Vanderbilt Journal of Transnational Law

Volume 22
Issue 3 *Issue 3 - 1989*

Article 1

1989

From Red Lion Square to Skokie to the Fatal Shore: Racial Defamation and Freedom of Speech

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Vanderbilt Journal of
Transnational Law

VOLUME 22 | 1989 | NUMBER 3

From Red Lion Square* to Skokie** to the Fatal Shore:*** Racial Defamation and Freedom of Speech

*David Partlett*****

ABSTRACT

This Article addresses, against the backdrop of possible legislative reforms in Australia, the tension between the desire to eliminate racial defamation and the need to protect freedom of speech. In an historical overview, Mr. Partlett notes an increasing sensitivity to racial issues in Australia in the face of an assumed but nebulously stated value of free speech. Mr. Partlett analyzes theoretical and legal approaches to free speech from Commonwealth and United States perspectives, and analysis of recent legal and social developments in civil rights in the United States makes this Article relevant for both Commonwealth and United States reformers in this area of the law. He concludes that the interest served by free speech is the individual's interest of autonomy. Thus, the aim to promote individual autonomy, accompanied by a presumption favoring free speech and a healthy suspicion of government, legitimates cautious governmental regulation of speech. Government action in this area is best expressed through government's role as a speaker on moral matters and through the institutional competence of the courts. Mr. Par-

* THE RED LION SQUARE DISORDERS 15 JUNE 1974, CMND. No. 5919.

** Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978).

*** R. HUGHES, THE FATAL SHORE (1987).

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tlett then analyzes the recommendations of the Australian Human Rights Commission to amend Australia's 1975 Racial Discrimination Act and finds that its attempts to outlaw racial defamation and incitement to racial hatred neglect the value of free speech. Mr. Partlett proposes two alternatives for achieving a more comfortable balance—alternatives through which government may symbolically condemn incidents of racial defamation yet give sufficient ambit to the exercise of free speech.

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I. INTRODUCTION

Those landing on the Fatal Shore in the first fleet in 1788 encountered inquisitive Aborigines who had occupied this vast landmass for 40,000 years and who had developed a society superbly adapted to a nomadic

life in the most arid of lands.[1] European settlement changed forever, and dislocated, the patterns of life of those Aborigines of which much was said in Australia's 1988 Bicentennial Year.[2] Convict transportation, a trickle of free settlement, and, later in the 19th century, gold fever,[3] established a European—predominantly English, Scottish, and Irish—outpost in the Antipodes. With this came many of the accoutrements of English culture including, of course, the common law.[4]

Asian immigration to the gold fields in the late 19th century, a large non-English immigration after the Second World War, and, more recently, a significant Asian immigration, both of refugees and of those under established migrant quotas, have in their turn transformed Australian attitudes and life.

Race issues, then, have been a part of Australian history from the time of the First Fleet. British justice extended to Aborigines, but the realities of isolation, the need for land that could be securely stocked, and the frequent contact with brutalized convicts dictated the frequent absence of that justice. Except for repressive and discriminatory laws directed particularly to Asians in the late 19th century, little was felt of racial issues in legal theaters until the early 1970s; those years saw state and federal antidiscrimination laws enacted.

Recently, it has been suggested that Parliament should act against extremist racist propaganda and defamation—speech that attacks racial or ethnic groups, branding them as inferior and stirring up loathing and hatred. Unlike the antidiscrimination legislation, these suggestions have made little progress.[5]

The reasons for the reluctance of lawmakers are complex. Certainly an idealism present in the early 1970s is absent in the pragmatic 1980s. Very few votes are to be won with this kind of legislation. Along with

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1. R.M. BERNDT & C.H. BERNDT, THE WORLD OF THE FIRST AUSTRALIANS (1964); Wright, *Landscape and Dreaming*, 114 DAEDALUS 29, 31 (1985).

2. *See* Starke, *Commonwealth Parliamentary Resolutions on the Aboriginal Occupation of Australia*, 62 AUSTL. L.J. 978-80 (1988); Lumb, *Aboriginal Land Rights: Judicial Approaches in Perspective*, 62 AUSTL. L.J. 273 (1988); Nettheim, *Indigenous Rights, Human Rights and Australia* 61 AUSTL. L.J. 291 (1987). On the Aboriginal Treaty Committee, see B. HOCKING, INTERNATIONAL LAW AND ABORIGINAL HUMAN RIGHTS (1988). *See generally* J. MCCORQUODALE, ABORIGINES AND THE LAW: A DIGEST (1987); H.C. COOMBS, TRIAL BALANCE 291-95, 297-300 (1981) (political background to the change in government's involvement in Aboriginal affairs).

3. J. MONAGHAN, AUSTRALIANS AND THE GOLD RUSH—CALIFORNIA DOWN UNDER 1849-1854 (1966); C. CHOI, CHINESE MIGRATION AND SETTLEMENT IN AUSTRALIA 17-35 (1975).

4. A. CASTLES, AN AUSTRALIAN LEGAL HISTORY (1982).

5. *See infra* Part II, section B, and Part IV.

this vulgar factor is one of genuine social policy: the potential possessed by racial defamation legislation to infringe freedom of speech. In the face of present, and probable, law reform recommendations and the vigor of free speech arguments, Australia presents a grand opportunity to observe a resolution of the contending forces. Its affinity in values with Britain and the United States suggests that lessons on a broader canvas can be drawn from the Australian dilemma. Furthermore, it provides a satisfying subject because one's musings may be heeded by reformers of the law.

However, it is this broader canvas that justifies the presence of this Article on these pages. The Australian dilemma is precisely the dilemma of nations whose society adheres to the values of diversity, liberty, and personal autonomy. The hardest test for the law as both a regulator and a conveyor and articulator of justice[6] is at the pressure points where values contend.[7] The law at its best reconciles basic values through mechanisms that assure individuals and groups that their beliefs count.[8] *Roe v. Wade*[9] has failed because it excluded an entire belief system held by a large group in society "to the detriment of our pluralistic society."[10] In Dean Calabresi's terms that group is "emarginated."[11]

To look at the issue at hand from first principles stripped of the accumulations of first amendment presuppositions should engage Americans at a time when racial defamation seems resurgent in that most pluralistic, tolerant, and influential Western institution—the university.[12] A comparative view allows this fresh perspective where our mission is the same. This view, however, must be tempered by an appreciation of differences in social and legal culture.[13]

Racial defamation is speech which is published and identifies racial, ethnic or religious groups in such a way that members of that group will

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6. P. ATIYAH & R. SUMMERS, FORM AND SUBSTANCE IN ANGLO-AMERICAN LAW: A COMPARATIVE STUDY OF LEGAL REASONING, LEGAL THEORY, AND LEGAL INSTITUTIONS 4, 5 (1987) [hereinafter ATIYAH].

7. G. CALABRESI & P. BOBBITT, TRAGIC CHOICES 19-22, 195-99 (1978).

8. *Id.* at 67-68.

9. Roe v. Wade, 410 U.S. 113 (1973).

10. G. CALABRESI, IDEALS, BELIEFS, ATTITUDES, AND THE LAW 97 (1985) (The group in the case of abortion comprises those who view abortion as morally wrong). *See generally* M.A. GLENDON, ABORTION AND DIVORCE IN WESTERN LAW 10-62 (1987) (ways of thinking more broadly about the complexities of abortion).

11. G. CALABRESI, *supra* note 10, at 98.

12. *See* Barringer, *Campus Battle Pitts Freedom of Speech Against Racial Slurs*, N.Y. Times, Apr. 25, 1989, § 1, at 1, col. 1.

13. *See* ATIYAH, *supra* note 6, at 3 (mode of legal reasoning closely correlated with historical, cultural, and institutional factors).

tend to suffer social embarrassment, humiliation, and ostracism. It is speech that asserts false facts either boldly or, more problematically, disguised in opinion. It should be contrasted with speech that incites violence. This latter speech is subject to government proscription and does not give rise to the acute problems of racial defamation proscription. Other Western liberal democracies have tackled the issue of racial defamation. In Britain,[14] Canada,[15] New Zealand,[16] and Western Europe,[17] examples of varying legislative proscription of this type of speech are readily found. In contrast, in the United States, legislation of this type is conspicuous in its absence.[18] This dissonance is perplexing for an Australian presented with the Robert Frost choice of divergent paths.[19]

Part II of this Article will sketch the place of racial issues in Australia's social and legal background. The idea of freedom of speech cannot be divorced from this background or culture. Much of the Australian debate to date has lacked a principled framework for reaching a resolution between the vying camps. On the one hand, free speech has been assumed to be self-defining, and, hence, little thought has been given to its limits within a liberal Western democracy. On the other, racial defamation is taken as an invidious practice that justifies far-reaching legislative prohibition. The obvious tension between these approaches to racial defamation has never received adequate attention.

Part III seeks to provide a framework to guide the reformer/pilgrim. Let it be said, though, that the theory of free speech is its own kind of

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14. Race Relations Act, 1976, ch. 74, § 70. *See* I.A. MACDONALD, RACE RELATIONS: THE NEW LAW 472-487 (1977). This Act has been the subject of a number of inquiries. *See* THE RED LION SQUARE DISORDERS 15 JUNE 1974, CMND. NO. 5919; REPORT BY LORD SCARMAN, THE BRIXTON DISORDERS 10-12 APRIL 1981, CMND. NO. 8427 [hereinafter THE BRIXTON DISORDERS]; *see also* Public Order Act, 1986, ch. 69, §§ 17-22.

15. R.S.C. ch. C-34 §§ 281.1-.2 (1970) (current version at R.S.C. ch. C-46, §§ 319.1-.2 (1985)); Civil Rights Protection Act, ch. 12, 1981 B.C. Stat 69; Act of 4 May 1979, ch. S-24.1 § 14, 1979 Sask. Stat. 342 (respecting the Saskatchwan Code of Human Rights and its Administration); Human Rights Act, ch. 65 § 2, 1974 Man. Stat. 567.

16. Race Relations Act, 1977, § 9A (N.Z. 1977).

17. *See* Lasson, *Racial Defamation As Free Speech: Abusing the First Amendment*, 17 COLUM. HUM. RTS. L. REV. 11, 50-53 (1985) (discussing European legislation). *See also* E. Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—And Other—"Lies,"* 85 MICH. L. REV. 277 (1986) (discussing West German law).

18. Some states have these statutes on their books. *See* CONN. GEN. STAT. ANN. § 53-37 (West 1985); MASS. GEN. LAWS ANN. ch. 272, § 98C (West 1970); W. VA. CODE § 61-10-16 (1984).

19. R. FROST, *The Road Not Taken,* in THE POETRY OF ROBERT FROST 231 (R. Brower ed. 1963).

Serbonian bog. (We have much for which to thank Milton in the free speech area).[20] And the journey between free speech and racial defamation is redolent of that between Charybdis and Scylla. We all may agree that gutter press publishing of vile racial vituperation is harmful; like pornography, it may be valueless speech and not deserving of protection from state proscription.[21] However, this speech is political, and we must be wary of governmental regulation. Should, for example, the government ban the publication of scientific studies demonstrating differences in I.Q.s of various racial or ethnic groups? Or should debate about Asian immigration be censored?

American first amendment jurisprudence may serve as a benchmark. My argument is that in a liberal democratic society, governmental interference must be carefully justified in terms of protection of individual autonomy. Free speech often protects this interest by nurturing the values of toleration and pluralism. But free speech also may be destructive of individual autonomy, especially when it is perceived that the autonomy of individuals in a racial or ethnic group is intimately connected to their group. This must be more compelling in a society that recognizes the goals of racial equality. Nevertheless, the imperative quality of free speech demands the most carefully modulated of governmental interference. The presumption is that free speech in an imperfect world where one should be suspicious of government is our best guardian of basic values. Here the symbolic role of government as speaker in promoting what is right[22] and the institutional competence of the courts provides a way of protecting the autonomy of individuals while maintaining a vigorous free speech principle. These are matters expounded upon in Part IV.

Part V examines this debate as it has emerged in Australia. The recommendations of the Australian Human Rights Commission will be discussed.[23] In addition, the untapped possibilities of common-law develop-

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20. *See, e.g.*, J. MILTON, *Areopagitica*, in JOHN MILTON: COMPLETE POEMS AND MAJOR PROSE 716 (M.Y. Hughes ed. 1957).

21. *See* ATT'Y GEN. COMMISSION ON PORNOGRAPHY: FINAL REPORT 405-418 (1986) (child pornography); *see also* Sable Comm., Inc. v. FCC, Nos. 88-515, 88-525 (U.S. S.Ct. June 23, 1989) (LEXIS 3135 Genfed Library, Courts file) (First Amendment protection does not extend to obscene speech). *But see* American Library Ass'n v. Thornburgh, No. 89-0611 (D.D.C. May 16, 1989) (LEXIS 5399 Genfed Library, Dist. file) (Revercomb, J., declared unconstitutional and enjoined enforcement of several provisions of the 1988 Child Protection and Obscenity Enforcement Act).

22. Welch, *The State as a Purveyor of Morality*, 56 GEO. WASH. L. REV. 540 (1988).

23. The Commission has been renamed the Human Rights and Equal Opportunity

ment will be briefly investigated. This discussion proceeds in the context of the framework developed in Part IV.

In the Conclusion, I will offer some constructive suggestions for possible reforms. No solution proferred elsewhere may be taken off the shelf and applied in Australia. Neither strategies in the Commonwealth nor in the United States appropriately respond to the imperatives of the problem given rise to by racial defamation. The reform I have in mind will create the machinery, through legislation, to afford an opportunity by which those defamed may have their day in court, but the legislation will be framed to protect free speech. Government in this symbolic way makes a statement about values, and the courts—as the appropriate social institution—may comment upon the specifics of particular cases brought before them. Freedom of speech is retained while the harm of racial defamation is mitigated. It may lack the force that proponents would seek, and this for good reason—for this legislation is mainly symbolic. To arm the legislation not only is to hazard an erosion of free speech but also, by highlighting the gulf between formal powers and real world futility, may damage the goals of community racial harmony. It is an imperfect solution for an imperfect world.

II. Essential Background: Racial Issues in Australia's Social and Legal History

A. *The Roots*

Captain Phillip was commissioned as Captain-General and Governor-in-Chief of the territory of New South Wales in 1787.[24] He was to captain the First Fleet and administer the colony to be established at Botany Bay, a site discovered by Captain James Cook in 1770. In contrast to the settlement of the American colonies, the pioneers of the First Fleet were not seeking freedom. Rather, they were being transferred from miserable imprisonment in England to incomprehensible isolation and banishment in New South Wales.[25] America was born in hope, Australia in despair.

Phillip was to be dictator of the colony with responsibility to the Colonial Office in London. His instructions ran from detail of how convicts were to be employed to requirements of further exploration, including colonization of Norfolk Island. He was to open an intercourse with the natives, conciliate their affections, and enjoin all subjects to live in amity

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Commission. Human Rights and Equal Opportunity Commission Act 1986, No. 125, 1986 Austl. Acts § 7, at 2567, 2573 (1986).

24. 1 C.M. Clark, A History of Australia 79 (1962).

25. For a vivid description, see R. Hughes, The Fatal Shore 1-18 (1987).

and kindness with them. He was to ascertain their numbers and to punish those who wantonly destroyed them or interrupted their occupation. Lastly, he was required to report in what manner involvement with them could be turned to the Colony's advantage.[26]

This noble injunction was soon tested in the realities of the penal colony established just north of Botany Bay at Port Jackson, later to become Sydney.[27] Friction mounted between the Aborigines and the convicts; property deprivations by the convicts elicited violent response by the Aborigines. Phillip forbade punitive expeditions and reacted to one retaliatory attack against Aborigines, in which one convict was killed, by having the survivors flogged and placed in leg irons for a year.[28] The convicts resented this extension of the King's peace to Aborigines. They dearly wished for an official recognition of a class lower than themselves.[29] This became magnified as the degradation of the surrounding tribes became manifest.[30] The noble savage image, generated from Cook's descriptions and romantically adhered to in genteel English society, eroded. But still the criminal law was even-handed.[31] The murder of two Aborigine boys as revenge for the murder of settlers in 1799 could not be defended on the grounds that Aborigines were treacherous, evil-minded, and bloodthirsty.[32] The perpetrators were found guilty, and Governor King, who had replaced Phillip, reminded the colonists that killing natives would "be punished with the utmost severity of the Law." The Governor, however, conscious of the sensibilities of an infant colony to a hanging, relented and conceded that the sentences of hanging would be commuted.[33] As the colony grew, the official policy of equality before

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26. 1 C.M. CLARK, *supra* note 24, at 79-80.

27. For a description of the reasons for this location, see *id.* 59-89.

28. R. HUGHES, *supra* note 25, at 94.

29. *Id.* at 95. This is endemic in human social affairs. *See* T. SOWELL, THE ECONOMICS AND POLITICS OF RACE: AN INTERNATIONAL PERSPECTIVE (1983); J.H. ELY, DEMOCRACY AND DISTRUST: A THEORY OF JUDICIAL REVIEW 158 (1980).

30. 1 C.M. CLARK, *supra* note 24, at 110 (discussing the "taint of European civilization—its destructive effect on all primitive cultures with which it came into contact. Not one of the faiths sustaining these men—neither the Christian religion, the enlightenment, nor romantic notions about noble savages—could restrain the rapacity and greed of the white man, nor afford him a workable explanation for the backwardness and material weakness of the aborigine.")

31. J.F. STEPHEN, A DIGEST OF THE CRIMINAL LAW 112-13 (L. Sturge 8th ed. 1947) (Article 140 "Kidnapping Pacific Islanders" and analysis of the Pacific Islanders Act, 1872).

32. 1 C.M. CLARK, *supra* note 24, at 145.

33. R. HUGHES, *supra* note 25, at 275.

the law belied the realities of Aborigine and white relations.[34] The exigencies of settlement, the gulf in understanding competing cultures, and primitive communications in the newly settled areas ensured that the principles of criminal justice had, at best, a tenuous hold.[35] Nonetheless, maintenance of the principle remained.

B. *Discriminatory Legislation*

The Aborigines had never posed a sufficiently great economic threat to trigger the invocation of discriminatory legislation. Their want of strict property rights, in a European sense, imposed no constraint on European expansion; Aborigines simply did not enter and compete in the commercial life of the colony.[36] It was a different matter, however, when gold was discovered in the mid-19th century. The ensuing rush brought population and wealth. It also brought relatively large numbers of Chinese immigrants.[37]

Riots erupted as the Chinese competed with the European diggers hailing from Australia, Britain, and America. Legislation was recommended to check the flow of Chinese.[38] In June 1855 the Victorian Parliament passed an "Act to make provisions for Certain Immigrants." Legislation was passed in the contiguous colonies of New South Wales and South Australia to prevent Chinese arrivals walking the several weeks necessary to reach the Victorian gold fields. This was repeated in other colonies. When gold was discovered in Queensland in the 1870s, all plans to import Chinese coolies for labor were abandoned, and legislation proposed to impose a heavy gold fields' license fee for "Asiatic and African aliens." The British government blocked the legislation,[39] but colonial outrage eventually won the day. By 1896 five of the colonies had chosen to extend the provisions of the Chinese exclusion acts to all Asians.[40] The exclusion of Chinese and "other Asiatics" from the gold fields forced them into other niches in the economy, in particular laundries and furniture making, where they would face further state sup-

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34. *Id.* at 276-78.

