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How to Think about the Problem of Hate Speech: Understanding a Comparative Debate

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The problem of hate speech seems to set two fundamental commitments of liberal democracies against each other. While it seems obvious that we should condemn speech that conveys, or worse *incites*, hatred on the basis of race, religion, gender or some other shared characteristic, our commitment to freedom of expression seems to ask us to put up with it.

As Australian lawyers and policy-makers come to face this problem, they will inevitably (and perhaps wisely) seek to learn from the experience of other countries confronting the same problem. The two best-developed bodies of law available for consultation are the laws of freedom of speech as developed by courts in the United States and in Canada. In each case, the courts are applying a guarantee found in a constitutional bill of rights: the American guarantee of 'freedom of speech' found in the First Amendment to the Constitution of the United States and the Canadian guarantee of 'freedom of expression'[1] found in the *Canadian Charter of Rights and Freedoms.* Even if Australia does not choose to resolve these issues within the structure of a bill of rights, these bodies of case law provide an enormously rich source of ideas and arguments about the problem of hate speech.

However, even a brief glance at these two bodies of law immediately demonstrates the complexity of the task. Especially puzzling, given the obvious cultural and political similarities, and their similar constitutional structure, are the deep differences between the Canadian and United States courts.

This chapter has two purposes. First, it seeks to provide the reader with some assistance navigating the complexities of these bodies of

1 In this chapter I use 'speech' and 'expression' interchangeably.

their understanding of how these values are best protected. A common thread through First Amendment conceptions of freedom of speech is that equality and multiculturalism are seen to thrive in the absence of state action regulating speech. On this view, freedom of speech is a 'shield' under which an equal, multicultural society can flourish. On the Canadian conceptions of freedom of expression, however, state action is required to protect these values. Thus two free-speech traditions differ much less on the kind of freedom they pursue than on the degree to which they trust the state to pursue it.

Conclusion

Let me conclude by returning to my title: 'How to Think about the Problem of Hate Speech'. The title reflects the modesty of my aims. I do not intend to persuade Australian law and policy-makers to take any particular path with respect to the regulation of hate speech. My aim instead is to assist them in navigating their way through a complex comparative debate and to avoid simplistic understandings of that debate.

The two major jurisdictions surveyed here do not present a stark choice between respect for equality and multiculturalism on the one hand and freedom of expression on the other. On the contrary, they demonstrate a shared commitment to these values but present two different understandings of how these two values are best pursued and specifically the extent to which the state, acting through law, can be trusted to pursue these values.

The reshaping of this debate may well be of significance beyond the hate speech context as well. In particular, though it contains complexities of its own (Cossman 2003; Green 2000), debates about pornography are mirrored in many respects by debates about the regulation of hate speech (Strossen 1996). More broadly, the question of how to view the threat of state abuse of power affects the understanding of rights in Australian law more generally. As Australia moves towards a more legalised culture of rights (evident in the *Human Rights Act 2004* (ACT) and the *Charter of Human Rights and Responsibilities 2006* (Vic)) a clear focus on the nature of state power and the extent and nature of the dangers it poses becomes ever more urgent.

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