER 1133, 1133-1134: 'but this is a very strange doctrine, to say, it is not a libel, reflecting on the government ... if men should not be called to account for possessing the people with an ill opinion of the government no government can subsist; for it is very necessary to every government, that the people should have a good opinion of it. And nothing can be worse to any government than to endeavour to procure animosities as to the management of it. This has been always looked upon as a crime, and no government can be safe unless it be punished'.

[12] James Fitzjames Stephen *A History of the Criminal Law of England* (Macmillan, 1904) 299-300: 'two different views may be taken of the relation between rulers and their subjects. If the ruler is regarded as the superior of the subject, as being by the nature of his position presumably wise and good, the rightful ruler and guide of the whole population, it must necessarily follow that it is wrong to censure him openly, that even if he is mistaken, his mistakes should be pointed out with the utmost respect, and that whether mistaken or not no censure should be cast upon him likely or designed to diminish his authority. If on the other hand the ruler is regarded as the agent and servant, and the subject of the wise and good master who is obliged to delegate his power to the so-called ruler because being a multitude he cannot use it himself, it is obvious that this sentiment must be reversed. Every member of the public who censures the ruler for the time being exercises in his own person the right which belongs to the whole of which he forms a part ... to those who hold this view fully and carry it out to all its consequences there can be no such offence as sedition'.

> In 1710 the idea of vigorous criticism of authority was as disturbing to most Tories as it may have been congenial to a small number of radical Whigs. Among Tories, Grub Street's pamphlet and newspaper onslaught elicited deep ideological as well as practical concern. Committed to a vision of hierarchical society established by divine authority and therefore unimprovable, unchanging and uniform, Tory ideologues in the excited atmosphere of 1710 perceived no alternative to the received religious and political establishment except complete moral and social disintegration. In church and state, according to extreme Tories, the slightest dissent posed a danger, and printed criticism of the government was no exception. In their second administration under Anne, as in their first, the Tories prosecuted printers and publishers for seditious libel, relying, where need arose, upon the judges to interpret the law in a way that would not be prejudicial to the requirements of the government ... by 1720 many men began to realize that ministers and factions, with all their petty squabbles and scurrilous printed attacks on one another, would come and go, but the English Establishment, a Protestant parliamentary monarchy, would be secure in spite of all the liberties taken by the press. Accordingly, although the Whig government continued to prosecute printers for seditious libel after 1714, it did so without expecting to bring the press to complete submission.[13]

By the mid-19th century, United Kingdom courts were reflecting the importance of free speech.[14]

Traditionally, Australian law recognised freedom of speech as a fundamental common law right, in the sense that it existed, to the

[13] Philip Hamburger 'The Development of the Law of Seditious Libel and the Control of the Press' (1985) 37 *Stanford Law Review* 661, 748, 752.

[14] *Wason v Walter* (1868) LR 4 QB 73, 93 (Cockburn CJ).

extent that parliament did not abrogate it.[15] Parliament has done so. A notorious example is the successful prosecution of individuals for merely expressing pro-communist views.[16] In the early 1990s the High Court discerned an implied freedom of political communication as a result of Australia's system of representative government.[17] Notwithstanding this freedom, the Commonwealth[18] and the states[19] have introduced anti-vilification legislation, including vilification on the basis of race. These provisions are typically framed around inciting hatred towards, serious contempt for or ridicule of a person. In some cases, a criminal offence exists, usually where intent and/or recklessness exists.[20] The constitutionality of such measures, having regard to the implied freedom, has not yet been tested.[21]

Together with Locke and John Milton, the leading philosophical support for freedom of speech is typically sourced in the writings of John Stuart Mill. Mill espoused various rationales for freedom of speech, including the search for truth:

> The peculiar evil of silencing the expression of an opinion is that

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15 *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 564 (all members of the Court).

16 *R v Sharkey* (1949) 79 CLR 121; *Burns v Ransley* (1949) 79 CLR 1.

17 *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1.

18 *Racial Discrimination Act 1975* (Cth) s 18C.

19 *Anti-Discrimination Act 1977* (NSW) s 20C and *Racial and Religious Tolerance Act 2001* (Vic) s 7; *Anti-Discrimination Act 1991* (Qld) s 124A; *Anti-Discrimination Act 1998* (Tas) s 19; *Discrimination Act 1991* (ACT) s 67A.

20 *Crimes Act 1900* (NSW) s 93Z; *Racial and Religious Tolerance Act 2001* (Vic) s 24; *Anti-Discrimination Act 1991* (Qld) s 131A; *Criminal Code Compilation Act 1913* (WA) ss 80A-80D; *Racial Vilification Act 1996* (SA) s 4; *Criminal Code 2002* (ACT) s 750. Notably, s 80B and s 80D of the Western Australian legislation do not require either intent or recklessness in order for a person to commit a criminal offence.

21 Anthony Gray 'Racial Vilification and Freedom of Speech in Australia and Elsewhere' (2012) 41(2) *Common Law World Review* 167.

> it is robbing the human race, posterity, as well as the existing generation, those who dissent from the opinion; still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth; if wrong, they lose, what is almost as great a benefit, a clearer perception and livelier impression of truth, produced by its collision with error ... we can never be sure that the opinion we are endeavouring to stifle is a false opinion, and if we were sure, stifling it would be an evil still.[22]

He also lauds freedom of speech on the basis of the role it plays in aiding an individual's development. He notes:

> The only way in which a human being can make some approach to knowing the whole of a subject is by hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind. No wise (person) ever acquired (their) wisdom in any mode but this; nor is it in the nature of human intellect to become wise in any other manner.[23]

Mill's defence of freedom of speech was not absolute. His 'harm principle' was an identified limit – a person's freedom to speak ended when its exercise caused another 'harm'. Mill did not elaborate on this principle, and he did not consider its possible application to the regulation of so-called 'hate speech'.[24]

Later, scholars would attempt to justify freedom of speech with

[22] John Stuart Mill, *Utilitarianism, On Liberty, Considerations on Representative Government*, ed Geraint Williams (Everyman's Library, 1910) 83.

[23] Ibid 84.

[24] It has been considered difficult to apply in the context of hate speech: Anthony D'Amato, 'Harmful Speech and the Culture of Indeterminacy' (1991) 32 *William and Mary Law Review* 329, 337: 'whether harm occurred just by the utterance itself can be nothing better than a random guess'.

rationales such as the 'marketplace of ideas' notion, that an environment in which ideas openly competed with one another would most likely lead a society closer to truth.[25] Any number of historical examples from a range of fields would demonstrate that what was once thought to be unassailable truth turned out to be palpably false. It is argued that censorship actually hurts minorities disproportionately compared with majority groups.[26] It is said that censorship will not drive unpopular or unpalatable ideas away; rather it will put them underground, where they might fester.[27]

It has also been asserted that freedom of speech is necessary for, and to the extent of, a healthy functioning democratic, representative government in which individuals have access to a range of views and opinions in order to make an informed judgment about the government they wish to represent them, and to assess a government's performance in office.[28]

In sum, freedom of speech fits within a liberalist view of the legal system, where individual personal liberty is maximised, and the role of government and government regulation minimised.[29] An individual exists before society does, and has free will and autonomy,

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[25] *Abrams v United States* 259 US 616, 630 (1919) (Holmes J, dissenting).