35. This gulf between ideas and practice was the subject of an excellent book by E. EGGLESTON, FEAR, FAVOUR OR AFFECTION: ABORIGINES AND THE CRIMINAL LAW IN VICTORIA, SOUTH AUSTRALIA AND WESTERN AUSTRALIA (1976).

36. For a detailed description of the place of Aboriginal communities in Australian society, see 2 C.D. ROWLEY, OUTCASTS IN WHITE AUSTRALIA: ABORIGINAL POLICY AND PRACTICE (1971).

37. *See* C. CHOI, *supra* note 3, 17-35 (description of Chinese migration).

38. This was often the fate of overseas Chinese. *See* T. SOWELL, *supra* note 29.

39. C. CHOI, *supra* note 3, at 25.

40. *Id.* at 27.

ported discrimination.[41]

At the time of Australia's federation at the turn of the century, restrictive legislation was rife. The Founding Fathers ignobly accepted that state of affairs in drafting the Australian Constitution.[42] One of the enumerated constitutional powers of the Federal Parliament entitled it to carry on the tradition and to make laws regarding "[t]he people of any race for whom it is deemed necessary to make special laws."[43] Sixty-seven years later, with more noble intent, and in one of the few successful referenda amending the Constitution, this provision was amended to excise the words relating to the Aboriginal race, thus allowing the Commonwealth Parliament to assume responsibility for Aborigines.[44]

The contemplation of continued discriminatory legislation in the states also ensured defeat of suggestions that an equal protection clause, modeled along the lines of the fourteenth amendment of the United States Constitution, be included in the Constitution.[45] The draft provision worried a Victorian politician who opined that the state's factories legislation would be avoided because it included discriminatory provisions against the Chinese, born of a resentment to their "sweating" practices in the furniture trade.[46] Other states warned that their legislation banning Asians and Asiatics from the gold fields would be in jeopardy under an equal protection provision.[47] The extent of repressive legislation grew proportionally as Australian colonies achieved more extensive self-government in the nineteenth century. Majority rule in Australia, as

41. *Id.* at 33. Redolent of discriminatory legislation in United States, see, e.g., *In re* Ah Fong, 1 F. Cas. 213 (C.C.D. Cal. 1874) (No. 102) (voiding California law blocking habeas corpus); *In re* Tiburcio Parrott, 1 F. 481 (C.C.D. Cal. 1880) (voiding California law imposing criminal sanctions on anyone employing a Chinese or Mongolian person); Baker v. Portland, 2 F. Cas. 472 (C.C.D. Or. 1879) (No. 777) (voiding Oregon law prohibiting employment of Chinese on street improvement or public works projects). *See generally* McClain, *The Chinese Struggle for Civil Rights in Nineteenth Century America: The First Phase, 1850-1870*, 72 CALIF. L. REV. 529 (1984) *and* Fritz, *A Nineteenth Century "Habeas Corpus Mill": The Chinese before the Federal Courts in California*, 32 AM. J. LEGAL HIST. 347 (1988).

42. J.A. LANAUZE, THE MAKING OF THE AUSTRALIAN CONSTITUTION 165, 229-232 (1972).

43. AUSTL. CONST. §51 (xxvi). Before its alteration by Act of 10 August 1967, No. 55, § 2, section fifty-one read: "The people of any race, other than the aboriginal race in any State, for whom it is deemed necessary to make special laws."

44. 2 C.D. ROWLEY, *supra* note 36, at 420-21 (seeing hope that the federal powers could lead to a national policy). For a more extended analysis, see C.D. ROWLEY, A MATTER OF JUSTICE (1978).

45. J.A. LANAUZE, *supra* note 42, at 227, 231-32.

46. *Id.* at 231.

47. *Id.* at 231-32.

elsewhere, did not guarantee equality or fair treatment.[48] Public sentiment was racist, in those times sitting comfortably with patriotism and imperialism.[49] The words of Australia's war historian, C.E.W. Bean, captured the spirit: "The Australian is fighting the coloured nations of the East today in the same cause in which Themistocles fought with Xerxes, Pompey with Mithridates, Richard of the Lion Heart with the Saracens, and Charles Martel with the Moors."[50] Aborigines were treated at worst cruelly and at best with morale-destroying paternalism.[51]

C. *Post Second World War*

The Second World War showed that Australia was strategically vulnerable. The slogan "Populate or Perish" accompanied a large scale immigration program.[52] Many migrants were drawn from non-British homelands and their numbers were augmented by the multitudes whose lives had been dislocated by war. This diversity diminished the old xenophobia, and as international disapprobation of racially-based policies increased, the restrictive immigration policies eventually fell.

By the 1950s and 1960s, Australia was successfully absorbing new immigrants. Some difficulties of assimilation were apparent.[53] Similarly, the plight of the Aborigines was partially uncovered to those Australians living in the cities who did not witness Aborigines' circumstances at first hand.[54] But this did not elicit legislation to protect persons from discrimination. It was only in the early 1970s with the election of Whitlam's activitist Labor party that government took action. Admittedly, much of that government's social reform agenda was frustrated by a hostile Sen-

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48. T. SOWELL, *supra* note 29, at 164 (noting that the return of popular government in the South during the Jacksonian period in the United States brought "disenfranchisement of the blacks, and racial segregation and discrimination on an unprecedented scale."); C.D. ROWLEY, THE DESTRUCTION OF ABORIGINAL SOCIETY (1970). During the Civil War period feelings against Jews were also manifested. *See* J.M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 441-442, 622-623 (1988).

49. G. SOUTER, LION AND KANGAROO: THE INITIATION OF AUSTRALIA 1901-1919, at 188 (1976).

50. *Id.*

51. *Id.* at 188-190.

52. G. SHERINGTON, AUSTRALIA'S IMMIGRANTS, 1788-1978, at 127-61 (1980).

53. *See* A.H. RICHMOND, IMMIGRATION AND ETHNIC CONFLICT (1988); H.I. LONDON, NON-WHITE IMMIGRATION AND THE "WHITE AUSTRALIA" POLICY (1970); A.T. YARWOOD, ATTITUDES TO NON-EUROPEAN IMMIGRATION (1968).

54. 2 C.D. ROWLEY, *supra* note 36, at 383-450 (detailing increasing awareness, responses, strategies, and prospects for greater equality).

ate. But so much had the perceptions of the unfairness of race discrimination changed that the Parliament passed the Racial Discrimination Act of 1975 with support of the Conservative opposition. No one of good conscience, it seemed, could argue against the worthiness of that legislation—especially when stiffened by international anti-racial pressures at a time when Australia was beginning to assert a new independence in foreign relations.[55]

The Racial Discrimination Act broadly prohibits discrimination against persons on the basis of race, color, or ethnic origin in, among other things, employment, accommodation, services, and administration of justice. The Act also established the Office for Community Relations, with the functions of research, education, investigation of complaints, and conciliation of disputes.[56]

At the same time, a Human Rights Bill was drafted and introduced into Parliament.[57] In contrast to the Racial Discrimination Act this caused a great deal of controversy, and was defeated. This legislation would have given rights to citizens derived from the Covenant on Civil and Political Rights. State legislation would have been subject to the preemptive power of the Commonwealth.[58] In the absence of proscription of racial discrimination, the vague provisions of the bill could not command support of all political factions, and was doomed. The subsequent Conservative (Liberal-Country Party Coalition) government enacted a Human Rights Commission Act[59] without the earlier legislation's far-reaching consequences, in particular its self-executing aspects. In the

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55. The "principle of racial non-discrimination" is part of the *jus cogens* of international law. *See* I. BROWNLIE, PRINCIPLES OF PUBLIC INTERNATIONAL LAW 513 (3d ed. 1979) (numbering racial non-discrimination among the principles of *jus cogens* if such principles in fact exist). It is pertinent, then, that the power of the Commonwealth Parliament to enact this legislation was mainly derived from an exercise of the foreign affairs constitutional placitum implementing the 1965 International Convention on the Elimination of All Forms of Racial Discrimination. The High Court of Australia upheld the constitutionality of the Racial Discrimination Act, in Koowarta v. Bjelke-Petersen, 153 C.L.R. 168 (1982). For a description of Australia's greater independence in foreign relations, see T.B. MILLAR, AUSTRALIA'S FOREIGN POLICY (1968).

56. *See* Partlett, *The Racial Discrimination Act 1975 and the Anti-Discrimination Act 1977: Aspects and Proposals for Change* 2 U. NEW S. WALES L.J. 152 (1977) (discussing this and various anti-discrimination legislation).

57. *See* Evans, *New Directions in Australian Race Relations Law*, 48 AUSTL. L.J. 479, 481 (1974); *see generally Current Topics*, 60 AUSTL. L.J. 117-208 (1986) (the AUSTL. L.J. "Human Rights" Issue).

58. AUSTL. CONST. § 109. *Compare* U.S. CONST. art. VI, § 2 (analogous United States constitutional authority regarding preemption).

59. No. 24, 1981 Austl. Acts.

pantheon of rights, freedom from invidious racial discrimination held a preeminent position quite at odds with its nineteenth century evaluation.

Affirming the status of the anti-racial discrimination principle, some states also hastened to enact anti-discrimination legislation, necessitating that the Commonwealth work out a *modus vivendi* with those states in order to avoid clashes in jurisdiction.[60] Australia mercurially changed from a desert to a jungle of competing regimes. Standout states, like Queensland, were branded as antediluvian.[61]

D. *Free Speech: A Fragile Liberty*

The sovereignty of Parliament is not legally constrained by notions of individual free speech.[62] Free speech had little place in the penal colony established in Botany Bay; it was a totalitarian place.[63] No fundamental freedoms were entrenched in Australia's constitution. But as mentioned, along with the convicts came the common law. Within the interstices of that law, the courts had instilled a protean free speech presumption. This comported with the libertarian base of the common law as it emerged in the nineteenth century.[64] Accordingly, while no constitutional protection could be relied upon, the common law together with a social ethic might coalesce to give protection to the value.[65]

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60. Racial Discrimination Act, S. Austl. Acts (1976); Anti-Discrimination Act, No. 48, N.S.W. Stat., 1 (1977); Equal Opportunity Act, No., 100995, Vict. Act 6881, (1984).

61. G. NETTHEIM, OUTLAWED: QUEENSLAND'S ABORIGINES AND ISLANDERS AND THE RULE OF LAW (1973).

62. For discussion of the sovereignty of Parliament, see O'Neill, *The Australian Bills of Rights Bill 1985 and the Supremacy of Parliament*, 60 AUSTL. L.J. 139 (1986); E. WADE & G. PHILLIPS, CONSTITUTIONAL LAW 46-61 (8th ed. 1970); L. ZINES, COMMENTARIES ON THE AUSTRALIAN CONSTITUTION 64-68, 90-92 (1977); *see also* A.V. DICEY, INTRODUCTION TO THE STUDY OF THE LAW OF THE CONSTITUTION 39-85 (10th ed. 1959); Walker, *Dicey's Dubious Dogma of Parlimentary Sovereignty: A Recent Fray with Freedom of Religion*, 59 AUSTL. L.J. 276 (1985).

63. R. HUGHES, *supra* note 25, at 114-116, 286-322.

64. O. HOLMES, THE COMMON LAW (1881). The rise of freedom of contract was based upon faith in individual choice making; for a rich discussion of the law and intellectual background, see P. ATIYAH, THE RISE AND FALL OF FREEDOM OF CONTRACT (1979). Society is not a pure reflection of the law for Dicey. *See* A.V. DICEY, LAW AND PUBLIC OPINION IN ENGLAND DURING THE NINETEENTH CENTURY 1-16 (1905) (describing the period of 1865-1900 as "collectivist"). *But see* ATIYAH, *supra*, at 231-37. Laissez-faire was compatible with the increase in legislation. *See* Woodard, *Reality and Social Reform: The Transition from Laissez-Faire to the Welfare State*, 72 YALE L.J. 286, 290-91 (1962).

65. In Attorney-General v. Guardian Newspapers Ltd. (No. 2) 3 W.L.R. 776, 808 (H.L. 1988) (Lord Goff commented that "freedom of speech has existed in this country perhaps as long as, if not longer than, it has existed in any other country in the world").

This value could not resist determined government repressions as existed in the early years. But later, when the social ethic was conducive, the courts would import the value into lawmaking functions. The courts have construed legislation in light of a presumption in favor of free speech; should the legislature wish to restrict free speech, it had to be plain on the face of the statute. For example, if the legislature should abrogate the rule of legal professional privilege it must be express; the common-law interest of freedom of communication between solicitor and client—a species of free speech—may not be overturned by inference.[66] Away from statutory interpretation, the courts often have attempted to protect free speech in fashioning rules. The law of defamation, for example, maintains defenses that attempt to balance harm to reputation against exercise of free speech, and the law of confidence in equity protects speech balanced against the public interest in maintaining the vitality of a given relationship.[67]

For all this, free speech in Australia has never assumed a rhetorical power base in public and political debate. It has appeared more as a theoretical artifact of the intellectual.[68] The want of a constitutional protection makes it too nebulous a value in a Benthamite society to effectively counter governmental action.[69] No standard is available under which the troops may be marshaled. Although this does not doom public arguments based upon appeal to the free speech principle, it certainly

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66. Baker v. Campbell, 49 A.L.R. 385 (Austl. 1983); Waterford v. The Commonwealth, 61 Austl. L.J. Rep. 350 (Austl. 1987).

67. *See* F. GURRY, BREACH OF CONFIDENCE (1984) (describing the English law of confidence); Humphers v. First Interstate Bank, 696 P.2d 527 (Or. 1985). Recently, the "Spycatcher" case has aired the issue. In England see Attorney-General v. Guardian Newspapers, 1 W.L.R. 1248 (H.L. 1987). In Australia, the British government brought an action to suppress the publication of Spycatcher. The High Court of Australia refused to give injunctive or other relief to the contract of confidentiality between the British Crown and a member of the British Security Service. Attorney-General (U.K.) v. Heinemann Publishers Austl. Pty. Ltd., (No. 2), 62 Austl. L.J. Rep. 344 (1988). The House of Lords clarified aspects of the action and remedies in *Guardian Newspapers*, 3 W.L.R. 776. For comment, see 48 CAMBRIDGE L.J. 1 (1989). The New South Wales Court of Appeal found no grounds to suppress. Attorney-General (U.K.) v. Heinemann Publishers, Austl. Pty. Ltd., 10 N.S.W. L. Rep. 86 (1987). For an interesting comparative appraisal, see Lee, *Bicentennial Bork, Tercentennial* Spycatcher*: Do the British Need a Bill of Rights?* 49 U. PITT. L. REV. 777 (1988).

68. *See, e.g.*, Purcell, *Rights in the Constitution: The Bill of Rights Revisited?* 62 AUSTL. L.J. 268, 271 (1988); E. CAMPBELL & H. WHITMORE, FREEDOM IN AUSTRALIA 268-269 (1977); Curtis, *Freedom of Information in Australia* 14 FED. L. REV. 5 (1983).

69. *See* RESTRAINING LEVIATHAN: SMALL GOVERNMENT IN PRACTICE (M. James ed. 1987) [hereinafter RESTRAINING LEVIATHAN].

makes the argument more difficult to win.[70] Australians attach little weight to the idea of liberty—perhaps because their liberty has never been crushed by conquest.[71]

When faced with the momentum built up against racial discrimination, the freedom of speech value seems like a weak reed on which to rely. The next part will show that free speech is not so elusive, but that—considering the fragility of the liberty—there is even more reason to demand careful justification of its infringement.[72] As a result, it is essential to articulate the legitimate ambit of free speech in order to gauge how far the legislature should proscribe racial defamation.

III. A GUIDING FRAMEWORK

A. *The Dilemma*

The place of extremist defamatory racial speech in a society committed to free speech has often seemed like an intractable conundrum. Those with a case law mind may examine with reward the United States Supreme Court's attempts to draw the boundaries of free speech.[73] The Court has reserved some of its best rhetoric for the first amendment's guarantee of free speech.[74] As impressive as this literature is, however, in the end it fails to provide appropriate guidance on the issue of extremist racial defamation.

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70. *See, e.g.*, G. DE Q. WALKER, INITIATIVE AND REFERENDUM: THE PEOPLE'S LAW (1987).

71. R. TERRILL, THE AUSTRALIANS (1987).

72. For an excellent analysis, see H. Collins, *Political Ideology in Australia: The Distinctiveness of a Benthamite Society*, 114 DAEDALUS 147 (Winter 1985).

73. It is noteworthy that non-United States courts have taken note of United States first amendment jurisprudence, see Attorney-General v. Guardian Newspapers, Ltd. (No. 2) 3 W.L.R. 776, 790 (H. L. 1988). United States treatments of free speech are legion; see, e.g., D. TUCKER, LAW, LIBERALISM AND FREEDOM OF SPEECH (1985); F. SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY (1982); F. BERGER, FREEDOM OF EXPRESSION (1980); J. BARRON & C. DIENES, HANDBOOK OF FREE SPEECH AND FREE PRESS (1979); R. O'NEIL, FREE SPEECH: RESPONSIBLE COMMUNICATION UNDER LAW (1966); T. SCHROEDER, CONSTITUTIONAL FREE SPEECH: DEFINED AND DEFENDED (1970); N. CAPALDI, CLEAR AND PRESENT DANGER: THE FREE SPEECH CONTROVERSY (1969); A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1960); M. KONVITZ, FUNDAMENTAL LIBERTIES OF A FREE PEOPLE: RELIGION, SPEECH, PRESS, ASSEMBLY (1957); *see generally* Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

74. Justices Holmes, Brandeis, and, more recently, Brennan have been particularly successful in lending inspiration to the work of the first amendment. Some may say that this is the reverse of what was said by Mark Twain of Wagner's music that "it is better than it sounds."

In *Beauharnais v. Illinois*,[75] the United States Supreme Court was required to pass on the constitutionality of a provision in the Illinois Criminal Code. The provision made it unlawful for any person to publish material which, amongst other things, exposed "citizens, of any race, color, creed or religion to contempt, derision, or obloquy. . ."[76]

Beauharnais had distributed a leaflet setting forth, in a rudely constructed prose, a petition calling on the Mayor and City of Chicago "to halt the further encroachment, harassment and invasion of white people, their property, neighborhoods and persons, by the Negro. . . ."[77] It went on to state that if "persuasion and the need to prevent the white race from becoming mongrelized by the negro will not unite us, then the aggressions . . . rapes, robberies, knives, guns and marijuana of the negro, surely will."[78] With this preamble, persons were invited to join the "White Circle League of America, Inc."

It was perhaps portentous that this decision followed closely on the Second World War. Memories were fresh of the Nazi atrocities and of a remarkable upsurgence of antisemitism in the United States in the war years.[79] There was academic writing generally supporting legislative action.[80] Against this background, the majority of the Court, in an opinion delivered by Justice Frankfurter, upheld the constitutionality of the provision under which Beauharnais had been convicted.

Justice Frankfurter recited the "tragic experience of the last three decades" as support for the conclusion that "wilful purveyors of falsehood concerning racial and religious groups promote strife and tend powerfully to obstruct the manifold adjustments required for free, ordered life in a metropolitan, polyglot community."[81] Illinois, because of ructions experienced over a period, had a rational interest in enacting

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75. 343 U.S. 250 (1952).

76. *Id.* at 251 (quoting section 224 of the Illinois Criminal Code, ILL. REV. STAT., ch. 38, § 471 (1949)).

77. *Id.* at 252.

78. *Id.*

79. *See* P. JOHNSON, A HISTORY OF THE JEWS 504 (1987) (There was "more anti-Semitism during the war than at any time in American history.").

80. *See* Riesman, *Democracy and Defamation: Control of Group Libel*, 42 COLUM. L. REV. 727 (1942); Lasson, *Group Libel Versus Free Speech: When Big Brother Should Butt In*, 23 DUQ. L. REV. 77 (1984). *See also* L. ELDREDGE, THE LAW OF DEFAMATION 54-64 (1978); Belton, *The Control of Group Defamation: A Comparative Study of Law and Its Limitations*, 34 TUL. L. REV. 299 (1960); Beth, *Group Libel and Free Speech*, 39 MINN. L. REV. 167 (1955); Donnelly, *The Law of Defamation: Proposals for Reform*, 33 MINN. L. REV. 609, 623-26 (1949); Tanenhaus, *Group Libel*, 35 CORNELL L.Q. 261 (1950).

81. *Beauharnais*, 343 U.S. at 258-259.

this kind of legislation.

The first amendment free speech issue was addressed only obliquely, the argument resting upon the well-established state right to allow its citizens to vindicate reputations via defamation law. If reputations are inextricably tied to group or racial identity, the same right ought to sustain a group defamation statute. What is more, criminal libel, suitably conditioned, was a fixed part of "Anglo-American law."[82] The statute in *Beauharnais*, as the Illinois Supreme Court opined, was "a form of criminal libel law."[83] These foundations of the argument, taken together with the recitation of episodes of racial violence in order to ground the state's interests in the legislation, were later to severely weaken the authority of *Beauharnais*. The case was decided in the pre-*New York Times v. Sullivan* era, and it could be said that the Court therefore neither took seriously enough free speech nor recognized the limits of defamation law.[84] In addition, or alternatively, it could be said that the reasoning relied upon words that threaten breach of the peace and fall within the "fighting words" exception to the first amendment.[85] The Supreme Court requires that the words must be likely to incite a person to physical violence,[86] or to an unlawful act. The nexus to outbreaks of violence or unlawfulness must be so close as to be imminent, and likely to produce such action.[87]

Time has eroded the foundations of Justice Frankfurter's majority

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82. *Id.* at 263. *Beauharnais*' observations about criminal libel and its place under the first amendment were expressly repudiated in Garrison v. Louisiana, 379 U.S. 64 (1964), decided a few months after New York Times v. Sullivan, 376 U.S. 254 (1964) had placed libel laws within first amendment coverage thus overruling *Beauharnais*. T. EMERSON, THE SYSTEM OF FREEDOM OF EXPRESSION 396 (1970).

83. 343 U.S. at 253.

84. Collin v. Smith, 578 F.2d 1197, 1204-05 (7th Cir. 1970). The federal courts now gladly ignore the decision. *See* Anti-Defamation League of B'nai B'rith v. FCC, 403 F.2d 169, 174 n.5 (D.C. Cir. 1968) ("[F]ar from spawning progeny, *Beauharnais* has been left more and more barren by subsequent First Amendment decisions, to the point where it is now doubtful that the decision still represents the views of the Court"). *See also infra* note 102.

85. Chaplinsky v. New Hampshire, 315 U.S. 568 (1942).

86. Gooding v. Wilson, 405 U.S. 518 (1972); Rosenfeld v. New Jersey, 408 U.S. 901 (1972) (vacated and remanded in light of *Gooding v. Wilson*); Brown v. Oklahoma, 408 U.S. 914 (1972) (vacated and remanded in light of *Gooding v. Wilson*); Lewis v. New Orleans, 415 U.S. 130 (1974).

87. Brandenburg v. Ohio, 395 U.S. 444 (1969); Hess v. Indiana, 414 U.S. 105 (1973); Cohen v. California, 403 U.S. 15 (1971); Farber, *Civilizing Public Discourse: An Essay on Professor Bickel, Justice Harlan and the Enduring Significance of* Cohen v. California, 1980 DUKE L.J. 283. Note also that the English courts have insisted upon this immediacy by statute. *See, e.g.*, Regina v. Howell, 1 Q.B. 416 (C.A. 1982).

opinion. His underlying assumption that states ought to be given some room in law reform—that the courts should not judge "the wisdom of the legislation or . . . its efficacy"[88]—while of contemporary moment, is trumped by first amendment free speech notions.[89] Instead, the certainties of the dissenters, Justices Black and Douglas, were victorious in the battle of ideas concerning the first amendment. In retrospect, these are predictable dissents, and they were repeated over the next two decades.[90] The most interesting of the dissents, albeit a neglected one, is that of Justice Jackson, who had been Chief Counsel on the Nuremburg Trials.[91] On the one hand, he had close exposure to the destructive power of racial defamation. On the other, he was a staunch supporter of free speech.[92] The tension between his loathing of the result under the Nazi regime and the imperatives of free speech is well articulated toward the end of his opinion:

> Group libel statutes represent a commendable desire to reduce sinister abuses of our freedoms of expression—abuses which I have had occasion to learn can tear apart a society, brutalize its dominant elements, and per-

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88. *Beauharnais*, 343 U.S. at 267. Justice Frankfurter's opinion also reflects his philosophy of judicial self-restraint—a philosophy which was to lose ground in the Warren court. *See* Dennis v. United States, 341 U.S. 494 (1951).

89. The Supreme Court, in Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974), recognized the states' interest in protecting reputation under defamation law, and that they could establish their own standard of liability provided that first amendment requirements ultimately ruled. *Id.* at 348.

90. The concurring opinions of Justices Black and Douglas are legend. This tandem, while originally expressing the "absolutist's" dissent, would later more closely express the prevailing opinion of the Court on matters of free speech. *See, e.g.*, Dennis v. United States, 341 U.S. 494, 579 (1951) (Black and Douglas dissenting); Yates v. United States, 354 U.S. 298, 339 (1957) (Black and Douglas concurring in part, dissenting in part); Barenblatt v. United States, 360 U.S. 109, 134 (1959) (Black and Douglas dissenting); Brandenburg v. Ohio, 395 U.S. 444, 449 (1969) (Black and Douglas concurring) (cases concerning political speech). *See also* Roth v. United States, 354 U.S. 476, 508 (1957) (Black and Douglas dissenting); Ginzburg v. United States, 383 U.S. 463, 476 (1966) (Black and Douglas dissenting); Mishkin v. New York, 383 U.S. 502 (1966) (Black and Douglas dissenting) (cases concerning pornography and free press). *See* Freedman v. Maryland, 380 U.S. 51, 61 (1965) (Black and Douglas concurring) (free press extended to motion pictures); New York Times v. Sullivan, 376 U.S. 254, 293 (1964) (Black and Douglas concurring) (free speech versus libel). *See generally* W. DOUGLAS, THE COURT YEARS 103-110, 197-211 (1980); J. MAGEE, MR. JUSTICE BLACK: ABSOLUTIST ON THE COURT 29-64 (1980); HUGO BLACK AND THE SUPREME COURT: A SYMPOSIUM 118-122, 245-252 (S. Strickland ed. 1967).

91. *See* R.H. JACKSON, THE NÜRENBERG CASE (1947). *See also* G.E. WHITE, THE AMERICAN JUDICIAL TRADITION 236 (expanded ed. 1988).

92. Thomas v. Collins, 323 U.S. 516, 544 (1945) (Jackson, J., concurring).

> secute, even to extermination, its minorities. While laws or prosecutions might not alleviate racial or sectarian hatreds and may even invest scoundrels with a specious martyrdom, I should be loath to foreclose the States from a considerable latitude of experimentation in this field. Such efforts, if properly applied, do not justify frenetic forebodings of crushed liberty. But these acts present most difficult policy and technical problems . . .
>
> No group interest in any particular prosecution should forget that the shoe may be on the other foot in some prosecution tomorrow. In these, as in other matters, our guiding spirit should be that each freedom is balanced with a responsibility, and every power of the State must be checked with safeguards. Such is the spirit of our American law of criminal libel, which concedes the power to the State, but only as a power restrained by recognition of individual rights. I cannot escape the conclusion that as the Act has been applied in this case it lost sight of the rights.[93]

Justice Jackson's argument was that the history of defamation law and of criminal libel in particular exemplified an accommodation, with ordered liberty preventing an invasion of free speech.[94] Protection of speech through defenses of truth or fair comment was essential.[95]

Needless to say, Justice Jackson's opinion has suffered the slings and arrows of a Court imbued with the spirit of *New York Times v. Sullivan*.[96] The balance struck by the common law in resolving the demands of free speech and protection of reputation has been cast aside as not affording a sufficient scope to free speech.[97] But even though American constitutional theory has bypassed much of the common law, Justice Jackson's dissent provides some insights for others not tied to the American constitutional doctrine.

About a quarter of a century later the Neo-Nazis were planning a

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93. *Beauharnais*, 343 U.S. at 304-05.

94. *Id.* at 295.

95. *Id.* at 300-01.

96. 376 U.S. 254 (1964).

97. The details of the constitutional demands remain uncertain; *New York Times v. Sullivan* was merely the beginning point. Supreme Court decisions that illuminate the landscape are Gertz v. Robert Welch, Inc., 418 U.S. 323 (1974) (the constitutional standard for non-public figures or officials); Curtis Publishing v. Butts, 388 U.S. 130 (1967); (extending the actual malice requirement for public officials to public figures), Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 763 (1984) (the restrictive *Gertz* rules on presumed and punitive damages do not apply to defamatory matters that "do not involve matters of public concern"); Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986) (burden of proving the falsity of the defamatory statement is on the plaintiff where a media defendant publishes material involving public officials or public figures as matters of public concern).

march on Skokie. The case law springing from this incident[98] shows how far United States constitutional law has departed from *Beauharnais*. The circumstances were notorious at the time, and have been widely commented upon.[99] Collin was the leader of the National Socialist Party of America. That party's believers embraced the dogma that blacks are biologically inferior to whites; that the former should be expatriated to Africa as soon as possible; and that American Jews wield "inordinate . . . political and financial power" and stand in "the forefront of the international Communist revolution."[100] Members donned the regalia of the Third Reich. Collin and his party's members proposed to march in front of the Village Hall of Skokie, a village near Chicago. The village has a large Jewish population, including several thousand survivors of the Nazi holocaust. The march elicited a number of actions in court. In these actions, the courts were obliged to deal with the constitutionality of village ordinances designed to prohibit, control, and penalize demonstrations of the type planned by Collin.

The United States Court of Appeals for the Seventh Circuit considered *Beauharnais*, but read it down to accord with present day conceptions.[101] In this vein, the Seventh Circuit expressed doubt that *Beauharnais* remains "good law at all after the constitutional libel cases."[102]

Other arguments were raised and rejected. The plaintiff, in particular, submitted that the actions of Collin's cohorts would inflict psychic trauma on the resident Holocaust survivors and upon other Jewish residents. The plaintiffs pointed to the recognized tort of intentional infliction of emotional distress. The Seventh Circuit dealt narrowly with this

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98. Collin v. Smith, 578 F.2d 1197 (7th Cir. 1978), *cert. denied*, 439 U.S. 915 (1978); Village of Skokie v. National Socialist Party of America, 69 Ill. 2d 605, 373 N.E.2d 21 (1978); *see also* Note, *A Communitarian Defense of Group Libel Laws*, 101 HARV. L. REV. 682 (1988).

99. *See, e.g.*, L. BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 12-42, 104-44, 175-212 (1986). *See also* A. NEIER, DEFENDING MY ENEMY (1979).

100. 578 F.2d at 1199.

101. *Id.* at 1204-05.

102. *Id.* at 1205. The rhetoric of these cases must destroy *Beauharnais*, condemning it to oblivion when next considered by the Supreme Court. Take the rhetorical force of the oft repeated assertion in Gertz v. Robert Welch, Inc., 418 U.S. 323, 339-40 (1974), "[u]nder the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." For additional support questioning the viability of the holding in *Beauharnais*, see, American Booksellers Ass'n v. Hudnut, 771 F.2d 323, 331 n.3 (7th Cir. 1985); R. SMOLLA, LAW OF DEFAMATION § 4.10[3], at 48, n.197 (1989).

issue, indicating that criminalizing conduct was quite a different matter from creation of tortious liability.[103]

The telling point for the plaintiffs was either not put, or not sufficiently apprehended, by the court. If the law is prepared to countenance a restriction of free speech for tortious liability, why should it not for criminal liability? The trammels on speech posed by tort liability may be much greater than by criminal liability.[104] For instance, punitive damages may be more draconian than criminal fines, which in *Collin* were five to 500 dollars. Moreover, the safeguards for the individual of the criminal law are more exacting than those pertaining to civil law.[105]

The Seventh Circuit in *Collin* dilated upon another point worthy of close thought. One provision in the Skokie ordinance gave the "officials the power to deny use of a forum in advance of actual expression."[106] The court opposed any power of prior restraint, finding a "heavy presumption" against its constitutionality: "a free society prefers to punish the few who abuse rights of speech *after* they break the law than to throttle them and all others beforehand."[107] But prior restraint is a concern not only of the first amendment; the common law of defamation is also loath to grant an injunction to prevent the publication of defamatory matter. Like the American constitutional position, the common law has its own presumption favoring vigorous competition of ideas.[108] The difference is that American courts have come to believe that the possibility of retrospective penalization by way of damages in defamation may overly dissuade publishers from engaging in important public debate. In consequence the forensic dice need to be loaded in favor of the publisher.[109]

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103. Collin v. Smith, 578 F.2d at 1205-06.

104. *Cf.* New York Times v. Sullivan, 376 U.S. 254, 277, 278 (1964) (recognizing this very argument).

105. It is now clear, however, that the scope for state tort law imposing liability for intentional infliction of emotional distress is severely truncated under the strictures of the first amendment. The Supreme Court has recently examined the limits of the tort in Hustler Magazine, Inc. v. Falwell, 485 U.S. 46 (1988).

106. 578 F.2d at 1207 (citing Southeastern Promotions, Ltd. v. Conrad, 420 U.S. 546, 553 (1975)).

107. 578 F.2d at 1207 (quoting *Conrad* 420 U.S. at 558-59).

108. *See* Near v. Minnesota, 283 U.S. 697 (1931). For a thorough study of the *Near* case, see F. FRIENDLY, MINNESOTA RAG (1981).

109. Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986) is a recent example in which the Supreme Court altered the burden of proof to improve the strategic position of the media in defamation actions. *See also* Pring v. Penthouse Int'l, 695 F.2d 438 (10th Cir. 1982), *cert. denied*, 462 U.S. 1132 (1983) (strengthening position of writers of fiction and "gonzo" journalism).

It seems probable that the stance taken in *Collin* will prevail in American courts and that the unresolved issue on the limits of the tort of intentional infliction of emotional distress will be decided in favor of free speech where the speech may be dubbed political.[110] Formally, however, the dilemma continues, for the basic points made by Justices Frankfurter and Jackson in *Beauharnais* have never been answered.[111]

B. *Theoretical Foundations*

The foregoing argument demands some firm theoretical mooring. This will permit us to appreciate the amplitude of the freedom, and its corollary, how it may be confined.

Even the most absolute believer in freedom of speech admits that limits exist. Can a person, for no good reason, call, "Fire!" in a crowded theater, or knowingly misstate facts in order to defraud, or maliciously besmirch the reputation of another,[112] or, more problematically, promote ideas destructive of fundamental institutions in an open society?[113] All

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110. Hustler Magazine Inc., v. Falwell, 485 U.S. 46 (1987) Le Bel, *Emotional Distress, The First Amendment and "This Kind of Speech": A Heretical Persepctive on* Hustler Magazine v. Falwell, 60 U. COLO L. REV. 315 (1989). Non-political speech, however, would not attract the same protection. *See* Weirum v. RKO General, Inc., 15 Cal.2d 40, 539 P.2d 36, 123 Cal. Rptr. 468 (1975); Eimann v. Soldier of Fortune, Inc., 680 F. Supp. 863 (S.D. Tex. 1988), *rev'd*, 880 F.2d 850 (5th Cir. 1984); Caswell, *Soldiers of Misfortune: Holding Media Defendants Liable for the Effects of their Commercial Speech*, 41 FED. COMM. L.J. 217 (1989). But courts are not always willing to make a distinction between political and non-political speech. *See, e.g.,* Herceg v. Hustler Magazine, 814 F.2d 1017 (5th Cir. 1987).

111. *See* Note, *Group Vilification Reconsidered,* 89 YALE L.J. 308 (1979) (suggesting that the first amendment does not preclude legislation directed to the evil).

112. In these three instances the law of torts provides causes of action and remedies for injuries sustained as a result of the tort. Negligent or intentional words causing physical harm are actionable. *See, e.g.,* Gooding v. Wilson, 405 U.S. 518, 523 (1972) (insult statutes, which entail a breach of the peace, do not violate free-speech provisions of the first amendment). Strict liability may adhere when the words relate to products. *See, e.g.,* Baxter v. Ford Motor Co., 168 Wash. 456, 12 P.2d 409 (1932) (strict liability extended to express statements as to quality made in advertising, sales materials, and representations). Deceit or fraudulent misrepresentation are actionable. See the foundation case of Derry v. Peek, 14 C.A. 337 (1889). Defamation protects reputation; *see* R. SMOLLA, *supra* note 102, § 1.06, at 1-15.