[26] Larry Alexander *Is There a Right to Freedom of Expression?* (Cambridge University Press, 2005) 192-193.

[27] Ibid 193.

[28] Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (Oxford University Press, 1980); *Australian Capital Television Pty Ltd v Commonwealth* (1992) 177 CLR 106; *Nationwide News v Wills* (1992) 177 CLR 1. A view of free speech as the 'lifeblood' of democracy was denounced as a 'merely rhetorical flourish': Bill Swannie, 'Are racial vilification laws supported by free speech arguments?' (2018) 44(1) *Monash University Law Review* 71, 77.

[29] John Locke, *The Second Treatise of Government* (1689) 4-11; *West Virginia Board of Education v Barnette* 319 US 624, 639-640 (1943) (Jackson J, for Stone, Robert, Reed and Rutledge JJ, Black, Douglas and Murphy JJ concurring).

compatible with the rights of other individuals.[30] Liberalism makes a sharp distinction between the private and public spheres. The former substantially pre-dates the latter. Regulation is typically targeted at the latter. Liberalism would not typically favour the regulation of hate speech. Toni Massaro identifies that this is because liberalism assumes that individuals are strong with individual powers of self-identification and resilience, and because they judge that, at least typically, any injury caused by nasty speech is not at a level that would justify the intervention of the state, unless it was likely to cause an imminent breach of the peace.[31]

I will now articulate how subsequent intellectual movements, including post-modernism and its critical race theory, have come to challenge the liberal view of free speech.

III POSTMODERNISM, CRITICAL RACE THEORY AND FREE SPEECH

A *Postmodernism*

One way of interpreting postmodernism is to articulate modernism. As one scholar puts it:

> The modern period spanned the mid-Enlightenment to the 1960s and early 1970s. It was characterized by the power of reason, and the inherent dignity and uniqueness of individuals as ends in themselves. A basic tenet of modernism held that the faculty of reason could operate as a neutral court of appeal to weed out

[30] Stephen Feldman, 'Postmodern Free Expression: A Philosophical Rationale for the Digital Age' (2017) 100 *Marquette Law Review* 1123, 1125.

[31] Toni Massaro, 'Equality and Freedom of Expression: The Hate Speech Dilemma' (1991) 32 *William and Mary Law Review* 211, 229-230.

beliefs and practices based on superstition and blind tradition.[32]

This view of the political and legal system has been challenged. Postmodern theory has a very different view of the political and legal system, and begins from different premises. According to postmodern theory, there is no 'truth'.[33] It can be seen how this potentially conflicts with the traditions of liberalism, and rationales for freedom of speech. Freedom of speech is lauded as a means of discovering, or bringing society closer to, truth. However, this rationale falls away if, in fact, there is no truth. Feldman says that the original rationales for freedom of speech 'no longer fit in our postmodern ... society'.[34] Delgado claims the traditionalist view of freedom of speech rationales is 'passing into history. Replacing it is a much more nuanced, sceptical and realistic view of what speech can do'.[35]

Postmodernists believe that there is no innate self, that each person's

[32] Douglas E Litowitz, *Postmodern Philosophy and Law* (University Press of Kansas, 1997) 7.

[33] Calvin Massey, 'The Constitution in a Postmodern Age' (2007) 64 *Washington and Lee Law Review* 165, 171: 'a central postmodern claim is that there can be no such thing as a objective truth'; Stanley Fish, *Doing What Comes Naturally: Change, Rhetoric and the Practice of Theory in Literary and Legal Studies* (Duke University Press, 1989) 344.

[34] Stephen Feldman, 'Postmodern Free Expression: A Philosophical Rationale for the Digital Age' (2017) 100 *Marquette Law Review* 1123, 1148. Feldman claims that 'the concept of the classical liberal self and the three philosophical rationales for free expression assume that the absence of government regulation maximizes individual liberty. But in the digital age, this assumption is patently false': at 1161.

[35] Richard Delgado, 'First Amendment Formalism is Giving Way to First Amendment Legal Realism' (1994) 29 *Harvard Civil Law-Civil Liberties Law Review* 169, 170.

identity is socially constructed.[36] Race is a social construct,[37] not an immutable characteristic.[38] Presumably this social construct means that individuals cannot be held responsible for their behaviours, and the criminal law will not effectively deter or punish undesired behaviour. If an individual is 'socially constructed', this means that government regulation becomes critical in construction of 'socially desired' identity.[39] Of course, it is very difficult to square this idea with the fundamental principle of representative government, under which government is considered to be representative of the community it serves, rather than its master. In fact, these aspects of postmodernism seem to be more of a throwback to the bleak view of human nature espoused by Hobbes – that the state needs to shape individuals in ways thought (by some) to be socially desirable.

Postmodernists believe that existing legal structures perpetuate existing status and power and show disdain for the powerless. A pithy claim that succinctly sums up postmodernist thought here is that 'the places where the law does not go to redress harm have tended to be the places where women, children, people of colour and poor

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36 Calvin Massey, 'The Constitution in a Postmodern Age' (2007) 64 *Washington and Lee Law Review* 165, 174: 'the postmodern contention is that there is no coherent self that lies outside the disparate social discourses that inevitably construct us'; Stephen Feldman, 1162.

37 Charles R Lawrence III, 'If He Hollers Let Him Go: Regulating Racist Speech on Campus' [1990] *Duke Law Journal* 431, 443; Kimberlé Crenshaw Mapping the Margins: Intersectionality, Identity Politics and Violence Against Women of Color' (1991) 43 *Stanford Law Review* 1241; Neil Gotanda 'A Critique of "Our Constitution is Color-Blind"' (1991) 44 *Stanford Law Review* 1, 23; Richard Delgado and Jean Stefancic, *Critical Race Theory: An Introduction* (New York University Press, 3rd ed, 2017) 9.

38 Robert Hayman, The Color of Tradition: Critical Race Theory and Postmodern Constitutional Traditionalism' (1995) 30 *Harvard Civil Rights – Civil Liberties Law Review* 57, 91.

39 Steven Gey, 'The Case Against Postmodern Censorship Theory' (1996) 145 *University of Pennsylvania Law Review* 193, 198.

people live'.[40] In the post-modern world, the distinction between the private and the public realm collapses, because the private is publicly (socially) constructed.[41]

Postmodernism would also decry another major rationale for freedom of speech – belief that it is in the marketplace of ideas that the strongest arguments will win out. A postmodernist would disagree with the assumption underlying this argument, that of fair and free access to the 'market'. A postmodernist would argue the market was 'rigged' in favour of the powerful, strong and wealthy, and that only the voices of the strong are heard in such a system. The argument is that the weak are silenced under this (broadly) laissez-faire system, such that only government intervention can bring about a system where all voices are heard. The argument would be that the government needs to intervene in this market, by muting some of the strong voices, and magnifying others, in order to ensure that all voices are heard, and the market works in a more efficient and effective manner. It would overtly favour the expression of some views over others.[42] It is argued that existing exceptions to the generally very robust protection of free speech are rooted in 'privilege':

> When powerful groups find a particular type of speech offensive, and likely to render them one-down, they pass a law to curtail it. We rarely notice these exceptions and special doctrines, however, because they are time-honoured and second nature. Of course there would be an exception for state secrets, plagiarism,

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[40] Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320, 2322.