113. Ideas alone may be sacrosanct, but when ideas are action-producing the law has responded. *See* Debs v. United States, 249 U.S. 211 (1919); Brandenburg v. Ohio, 395 U.S. 444 (1969); Hess v. Indiana, 414 U.S. 105 (1973); *see also* Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942). The traitor motivated by vehemently held ideals cannot plead free speech when she engages in subversive activities, see Dennis v. United States, 341 U.S. 494 (1951); Yates v. United States, 354 U.S. 298, 320-24

are examples of where the law has been willing to restrict free speech.

Various perspectives are not lacking, but to view free speech from the function it serves is the most common and enlightening approach.[114] What social purposes are fulfilled by a commitment to free speech? These social purposes have a critical connection with the democratic nature of our respective societies. In this way, our law, both common and constitutional, has conceived that freedom of speech serves some public interests of such weight that individual private interests must give way.[115] The goal of any theory in this area is to help us identify the public interests secured by free speech. My argument is that these "public interests" are concerned with the preservation of democratic rights.

Free speech nurtures two essential aspects of a liberal democratic society: moral pluralism and tolerance. In turn these aspects protect at base the important normative and conceptually fundamental value of individual autonomy:[116] a person's right to make free choices, to determine a life plan to conform to his own conception of the good life, and to seek truth.[117] The state has no right to impose its conception of the good on its inhabitants.[118]

Political society—especially one that can be called a liberal democracy—exists to serve the interests of its members. The interest served by free speech is the individual's interest of autonomy. The individual may sacrifice a share of his personal interests at the altar of a society committed to free speech in order to secure his autonomy.[119] If this is accepted, it follows that speech may be constrained when it invades the basic value it was designed to protect. The law, however, is an imperfect tool by which we can identify the stopping point.

I shall return to explicate this theory, but first I must traverse ground,

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(1957).

114. *See* Schauer, *Categories and the First Amendment: A Play in Three Acts*, 34 VAND. L. REV. 265, 274 (1981) ("purpose-oriented" distinction).

115. *See* J. RAZ, THE MORALITY OF FREEDOM 179 (1986).

116. G. DWORKIN, THE THEORY AND PRACTICE OF AUTONOMY 32 (1988).

117. *Id.* at 398. The concept of autonomy has been invoked both to justify and damn liberalism. *See* A. RAPACZYNSKI, NATURE AND POLITICS: LIBERALISM IN THE PHILOSOPHIES OF HOBBES, LOCKE, AND ROUSSEAU 239-48 (1986) (Rousseau's conception of the autonomous man).

118. J. RAZ, *supra* note 115, at 108.

119. This is revealed most strongly in the contractarian scheme of liberal democracy stemming from Hobbes, but modified in the hands of the economists, Adam Smith and his intellectual progeny. *See* A. RAPACZYNSKI, *supra* note 117 (tying the intellectual history); G. BRENNAN & J. BUCHANAN, THE REASON OF RULES (1985) (describing in economic theory the function of legal rules); *see generally* J. Hampton, Hobbes and the Social Contract Tradition (1986).

the consideration of which has led me to my views.

C. *A Traverse of the Territory*

Most theories have blended, without punctilious attention to philosophical niceties, utilitarian, and rights-based theories. This seems natural, for J.S. Mill has always been the point of departure for theorists, and his ideas possess an amalgam of the utilitarian and rights-based notions.[120] Mill wished to place some constraint upon the kinds of harm that government may seek to prevent. Hence, he eschewed the pure utilitarian balancing of his father and Jeremy Bentham. In a rule utilitarian fashion,[121] he reasoned that more good, in the long run, was likely to come from placing fetters upon government.[122] A happy example of this philosophy recognizes free speech:

> All who are on a level with their age now readily admit that government ought not to interdict men from publishing their opinions, pursuing their employments, or buying and selling their goods, in whatever place or manner they deem the most advantageous. Beyond suppressing force and fraud, governments can seldom, without doing more harm than good, attempt to chain up the free agency of individuals.[123]

His focus was the individual and the individual's capacity to choose life patterns for himself. His preeminent faith resided in the reasoning and intellectual powers of the individual, and found its place in the harm principle:

> [T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. . . . He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinions of others, to do so would be wise or even right.[124]

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120. *See, e.g.*, J.S. MILL, ON LIBERTY AND CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (G. Himmelfarb ed. 1974).

121. *See* J.J.C. SMART & B. WILLIAMS, UTILITARIANISM: FOR AND AGAINST 72-78 (1973).

122. *See* J.S. MILL, *supra* note 120, at 180-83. *Cf.* THE FEDERALIST NO. 51 (J. Madison), *reprinted in* THE ORIGINS OF THE AMERICAN CONSTITUTION: A DOCUMENTARY HISTORY 203 (M. Kammen ed. 1986) (a similar suspicion of government was central to Madison's rationale for the limitation of governmental powers).

123. J.S. MILL, ESSAYS OF POLITICS & CULTURE 177 (G. Himmelfarb ed. 1962).

124. J.S. MILL, *supra* note 120, at 68. The political and economic analysis of industrialized Britain also spawned a suspicion of government from an unlikely quarter. The current scholarship on Marx's early manuscripts demonstrates his concern with unfettered governmental authority "eliminat[ing] talent, etc. by *force* . . . which negates the *personality* of man in every sphere." *See* K. MARX, *Private Property and Communism*

An individual has a realm of private life where the public may not enter.[125] Not only are the interests of the individual protected, but so too are society's, since the public weal is promoted through the participation of autonomous individuals in society. The autonomous life has two distinct features often not clearly differentiated: the first is the individual's private realm; the second is the individual's *capacity* to make choices directed to this own conception of the good life.[126] Part and parcel of the latter is the commonly identified element of autonomy—the freedom of the individual to exercise his faculties in a search for truth and fulfillment,[127] and although often not socially adhered to, "its influence is the main determining cause of the social progress."[128] Truth-seeking is essential to informed decisionmaking, as is well-recognized in the law of informed consent, where the doctor has a duty to convey the risks of a therapy to the patient.[129] This is what Thomas Scanlon had in mind when he said that the autonomous person must "see himself as sovereign in deciding what to believe and in weighing competing reasons for action."[130] Scanlon would limit government's ability to restrict liberty to prevent harm. Government may not prevent harm by "controlling people's sources of information to insure that they will maintain certain beliefs."[131] When the individual is both a receiver and a conveyor of information, full autonomy demands that government neither repress expression[132] nor muffle the source to limit its reception.[133]

Mill's arguments have deeply influenced this thesis on the free flow of information.[134] Although modern day experience may warn of the dan-

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in MARX'S CONCEPT OF MAN 124-25 (E. Fromm ed. 1966).

125. *See* PUBLIC AND PRIVATE IN SOCIAL LIFE (S. Benn and G. Gaus, eds. 1983).

126. *See* G. DWORKIN, *supra* note 116.

127. *See* J.S. MILL, *supra* note 120, at 119-139 (of individuality, as one of the elements of well-being); Schauer, *Free Speech and the Argument from Democracy*, 25 NOMOS 241 (1983).

128. J.S. MILL, *A System of Logic, Book VI*, in COLLECTED WORKS OF JOHN STUART MILL, VIII, 926 (1974).

129. Canterbury v. Spence, 464 F.2d 772 (D.C. Cir. 1972).

130. Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 215 (1972).

131. *Id.* at 222.

132. Baker, *Scope of the First Amendment Freedom of Speech*, 25 UCLA L. REV. 964, 1000 (1978).

133. *See also* Scanlon, *Freedom of Expression and Categories of Expression*, 40 U. PITT. L. REV. 519, 524-27 (1979).

134. "A popular Government, without popular information, or the means of acquiring it, is but a Prologue to a Farce or a Tragedy; or, perhaps both. Knowledge will forever govern ignorance: And a people who mean to be their own Governors, must arm

gers of an avalanche of information as benumbing autonomy, it is difficult to conclude that the government has a legitimate role in censoring political speech. Individuals through private choice will devise strategies to handle information,[135] and thus avoid the dangers of a surfeit of information.

Holmes was influenced by Mill but added his own gloss of moral relativism which led him to fashion a province for free speech more extensive than Mill's.[136] Holmes's essential, if dismal, point can be put succinctly: The harm principle has the capacity of undermining free speech when, as is inevitable, a human institution is charged with weighing the harm justifying the government intervention. Holmes's instincts made him suspicious of moral absolutes; certainly no human could determine absolute truth.[137] At best, one could depend upon a mechanism of an objective kind—and the invisible hand of the market was an appealing paradigm.[138] This concept, too, has had staying power. It comports with the Madisonian minimalist state theory, where the state should act as the facilitator of private arrangements and establish conditions conducive to the free play of the market.[139]

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themselves with the power knowledge gives." 9 THE WRITINGS OF JAMES MADISON 103 (G. Hunt ed. 1910).

135. *See* Kronman, *Mistake, Disclosure, Information, and the Law of Contracts*, 7 J. LEGAL STUD. 1 (1978); Hirshleifer, *The Private and Social Value of Information and the Reward to Inventive Activity*, 61 AM. ECON. REV. 561 (1971); A. SPENCE, MARKET SIGNALING (1974).

136. Holmes' classic dissent in *Abrams* provides ample evidence of his intellectual ties to Mill. *See* Abrams v. United States, 250 U.S. 616, 630 (1919). However, Holmes' skepticism and penchant for Social Darwinism prevented his position from merely echoing that of Mill's. See Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 454-58 (1988). Holmes' market-place of ideas ensured majority rule—including majoritarian repression of minority rights when the latter could be reasonably said to subvert majoritarian social goals—not individual development. See G.E. White, *supra* note 91, at 158, 175. *See generally* Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989); Bloustein, *Holmes: His First Amendment Theory and His Pragmatist Bent*, 40 RUTGERS L. REV. 283 (1988).

137. E. PURCELL, THE CRISIS OF DEMOCRATIC THEORY 209 (1973).

138. This powerful paradigm recurs in first amendment jurisprudence. *See* Philadelphia Newspapers v. Hepps, 475 U.S. 767 (1986), Smolla, Dun & Bradstreet, Hepps, *and* Liberty Lobby: *A New Analytic Primer on the Future Course of Defamation*, 75 GEO. L.J. 1519, 1530 (1987).

139. *See* Bork, *Neutral Principles and Some First Amendment Problems*, 47 INDIANA L.J. 1 (1971). For a sustained argument about the need for imposing constraining rules upon political action, see G. BRENNAN & J. BUCHANAN, *supra* note 119. For a discussion of the nature of these rules in a democracy, see J. COLEMAN, MARKETS, MORALS, AND THE LAW 290-310 (1988).

Complementary to this—and also based upon Holmes's skepticism—one may discern another theory, which Dean Bollinger calls the "Fortress Model."[140] This thesis takes as its premise that allowing governments to control for the good permits government to control for the bad; truth is so relative in time and social condition that its definition must be vague. It follows that desirable regulation may overreach and become repressive. Albeit tenebrous, this view appeals especially to the sardonic Australian temperament. However, this purely relativist stance provides no foundation for any limits to speech. It allows the most vicious and destructive of views to rank equally beside other views, even though the former views would destroy the fabric of society and its capacity to create conditions for the exercise of free speech.[141] To take an absolutely relativist position where all values are in flux is to say that freedom of speech itself may not attract any protection in the face of other values.[142]

The Fortress Model turns its suspicious eye on government. To be sure, government—even well-intentioned—has a great potential to invade the liberty of the individual. It follows that a heavy burden of justification is required when government acts through legislation to restrict freedom of speech.[143] But one of the weaknesses of free speech analysis has been a singular concentration upon government as the villain.[144] This is unfortunate for two reasons. In the first place, it is not only the government and its officials, but also, and more significantly, the majority—through legal and extra-legal means[145]—that may thwart the exercise of free speech.[146] But if this is our present day concern, it erodes support for the influential functional or utilitarian theory that free speech supports, and is justified by, the operation of a liberal democracy. This theory has profoundly influenced the United States Supreme

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140. L. BOLLINGER, *supra* note 99, at 76-103.

141. 1 K. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 265-66 (5th ed. 1966).

142. *See* R. DWORKIN, LAW'S EMPIRE 373 (1986) (similar argument and "external skepticism").

143. Philadelphia Newspapers v. Hepps, 475 U.S. 767, 787-88 (1986) (Stevens, J., dissenting).

144. *See, e.g.*, A. Meiklejohn, *Free Speech and Its Relation to Self-Government*, in POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE (1965) (concentrating on governmental interference).

145. *See* L. BOLLINGER, *supra* note 99, at 110.

146. This is by no means a new idea. *See* A. DE TOCQUEVILLE, DEMOCRACY IN AMERICA 12 (R. Heffner ed. 1956); J.S. MILL, *supra* note 120, at 31; F. SCHAUER, *supra* note 73, at 45 (citing a letter from Thomas Jefferson to James Madison, in which Jefferson quoted Horace, *Odes*, book III, ode iii "*Civium arder prava; jbentium or 'the frenzy of the citizens bidding what is wrong').*

Court's first amendment jurisprudence. Although the halcyon days of the theory would be ushered in by *New York Times v. Sullivan*, Justice Brandeis in *Whitney v. California* was a harbinger:

> Those who won our independence believed that the final end of the State was to make men free to develop their faculties; and that in its government the deliberative forces should prevail over the arbitrary. . . . They believed that freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth;. . . that the greatest menace to freedom is an inert people; that public discussion is a political duty; and that this should be a fundamental principle of American government.[147]

I take it that a central tenet of democracy is majority rule.[148] If the majority decides to suppress free speech, how can it be defended upon democratic lines? No doubt democracy is more than rule by the majority. Yet, if liberal democratic theory legitimately places fetters on the majority in order to promote democratic values, may it not be that it is justifiable to place fetters on the exercise of freedom of speech, if the purpose for those fetters is to promote those democratic values? If minorities[149] are given special protections in democratic theory, then laws preventing erosion of those minority rights may *legitimately* infringe freedom of speech as a consequence.[150] For example, to prohibit racial defamation may be justifiable as protecting the democratic rights of minorities.[151]

At this point, the democracy argument—usually associated with Meiklejohn—may beat a retreat to Holmes's fortress and the market of ideas. The argument is this: To permit restrictions will lead to others. Jews may support the right of the Neo-Nazi members to stage the Skokie march, on the basis that the very right asserted by the Neo-Nazis affords them a right later to fight back in words or symbolic speech.[152] The retreat is futile because it idealizes our complex society. What suf-

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147. 274 U.S. 357, 375 (1927) (Brandeis, J., concurring).

148. J.H. ELY, *supra* note 29, at 7.

149. The definition of "minority" is problematic. *See id.* at 149-179.

150. *Cf.* R. DWORKIN, *supra* note 142, at 377; *see also* J.H. ELY, *supra* note 29, at 152-53 (referring to United States v. Carolene Products, 304 U.S. 144 (1938)).

151. R. DWORKIN, *supra* note 142, at 382-87. For a discussion extending the protection against defamation to the civil rights of women opposing the depiction of women in pornography, see Finley, *The Nature of Domination and the Nature of Women: Reflections on Feminism Unmodified*, 82 NW. U.L. REV. 352, 355 (1988) (a review essay of MACKINNON, FEMINISM UNMODIFIED (1987)); *see also* Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320 (the "outside" perspective).

152. L. BOLLINGER, *supra* note 99, at 98-100.

fices in a New England town meeting fails where powerful media operate with highly passionate and volatile public opinion.[153] The ideal would smooth over this objection by submitting that in the long run, the market will prevail—that truth will win out. But as Lord Keynes said, in the long run we are all dead, and the costs will have been considerable—perhaps devastating—for democratic societies. The realities of contemporary public debate are far removed from the origin of the paradigm, the Baconian insight that "truth comes more easily out of error than confusion, but it is also a tribute to the moral qualities of earnestness, scrupulousness, and honesty that are essential to the proper understanding of any difficult matter."[154] This contemplative intellectual endeavor, the root of Mill's ideas, is out of place in the mendacious present day world of the media.

Furthermore, to view the government as villain is to ignore the capacity of the government as a speaker to moral matters. Government actions carry the imprimatur of authority. Silence and action carry social messages. This sits at the base of much anti-discrimination legislation. For government to speak provides not only a greater power to rectify wrongs but carries a moral message that discriminatory behavior does not have a place in that society. The commitment of the welfare state to the provision of certain services is a manifestation of this moral role. This is a reason why an impersonal market is often eschewed in favor of less efficient government services. It is certainly plain that the moral role of government in race relations has been strongly asserted in the years since the Second World War.[155] This is no warrant to accept the claims of government but simply to recognize its positive, non-villainous role.

D. *Bollinger's Tolerance*

In his book, *The Tolerant Society*,[156] Dean Bollinger employs the dilemmas posed by extremist speech to explicate a new theory of free speech, finding shortcomings in the existing theories. He fastens on toler-

153. Indeed, critical legal scholars criticize the law for failing to account for powerful publishers' dominance in information dissemination. *See* A. HUTCHINSON, DWELLING ON THE THRESHOLD: CRITICAL ESSAYS ON MODERN LEGAL THOUGHT 175 (1988). "American soil is not the rich loam of freedom, but the cloying mud of privilege." *Id.* at 180.

154. Edwards, *Toleration and Mill's Liberty of Thought and Discussion*, in JUSTIFYING TOLERATION 106-107 (S. Mendus ed. 1988) [hereinafter JUSTIFYING TOLERATION].

155. *See supra* Part II, section C.

156. L. BOLLINGER, *supra* note 99, at 43-144.

ance as the central support for free speech.[157] Under the other theories, tolerance was but an incident to free speech. But tolerance becomes, within Bollinger's framework, a central value that if accepted by the individual works through to the public culture of a society: "[T]he operation of free speech may be seen as reflecting a determination to create a general intellectual character through the creation of a kind of tolerance ethic."[158] Bollinger argues that this general public culture will defuse most harmful speech. It is conceded, however, that speech may be socially destructive, and the possibility of its correction or amelioration attenuated. Yet the law should be slow to proscribe this speech, for it may be that it enhances tolerance. The march on Skokie may have had such a positive benefit, for to allow the march would induce feelings of tolerance that overall have a civilizing influence on the public culture. This it does by confronting individuals with their innermost feelings about these matters and forcing them to examine why they should wish persons carrying out the attacks to be punished by legal or nonlegal means.[159]

This theory shares some of the flaws of theories that Bollinger attacks. Although he recognizes the dark side of the mind, he idealizes the individual and the public. The fact is that individuals are influenced by racist speech that is not necessarily offset by the opportunity to reflect upon it or weigh it with other information, whether derived from within one's psyche or from the outside. It is chimerical to conceive that a sufficient number of individuals will intellectualize these matters in this way so as to cultivate a public culture of self-restraint. No doubt we have all had the feelings described by Bollinger. And perhaps to contemplate extremist speech helps us exorcise the devil. However, it seems entirely possible that extremist speech may embolden the devil. To allow extremist speech is symbolic of a public culture of self-restraint—albeit beset by hideous intolerance at the extremities—but, to the attacked minority groups, it is also symbolic of a feckless society, one that permits divisions and breeds alienation.

When discussing symbols, one should not forget that governmental actions carry great symbolic weight. This, as stated previously, is a reason why legislation against racial discrimination, although often unwieldy and ineffectual, still carries a moral weight from its very enactment and

157. *Id.* at 134-137.

158. *Id.* at 123-124.

159. *Id.* at 127. *But see* Raz, *Autonomy, Toleration and the Harm Principle*, in JUSTIFYING TOLERATION, *supra* note 154, at 169 (articulating reasons for allowing evil or repugnant options, but rejecting them as "rarely" reducing "a person's choice sufficiently to affect his autonomy").

presence on the statute books. It is important that the present-day issue has arisen in those democracies with increasingly complex multi-racial societies. For example, the National Front in Britain flourished only when British society became less homogeneous—a result of the immigration of significant numbers of blacks from the Caribbean and Indians and Pakistanis.[160] The dynamics of groups in society are ignored by an overconcentration on the individual.[161] To tolerate extremist speech may lead to perceptions of impotence and inadequacy in those groups. The harm of this alienation is unlikely to be offset by benefits of tolerance on an individual psychological plane.[162]

One aspect of American public culture may mitigate this dispiriting of traduced racial groups. Such is the faith in private individual initiative and the commensurate wariness of public action, that lack of governmental action may not be seen as a social abandonment. This faith and wariness have substantially eroded since the 1950s.[163] Expectations among racial minorities are more Benthamite; such has been the great endeavor of the civil rights movement.[164] This is exemplified by affirmative action, representing government action that would be completely unacceptable elsewhere.[165] And so in this area, despite a rear-guard neo-conservative

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160. THE BRIXTON DISORDERS, *supra* note 14, at 8.

161. I do not propose recognition of group rights but note that individual rights may depend upon group identity. *See* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 13 (1985); Garet, *Communality and Existence: The Rights of Groups*, 56 S. CAL. L. REV. 1001 (1983). This is, however, a matter of considerable moment. *See* P. FRENCH, COLLECTIVE AND CORPORATE RESPONSIBILITY (1984); L. MAY, THE MORALITY OF GROUPS: COLLECTIVE RESPONSIBILITY, GROUP-BASED HARM AND CORPORATE RIGHTS (1987) (Soundings: A Series on Ethics, Economics and Business No. 1).

162. Not all defenders of free speech have defended toleration. Of Milton, Fish has asserted that toleration was merely a step to a future "till we come to beatific vision." *See* Fish, *Unger and Milton*, 1988 DUKE L.J. 975, 979 (quote is from J. MILTON, *Areopagitica*, in COMPLETE POEMS AND MAJOR PROSE 741 (M. Hughes ed. 1957)).

163. Nowadays government is looked to to solve social problems—leading to a crisis of faith in government as demand for social problem-solving outstrips government capacity. T. HALLIDAY, BEYOND MONOPOLY: LAWYERS, STATE CRISIS, AND PROFESSIONAL EMPOWERMENT 36 (1987). This disjunction between popular demand and institutional capacity erodes public confidence and leads to "democratic distemper." *Id.* at 13 (citing Huntington, *The Democratic Distemper*, 16 PUB. INTEREST 9 (1975)).

164. Brown v. Board of Educ., 347 U.S. 483 (1954) was the watershed.

165. Fullilove v. Klutznick, 448 U.S. 448 (1980) (upholding a 10% set-aside program for minority owned businesses). However, the use of racial classifications, even if sometimes justifiable for the benign purposes of affirmative action, does not presently sit well with the Court's new consensus that all racial classifications are suspect. *See* Regents of Univ. of Calif. v. Bakke, 438 U.S. 265 (1978) (invalidating the university's set-

reaction,[166] the supporters of governmental intrusion, for better or for worse, have won the day. The fat, the short, and the ugly may all suffer unfocused defamation, but not for one moment do we treat these matters as we do race.[167]

E. *Liberal Theory*

The foregoing theories, gnarled as they are, have drawn upon ideas deeply imbedded in Western democratic thought and legal tradition.[168] The combined force of the theories is to give a firm place to free speech. Each theory gives a powerful reason why any restriction on that freedom must be closely justified.

In my view, a durable theory (or combination of theories) may only be fashioned upon a theory of liberal democracy. The commitment of liberal democracies is to afford their citizens the opportunity to live full autonomous lives. Within this is the value of equal concern and respect for individuals. Combining this value with the harm principle, it may be said that a fundamental value is the equal moral agency of every person to pursue his own conception of the good, provided he does not harm others.[169]

As mentioned at the outset, free speech serves the public interest by protecting the autonomy of individuals. But any society governed by laws restricts the liberties of its members; one person cannot exercise his au-

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aside quotas for minority medical school applicants); *see also* Wygant v. Jackson Bd. of Educ., 476 U.S. 267 (1986) (holding "societal" discrimination insufficient to validate a set-aside program); City of Richmond v. Croson Co., 109 S. Ct. 706 (1989) (invalidating a 30% set-aside for minority owned businesses).

166. *See* P. STEINFELS, THE NEO-CONSERVATIVES (1979). Nathan Glazer argues that affirmative action abandons the first principle of a liberal society that public policy should take account of individual rights and welfare without consideration of group membership. *See* N. GLAZER, AFFIRMATIVE DISCRIMINATION 220-21 (1975). Alan Goldman, though presenting a more even-handed treatment than Glazer, similarly restricts the justification of affirmative action programs to create equal opportunity for the chronically poor or to compensate those who were unjustly denied deserved positions in the past. *See* A. GOLDMAN, JUSTICE AND REVERSE DISCRIMINATION 230-31 (1979). For the Supreme Court's current restriction of affirmative action to those cases of past discrimination against specific individuals, see Note *supra* note 165. *See generally* K. GREENAWALT, DISCRIMINATION AND REVERSE DISCRIMINATION (1983).

167. Some may say this is an obsession. Nevertheless, it is a contemporary social fact. *Cf.* Note, *supra* note 98, at 693 (differentiating between "instrumental" (acquired or earned) and "constitutive" (innate) group affiliations).

168. *See* H. BERMAN, LAW AND REVOLUTION: THE FORMATION OF THE WESTERN LEGAL TRADITION 1-18 (1983).

169. The author thanks Dr. Wojciech Sadurski for suggesting this formulation.

tonomy in a way that destroys the autonomy of others. Free speech—enhancing tolerance and pluralism—promotes the conditions under which individual autonomy can be exercised without unduly trespassing. But free speech exercise may also eclipse those values.[170] Accordingly, a society of laws should attempt to draw limits,[171] even while recognizing the powerful side-constraint or presumption in favor of free speech.

One's life choices and ability to act as an equal moral agent may be intimately tied to a racial or ethnic group or minority in society. Indeed, for any person, choice-making takes place in a social context. Joseph Raz has said that the state may "prevent extreme cases where severely offending or hurting another's feelings interferes with or diminishes that person's ability to lead a normal autonomous life in the community."[172] The autonomous life of a person associating with a racial minority is diminished by racial defamation because his ability to enjoy pride in membership is diminished.[173] Justice Frankfurter cogently made the point in *Beauharnais*: "[A] man's job and his educational opportunities and the dignity accorded to him may depend as much on the reputation of the racial and religious group to which he willy-nilly belongs, as on his own merits."[174] The vital connection here is between the autonomous life and the society in which it is lived.[175]

The approaches to protecting the autonomous life vary among liberal democracies. The United States heritage, manifested strongly in recent years, is to distrust the state acting on the harm principle. At best, an

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170. It is similar to the often discussed dilemma of a man exercising his freedom to sell himself into slavery. Exercise of freedom and toleration finds its limit where the acts contravene the principle of respect for persons. In Kantian terms the limit is the categorical imperative that human beings are ends in themselves and not means. I. KANT, *Groundwork for the Metaphysics of Morals* in THE CATEGORICAL IMPERATIVE 165 (H. Patton ed. 1967) ("So act as to use humanity, both in your own person and in the person of every other, always at the same time as an end, never simply as a means"). For discussion, see D.D. RAPHAEL, *The Intolerable*, in JUSTIFYING TOLERATION, *supra* note 154, at 138-139.

171. F. SCHAUER, *supra* note 73, at 7-8 (citing R. NOZICK, ANARCHY, STATE AND UTOPIA 28-33 (1974)).

172. J. RAZ, *supra* note 115, at 254; *see also* Note, *supra* note 98. *But see* Guest, 103 L.Q. Rev. 642 (1987) (reviewing J. RAZ, THE MORALITY OF FREEDOM (1986)).

173. *See* J. RAZ, *supra* note 115.

174. Beuharnais v. Illinois, 343 U.S. 250, 263 (1952).

175. Community values are compatible with the cultivation of the autonomous person. The autonomous person may have concern or respect for others in the group or society or, I add, other groups in the society, and still be autonomous. This avoids having to abandon an individualistic stance in order to inject wider community based values. *See* S. BENN, A THEORY OF FREEDOM 213-235 (1988).

objective market is the best protector—for reasons well articulated by Holmes.[176] This tradition, embodied in the Constitution, derives from eighteenth century ideas. Suspicion of overreaching government has always been the watchword, together with "a romantic faith in human perfectibility"—an "explosive blending of Jeffersonian rationalism with democratic optimism."[177]

Elsewhere, in the United Kingdom and the Commonwealth, the public culture is dominated more by ideas of nineteenth century origin.[178] The utilitarian ideas of Jeremy Bentham and of John Austin encouraged a greater faith in the efficacy of the state's intervention.[179] Government may be harnessed more actively, in this view, to promote conditions for individual autonomy.[180] It follows that when this freedom is cherished and is threatened by racist propaganda, the state may act. But freedom of speech is such an essential condition for individual autonomy that the greatest of care is demanded to avoid governmental overreaching and hence erosion of individual autonomy itself.

Varying public cultures, then, will result in varying points of prohibition along the continuum between freedom of speech and racist defamation. The American approach gives more ample room for exercise of free speech—the British, including some Commonwealth countries, less.[181]

The force of the free speech presumption is viewed differently. But this is not to say that free speech is a relative value. The value remains; it is simply a matter of strategy in these societies of how that value will

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176. *See* G.E. WHITE, *supra* note 91, at 158, 175; *see also* Abrams v. United States, 250 U.S. 616, 630-631 (1919).

177. C. BOLT & S. DRESCHER, ANTI-SLAVERY, RELIGION AND REFORM 2 (1980) (Introduction).

178. ATIYAH, *supra* note 6, at 240-242 ("From the time of Bentham & Austin, English lawyers and jurists increasingly subscribed implicitly, if not explicitly, to many of their leading tenets").

179. *Id.* at 242. For Bentham's work, see JEREMY BENTHAM AND THE LAW (G. Keeton & G. Schwarzenberger eds. 1948). For Austin's work, see J. AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED (Library of Ideas ed. 1954); and for a summation, see W. L. MORISON, JOHN AUSTIN (1982).

180. L. HUME, BENTHAM AND BUREAUCRACY 209-237 (1981). *But see* J.S. MILL, ESSAYS ON POLITICS AND CULTURE 120-125 (G. Himmelfarb ed. 1962) (chastizing Bentham for not providing for such a harness in his majoritarian theories).

181. It should not be thought that public culture totally explains legal differences between different countries. More prosaic explanations may be available, such as differences in procedure, for example financial incentives and other conditions governing litigation, see Prichard, *A Systematic Approach to Comparative Law: The Effect of Cost, Fee, and Financing Rules on the Development of the Substantive Law*, 17 J. LEGAL STUD. 451 (1988).

protect individual autonomy. Any point selected will be subject to severe pressures. In particular, a populist sentiment may often be encountered to prohibit speech that is unpopular or inconsistent with current social mores. A principle of free speech must hold the line against these pressures. It may do so by requiring a compelling reason for any infringement of free speech and by protection of individual autonomy. However, one state's determination of the balance may be inconsistent with another's. Yet, the democratic character of both may be equal. Those values cherished as democratic or just will change. Elusive as they are, they will inform the public culture.

Public culture changes from time to time within a society. The notorious example is that when a nation is at war free speech is more readily confined.[182] More subtly in the United States the point in the continuum has shifted, to which the constitutionalization of defamation in *New York Times v. Sullivan*[183] bears witness. Here the point shifted from one established under the common law to one favoring more vigorous speech in political matters. It shifted from the private right of the individual to the public right of political discussion.[184] Identifying the locus of the point, with the ebb and flow of constitutional law, is in no wise easy. A strong minority of the Supreme Court has in recent decisions given greater weight to a person's reputation.[185] Some strategic changes in the court could give pause to the impulse to favor free speech over reputation. It may be that the torts of intentional infliction of emotional distress and invasion of privacy may reveal fissures in the free speech monolith, although the Supreme Court in the *Falwell* case[186] recently invoked the

182. Free speech is not the only individual freedom to give way. *See, e.g., Ex parte* Mitsuye Endo, 323 U.S. 283 (1944); Hirabayashi v. United States, 320 U.S. 81 (1943); Korematsu v. United States, 323 U.S. 214 (1944); *see also* Fraenkel, *War, Civil Liberties and the Supreme Court 1941-1946*, 55 YALE L.J. 715 (1946).

183. 376 U.S. 254 (1964). *But see* R. Epstein, *Was* New York Times v. Sullivan *Wrong*?, 53 U. CHI. L. REV. 782 (1986).

184. Franklin & Bussel, *The Plaintiff's Burden In Defamation: Awareness and Falsity*, 25 WM. & MARY L. REV. 825 (1984); Lewis, Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., Philadelphia Newspapers, Inc. v. Hepps, *and Speech on Matters of Public Concern: New Directions in First Amendment Defamation Law*, 20 IND. L. REV. 767 (1987).

185. *See, e.g.*, Philadelphia Newspapers v. Hepps, 475 U.S. 767, 780 (1986) (Stevens, J., dissenting); Rosenblatt v. Baer, 383 U.S. 75, 91 (1966) (Stewart, J., concurring); Dun & Bradstreet, Inc. v. Greenmoss Builders, 472 U.S. 749, 774 (1985) (Brennan, J., dissenting).

186. *See* Hustler Magazine v. Falwell, 485 U.S. 46 (1988) (deciding that the first amendment rendered unconstitutional state tort law that would find a publisher liable for intentional infliction of emotional distress in respect of a political parody of a public

well-worn rhetoric of the market of ideas in rejecting the famous preacher's claim for damages for intentional infliction of nervous shock.

This is a central concern for law reform in Australia. Measure must be taken of the prevailing Australian public culture. Doubtless it has shifted with the enactment of racial antidiscrimination laws, the rhetoric of multi-culturalism, and the reality of a less homogeneous society. These are forces that militate in favor of a shift toward the proscription of racial defamation and highlight the futility of an "absolute" protection of speech.[187]

IV. THE ROLE OF GOVERNMENT

A. *The Framework for Reform*

So the harm principle allows the state to intervene, even in the most libertarian of societies: in the United States, an individual's reputation continues to be protected. And I have demonstrated that similarly good reasons may be found for interference with speech promoting racial defamation. This, however, does little to solve the critical dilemma of crafting a legal response to the phenomenon of racial defamation without encroaching upon and destroying legitimate free speech. Because this speech is so often of a political nature, the issue is perplexing. For example, should scientific work exploring possible intellectual differences between the races fall foul of the proscription? Would debate about the desirable mix of immigration be chilled by fear of liability?

Two governing premises emerge in charting the course between Charybdis and Scylla. The first, as stated above, is a recognition of the justifiability of the government's acting as a speaker on moral matters in relation to racial defamation. Second, a governmental response must choose an institution to deal with instances of racial defamation. The courts should be chosen, and specialized agencies of the legislature or executive eschewed. These two issues, now discussed, will later form the framework of reform recommendations.

B. *The Government as Speaker*

Much emphasis has been given over the years to the impotence of anti-discrimination legislation.[188] The processes of the law are ponderous

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figure. It is not clear how far the Court's reasoning would extend to political speech that caused similar damage to non-political figures).

187. This is the approach adopted in Part IV, where I suggest that very cogent reasons must be given to restrict expression of opinion.

188. *See* D. BELL, AND WE ARE NOT SAVED: THE ELUSIVE QUEST FOR RACIAL

and not easily accessible to those suffering the wrongs that the legislation was designed to prevent. This has spawned suggestions for strengthening the legislation[189] and judicial responses that stretch doctrine to accommodate policy goals.[190] The inability of the legislation to accord equal opportunity has prompted a move to affirmative action programs.[191] This move reveals a nerve of faith in society's perfectability. Antidiscrimination legislation cannot be dismissed as a failure, however, simply because we have fallen short of Nirvana. Its success should be seen, rather, in terms of its speaking to citizens about the shape of a desirable society.

Antidiscrimination legislation is an example of the government's discourse about moral matters, and can be seen "as symbolizing the public affirmation of social ideals and norms as well as a means of direct social control."[192] The legislature draws its authority from the majority; it may mix a potent brew, in order to change public perceptions, by enacting principled legislation and employing the courts to implement it. In our respective democratic societies, the courts have a power—derived from their symbolic stance as upholders of individual rights, as institutions above the venal vicissitudes of politics, and as elaborators of the law—to communicate, to persuade, and to appeal to the sensibilities of the populace and those occupying positions of power.[193]

Legislation on racial defamation comes directly within this tradition. Hedged with protections for free speech, it will be ineffectual in bringing to book more than a small minority of those citizens bent on disseminating racial defamation. In fact, the diversity and tolerance of society must always contemplate such citizens, for draconian legislation will do little to curb their nefarious activities. Moreover, to arm legislation with the police powers necessary to bring these perpetrators to book not only sets

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JUSTICE (1987); *see also* Delgado, *Derrick Bell and the Ideology of Racial Reform: Will We Ever Be Saved?*, 97 YALE L.J. 923 (1988) (book review).

189. *See* Partlett, *supra* note 56, at 174. *See also* Tarnopolsky, *The Iron Hand in the Velvet Glove: Administration and Enforcement of Human Rights Legislation in Canada*, 46 CAN. B. REV. 565, 584 (1968).

190. Recent Supreme Court decisions of employment discrimination and proof of causation took a broad view of causation to accommodate the eradication of racial discrimination in the workplace. *See* Belton, *Causation in Employment Discrimination Law*, 34 WAYNE L. REV. 1235 (1988).

191. *See supra* notes 164, 165, 166 and accompanying text.