[41] Gey (n 39) 241.

[42] Ibid 204. The United States Supreme Court has specifically rejected the suggestion that government should mute some voices so that others may be heard: *Buckley v Valeo* 424 US 1, 48-49 (1976).

false advertising and dozens of other types of speech, we say.[43]

The umbrella of postmodernism houses a range of movements, including critical legal theory. Critical legal theorists would typically criticise freedom of speech on the basis that it only permitted the voices of the strong and powerful to be heard, preserving the status quo of an unfair society.[44] They would argue that freedom of speech perpetuates existing hierarchies within society, consigning the weak and powerless to remain permanently so.[45] In their view, freedom of speech entrenches and reflects existing power structures. Critical legal theoriests would argue that "freedom of speech" is really an illusion, that individuals are not truly "free", but constrained by existing societal structures, discourse, meaning of words, their education etc.[46] Closely aligned with critical legal theory is a sub-branch known as critical race theory. Due to its importance for the immediate context of freedom of speech under discussion in this article, critical race theory, and the views of its leading adherents, warrants fuller discussion here.

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[43] Delgado (n 35) 172. By way of respectful response, rules against plagiarism protect everyone against another person's unauthorised copying or appropriation of the work, whether the person who authored the work copied is powerful or powerless, or somewhere in between. Similarly, false advertising protects all of us as consumers, not merely the strong, wealthy or powerful.

[44] Allan Hutchinson, *Introduction to Critical Legal Studies* (Rowman & Littlefied Publishers, 1989) 3: 'offended by the hierarchical structures of domination that characterize modern society CLS people work toward a world that is more just and egalitarian ... for CLS the rule of law is a mask that lends to existing social structures the appearance of legitimacy and inevitability'.

[45] Jay Moran, 'Postmodernism's Misguided Place in Legal Scholarship: Chaos Theory, Deconstruction and Some Insights from Thomas Pynchon's Fiction' (1998) 6 *Southern California Interdisciplinary Law Journal* 155, 158-159.

[46] Stanley Fish, *There's No Such Thing as Free Speech* (Oxford University Press, 1994); Augusto Zimmermann 'The Unconstitutionality of Religious Vilification Laws in Australia: Why Religious Vilification Laws are Contrary to the Implied Freedom of Political Communication Affirmed in the Australian *Constitution*' [2013] 3 *Brigham Young University Law Review* 457, 470.

B *Critical Race Theory*

The late 20th century saw the development of a sub-genre within the critical legal theorists movement, focussed on race. Evolving from the idea in critical legal theory that law reflected existing power structures and privilege in society, critical race theory developed on the argument that laws reflected the privilege of a particular race, or in other words 'white privilege'. According to this viewpoint, freedom of speech was not an essential pre-condition for a healthy functioning democracy, a way in which individuals developed, or a way in which society determined or became closer to truth. Rather, it was a way in which existing power structures and privilege was perpetuated, on the basis that it was those of a particular race, and in particular 'whites', who controlled the means of communication and therefore spoke with the loudest voices, effectively silencing and drowning out the less privileged, including in particular racial minorities. This leads Delgado to claim that racism and sexism 'are embedded in the reigning paradigm' by which 'we construct and interpret reality'.[47] Race-based 'hate speech' is 'spirit murder'.[48] In this theory, 'law (is)

[47] Delgado (n 35) 171.

[48] Patricia Williams, 'Spirit Murdering the Messenger: The Discourse of Fingerpointing as the Law's Response to Racism' (1987) 42 *University of Miami Law Review* 127, 129-130. Williams claims that racism 'can be as difficult to prove as child abuse or rape, where the victim is forced to convince others he or she was not at fault, or that the perpetrator was not just playing around. As in rape cases, victims of racism must prove that they did not distort the circumstances, misunderstand the intent, or even enjoy it'. I must respectfully disagree with many of these comments. In criminal law, any person who accuses another of committing a crime must prove the elements of the crime at a level beyond reasonable doubt. This is as it should be. I am not aware of any defence to a rape or child abuse charge that involves questions of whether the alleged perpetrator was 'playing around', or any case in which the issue of 'enjoyment' was in any way relevant in such a context. The truth is that a rape charge typically revolves around the issue of the physical act of intercourse, and the question of consent: see for example *Criminal Code Act Consolidation Act 1913* (WA) s 325.1; *Criminal Code 1899* (Qld) s 349.

a prime instrument in the construction and reinforcement of racial subordination'.[49] I will now elaborate in some detail the work of some of the leading scholars in the critical race theory movement.

1 Mari Matsuda

A notable feature of Matsuda's work, fairly typical of critical race theorists, is the use of narrative, or personal story and anecdote. I will leave it to others to debate the extent to which use of narrative, often extensive, is appropriate or persuasive within a discussion about legal issues.[50] There is certainly conjecture about this. Regardless, in one of Matsuda's leading articles, she includes an anecdote where she claims she arrived in Perth and:

> [F]inds a proliferation of posters stating 'Asians Out or Racial War' displayed on telephone poles. She uses her best, educated inflection in speaking with clerks and cab drivers, and decides not to complain when she is overcharged.[51]

Matsuda refers to a 'structural reality of racism' in America.[52] She claims that:

> [V]arious implements of racism find their way into the hands

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[49] Ian Haney Lopez, 'The Social Construction of Race: Some Observations on Illusion, Fabrication and Choice' (1994) 29 *Harvard Civil Rights-Civil Liberties Law Review* 1, 3.

[50] Mark Tushnet, 'The Degradation of Constitutional Discourse' (1992) 81 *Georgetown Law Journal* 251; Daniel Farber and Suzanna Sherry, 'Telling Stories Out of School: An Essay on Legal Narratives' (1993) 45 *Stanford Law Review* 807; Richard Delgado, 'On Telling Stories Out of School: A Reply to Farber and Sherry' (1993) 46 *Vanderbilt Law Review* 665.

[51] Mari Matsuda, 'Public Response to Racist Speech: Considering the Victim's Story' (1989) 87 *Michigan Law Review* 2320, 2320 (this incident apparently occurred in 1987).

[52] Ibid 2332.

> of different dominant-group members. Lower and middle class white men might use violence against people of colour; while upper class whites might resort to private clubs or righteous indignation against 'diversity' and 'reverse discrimination'.

Her key argument is that what she considers to be 'racist' speech should not be protected by the First Amendment to the *United States Constitution*. In making this argument, she faces very significant hurdles in terms of precedent. The United States Supreme Court has generally very strongly protected freedom of speech in that country as an indispensable aspect of democratic self-government. It has particularly frowned upon content-based and viewpoint-based restrictions on speech.[53] It has recognised few exceptions to free speech rights, including a so-called 'fighting words' exception,[54] although the continued scope of this exception is open to doubt. In protection of free speech, the Court has invalidated an ordinance applied to stop a march involving the wearing of swastikas on armbands,[55] and one that criminalised cross-burning.[56] It did uphold a challenge an ordinance banning publications that portrayed a class of citizens of any 'race, color, creed, or religion' in a way that exposed them to contempt,

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[53] 'If there is a bedrock principle underlying the First Amendment, it is that the government may not prohibit the expression of an idea simply because society finds the idea itself offensive or disagreeable': *Texas v Johnson* 491 US 397, 414 (1989).

[54] *Chaplinsky v New Hampshire* 315 US 568 (1942).

[55] *Skokie v National Socialist Party of America et al* 432 US 43 (1977).

[56] *Brandenburg v Ohio* 395 US 444 (1969); *RAV v Petitioner, City of St Paul* 505 US 377 (1992). In the former case, the Court limited the ability of a legislature to criminalise speech advocating force or violation of the law 'except where such advocacy is directed to inciting or producing imminent lawless action and is likely to incite or produce such action': at 447; *United States v Eichman* 496 US 310, 318-319 (1990) Brennan J (with whom Marshall, Blackmun, Scalia and Kennedy JJ concurred) noted that the First Amendment protected 'virulent ethnic and religious epithets' because governments could not prohibit the expression of idea, however distasteful, because they disagreed with it.

derision or a breach of the peace,[57] but later developments in First Amendment jurisprudence suggest this decision is no longer good law.[58]

The Court has reiterated on countless occasions that there is no such thing as a false idea. It is considered essential that all have the right to speak; the price of this is that some will say horrible and hurtful things, but we pay this price because we know the price of the alternative, government sanction of speech it happens to disfavour at any particular time, is higher and worse.[59]

Matsuda argues for reform of these free speech principles such that legislatures would be permitted to outlaw 'racist' speech. Her justification is that:

> Racist speech is best treated as a sui generis category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse.[60]

Matsuda would permit the banning of speech that was 'racist' if it met three criteria: (a) the message was one of racial inferiority, (b) it was directed against a historically oppressed group, and (c) the message was persecutorial, hateful and degrading.[61] She says that the test for

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[57] *Beauharnais v Illinois* 343 US 250 (1952).

[58] Kent Greenawalt, 'Insults and Epithets: Are They Protected Speech?' (1990) 42 *Rutgers Law Review* 287, 304.

[59] Aryeh Neier, *Defending My Enemy: American Nazis, the Skokie Case and the Risks of Freedom* 7 (Dutton Books, 1979): 'it is dangerous to let the Nazis have their say. But it is more dangerous by far to destroy the laws that deny anyone the power to silence Jews if Jews should need to cry out to each other and to the world for succor'.

[60] Matsuda (n 51) 2357.

[61] Ibid.

whether particular material met this final requirement should be the recipient's community standard.[62] Her writing suggests she believes that the swastika would meet these requirements.[63] She justifies a legal ban on what she considers to be racist speech on the basis that it is 'wrong'.

Matsuda's argument seems to be that the 'truth' rationale for freedom of speech does not apply to what she considers to be 'racist' speech, because of the 'universal acceptance of the wrongfulness of the doctrine of racial supremacy', given her view that racist speech necessarily involves a supremacy view. Of course, I agree that the doctrine of racial supremacy is awful and wrong. But I am naturally sceptical about any claim that anything is 'universally accepted', as Mill's work teaches, and I must respectfully disagree with the claim about universal acceptance of this position. Ethnic minorities in various countries, including China and Sri Lanka, might beg to differ. Of course, persecution of a person based on race is one of the five animating factors for the *Refugee Convention*, and it would be a large claim to suggest that there is no longer any need for that part of the *Refugee Convention* based on race-based persecution, because it is no longer occurring. Regrettably, it is. But this fact surely demonstrates the folly of the universality claim.

Because of the way in which Matsuda defines racism and 'hate speech', she freely admits that:

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[62] Ibid 2364; 'rather than looking to the neutral, objective, unknowing and ahistorical reasonable person, we should look to the victim-group members to tell us whether the harm is real harm to real people'.

[63] Ibid 2365-2366: 'there are certain symbols and regalia that in the context of history carry a clear message of racial supremacy, hatred, persecution and degradation of certain groups. The swastika ... (is) an example of a sign ... that convey(s) a powerful message to both the user and the recipient'.

> Expressions of hatred, revulsion, and anger directed against historically dominant-group members by subordinated group members are not criminalised by the definition of racist hate messages used here.[64]

Matsuda claims that these expressions should not be criminalised because 'they come from an experience of oppression'.[65] Thus, ironically, she would embed what I would consider racism into our legal system, by having the law applied in different ways according to the race of the speaker. If the speaker were of a racial minority, what they said to a member of the racial majority would not amount to hate speech and therefore would not be prohibited, but the very same content expressed by a member of the racial majority to a member of a racial minority would be hate speech, according to her view. I could never accept the application of a law being dependent on the race of those involved in a given situation. To do so, ironically, would be racist (in the traditional meaning of the word, not the unusual definition Matsuda ascribes to it). Respectfully, one does not tackle racism by being racist.

She also argues that those who attempt to adopt a neutral position on certain kinds of speech she deems racist are in fact not neutral, but in complicit agreement with the relevant offensive messages. This claim appears in the following passage:

> To allow an organisation known for violence, persecution, race hatred and commitment to racial supremacy to exist openly, and to provide police protection and access to public streets and college campuses for such a group, means that the state is promoting racist speech. If not for such support, hate groups

[64] Ibid 2361.
[65] Ibid 2363.

> would decline in efficacy. The chilling sight of avowed racists in threatening regalia marching through our neighbourhoods with full police protection is a statement of state authorization.[66]

This is not an isolated sentiment. Others who defend the right of individuals to speak are attacked by associating them with the controversial views expressed by the individual. So, for instance, the American Civil Liberties Union ('ACLU') and those who give of their time to defend human rights, including free speech, are the subject of abuse and derision. Andrea Dworkin dismisses the ACLU as the 'handmaiden of the pornographers, the Nazis and the Ku Klux Klan' for their defence of free speech in these controversial contexts.[67]

2 *Richard Delgado*

Delgado paints a bleak picture of the United States, stating it is a 'deeply ingrained' idea that a person's colour is a badge of inferiority and involves denial of opportunity.[68] He claims (without referencing any literature) that 'the psychological harms caused by racial stigmatization are often much more severe than those created by other stereotyping actions',[69] and compares the plight of racial minorities with 'persons with physical disfigurements'[70] (this is a direct quote

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66 Ibid 2378.

67 Andrew Dworkin, 'The ACLU: Bait and Switch' (1989) 1 *Yale Journal of Law and Feminism* 37, 37. She also claims that 'genocidal ambitions and concrete organizing towards genocidal goals are trivialized by male lawyers who are a mostly protected and privileged group': at 39.

68 Richard Delgado, 'Words that Wound: A Tort Action for Racial Insults, Epithets and Name-Calling' (1982) 17 *Harvard Civil Rights-Civil Liberties Law Review* 133, 135.

69 Ibid 136.

70 Ibid 136.

from Delgado; he used the phrase that I merely cite. I would not use these terms). His view is that the harm caused by racial insults justifies not according First Amendment speech to such expression, and conferring a civil claim on the person targeted for emotional abuse and injury. He derides the position of the ACLU, as strong defenders of free speech doctrine, as being part of a 'backwater of legal thought'.[71]

Delgado seems to share the view of Matsuda that, by curbing racially offensive speech, it will lead to a more 'peaceful and diverse' society.[72] Again, this statement is not referenced or accompanied by supporting evidence. He also defines hate speech very narrowly, as involving members of a privileged class speaking disparagingly about those of a lower class.[73] He claims, again without evidence, that university administrators 'may know, on some level, that tolerating a small degree of harassment and invective on campus confers benefits ... tolerating 'micro-aggression' keeps students of colour on edge and defensive, prevents them from feeling too secure on campus, and discourages them from making demands'. He claims university administrators might 'treat lightly' the occasional racist student, visitor or lecturer who utters a racist slur 'recognizing, perhaps unconsciously, that his transgression brings stability to the institution'.[74]

He claims that the marketplace of ideas justification for free speech is not strong, because 'the fight was not fair. Speech is expensive, not all can afford the cost of a microphone, computer or television airtime,

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[71] Delgado (n 35) 174.