192. M. YUDOF, WHEN GOVERNMENT SPEAKS: POLITICS, LAW AND GOVERNMENT EXPRESSION IN AMERICA 193 (1983) (citing J. Gusfield, *Moral Passage: The Symobolic Process in Public Designations of Deviance*, in LAW AND BEHAVIORAL SCIENCES 308, 309 (L. Friedman & S. MacCaulay eds. 1969)).

193. The United States courts may have extended this power beyond its traditional uses. *See id.* at 193-94.

an impossible task, but, worse, it hazards the values encompassed by free speech.[194]

Legislation is governmental speech of the most potent kind.[195] As government speech, it has the entire lawmaking and enforcing apparatus behind it. This necessarily confronts the debate about the legitimacy of the government speaking. In the most general sense, it would be absurd to restrain government from taking moral stances. It adopts positions every day.[196] More positively, as Professor Tribe says, the first amendment, presumably even on its most absolute interpretation, does not mean that government must be ideologically "neutral." Nor does it "silence government's affirmation of national values," or prevent government from "add[ing] its own voice to the many that it must tolerate."[197] And as Justice Scalia has well said while on the D.C. Circuit, a rule proscribing government speech would lead to the "strange conclusion that it is permissible for the government to prohibit racial discrimination, but not to criticize racial bias; to criminalize polygamy, but not to praise the monogamous family; to make war on Hitler's Germany, but not to denounce Nazism."[198] Despite protestations from a first amendment angle that government should be agnostic, this is impossible.[199] All we can say is that government's speech should not interfere with, but rather cultivate, individual autonomy. Because government is a powerful, sometimes overwhelming, voice, great care should be taken to cabin its exercise.

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194. This argument is counterintuitive, for it is rarely heard that legislation should lack powers to ensure its full implementation. But the symbolic function of legislation in a government's moral discourse justifies this route, and in the long run balances the concerns aired in this paper. *See* Texas v. Johnson, 109 S.Ct. 2533, 2542 (1989) (Brennan, J.) (majority contending government's symbolic speech may foster nonoffensive conduct by persuasion and example where criminal punishment would not be justified).

195. M. YUDOF, *supra* note 192, at 263. *See also* White, *What Can a Lawyer Learn from Literature?*, 102 HARV. L. REV. 2014, 2047 (1989) (book review) (suggesting that statutes are a way that government may speak not merely to coerce but to inspire through literary symbols—"law is not simply an instrument for achieving a certain distribution of items in the world, but a way of creating and sustaining a political and ethical community").

196. Welch, *supra* note 22, at 542-49 (law and morality are thoroughly intertwined).

197. L. TRIBE, AMERICAN CONSTITUTIONAL LAW 588, 590 (1978). *See also Texas v. Johnson,* 109 S.Ct. at 2546-47; *id.* at 2552 (Rehnquist, J., dissenting).

198. Block v. Meese, 793 F.2d 1303, 1313 (D.C. Cir. 1986).

199. Kamenshine, *The First Amendment's Implied Political Establishment Clause,* 67 CALIF. L. REV. 1104 (1979). The same conclusion is applicable to the free exercise clause of the first amendment, Welch *supra* note 22.

But it is not sufficient simply to leave the argument here. Government—in the defense of interests of tolerance, pluralism, and individual autonomy—has a duty to speak on moral matters on behalf of those in the society who are inarticulate. Government is then acting as a facilitator for the expression of ideas, and it is difficult to attack the action from a free speech standpoint. As Yudof has said, the preservation of democracy in modern society demands "a balance between communications from government and those addressed to it."[200] He identifies a "need for a consciously fostered pluralism in communications networks that treats government neither as impotent observer nor as omnipotent participant."[201] The legitimacy of governmental speech is enhanced if it is the legislature that speaks through its constitutional channels, for this is at the very foundation of democracy, and consonant with Meiklejohn's argument for free speech as the preserver of democratic rights.[202]

Many forces will oppose the publication of racial defamation; in our tolerant societies, it elicits great social opprobrium. But reinforcement may come from the organ of the majority, the legislature, which may speak eloquently and symbolize a social commitment. Moreover, bigoted interests often have a voice, magnified by modern media, vastly outweighing their real significance. The diversified, unorganized interests of the majority are often not enunciated. Legislation may do the job of speaking and disapproving of certain social activities. Moreover, the legislation—in addition to expressing government's position—may afford an avenue for minority group opinion. Litigation and courts represent a highly important vehicle in our society, not only for vindication of rights, but also the expression of opinion.

This should not be taken to mean that the legislation should be unenforceable. It is not necessary that government be relegated to mere speaker; government may seek to regulate. The regulation will be secondary, however, to the speaking function of government. Fustian claims of great social change should be forsworn, lest the entire enterprise appear a sham. The strategy should be to justify the terms of the legislation as a balance between free speech and the rights of racial or ethnic groups. It should then be admitted that in a democratic society racial defamation, like many harmful social practices, may be exposed for what it is, sometimes sanctioned, but never eradicated.

The courts are essential in this process, and it is to this question that I

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200. M. YUDOF, *supra* note 192, at 22.

201. *Id.*

202. A. MEIKLEJOHN, POLITICAL FREEDOM: THE CONSTITUTIONAL POWER OF THE PEOPLE 57-77 (1965).

now turn.

C. *The Common Law and the Courts*

The courts, in fashioning the common law, have from earliest times imposed necessary constraints on free speech.[203] The common law protected elemental rights of bodily integrity, economic rights, and reputation, and it was impermissible to harm these rights through actions. Speech stood on the same footing. Racial insults could amount to actionable defamation if they sufficiently identified the persons defamed.

The new tort of intentional infliction of emotional distress—a cause of action with great free speech implications—may be harnessed to vindicate the rights of an aggrieved person.[204] This tort, as with the privacy tort, departs from and reaches beyond the protection of time-honored elemental interests. The interests protected by these torts, psychic well-being and privacy, are particularly susceptible to invasion by speech. So it is that the courts by extension of tort will severely test the limits of the Supreme Court's drive toward public democratic rights at the price of private rights. Whether or not the balance finally established is appropriate, the debate is salutory. Indeed, it is probable that no balance will be arrived at, for public culture is in constant flux. Process is here more important than result. The reasoned elaboration of the courts allows an airing of views and a constant renewal and self-examination.

Not all common-law courts have the same capacity to deal with these redoubtable matters. The creativeness of American courts is to be contrasted with the narrowness of British Commonwealth courts.[205] Commonwealth courts, without the inspiration of a bill of rights, infrequently invoke free speech principles, although those principles may influence *sotto voce*. This narrowness invites legislative creativity, as has happened

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203. *See* 2 F. POLLOCK & F. MAITLAND, THE HISTORY OF ENGLISH LAW 537-38 (1911) (in "local courts" of the 13th century defendants might allege that their words were true—*veritas non est defamatio*; citing Select Pleas in Manorial Courts); *see also* GATLEY ON LIBEL AND SLANDER §§ 866-67 (Special ed. 1982).

204. *See* Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling*, 17 HARV. C.R.-C.L. L. REV. 133 (1982). Although the Supreme Court's decision in Hustler Magazine v. Falwell, 485 U.S. 46 (1988) will dampen initial enthusiasm for the tort, the holding upon reflection may be quite narrow. *See supra* note 186; *see also* Treiger, *Protecting Satire Against Libel Claims: A New Reading of the First Amendment's Opinion Privilege*, 98 YALE L.J. 1215, 1224 (1989).

205. This is put in different ways by different writers. *See, e.g.*, ATIYAH, *supra* note 6. The authors of that book see the division as between the "highly formal" English legal system and the "highly substantive" American. This discussion is explicated in the entirety of the book.

in the Commonwealth with relation to race matters. One may point to a variety of reasons for differences in judicial creativity.[206] Perhaps the most important is the presence of constitutional rights. Not only are courts in the United States accustomed to exercising a large measure of judicial review, but they may develop the common law with the knowledge that constitutional protections will limit their inadvertent trampling upon fundamental freedoms. In other words, a corrective device is built in, and one hand need not know what the other is doing. Commonwealth judges must exercise greater self-restraint; a common-law doctrine once born is not so bridled. The cup is thus passed to the legislature where, ironically, the potential is exacerbated for overreaching and, hence, unjustifiably inhibiting, free speech.[207]

The United States courts underscore the capacity of courts to function with superior institutional competence—bringing to light good reason to bemoan the crabbed role of the courts in the Commonwealth.[208] The United States Supreme Court, for example, has reserved some of its outstanding jurisprudence for freedom of speech issues. This has established a rich tradition in which to judge issues as they are presented. Additionally, the judicial process of publishing reasons for its judgments allows a flexibility not available to other institutions if charged with these duties. A court may adhere to broad principles which, in the narrow circumstances, may shock the conscience. The march on Skokie was despicable, and a court may say so, while relying on broad principles to allow it to proceed.[209] Also, the courts, because of their political weakness, may present less risk of overreaching,[210] to the detriment of free speech. A court

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206. *Id.* at 118 ("American courts of last resort [are] in general far more activist than English courts . . . English courts are more formal in their approach than their American counterparts"). For exploration of reasons and the differing rules of these courts, see *id.* 118-156, 267-297.

207. Rutherglen, *Theories of Free Speech,* 7 OXFORD J. LEGAL STUD. 115, 122 (1987) (reviewing E. BARENDT, FREEDOM OF SPEECH (1985)).

208. Some are very pessimistic about the role judges could play, BLACKSHIELD, *Judges and the Court System* in LABOR AND THE CONSTITUTION 1972-1975, at 105-13 (Evans ed. 1977).

209. In this way courts are unique political institutions because of their ability to recognize differing values and beliefs and to say that they count even though another, broader principle must be adhered to. This process avoids, as Dean Calabresi states it, the "emargination" of groups in society; *see* G. CALABRESI, *supra* note 10, at 98-99.

210. *See* A. BICKEL, THE LEAST DANGEROUS BRANCH 23-29 (1962) (arguing that the enduring principles of the constitution are best protected by the judiciary because of the courts' isolation from the "sword" and the "purse"). *But see* J.H. ELY, *supra* note 29, at 43-104 (arguing that courts are better suited to reinforce the representational process, not "enduring values"). Cover, *The Supreme Court, 1982 Term—Foreword: No-*

must seek and retain moral capital. Courts are tolerant institutions used to weighing contending arguments,[211] and this has much to commend them when dealing with accommodation of rights; the dialectic is open.

Furthermore, courts may more accurately reflect a changing public culture. This may seem paradoxical since the legislature is usually seen as more responsive to the will of the people. However, in our societies, public culture is often channeled into legal discourse in the context of a particular dispute. Legislatures are relatively unwieldy beasts which, through complex usages, reflect in the end a social equilibrium. Legislation moves in quantum jumps, while courts may tinker at the edges, experiment, cajole, and move the law at a micro-level. The courts may be seen as political agents[212] that provide access for the weak and inarticulate at a lower cost than the legislature. The courts may be conceived as mediating institutions which, like churches, families, corporations, and universities, may enhance the individual autonomy values of a democratic society.[213] Last, courts assume a measure of continuity essential to the society's well-being.[214] This continuity reduces the uncertainty of the future implications of a present reform. Exceptions to general principles, like freedom of speech, may be appropriately confined and the fear of the general erosion of the principle diminished. Thus, the "slippery slope" is less a formidable argument in restraining reform.[215] The courts will apply the rule of statutory construction that the legislation should not be interpreted to depart from established common law.[216] Reform that flouts established common-law mores in a way that is clear, and thus not susceptible to appropriate construction, may be allowed to stand without judicial ameliorization—hoisted on its own petard. The courts, as in their construction of civil RICO, may thus strongly signal the undesirability of reform but remain institutionally scrupulous in deferring to the legislature.[217]

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mos and Narrative, 97 HARV. L. REV. 4 (1983) (denying the courts have a special competence to protect enduring values). *See generally* Kronman, *Alexander Bickel's Philosophy of Prudence*, 94 YALE L.J. 1567 (1985).

211. Referred to as "reasoned elaboration" by White, *The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change*, 59 VA. L. REV. 279 (1973).

212. Zacharias, *The Politics of Torts*, 95 YALE L.J. 698 (1986).

213. *Cf.* R. NISBET, THE QUEST FOR COMMUNITY: A STUDY IN THE ETHICS OF ORDER AND FREEDOM 50-74 (1953) (discussion of these institutions).

214. J. RAZ, *supra* note 115, at 260.

215. F. Schauer, *Slippery Slopes*, 99 HARV. L. REV. 361 (1985).

216. *See* Pub. L. No. 91-452 § 848, 84 Stat. 959 (1970); *see also* Russello v. United States, 464 U.S. 16, 20 (1983).

217. *See* Sedima, S.P.R.L. v. Imrex Co., 473 U.S. 479, 500 (1985); *see also* Ameri-

D. *Conclusion*

Free speech may be confined in a liberal democracy where the value of individual autonomy is enhanced by its restraint—for example, where individual autonomy may be intimately tied to a person's racial or ethnic identity in society. While this gives license to confine speech in the interests of guarding racial and ethnic groups from vilification, it does not indicate the extent of restriction. Here the ideas of Holmes, Meiklejohn, and Bollinger should be weighed. Dangers of the slippery slope, a distrust of government, a faith in the competition of ideas in the political arena, and an engendering of a tolerant mindset, while not entirely coherent, are matters of great moment in a liberal democracy. There is no certain course to be charted between free speech and the proscription of racial defamation. Prevailing public culture variously weighing the values at stake will yield differing results.

In these concerns, two matters have been accorded inadequate weight. The first is the agency of government as speaker and the second is the institution of the courts to give vent to competing ideas within its influential and intellectual discourse.

The sum of these observations leads to the conclusion that free speech should be sacrificed only reluctantly, for very few restrictions on free speech restore the individual autonomy thus forfeited. Notwithstanding the legitimacy of government influence to curb racial defamation, the presumption must still rest with free speech. As Professor Schauer puts it, a "Free Speech Principle" means "that free speech is a good card to hold. It does not mean that free speech is the ace of trumps."[218] The burden may be satisfied only by reference to government's speaker role, supported by the symbolic commitment of legislation and in affording an avenue of speech for defamed racial groups in the courts. The strategy to be developed accommodates both of these elements.

V. An Attempted Resolution: The Debate in Australia

A. *Proposals for Reform: Background and Resolution*

The Racial Discrimination Act, 1975, as a bill contained a provision proscribing incitement to racial hatred. The provision, designed to track the requirements of Article 4 of the International Convention on the

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can Nat'l Bank & Trust Co. v. Haroco, Inc., 473 U.S. 606 (1985); H. J., Inc. v. Northwestern Bell Telephone Co., 108 S.Ct. 1219 (1989) (Court rejects eighth circuit's narrowing of the RICO act to separate "schemes" and organized criminals acts—reaffirms *Sedima*).

218. F. Schauer, *supra* note 73, at 9.

Elimination of All Forms of Racial Discrimination, was stripped from the legislation during its passage through Parliament by dint of an attack based upon its capacity to invade free speech.[219] The Australian Government, punctilious about the ratification of treaties, made a consequential reservation to its ratification of the International Convention on the Elimination of All Forms of Racial Discrimination, stating as grounds free speech concerns.

The Commissioner for Community Relations was later brought within the Human Rights Commission. A function of this Commission, and the earlier Commissioner, is to receive complaints of racial discrimination as a precursor to its exercise of conciliation powers. In the process it accumulated complaints of racial defamation, covering about one quarter of all complaints made.[220] "The range [of complaints] extended from

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219. The provisions in the Bill created a $5,000 penalty for 1) publication or distribution of written material; 2) television or radio broadcast; 3) public speech; that promoted ideas based on 1) alleged racial, national or ethnic superiority; 2) racial, national or ethnic hatred. Racial Discrimination Bill, cl. 28 (1975) (available from author). This bill was passed by The House on April 15, 1975, but clause 28 was deleted by the Senate in the version it passed on May 29, 1975. *See* Kelsey, *A Radical Approach to the Elimination of Racial Discrimination*, 1 U. NEW S. WALES 56, 66 nn.54-55 (1975). Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination (1965) requires:

> States Parties condemn all propaganda and all organizations which are based on ideas or theories of superiority of one race or group of persons of one colour or ethnic origin, or which attempt to justify or promote racial hatred and discrimination in any form, and undertake to adopt immediate and positive measures designed to eradicate all incitement to, or acts of, such discrimination and, to this end, with due regard to the principles embodied in the Universal Declaration of Human Rights and the rights expressly set forth in article 5 of this Convention, *inter alia*:
>
> (a) Shall declare an offence punishable by law all dissemination of 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, and also the provision of any assistance to racist activities, including the financing thereof;
>
> (b) Shall declare illegal and prohibit organizations, and also organized and all other propaganda activities, which promote and incite racial discrimination, and shall recognize participation in such organizations or activities as an offence punishable by law;
>
> (c) Shall not permit public authorities or public institutions, national or local, to promote or incite racial discrimination.

International Convention on the Elimination of All Forms of Racial Discrimination, art. 4 (1965), *reprinted in* 1975 Austl. Acts 365, 367.

220. HUMAN RIGHTS COMMISSION, PROPOSAL FOR AMENDMENTS TO THE RACIAL DISCRIMINATION ACT TO COVER INCITEMENT TO RACIAL HATRED AND RACIAL DEF-

blatant and deliberate incitement to racial hatred . . . to unthinkingly racist statements, proverbs and jokes in poor taste."[221]

About a quarter of the complaints concerned comments directed toward Aborigines. The next largest group related to the English, closely followed by the Asians. Particularly virulent attacks were focused upon Jews. It is ironic that some complaints were registered by Australians who considered that certain ethnic groups exhibiting superior feelings had exercised an ethnocentricity.

The Commission's 1981-82 Report noting these complaints and the lack of legal redress initiated research on the issue.[222] The report maintains that most "politico-judicial" systems comparable to the Australian—"British, New Zealand, Canadian"—possess legislation dealing with racial defamation, and that the United States stands as the exception. The report hints at two bases for legislation—public order, and the powerlessness of maligned groups to respond effectively.[223]

The Commission engaged in a consultative process inviting submissions. Those supporting legislative action unsurprisingly came from those groups that are the targets of attacks. The opponents were "almost invariably members of the majority culture of persons descended from English-speaking ancestors."[224] This may be seen to weaken the credibility

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AMATION, REP. NO. 7, at 2 (1984) [hereinafter PROPOSAL FOR AMENDMENTS].

221. *Id.* at 3. The Commission gave the following list of representative instances of complaints:

(a) *Offensive words*: e.g. 'wog', 'Pom', 'Abo', 'Boong', 'black', 'yellow belly', 'nigger'.

(b) *Ethnic jokes*: especially Irish jokes but also cartoons featuring money-grabbing Jews, drunken Aborigines, etc.

(c) *Stereotyping*: e.g. articles on Mediterranean back, Italians and crime, Aboriginal unemployment—all dealing unsympathetically with the ethnic group involved and implying (not necessarily intentionally) that every individual member is involved.