[72] Richard Delgado 'Book Review: Toward a Legal Realist View of the First Amendment' (2000) 113 *Harvard Law Review* 778, 784.

[73] Ibid 787: 'hate speech grinds down persons of lower station and power than the speaker', and hate speech 'often operates further to advantage its speakers and their class': at 789.

[74] Ibid 790.

not all have equal credibility in the eyes of the public'.[75]

Delgado shares Matsuda's position that not all racial slurs are alike. He would apparently treat very differently slurs directed at white people from those directed at African-American people. This is because the slurs directed at the latter race carry a 'dispiriting quality' and historical impact that is missing from those directed at white people. In the case of whites, slurs are often experienced 'on an individual and isolated level'.[76]

3 *Charles Lawrence III*

Lawrence also paints a bleak view of American society, stating that 'for over three hundred years, racist speech has been the liturgy of America's leading established religion, the religion of racism'.[77] He is dismissive of the marketplace of ideas justification for freedom of speech, on the basis that:

> [T]he American marketplace of ideas was founded with the idea of the racial inferiority of non-whites as one of its chief commodities, and ever since the market opened, racism has remained its most active item in trade ... racism is an epidemic infecting the marketplace of ideas and rendering it dysfunctional. Racism is ubiquitous. We are all racists.[78]

At times, Lawrence seems to suggest that those without direct, personal

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[75] Ibid 791.

[76] Ibid 797.

[77] Charles R Lawrence III 'If He Hollers Let Him Go: Regulating Racist Speech on Campus' [1990] *Duke Law Journal* 431, 447.

[78] Ibid 468.

experience of racism cannot properly balance competing interests in the free speech space:

> Not everyone has known the experience of being victimized by racist, misogynist and homophobic speech, and we do not share equally the burden of the societal harm it inflicts. Often we are too quick to say we have heard the victim's cries when we have not; we are too eager to assure ourselves we have experienced the same injury, and therefore we can make the constitutional balance without danger of mismeasurement. For many of us who have fought for the rights of oppressed minorities, it is difficult to accept that – by underestimating the injury from racist speech – we too might be implicated in the vicious words we would never utter. Until we have eradicated racism and sexism and no longer share in the fruits of those forms of domination, we cannot justly strike the balance over the protest of those who are dominated.[79]

Lawrence apparently criticises civil libertarians who argue that injury to victims of racial abuse is typically minimal, and distance themselves from such activity by dismissing it as isolated and an aberration. He states that such individuals 'disclaim any responsibility for its occurrence', apparently implying that one citizen is to be held responsible for what another citizen says or does. He then refers to the unacceptable behaviour of two white university students who adorn a poster of Beethoven with particular colours, with features that these students presumably associated (stereotypically) with a particular race, after a classroom debate where there was discussion about Beethoven's ethnicity. Lawrence takes issue with colleagues who shared his outrage at the students' behaviour, but who claimed it was an isolated case of immature stupidity and a case of the rebelliousness of youth. Rather, Lawrence viewed it as the students 'imitating their

[79] Ibid 459.

role models in the professoriate, not rebelling against them'.[80]

He agrees with Matsuda about the government's culpability for failing to curb what he considers to be hate and/or racist speech, decrying the 'joint venture' between governments that refuse to legislate against such speech, and those uttering these views.[81] He agrees with Matsuda that hate speech needs to be regulated because it tends to silence victims.[82]

4 Neil Gotanda

One of Gotanda's leading articles attacks the liberal position of 'neutrality' towards race. A neutral view regarding race would favour the law not taking race into account in its formation or application. So, for example, it would forbid discrimination on the basis of race, whether that discrimination was against or in favour of a racial minority. It would disfavour a kind of 'identity-based' view that a person's characteristics, including race, should impact how the law applies to them.

Gotanda attacks this liberal premise as racist. He argues that it, in fact, 'fosters white racial domination' and legitimates and maintains the social, economic and political advantages that he believes white people have over other Americans.[83]

Gotanda believes that race is socially constructed. He also criticises how the dominant legal culture views race, as stable and immutable,

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[80] Ibid 479.

[81] Ibid 446.,

[82] Charles R Lawrence III 'Crossburning and the Sound of Silence: Antisubordination Theory and the First Amendment' (1992) 37 *Villanova Law Review* 787, 792.

[83] Neil Gotanda 'A Critique of "Our Constitution is Color-Blind"' (1991) 44 *Stanford Law Review* 1, 2-3.

and reflecting what he views as a 'formal-race' concept of race, rather than his favoured view of a 'status-race' or 'culture-race' concept that he favours. Gotanda claims that:

> Subordination occurs in the very act of a white person recognising a Black person's race. Much of constitutional discourse disguises that subordination by treating racial categories as if they were stable and immutable. Finally, the treatment of racial categories as functionally objective devalues the socioeconomic and political history of those placed within them. Through this complex process of assertion, disguise, and devaluation, racial categorization ... advances white interests.[84]

He believes that discussion of race in a legal context must take place in the context of the oppression and suppression of minority races in America.[85] Gotanda claims that the attempt to make constitutional rights 'colour-blind', given his view of the social construction of rights, amounts to a denial of the distinctive culture of African-American people and would amount to 'cultural genocide'.[86]

IV CRITICAL REFLECTIONS ON CRITICAL RACE THEORY AND ATTEMPTS TO BAN RACIST SPEECH

A *Essentialism*

One of the main criticisms of critical race theory is that it involves essentialism – that it is superficial because it makes gross generalisations about those of a minority race. For example, it assumes that all those of a minority race are impoverished, powerless and silenced. It assumes

[84] Ibid 26.
[85] Ibid 37.
[86] Ibid 59-60.

that their life experience has been one of oppression. One example of this in the work of Matsuda is her stated view that in order to determine whether or not race-based speech should be banned, the law should ask members of the victimised group. This view apparently assumes that members of the victimised group would all answer the same way as to whether a particular statement was, or was not, hurtful and something that the law ought to proscribe. Yet, self-evidently it is just not possible to draw this kind of conclusion about a group of people.

This criticism has been made elsewhere:

> One of the chief problems with the racialist account of social power and struggle lies in the tendency to 'essentialize' the racial communities with which it represents the social world. In black racialist circles the felt necessity to articulate the stable vision of group identity and interest has underwritten a 'representational politics' in which the experience of one segment of black America is taken as the representative of the black experience in totality. As a result, Black racialism yields a flat, fixed image of racial identity, experience and interest which fails to capture the complex and changing realities of racial domination in the contemporary United States.[87]

It would clearly be simplistic and incorrect to assume the uniformity of the life experience and views of members of a racial minority. Further, this aspect of critical race theory appears at odds with other elements of postmodernist thought, which assert there is no objective truth and that individuals are social constructs. If this were true, everyone's life experience would have 'constructed' them differently, making

[87] Cornell West, Kimberlé Crenshaw, Neil Gotanda, Gary Peller and Kendall Thomas *Critical Race Theory: The Key Writings That Formed the Movement* (New Press, 1995) xxxi.

any assumptions about the reactions of a particular group to a given situation impossible. At this point, critical race theory approaches incoherence.[88]

Further, though critical race theorists claim the powerlessness of many in society, and control of the media by powerful white individuals, in truth social media has permitted a much broader range of messages to be circulated. If it were once true that media ownership was concentrated in the hands of a powerful few, the exponential growth of social media, permitting all a chance to express views and have them circulated widely around the world, has surely muted this concern.

B *Contradictions Within Post-Modernism*

There are many logical irregularities with a post-modern view. Firstly, post-modernists criticise existing beliefs on the basis they are not really what an individual believes, but a product of the social structures in which a person exists. It fundamentally denies that individuals are essentially free, and exercise 'free will'. Of course, the same comment could be directed to the post-modernists themselves. On this argument, surely they themselves are a 'social construct'; their views are not really the product of an independent, informed judgment, but hemmed in and constrained by their place within societal structures. On this basis, how would a post-modern view be any different to the whole range of other views that currently exist, which post-modernists criticise as being socially constructed?

Post-modernists seem to have a very benign view of government,

[88] See for further discussion Kenneth Nunn, 'Essentially Black: Legal Theory and the Morality of Conscious Racial Identity' (2018) 97 *Nebraska Law Review* 287.

trusting it to inculcate citizens with the "right" beliefs, beliefs which the post-modernists happen to share. But, of course, to give power to government to inculcate citizens with particular beliefs is very dangerous. What happens if a particular bloc takes the reins of government, but does not share post-modern beliefs? Would the post-modernists then deny the right of that government to engage in the kind of encouragement of "right-thinking" that they have previously lauded?[89]

C *Neutrality of the Law Regarding Race*

A hallmark of liberal thought is the neutrality of the law toward race. It is inherent in the landmark dissenting judgment of Harlan J in *Plessy v Ferguson*.[90] In a strong affirmation of the rule of law, Harlan J states that the *United States Constitution* is 'colour-blind', and there was no superior, dominant ruling class. All citizens were equal before the law, without regard to race.[91] Of course, a majority of the Court in that case adopted a 'separate but equal doctrine', but this was overturned by the Court in *Brown v Board of Education*,[92] where the court found that the policy, as administered, had the practical effect that African-American children were denied educational opportunities that were open to students of other races.[93]

This article defends the neutrality of the law toward race. It is absolutely

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[89] These criticisms are discussed in further detail in Gey (n 39) 224-233.

[90] 163 US 537 (1896) ('*Plessy*').

[91] Ibid 559-560.

[92] 347 US 483 (1954).

[93] *Loving v Virginia* 388 US 1, 13 (1967) (Stewart J): 'it is simply not possible for a state law to be valid under our *Constitution* which makes the criminality of an act depend upon the race of the actor'.

fundamental in a nation premised on the rule of law that the law should be applied in an objective, neutral and impartial manner to all. Identity aspects of a person, including their race, but also other things like their gender, age, sexuality, religion, political view, disability etc are simply irrelevant, and should be irrelevant, in terms of how the law applies to them. Discrimination legislation nationally and in every state and territory throughout Australia seeks to ensure equal treatment of people, and that people are not discriminated against in employment, in the provision of goods and services and in relation to accommodation on the basis of these grounds, including race. Most would laud legislation such as this. It seems wholly at odds with the equality concerns and values underpinning anti-discrimination legislation to now seek to reject legal neutrality around race.

Because I support the neutrality of the law towards race, I must respectfully, but fundamentally, disagree with the claim of Matsuda that the expression of 'race hate' by the 'majority race' should be banned if it meets her criteria, but that the expression of 'race hate' by a member of a minority race towards a member of the 'majority race' would not be prohibited. In my view, it is fundamentally mistaken, not to mention ill-advised, to apply the law differently, according to the race of the person to which it is sought to apply. It is fatally inconsistent with the rule of law. It reifies one aspect of a person's identity above all of the other things that characterise them, and seeks to discriminate positively on that basis. It seems to be the very antithesis of the 'equality' that critical race scholars claim to seek. One does not solve 'inequality', to the extent that this is perceived to be a problem, by applying the law 'unequally'. An apparently simplistic assumption that all those of the 'majority race' are favoured and privileged and powerful, and all members of 'minority races' are

disfavoured and underprivileged and powerless, must be called out for what it is. It is incorrect and untruthful; it is demeaning to those of a racial minority, and is a grossly misleading view of our society. Its wildly false premises cannot be the basis for an argument that some speech be legally validated depending on the racial identity of a speaker, when the same speech made by someone of a different racial identity be legally invalidated.[94]

To reach this conclusion is not to ignore, trivialise or minimise the terrible racism and denial of human rights that has occurred in the past on racist lines, or to deny that racism continues to exist in our society. Of course, in the United States African-American people endured horrific years of slavery. After the end of the Civil War, they continued to endure blatant and endemic racism, including a denial of their most fundamental civil rights, including the right to vote. The right of African-American people to an education was blighted and crimped for many years, first by the notorious *Dred Scott* decision and then by the application of the 'separate but equal' doctrine of *Plessy*. African-American people endured years of state-imposed segregation from others in the community. Felon disenfranchisement laws, by intent or effect, have impacted on the voting rights of Africa-American people, and there are concerns that voter districting continues in an effort to disenfranchise and disempower African-American people.

In Australia, terrible atrocities were committed against Aboriginal

[94] Delgado and Stefancic (n 37) 27: 'critical race theorists ... hold that color blindness ... will allow us to redress only extremely egregious racial harms, ones that everyone would notice and condemn. But if racism is embedded in our thought processes and social structures as deeply as many crit(ic)s believe, then the 'ordinary business' of society – the routines, practices and institutions that we rely on to do the world's work – will keep minorities in subordinate positions. Only aggressive, color-conscious efforts to change the way things are will do much to ameliorate misery'.

and Torres Strait Islander peoples. Many of them were killed. They were dispossessed of their lands. They were originally denied the right to vote, not counted as individuals at census time, and were in some cases removed from their families by government mandate. There are multiple ongoing issues, including that some Aboriginal and Torres Strait Islander people do not believe that they have sufficient input into governance, and in particular policy issues that affect them. The mortality rate among Aboriginal and Torres Strait Islander people remains high, with life expectancy much lower than for those of other races, school attendance rates remain lower than hoped for, and domestic violence rates remain higher than the national average.

Having acknowledged this, it is submitted to be extremely dangerous for any legal system to have the application of its principles dependent on the race of individuals. It unjustifiably reifies an aspect, albeit an important aspect, of a person's identity, over and above the fundamental legal principle of the rule of law, and its promise of the equality of all people before the law. This point was made eloquently in recent times by Keane J in *Love v Commonwealth of Australia; Thomas v Commonwealth of Australia*.[95] Readers will be aware that the case essentially concerned whether a person identifying as Indigenous could be within the scope of the Commonwealth's constitutional power with respect to aliens, given that they were born overseas and had not been naturalised. In answering 'yes' in dissent, Keane J noted that

> To adopt race as a basis for differentiating between members of the people of the Commonwealth in terms of the application of laws is not a course that commends itself in terms of the exercise

[95] [2020] HCA 3.(2020) 270 CLR 152.