(d) *Reporting designed to aggravate tension*: especially in relation to Aborigines in rural areas and Asian migrants in towns.

(e) *Reports of racist statements by politicians and prominent public figures*: approximately six out of ten complaints against individuals concern prominent figures who attract media attention or government officials who are in positions where they have some power over members of the public.

(f) *Denials of the reality of racial extermination campaigns during World War II or of historical massacres of Aborigines.*

(g) *Claims that some racial groups are more animal than human.*

Id. at 5-6.

222. 1 Human Rights Commission, *Annual Report 1981-82*, at 35 (1982).

223. *Id.* at 36.

224. PROPOSAL FOR AMENDMENTS, *supra* note 220, at 7.

of the opponents. To be fair, however, the argument is not allowed to rest there, and the Commission's Occasional Paper, the basis of the later Report, gives serious attention to the free speech issue. The Paper frames the issue in terms of legislation designed to foster freedom of opportunity—the right "of each individual to build his or her life and to live in an atmosphere of mutual tolerance, understanding and respect."[225] From this it is put that two "goods" contend. The argument is one "that counter-positions the good (of freedom of expression) and the good (of freedom of opportunity), and places upon the well-meaning legislator the task of striking the kind of balance that has bedevilled democratic communities for millenia."[226] The Commission recognizes the difficulties in protecting freedom of expression while preserving fair play.[227] Unfortunately, it leaves the question posed and never attempts to resolve the dilemma. Instead, the dilemma declared, the Commission launches into an analysis of comparative legislation, an appraisal of remedies,[228] educational dimensions,[229] distinctions between group defamation and incitement to racial hatred,[230] and the "key" aspects of contemporary legislation.[231]

In its conclusion, the Occasional Paper exhibits a faith in the efficacy of governmental action in attaining the goal of giving targeted groups a "fair go."[232] Unfortunately, this conclusion fails to address the issue of whether the method of reaching this goal unduly curbs free speech. Nowhere is the danger of government overreaching apprehended, nor are the limits of social engineering adequately stated. The "libertarian" argument of reliance upon the good judgment of the majority is noted[233] but not the point, put forth in Part III, that the government most clearly

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225. HUMAN RIGHTS COMMISSION, INCITEMENT TO RACIAL HATRED ISSUES AND ANALYSIS, OCC. PAPER NO. 1, at 6 (1982), [hereinafter INCITEMENT TO RACIAL HATRED]. This notion is akin to the individual autonomy value dilated upon in Part II.

226. *Id.*

227. *Id.* at 11.

228. *Id.* at 13-14.

229. *Id.* at 15-16.

230. *Id.* at 16-18.

231. According to the Human Rights Commimssion, the seven key aspects of contemporary anti-incitement legislation would include: 1) defining the appropriate constituency of the law—who to protect; 2) defining the scope of proscribed actions; 3) clarifying the range of consequences that will be listed as offenses under the law; 4) clarifying the *mens rea* of the offense—possibly following Britain's experience and dropping the requirement of intent altogether; 5) defining the defenses; and 6) the sanctions; and lastly 7) adapting the legislation to the specific socio-political context of Australia. *Id.* at 19-29.

232. *Id.* at 28-29.

233. *Id.* at 11.

represents the majority, and a liberal democracy may place a restraint on government action for the protection of minorities. It is then not appreciated that a fundamental way to protect minorities is to afford individuals a broad ambit of free speech.[234]

Nevertheless, the Commission's Paper and its subsequent Report are instructive in airing opinions and conclusions about the nature and ambit of possible legislation in this area. The final recommendation was that the Racial Discrimination Act should be amended as follows:

> (1) *Incitement to racial hatred.* A provision to make it unlawful for a person publicly to utter or publish words or engage in conduct which, having regard to all the circumstances, is likely to result in hatred, contempt or violence against a person or persons, or a group of persons, distinguished by race, colour, descent or national or ethnic origin: this provision should be drafted so as to ensure that certain valid activities are not brought within its scope, e.g. the publication or performance of bona fide works of art; genuine academic discussion; news reporting of demonstrations against particular countries; or the serious and non-inflammatory discussion of issues of public policy.
> (2) *Racial defamation.* A provision to make it unlawful publicly to threaten, insult or abuse an individual or group, or hold that individual or group up to contempt or slander, by reason of race, colour, descent or national or ethnic origin.
> (3) *Definition of publication.* A definition clause to make it clear that publication is to be taken in a very broad way to cover the print and electronic media, sign boards, abusive telephone calls etc. and that both the individual making the statement and, where publication implies endorsement, the publisher would be covered by the two provisions outlined above.[235]

Those provisions are discussed in the Commissioner's Report.[236] Of particular note is that unlawfulness does not depend upon a showing of intention, but rather is based upon the published material's impact.[237] This follows current legislation in the United Kingdom and New Zea-

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234. As enunciated in Part III, to reiterate briefly, a basic premise of a broad-ranging free speech freedom is to prevent government overreaching. Legislation for good may be turned to the evil. Because the legislature is primarily an organ of the majority, minority groups should have a special aversion to restrictions. In the end, a competition in ideas is the best guarantor of individual autonomy. This view, deeply embedded in United States first amendment jurisprudence, cannot simply be sloughed off. As noted in Part III, the view has its weaknesses—but these are insufficiently understood in the Commission's Occasional Paper.

235. PROPOSAL FOR AMENDMENTS, *supra* note 220, at 14.

236. *Id.* at 14-19.

237. *Id.* at 15.

land where proof of intention is dispensed with.[238] The harshness of this is ameliorated, it is contended, by the conciliation process activated by a breach.[239] The "unwitting offender can immediately explain and apologise where this is appropriate."[240] If this conciliation should fail, probably when a recalcitrant racist is involved, a court may grant an injunction or damages.[241] The avoidance of criminal sanctions, it is thought, will allow room for the "publication or performance of bona fide works of art; genuine academic discussion; straight media reporting events; and the serious and non-inflammatory discussion of issues of public policy."[242]

The Commission argued that the legislation, if accepted, will allow Australia to remove its reservation to Article 4 of the International Convention on the Elimination of All Forms of Racial Discrimination.[243]

B. *The Impact of the Recommendations*

The recommendations, as previously stated, have had little impact and have not seen the light of legislative day. Political parties supporting the recommendations gain little—but risk much—in terms of electoral success. Signs are, however, that the fires for change are to be restoked. The Human Rights Commission, now the Human Rights and Equal Opportunity Commission, has begun to reconsider another initiative, and the New South Wales Anti-Discrimination Board began internal work from which a draft Bill has emerged. The changing political climate will dictate whether the reform suggestions will be revivified. Economic reforms have dominated the political agenda over the last five years. The Australian people have shown little interest in wider social reform, as seen in the overwhelming rejection of constitutional reform in the Referendum held on September 3, 1988.[244] When revivified, the basis for review will

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238. *Id.*

239. *Id.* at 15-16.

240. *Id.* at 16.

241. Racial Discrimination Act No. 52 Austl. Acts § 25 (1975).

242. PROPOSAL FOR AMENDMENTS, *supra* note 220, at 18-19.

243. *Id.* at 20.

244. *See* Starke, *The failure of the Bicentennial Referendum to Amend the Constitution, 3 September 1988*, 62 AUSTL. L.J. 976-78 (1988). The proposed reforms were:

(1) To provide for four-year maximum terms for members of Federal Parliament;

(2) To alter the Constitution to provide for fair and democratic parliamentary elections throughout Australia;

(3) To alter the Constitution to recognize local government;

(4) To alter the Constitution to extend the right to trial by jury, to extend

be the comprehensive work done by the Commission, covered in this part.

The significant anti-discrimination legislation, both state and federal, has had an effect on Australian views. This legislation was followed by a serious attempt to address the plight of the Aboriginals. In an earlier constitutional referendum of 1967, the Australian constitution was amended to allow the Australian Parliament to enact law for the aboriginal race in any state.[245] Governments both of the left and right have endorsed significant reforms to grant Aboriginal land rights.[246] Ironically, the courts' refusal to find property rights vested in Aboriginals galvanized the political process to implement land rights.[247] Consolidating these changes, both Houses of the Australian Parliament at the opening of the new Parliament House in 1988 adopted motions that acknowledged Aboriginal occupation of Australia prior to European settlement, affirmed the importance of their culture and heritage and restated their entitlement, under the Constitution and laws of Australia, to self-management and self-determination. The need for promotion of reconciliation and acknowledgement of their special place in Australia was affirmed.[248]

At the same time, political parties recognized the importance of the "immigrant" or "ethnic" vote in attaining election. Both the right and the left courted this vote and sold the concept of a multicultural Australia.[249] This coincided with changing patterns of immigration. The past European bias was replaced, and great numbers of Asians arrived to settle. Once established, Australians generally found they had little to fear from these changes. Indeed, possible gains were recognized in the blending of cultures. In rancorous Australian political affairs, one of the few matters of bipartisan agreement is policy in immigration and ethnic affairs.[250]

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freedom of religion, and to ensure fair terms for persons whose property is acquired by any government.

Id.

245. Constitution Alteration (Aboriginals), Act No. 55, 1 AUSTL. ACTS P. § 2, at 49 (1974); see Lindell, *The Corporations and Races Powers*, 14 FED. L. REV. 219, 243 (1984).

246. *See* Toohey, *Aboriginal Land*, 15 FED. L. REV. 159 (1985).

247. *See, e.g.*, Milirrpum v. Nabalco Pty. Ltd., 17 F.L.R. 141 (1971).

248. For details and commentary, see Starke, *supra* note 2.

249. R. TERRILL, *supra* note 71; R. SESTITO, THE POLITICS OF MULTICULTURALISM (1982).

250. This tenet is now re-established after a leadership battle in the Australian Liberal Party. Canberra Times, May 10, 1989, § 1, at 9, col. 3.

The courts, too, in landmark cases, have supported the aims of racial equality. For example, the constitutionality of the Racial Discrimination Act was affirmed,[251] and a challenge to the South Australian Pitjantjatjara Land Rights Act, 1981, as violating the Commonwealth's Racial Discrimination Act, was turned aside.[252] The changing Australian perspective has joined with an international ethos hostile to racism as Australia has asserted its voice before international fora and drawn closer, by dint of technological change, with the rest of the world.[253] These matters tip the balance in favor of change, but not toward the change proposed by the Commission.

C. *The Weaknesses of the Recommendations*

The recommendations fail to take seriously enough the free speech rules of a democratic society. Even if one is to agree that Australian public culture accepts this type of regulation, and given the subject matter public opinion would support it, free speech values are wantonly ignored.

The danger is two-fold. In the first place, the legislative scheme exemplifies an unrealistic faith in the efficacy of legislation; it contemplates a vigorous implementation to give defamed groups a fair go. The noble intentions may be applauded, but unless tempered with a wisdom of the realities, a frustration born of these noble intentions can easily result in governmental overreaching. And here the second point becomes pertinent. The governmental overreaching is facilitated by the very cornerstone of the Commission's recommendation. The implementation of the legislation would be in the hands of the Commission itself. The mission of the Commission is clear: to stamp out racial defamation. Indubitably, the role and jurisdiction of the Commission will be self-servingly construed to enhance that mission.[254] Lacking is the tradition, the innovation, the self-restraint and the independence of the courts. The selection of an institution is critical, and the probability of a self-serving Commission bent on its own moral certainty leaves little room for the more elu-

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251. Koowarta v. Bjelke-Peterson, 153 C.L.R. 168 (1982).
252. Gerhardy v. Brown, 59 Austl. L.J. Rep. 311 (1985).
253. *Cf.* 59 Austl. L.J. Rep. at 335.
254. Like Macbeth:

> I have no spur
> To prick the sides of my intent, but only
> Vaulting ambition, which o'erleaps itself. . . .

W. SHAKESPEARE, *Macbeth* I. vii. 25-27, in THE ARDEN EDITION OF THE WORKS OF WILLIAM SHAKESPEARE 40 (K. Murr ed. 1962).

sive values of free speech elaborated herein.

The process also flouts a fundamental of effective conciliation, that the conciliating body should not also be an investigative body.[255] The investigative process may channel conclusions contrary to the independence needed for conciliation. Conciliation, or mediation, can be most valuable in resolving disputes, in encouraging new views, and especially in humanizing social interactions. The process in relation to divorce serves that very function. Fundamental to this, however, is the conciliator's independence from any preestablished agenda, and in particular the articulation of any conclusions of right or wrong.[256] Conciliation would be fatuous if performed by a body representing, say, the interests of men in divorce.

The Commission, it should be said, is not a Star Chamber. Its powers are limited, and administrative law will check abuses. Nevertheless, the Commissioner may investigate and call parties together for conciliation. The discretion is ample to keep at bay close judicial scrutiny. Consequently, a zealous interpretation of racial defamation may chill legitimate speech. For example, the Commission could act in respect of public debate on immigration policies.[257]

The eschewal of criminal law and, in its stead, the promotion of conciliation procedures reduces the strength of free speech objections.[258] But this does not acknowledge the absence in the conciliation process of the protections of the criminal law. The machinery may be easily invoked, and an adverse conciliation finding can have a powerful stigmatizing effect on a person not far removed from the stain of criminal prosecution.

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255. For criticism of combining investigative and conciliation roles, see Tarnopolsky, *supra* note 189, at 577.

256. *See* Family Law Amendment Act 1976, AUSTL. ACTS P. § 7 (1976) (amending § 14 of the Family Law Act, no. 53 of 1975). *See also* Drake, *Conciliation—The Australian Experience*, 15 FAM. L. 65 (1985). *See generally* [Austl.]: Moloney, *Divorce Counselling: Conciliation at the Crossroads*, 11 LEGAL SERVICES BULL. 206 (1986); [U.K.]: L. PARKINSON, CONCILIATION IN SEPARATION AND DIVORCE (1986); [U.S.]: Phear, *Family Mediation: A Choice of Options*, 39 ARB. J. 22, 24 (1984) (distinguishing conciliation from mediation: "[t]he conciliator is often not a truly neutral third party and usually refrains from either structuring the process or from actively helping to reach an agreement"); Maxwell, *Keeping the Family out of Court: Court-Ordered Mediations of Custody Disputes Under the Kansas Statutes*, 25 WASHBURN L.J. 203, 204 (1986) ("[t]he decisions are made solely by the parties themselves; the mediator does not decide any of the issues for the parties").

257. *Cf.* PROPOSAL FOR AMENDMENTS, *supra* note 220, at 19. A defense for "non-inflammatory discussion of issues of public policy" leaves a gateway for a coach and fours to ride through.

258. *Id.* para. 61, at 18.

Although the Act requires confidentiality for the conciliation proceeding, it would seem that remedies do have a chastening effect, and to educate publicly would require publicity. The established press, in particular, may be dissuaded from furthering public debate because its reputation for fairness may be put in issue by the mere initiation of an investigation. The more established the press the less likely it would be that the dispute could be contained at the conciliation level. As defamation law experience shows, the press is reluctant to capitulate.[259]

Ironically, the conciliation process would seem more likely to have an initial impact on fringe groups that disseminate racial defamation. But this is largely illusory, and its impact merely evanescent, for these groups are often loosely structured and of short duration. An apology may be made and the immediate threat of legal sanction averted, and the unrepentant individuals may live racially to traduce another day. This two-tiered impact would undermine the efficacy of the Commission's proposed scheme. The visible protagonist (and scapegoat) would be the respected, established press, where the merit of the free speech claim is at its greatest. The fungibility of the gutter press would render it immune from effective sanction. The worst of all worlds may result: an unrestricted stream of vitriolic racial defamation, set against the apparent muffling of the established press. The corrosive power of this state of affairs should be apparent, and eventually the Commission would suffer in the entirety of its functions.

In sum, the Commission's recommendations have fundamental weaknesses. Not only do they pose an unacceptable inhibition to free speech, but they may weaken the capacity of the Commission to perform its established various functions.

D. *A Short Commentary on the Common Law*

If the courts have the institutional advantage argued for, it should be asked whether they should develop the common law to afford relief to the members of the traduced racial groups.

The common law did not address itself to an individual's interest to be free of discrimination on the basis of race.[260] To be actionable, some

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259. R. BEZANSON, G. CRANBERG & J. SOLOSKI, LIBEL LAW AND THE PRESS: MYTH & REALITY (1987). For an appraisal of the extent of litigation in Australia, see Unfair Publication: Defamation and Privacy, The Law Reform Comm. Report No. 11, at 17-33 (1979).

260. *Cf.* A. LESTER & G. BINDMAN, RACE AND LAW IN GREAT BRITAIN 336 (1972) (citing Constantine v. Imperial Hotels, Ltd., 1944 K.B. 693; awarding nominal damages for exclusion from a London hotel on racial grounds). *See also* Puerto Rican

recognized interest had to be shown to be invaded.[261] Defamation law protects reputation; reputation is a valuable property interest that, like other individual interests, is protected from unjustified invasion. The standard for gauging whether the publication constituted defamatory matter is the ordinary right-thinking member of the public. The question is whether the material will tend either to lower the reputation of the person identified or to encourage persons to shun and avoid him.[262] But reputation is established within a social setting and hence reflects the mores, although racist, of that society; so it was once held that to call a white person a "black" is defamatory.[263] To call a person "black" today would not be defamatory—not because of the court's repugnance of racism, but rather because of the changing community standard that no longer sees a "black" person as inferior.[264]

The rationale that reputation is a protected property interest has attracted the argument that the courts should recognize a right also subsisting in groups. A defamatory imputation directed at a racial or ethnic group unavoidably discredits all members of that group,[265] and this has an adverse impact on the capacity of those persons conducting their affairs in society. This is exacerbated in societies comprised of diverse racial and ethnic groups.

The courts have never accepted such a broad argument. At best, the courts have allowed an action for defamatory matter addressed to a group, which matter could be reasonably understood as identifying individual members of that group.[266] To say, "All lawyers are thieves" is not

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Legal Defense Fund, Inc. v. Grace, 9 Media L. Rep. (BNA) 1514, 1516 (N.Y. Sup. Ct. 1983).

261. In the American context a well-known case stretching existing categories to cover a racial insult is Fisher v. Carrousel Motor Hotel, Inc., 424 S.W. 2d 627 (Tex. 1967).

262. Yousoupoff v. Metro-Goldwyn-Mayer Pictures, 50 T.L.R. 581, 587 (C.A. 1934); *see also* H. STREET, THE LAW OF TORTS 292 (6th ed. 1976). In the United States, see Belli v. Orlando Daily Newspapers, 389 F.2d 579 (5th Cir. 1969), *cert. denied*, 393 U.S. 825; Grant v. Reader's Digest Ass'n, 151 F.2d 733 (2nd Cir. 1945).

263. Natchez Times Publising Co. v. Dunigan, 72 So.2d 681 (Miss. 1954).

264. *Gatley, supra* note 203, § 47.

265. Tanenhaus, *Group Libel*, 35 CORNELL L.Q. 261 (1950).

266. F. HARPER, F. JAMES, & O. GRAY, 2 THE LAW OF TORTS § 5.7 (2d ed. 1986). *See also* McCullough v. Cities Service, 676 P.2d 833, 837 (Okla. 1984) (setting forth the intensity of suspicion test); Brady v. Ottaway Newspapers, 84 A.D. 2d 226, 445 N.Y.S. 2d 786 (1981) (police department members could maintain a defamation action for a statement suggesting the members must have known of departmental wrongdoings); Fawcett Publications, Inc. v. Morris, 377 P.2d 42 (Okla. 1962) (fullback could maintain a defamation action for a statement alleging that the members of the team were using

actionable, for no particular lawyer is identified, and no specifiable harm is suffered.[267] The reason for caution is stated by the House of Lords in *Knupffer v. London Express Newspaper, Ltd.*:

> The reason why a libel published of a large or indeterminate number of persons described by some general name generally fails to be actionable is the difficulty of establishing that the plaintiff was, in fact, included in the defamatory statement, for the habit of making unfounded generalizations is ingrained in ill-educated or vulgar minds, or the words are occasionally intended to be a facetious exaggeration.[268]

Endeavors to prompt the courts to move defamation law from its individualistic stance have been largely abandoned in recent times. The sweep of free speech rhetoric is part of the reason. Another is frustration with judicial timidity, and hence for traduced groups, a turning of the lobbying energies to the legislature.

It is ironic that now is a favorable time, especially in the United States, to revivify the tort suggestions. To be sure, free speech rhetoric is still a formidable barrier—although some fissures may be discerned. Nonetheless, the law of torts has begun to change its focus from the individual to wider, extra-individual interests. The mass tort phenomenon of recent years has jettisoned many individualistic tort notions in the interests of public regulation. Rules of causation and burden of proof have been manipulated to afford recovery to classes of plaintiffs who would have failed under traditional notions. The courts have turned the law of torts into a formidable remedial engine to serve public law ends.[269] More widely than tort law, group-oriented claims are increas-

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amphetamines).

267. Eastwood v. Holmes, 175 Eng. Rep. 758, 759 (1858). But if the words are placed on the door of an attorney's home, the offense is actionable. The celebrated American decision of Neiman-Marcus v. Lait, 13 F.R.D. 311 (S.D.N.Y. 1952) nicely highlights the law. The statement that some Neiman-Marcus models are call girls—the "top babes in town"—was actionable by a model, but the statement that "the salesgirls are good, too—pretty, and often much cheaper . . ." was not actionable by the 382 saleswomen, although the twenty-five salesmen had actions for an imputation that they were homosexuals. *Id.* at 313.

268. 1944 C.A. 116, 122.

269. *See* Galanter, *The Day After the Litigation Explosion*, 46 MD. L. REV. 3 (1986); Rosenberg, *The Causal Connection in Mass Exposure Cases: A "Public Law" Vision of the Tort System*, 97 HARV. L. REV. 849 (1984).

Strangely, the silence has been deafening in relation to group defamation. It is not possible to pursue this topic, except to hint that given adequate free speech protections, the logic of the mass torts may be transferred to group racial defamation. I hasten to add that Australian courts are some distance from this. Unlike United States procedure, class actions are narrowly confined. Moreover, the contingency fee, which fuels the American

ingly made through litigation.[270]

For American courts the barrier to development is the broad interpretation of the first amendment. It would be a brave court indeed that found racial defamation actionable. Nevertheless, the tide may be ebbing. Despite the Supreme Court's determination that the Reverend Jerry Falwell lacked a good action against *Hustler* magazine for intentional infliction of emotional distress,[271] the Court may not view the question similarly outside the area of a public figure parody. In *Falwell*, the Court stressed the need for robustness of speech where such parodies are concerned.[272] In contrast, racial speech shares no long and esteemed tradition of speech in political discourse in America. It is noteworthy that the Court was prepared to admit limits to free speech, that "not all speech is of equal First Amendment importance".[273] The exceptions articulated were two: first, for "vulgar," "offensive," and "shocking" speech[274] and second, for "fighting" words.[275] This may well be a firm foundation upon which to build an argument that racial defamation is not speech worthy of first amendment protection.[276]

Blind categorization under the absolute first amendment interpretation carries high social costs that could be ameliorated by a sensitive balancing of the public interest in free speech against important private interests that make a society a more rewarding one in which to live.

VI. CONCLUSION

The challenge in this area is not to justify government action but to ensure that its form does not destroy the very reasons for intervention. In

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class action, is unethical in the Australian setting. For Australian courts these are obstacles of some moment and with legislatures in the Benthamite mold amenable to change, it is understandable that effort has been directed there.

270. *See* Prichard, *supra* note 181, at 469.

271. Hustler Magazine v. Falwell, 485 U.S. 46 (1988); *see also* notes 182-186, *supra*, and accompanying text. *See generally* Chuy v. Philadelphia Eagles Football Club, 595 F.2d 1265, 1273 (3rd Cir. 1979) (recognizing tort action for intentional infliction of emotional distress in connection with defamation action); Vietnamese Fishermen's Ass'n v. Knights of K.K.K., 518 F. Supp. 993 (S.D. Tex. 1981) (court issuing declaratory and injunctive relief for Vietnamese shrimp fishermen against self-help tactics of violence and intimidation).

272. *Hustler Magazine v. Falwell*, 485 U.S. at 51.

273. 108 S. Ct. at 882 (quoting Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc., 472 U.S. 749, 758 (1985)).

274. *Id.* (citing F.C.C. v. Pacifica Foundation, 438 U.S. 726, 747 (1978)).

275. *Id.* (citing Chaplinsky v. New Hampshire, 315 U.S. 568, 571-72 (1942)).

276. *Cf.* Smolla, *Emotional Distress and the First Amendment: An Analysis of* Hustler v. Falwell, 20 ARIZ. ST. L.J. 423, 443-444 (1988).

other words, government action to protect individual autonomy may undermine that autonomy. In essence, this explains the favored American first amendment interpretation. Any concession to governmental regulation lays a foundation for broader, and hence overreaching, regulation. It makes for greater certainty to deny that government has any function—that there is any foundation for government action.[277]

In the end this attitude is predicated upon the villainy of government. But there is no need to assume the posture of a full-blown statist to assert that this is a rather sterile view of modern government. I have provided reasons to encourage government's role as speaker especially in encouraging and supporting racial minorities to join in the life a nation.

Now I am faced with a task avoided by a broad first amendment view. It is to cabin racial defamation reforms so as not to erode legitimate free speech.

My approach is to concede the imperfectability of our society and to give free speech exercise a firm legitimizing presumption. In consequence, I propose that governmental action must be mainly symbolic. In addition, the implementation of any reforms should reside in the courts as an institution with a comparative advantage and competence. The shape of reform will eventually be determined by the prevailing public culture. Let me suggest, therefore, two reforms; both are modest and make no claims of efficacy in ridding our society of racial defamation.

The first would invest the courts with jurisdiction to make a declaratory judgment.[278] The court could be requested by persons allegedly defamed by racial, ethnic, or religious slur to declare that the matter was published falsely and maliciously defamed them. Accordingly, a person should be able to urge that immigration be restricted to the English. However, it would be defamatory for the published material to add that Asians are filthy or inferior.[279] Bona fide scientific and political debate should not be subjected to such a declaratory judgment.

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277. *See* Schauer, *supra* note 114.

278. It is noteworthy that reform suggestions in American defamation law have urged that reliance upon damages awards be replaced by declaratory judgments; *see* THE LIBEL REFORM PROJECT OF THE ANNENBERG WASHINGTON PROGRAM, PROPOSAL FOR THE REFORM OF LIBEL LAW 11 (1988); earlier parallel suggestions were made by Franklin, *Good Names and Bad Law: A Critique of Libel Law & a Proposal*, 18 U.S.F. L. Rev. 1 (1983); Note, *The Defamed Reputation: Will Declaratory Judgment Bill Provide Vindication?* 13 J. LEGIS. 72 (1986); *see also* Vietnamese Fisherman's Assn'n v. Knights of K.K.K., 518 F. Supp. 993 (S.D. Tex. 1981).

279. *See* Arkes, *Civility and the Restriction of Speech: Rediscovering the Defamation of Groups*, 1974 SUP. CT. REV. 281 (expressing the view that this task is too distasteful for courts).

An issue arises whether representative bodies of racial or ethnic groups should be given standing to bring class or representative actions. Aborigines are not monolithic in their views. Many may object to an action brought on their behalf by, say, the Northern Lands Council established under the Northern Territory Land Rights legislation to make claims and administer traditional lands.[280] But such bodies will have the information and resources to enforce rights. Perhaps rules could require a sampling of views in order to grant standing. The rules also may encourage intervention by individuals and groups objecting to the action. The procedure could be similar to that required under the Federal Rules of Civil Procedure for the validation of class actions.[281]

The standard for liability should parallel the United States Constitutional law gloss placed upon the common law of defamation. Consequently, the sting of the publication should be to expose members of the group to "distrust, hatred, contempt, ridicule, or obloquy."[282] This is judged by the standards of the ordinary members of the community.[283] More critically, the burden should be placed on the plaintiff to prove by clear and convincing evidence that the defendant intended the words to have the disparaging effect.[284] The plaintiff would have the burden of

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280. Aboriginal Land Rights (Northern Territory) Act 1976, No. 191, 1976 Austl. Acts, § 23(1)(2), § 25(2)(3), at 1617, 1633-34, 1634-55 [hereinafter Aboriginal Land Rights Act].

281. The Aboriginal Land Commission operates as a representative and is functionally similar to the representation of a class under the United States Federal Rules of Civil Procedure. *See id.* § 50-53, at 1645-47; *cf.* Fed. R. Civ. P. rule 23(c) (1988). However, the concern for absentee plaintiff in Fed. R. Civ. P. rule 23(c)(2) and for fair and adequate representation of the class in Fed. R. Civ. P. rule 23(a) are not developed in the Aboriginal Land Rights Act. The aboriginal land councils do provide legal counsel and assistance when claims are brought, and they currently ensure group consent and typicality of claims concerning land management. *See* Aboriginal Land Rights Act, *supra* note 280, § 23(1)(2), at 1633-34. The concerted actions of the land councils and the Commissioner might parallel the validation procedures for class actions. *See id.* § 25(2)(3), at 1634-35, § 50-51, at 1645-47.

282. Briggs v. Brown, 55 Fla. 417, 430, 46 So. 325, 330 (1908).

283. The verbal formula employed has led to a divergence between the English and American courts. The former, and the Commonwealth, required that the words be judged from the point of view of "right thinking" members of the community. *See* Byrne v. Deane, [1937] 1 K.B. 818 (C.A.); *see also* Reader's Digest Services Pty Ltd. v. Lamb, 38 A.L.R. 417 (1982) (endorsing the "reasonable men," "right-thinking members of society generally," or "ordinary men not avid for scandal" tests. The latter determines the issue according to the view of a "substantial and respectable minority"); RESTATEMENT (SECOND) OF TORTS § 559 comment e (1977).

284. Gertz v. Robert Welch, Inc., 418 U.S. 323, 332.

showing that the imputation was false.[285]

A difficult issue arises whether reckless disregard to the truth ought to be actionable.[286] For example, a publisher may write that Jews have purposely lied about the historical fact of the Holocaust.[287] If this is published with reckless disregard to its truth but without any belief that it is untrue, it should not be actionable. Free speech requires a wide margin of safety. The strict requirement of intention will not create major obstacles, because this kind of statement in the publications of concern is usually set amongst a barrage of lies and insinuations, the total effect of which is to impeach any argument that the publisher did not know that the factual imputations were untrue.

In addition, prudence dictates that the matter be published to the public or a segment of the public. Private conversations and arguments are often vituperative but have little lasting residue. It is inappropriate for the apparatus of the courts to be drawn into private disputes in this area. A sufficient degree of publicness is required so that the law is not invoked in paltry disputes far better settled by informal means. Race discrimination laws in the Commonwealth and in the United States have respected the public/private line.[288] A person may be a private bigot[289] but that only becomes the business of the law when that person's actions achieve a required degree of publicness.[290] To be sure this demarcation line is one not easily drawn.[291]

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285. Philadelphia Newspaper v. Hepps, 475 U.S. 767, 776-77 (1986).

286. New York Times v. Sullivan, 376 U.S. 254, 265-92 (1964).

287. *See* Stein, *supra* note 17; *see also* Correspondence, *On the "Auschwitz Lie,"* 87 MICH. L. REV. 1026 (1989).

288. Note, *Section 1981 and Private Groups: The Right to Discriminate versus Freedom from Discrimination*, 84 YALE L.J. 1441 (1975).

289. Bell v. Maryland, 378 U.S. 226, 313 (Goldberg, J. concurring).

290. U.S. CONST. amend. XIV, § 1 ("No *State* shall . . . deprive any person of life, liberty, or property, without due process of the law; nor deny . . . the equal protection of the laws") (emphasis added) has been interpreted to apply only to the state and not to private individuals). *See* The Civil Rights Cases 109 U.S. 3 (1883); Burton v. Wilmington Parking Auth., 365 U.S. 715 (1961); Katzenbach v. Morgan, 384 U.S. 641 (1966); Lugar v. Edmondson Oil Co., 457 U.S. 922 (1982). *Cf.* [U.K.] Race Relations Act § 6(1)(b) (1965) ("[w]ith intent to stur up hatred against any section of the public . . . in any public place or at any public meeting . . ."); [Canada] Constitutional Act of 1981, CAN. CONST. Part III, § 36(1)(a)(c) (Parliament, legislatures, and governments of Canada are committed to "promoting equal opportunities for the well-being of Canadians . . . providing essential public services . . . to all Canadians"); [Australia] Racial Discrimination Act 1975, No. 52175 Austl. Acts, §§ 9, 11, at 347, 352-53 (unlawful to refuse access to public places and facilities).

291. [U.S.] Daniel v. Paul, 395 U.S. 298 (1969). *Cf.* Moose Lodge No. 107 v. Irvis, 407 U.S. 163 (1972); New York State Club Ass'n, Inc. v. City of New York, 108 S. Ct.

A treacherous reef in these suggestions is revealed when we ask whether opinion should be actionable. We have the strong principle well grounded in liberal theory that "[u]nder the First Amendment there is no such thing as a false idea."[292] But this begs the vexed question of what constitutes an opinion. The distinction between opinion and fact has received extensive but, as yet, unclear analysis.[293] At common law the defense of fair comment on a matter of public interest represents one of the defenses often relied upon by the press.[294] A publication should be actionable only when it directly, or by necessary implication, asserts false facts about the group.

Doubtless this may have some chilling effect, but the effect would be slight and, in my view, the benefit more substantial. It may make publishers pause, but this is salutory. It may also lead to more artful libel posing as scientific debate. This may redouble the defamatory sting by clothing it in a way that is more acceptable to the wider public. My suggestion puts faith in the courts to uncover conceit, and definitively to put the lie to false quasi-scientific theories.

It may be objected that this process would both dignify and magnify the impact of the defamer and the defamatory statement. Doubtless this is true, but the person bringing the action (the best judge of this matter) may always weigh this as a factor in deciding whether to initiate the action for the declaration.[295]

The declaratory judgment, or fair comment on it, could be published in the press, and this would attract absolute privilege under defamation law. No enforcement consequences would flow from the declaration.

2225 (1988); Comment, *New York State Club Ass'n, Inc. v. City of New York: Private Club Sex Discrimination*, 91 W. VA. L. REV. 503 (1989); [U.K.] *see* Panama (Piccadilly) Ltd. v. Newberry, 1 W.L.R. 610 (1962); *but see* Severn View Social Club and Institute Ltd. v. Chepstow (Monmouthshire) Justices, 1 W.L.R. 1512 (1968).

292. Gertz v. Robert Welch, Inc., 418 U.S. 323, 339 (1974).

293. Ollman v. Evans, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985) (Rehnquist, J., dissenting).

294. *See Law Reform Commission, Unfair Publication: Defamation and Privacy*, 1979, AGPS Report No. 11, at 67-70.

295. To rest the power to initiate in the defamed class identifies an advantage over the process suggested by the Human Rights Commission, which would allow bureaucrats to initiate any action. Those persons are more likely to be blind to the problem of dignifying the defamer and the defamation. Contrariwise, the group may be reluctant to initiate an action for reasons that this may signal weakness or undue reliance on government, and hence a right for government to initiate could be justified. For a discussion of the limits of privately initiated litigation in regard to some "public" rights, see Stewart & Sunstein, *Public Programs and Private Rights*, 95 HARV. L. REV. 1195, 1235-36 (1982). On balance it is better to keep this from bureaucratic enforcement.

My second, and alternative, suggestion comports with a more Benthamite public culture and I think will be acceptable in societies less suspicious of positive governmental functions than is the United States. Individuals or a duly constituted representative class of a racial, ethnic or religious group may be enabled by legislation to bring an action for damages. The matter complained of must be false and malicious and serve no bona fide scientific or political debate. Any damages should be limited to a prescribed amount, say $100,000. No injunctive remedy would be available.

In Australia, it will be necessary to modify the legal cost rules to enable lawyers to represent the class on a contingency fee basis. Alternatively, and less neatly, a public fund could be established to support the litigation costs.

Although I consider that this provision may be more compatible with Benthamite Australia,[296] this is not to say that in the United States context the suggestion will be futile. My suggestion, it should be recalled, is akin to that of Justice Jackson's in *Beauharnais*.[297] It is by no means certain that public culture will continue to reflect the present suspicion of government.

For all the contrasts I have drawn between American and Commonwealth public culture, the tradition of free speech is central to a rule of law in a liberal democratic society.[298] I would urge that Australian reformers not be inveigled into copying other Commonwealth reforms. Nor should they be dissuaded from acting because of the present American broad view of the first amendment. A sensitive analysis will give great deference to free speech, but still it is not a trump card that will defeat all other values.[299] Whichever path is taken by reformers in Australia or elsewhere, it should be realized that our choices are at best imperfect. The perfect may be the enemy of the best—our best is a free, robust, vigorous society where all individuals may participate with dignity.

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296. *See* RESTRAINING LEVIATHAN: *supra* note 69.

297. *See* Beauharnais v. Illinois, 343 U.S. 250, 287, 304-305 (1952).

298. For a comprehensive application, see G. WALKER, THE RULE OF LAW: FOUNDATION OF CONSTITUTIONAL DEMOCRACY 23-42 (1988) (proposing a twelve point institutional definition).

299. F. SCHAUER, *supra* note 73, at 9.