> of judicial power given that justice is to be administered equally to all.[96]

Another aspect of this principle of neutrality implies the rejection of arguments made by Lawrence and others that the mere fact that legislatures or others fail to ban particular speech to which Lawrence and others object means that the legislature or other supports that speech. This is to misunderstand the concept of 'neutrality'. It presents a simplistic binary that either individuals support banning offensive speech, or in effect they support its contents. This is a falsity.[97] Neutrality means that the state takes no position as to the merits or otherwise of a particular speech. Failing to ban something cannot and should not be equated with supporting it. I am not my brother's (nor my sister's) keeper. I am not responsible for racist comments that others might make, contrary to the apparent position of Lawrence.

I must also respectfully disagree with a kind of identity politics view that it is only those with direct, personal experience of discrimination or racism that can properly balance free speech with the harm caused by racist views. Quite simply, our legal system and our society does not operate in this manner, and nor should it. It would, respectfully, be ridiculous to say that a judge could only properly assess another's

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[96] Ibid [181]; similarly Gageler J (dissenting) rejected the suggestion of a 'race-based constitutional distinction': at [133]; compare the very different view of Charles R Lawrence III, 'Race, Multiculturalism and the Jurisprudence of Transformation' (1995) 47 *Stanford Law Review* 819, 838 denouncing 'color-blindness' in the law: 'the colorblind race baiter completes his white supremacist wizardry by blaming affirmative action itself for creating hostility, resentment and racial divisiveness'. One interpretation of this sentence is that Lawrence equates those who believe the law should be 'colorblind' with views of white supremacy. I would respectfully, fundamentally oppose this assertion.

[97] Kent Greenawalt, 'Insults and Epithets: Are They Protected Speech?' (1990) 42 *Rutgers Law Review* 287, 305: 'allowing racist rhetoric does not show support of racism'.

behaviour if they shared characteristics of the other – whether that be race, religion, gender, age or other factor. An African-American judge can of course make a judgment about the behaviour of a Caucasian person. A female judge can make a judgment about the behaviour of a male person. Acceptance of this identity politics position would reify individual characteristics of a person above all else, including the law and the rule of law. It would minimise what unites us – capacity for rational thought, empathy to others, the essence of a human being – and seek to maximise differences. It is hard to understand the benefit in so doing, but the damage to the fabric of our society that would be wrought by such a view is very clear.

D *Awareness of Racism and Racial Hatred*

Unpleasant as it is, it is considered important for society to hear the expression of racist views. In doing so, it brings our collective attention to the fact that such horrible views continue to exist in our society. By being made aware of it, the state can work to counteract it with positive government policies promoting greater understanding of different cultures, acceptance of difference among us, and hopefully an acknowledgement that the great variation in cultures, backgrounds, ethnicities, races and religion in our society is and should be seen as a source of strength. Australia is a successful multicultural nation, built on large-scale immigration from all corners of the world, together with Indigenous Australians. If governments are not aware of racism or race hatred because it has been driven underground, it is less likely to respond to these issues with appropriate policies.

E *No Evidence that Laws Banning Speech Will Reduce Racism, Race-Motivated Violence or Hatred or Will 'Unsilence' Racial Minorities*

Of course, all of us would like to live in a society where there is less racism, where there is less violence, including that motivated by racism, and where there is less hatred of others (on any basis, including race). We all want to live in a world where everyone is free, and feels free, to express their views on matters, and where no-one is or feels intimidated about doing so.

That said, one of the characteristics of the discipline of law is its requirement for evidence. It is easy to make claims or accusations. The law rightly requires evidence of claims in order to accept them as valid. This requirement should be applied to various claims of critical race scholars regarding the harms said to be caused by racially motivated speech.

For example, one of the claims that Delgado and Matsuda makes is that suppression of racially motivated speech is necessary because racist speech silences the targets of such speech. They claim the 'marketplace of ideas' view of free speech does not work, because those who are the targets of race-based speech tend to be silenced by the shock of hearing the racist speech.[98] However, it is not clear why only racial minorities, and not other minorities, would be affected in this way by hurtful speech, so as to justify special rules for racially-motivated speech. At a more general level too, a claim that hate speech should be banned because it silences targets has been questioned in the

[98] *Inquiry Into Anti-Vilification Provisions* (Parliament of Victoria, 2021) noted that vilification 'has the potential to silence the speech of others where, for example, a person engaging in the conduct has the benefit of a position of social or other authority': at 41.

literature.[99]

It is claimed that racial vilification laws seek to eliminate discrimination and hatred.[100] But how effective is it in doing so? What evidence is there that the introduction of so-called hate speech actually reduces the level of such speech in society? Victoria has had laws prohibiting racial vilification for nearly 20 years. Somewhat paradoxically, in the course of an inquiry which required the significant 'strengthening' of Victoria's anti-vilification legislation, the inquiry itself acknowledged and quoted an article authored by Katherine Gelber and Luke McNamara. They had noted in 2018 that 'there has been little or no change in the incidence of vilification in public places ... on this level, anti-vilification laws do not seem to have reduced the overall level of hate speech'.[101] The Inquiry itself noted that 'legislation alone cannot change community attitudes or prevent hate speech or vilifying conduct'.[102]

I will leave to one side the questionable recommendations of that committee to further proscribe so-called hate speech, given their acknowledgement of literature suggesting that, although that state has had anti-vilification in place for nearly 20 years, there is no evidence

[99] Burt Neuborne, 'Ghosts in the Attic: Idealized Pluralism, Community and Hate Speech' (1992) 27 *Harvard Civil Rights-Civil Liberties Law Review* 371, 394: 'the assertion that hate speech should be uniquely subject to censorship because it "silences" vulnerable targets is emotionally appealing, but empirically empty ... virtually every attempt at censorship is premised on an assertion that speech causes harm. A social science theory to support the claim of harm can be generated on demand'.

[100] Larissa Welmans, 'Section 18C and the Implied Freedom of Political Communication' (2019) 44 *University of Western Australia Law Review* 21, 52.

[101] *Inquiry into Anti-Vilification Protections* (Parliament of Victoria, 2021) 1. It noted it had 'heard throughout the Inquiry that religious and racial discrimination, harassment and hatred remain prevalent throughout the state': at 26. On the other hand, in 2017-2018 and in 2018-2019, only 4 official complaints were made in each year: at 109.

[102] Ibid 61.

it has done anything to reduce the kind of speech we all dislike. It is not clear to me, with respect, why the committee believed that, having failed to reduce racism or hate-related speech, an extension of anti-vilification legislation (albeit with some changes to wording, proof etc) will now achieve the desired effect. But the main point to be made here is the absolute lack of evidence that anti-vilification legislation in fact achieves its goals. When seeking to weigh up the 'costs' of such provision, in terms of their impact on free speech and the uncertainty they create, and the 'benefits' of such regulation, the dearth of evidence as to any tangible benefit, in terms of reduction of racism or hate speech (hopefully, reflecting a reduction in the number of people who have this viewpoint), is critical.

And to some extent, this lack of evidence is not surprising. Germany in the 1930s had anti-vilification legislation in place.[103] Clearly, it did nothing to stop the rise of Nazism and the persecution of Jews and others. Those intent on expressing hateful views will often not likely be familiar with the nuances of the law, with all due respect. They may not be aware that their intended speech is or may be unlawful. They may not have considered the legal consequences of expressing such views. Individuals, including particularly in the online environment, often do not think carefully before expressing views. And even if the person were aware of the legal consequences, they may relish being the subject of a legal proceeding, which might give them further opportunity

[103] Zimmermann and Finlay (n 5) 191: 'The Weimar Republic of the 1930s had several laws against "insulting religious communities" and these laws were fully applied to prosecute hundreds of Nazi agitators ... far from halting National Socialist ideology, these laws helped Nazis achieve broader public support and recognition, and ultimately assisted the dissemination of racist ideas'; *R v Keegstra* [1990] 3 SCR 697, 854 (McLachlin J, with whom Sopinka J agreed, dissenting).

for them to vent their hateful views, and claim a martyr status.[104] The anti-vilification legislation will not have done much, if anything, to change a person's views. It may feed a person's outsider status or sense of grievance. If it does silence a racist, it may drive them underground, to use surreptitious ways of expressing their views to others. Again, the hate speech laws will have done nothing to address the underlying problem, merely seek to address public symptoms of it.

Of course, it is a dangerous slippery slope to permit the regulation of speech on the basis it is offensive or hateful.[105] In the classic words of Kirby J in *Coleman v Power*, the *Australian Constitution* protects speech beyond the 'whispered civilities of intellectual discourse'.[106] As he observes, political discussions in Australia often involves 'insult and emotion, calumny and invective', as part of the struggle for ideas.[107] This is a critical point. It must again be made, particularly in light of argument from the bench[108] and academic writing[109] that appears to confine freedom of speech to polite, civil tones. One claims that hate speech laws do not inhibit speech provided it is 'expressed reasonably moderately'.[110] Of course, that is the point about attempts to regulate speech. No-one can be sure what 'moderate' or 'reasonably moderate' is, and it not clear that courts could or should be determining

[104] *R v Keegstra* [1990] 3 SCR 697, 852-853 (McLachlin J, with whom Sopinka J agreed, dissenting).

[105] Nadine Strossen 'Freedom of Speech and Equality: Do We Have to Choose?' (2016) 25 *Journal of Law and Policy* 185, 186.

[106] (2004) 220 CLR 1, 91.

[107] Zimmermann and Finlay (n 5) 188.

[108] *Chief of the Defence Force v Gaynor* [2017] FCAFC 41, [109] where the Full Court referred to the 'tone' of the person's comments in determining whether he had freedom to express them.

[109] Welmans (n 100) 58, referring to the merit of s18C of *Racial Discrimination Act 1975* (Cth) in promoting 'civilised and thoughtful political discourse which will contribute to better general education on these issues'.

[110] Swannie (n 28) 87.

the legality of speech based on whether or not it is 'moderate'. Would Socrates have been able to pass this test? Would Galileo?

F *Uncertainty Over What is Being Banned*

A further difficulty with banning symbols is that they can be interpreted in different ways. On a personal level, I attended a zoom meeting last year from my home office. Behind me was a bookcase. One of the zoom attendees questioned the display of a swastika. As it happened, this was on the spine of a book in my library collection, entitled *The Rise and Fall of the Third Reich*. Of course, by innocently publicly displaying the swastika, I was not intending to indicate support for Nazism. It was a very minor incident, but it made an important point. We cannot know what message (if any) a person intends to convey when they show a particular symbol in public. Many symbols are inherently ambiguous in nature.

For example, the swastika has a long history. It has associations with religion, including the Hindu and Buddhist faiths.[111] It is said that swastikas first appeared more than 7,000 years ago. It was used to signify good fortune and wellbeing. Unfortunately, it became associated in the 1920s with horrific ideas about racial superiority and the Nazi movement, and was adopted as the German national flag in the mid-1930s. It was banned in Germany in 1945 and remains banned in that and other European nations.

The point is that a person who displays a swastika may be intending to convey many different possible messages, or none at all. It might

[111] Allison Mosig, 'Hate or Civic Pride: The Speech of Symbols in the United States, Germany and Japan' (2017) 40 *Suffolk Transnational Law Review* 73, 80-81.

be intended to indicate support for the hateful and murderous Nazi ideology; it might be intended to remind those who see it of the dangers of extreme ideology, or to compare an existing movement with that movement. It might reflect a religious view. It might not be intended to express any view whatsoever. No-one can know. It is extremely dangerous for the law to presume. Through the Victorian legislation banning display of the Nazi symbol contains exceptions and defences, it is not clear how broadly these will be interpreted.

V CONCLUSION

A liberal democratic society is fundamentally premised on freedom of speech. This should be a neutral political principle, espoused by all sides of politics. Freedom of speech has often been espoused by those on the political left, together with racial and other minorities, in support of their cause. At some time, freedom of speech became associated with the political right. It is a fundamental part of Western culture and values, but has come under increasing attack by postmodernists, including critical race theorists. These theorists reject fundamental rationales for freedom of speech, denying the concept of 'truth', claiming that any marketplace of ideas is "rigged" and favours "white privilege" and claiming that freedom of speech belongs only to the powerful. Some seem to advocate racism as a supposed antidote for the racism they see, seeking the law to be applied differently to different individuals based on their colour. This is inherently racist, and fundamentally at odds with the rule of law. Further, they apparently demand that the state take sides in arguments, ignoring the fundamental premise of state neutrality, and claiming a false equivalence between

not preventing something, and supporting it. It is to be regretted that some of these ideas have gained traction.

This article has documented major weaknesses with this approach to the law. It is dangerously simplistic, assuming that all members of one race are disempowered and oppressed, and that all members of another race are powerful, dominant and seek to maintain dominance over the former group. Postmodernism offers little by way of positive improvement in anything; rather it seeks to destroy what currently exists, with little idea of what should replace it. It seeks to reify aspects of a person's identity above reason, the rule of law and law itself, replacing objectivity with subjectivity. It strangely seeks to attack the idea that the law should not discriminate in terms of race, by positively advocating discrimination on the basis of race, undermining fundamental case law such as *Brown v Board of Education*, and anti-discrimination legislation. The state should be very slow to ban the expression of ideas, including unpleasant ones. It is most unlikely that banning particular speech will reduce the extent of the sentiment being banned. It may do the opposite. It is passing strange that in the inquiry that recognises that 20 years of an existing anti-vilification law has done nothing to reduce vilification, the same inquiry proposes to 'beef up' the anti-vilification law, apparently expecting a different result. History has taught us that these laws do not work to achieve their claimed purpose. Governments over-reach when they seek to ban signs and symbols, as the recent Victorian inquiry has recommended. This is because it is impossible to draw a conclusion as to what a particular sign or symbol means, if anything. It is dangerous to base any law, let alone one that abrogates freedom of speech, on an assumption as to what the person displaying it intended to convey. Politicians of all political persuasions are being seduced by the woke shutdown, de-platforming

vibe. It is anathema to democracy, and those who cherish democratic, free speech principles must fight back (with strong speech). Freedom of speech is too important to fall to a false idol.