Migration Act Visitor Entry Controls and Free Speech: The Case of David Irving

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1. *Tolerance and Extremism*

To what extent, if at all, should the Australian Government exercise its powers to control entry into Australia in order to deny a visitor's visa to a person on account of the person's opinions? More specifically, if an intending visitor is known to express opinions which are considered to be highly offensive or outrageous, or to pose some risk to public order, what should the Australian Government do?

The recent case of the visitor's visa application by the British historian David Irving has demonstrated the sensitive nature of these questions.[1] In *Irving v Minister of State for Immigration, Local Government and Ethnic Affairs*[2] a Full Court of the Federal Court of Australia unanimously allowed an appeal from a decision of French J[3] which had dismissed Irving's application for judicial review of the Minister's decision denying Irving a business visitor (short stay) visa. This article presents a summary and interpretation of the Full Court's decision in *Irving*. It is contended that the Full Court was correct to set aside the Minister's decision, but that the existing legislative framework, which was amended in late 1992, is seriously flawed in that it can be used inappropriately as a censorship mechanism. It is also contended that, to some

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1 Some of his most trenchant critics resent the application of the description "historian" to Irving. Irving's output has been prolific: see *The Destruction of Dresden* (1963); *The Mare's Nest* (1964); *The Virus House* (1967); *Accident: The Death of General Sikorski* (1967); *Breach of Security: The German Secret Intelligence File on Events Leading to the Second World War* (1968); *The German Atomic Bomb: The History of Nuclear Research in Nazi Germany* (1968); *The Destruction of Convoy PQ 17* (1969); *The Rise and Fall of the Luftwaffe: The Life of Luftwaffe Marshall Erhard Milch* (1973); *Hitler's War* (1977); *The Trail of the Fox: The Life of Field Marshall Erwin Rommel* (1977); *Selected Documents on the Life and Campaigns of Field Marshal Erwin Rommel* (microform) (1978); *The War Path: Hitler's Germany 1933–1939* (1978); *The War Between the Generals* (1981); *Uprising!* (1981); *Hess: The Missing Years 1941–1945* (1987); *The Struggle for Power* (1987); *Churchill's War* (1987); *Goering: A Biography* (1989); *Goebbels: A Biography* (1991).

2 (1993) 44 FCR 540 (Ryan, Lee and Drummond JJ).

3 *Irving v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 115 ALR 125.

extent, the Full Court's approach to the interpretation of the relevant statutory provisions detracts from the importance that should be accorded to freedom of expression. It is argued that the legislation should be recast to limit the power to deny a visa to those situations where there is compelling evidence that the intending visitor presents a serious unmanageable threat to public order, and to make it clear that the denial of a visitor's visa cannot be based only on the fact that the intending visitor's opinions may be rejected as outrageous by the overwhelming majority of Australians.

In the last fifteen years David Irving's name has become synonymous with a two-dimensional controversy.[4] The primary focus of this *cause célèbre* is whether Irving's history is truthful. His most notorious historiographical stance relates to Nazi Germany's record of genocide. Irving promotes a "revisionist" account of the history of Nazi Germany that some of his critics have labelled "Holocaust denial". For example, whilst acknowledging that the Nazis engaged in mass murder of innocent civilians, Irving disputes the widely accepted estimates of the number of Jews who were murdered and argues that there is no evidence that Hitler knew of or authorised the systematic killing of Jews, Gypsies and other persecuted minorities. Similarly, he has claimed, contrary to the evidence accepted by the International War Crimes Tribunal at Nuremberg in 1946[5] and contrary to the evidence led against, and given by, Adolf Eichmann at his trial in Jerusalem in 1961,[6] that death camps like Auschwitz did not contain gas chambers and crematoria.[7] This article is not concerned with the truth or falsity of Irving's account save to say in passing that Irving's historiography has been assailed in the scholarly literature[8] and the mainstream mass media alike.

Irving's revisionist account of the Nazis' genocide affronts and sickens Jews and non-Jews alike.[9] It is also said to feed anti-Semitism although Irving

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4 Irving's book *The Destruction of Convoy PQ 17* above n1 led to a celebrated libel case: *Broome v Cassell & Co* [1972] AC 1027.

5 For accounts of the Nuremberg proceedings see Conot, R E, *Justice at Nuremberg* (1984); Taylor, T, *The Anatomy of the Nuremberg Trials: A Personal Memoir* (1993).

6 See State of Israel, Ministry of Justice, *The Trial of Adolf Eichmann: Record of Proceedings in the District Court of Jerusalem* (2 Vols, 1992); for an account of the Eichmann trial see Arendt, H, *Eichmann in Jerusalem* (1964).

7 For a brief account of Irving's position in his own words see his letter to *Australian Jewish News* reproduced in full in n3 at 127, and his letters to *The Sydney Morning Herald*, 26 May 1993 and *The Weekend Australian*, 22–23 January 1994.

8 For a sample see Sydnor, C W, "The Selling of Adolf Hitler: David Irving's *Hitler's War*" (1979) 12 *Cent Eur Hist* 169; Broszat, M, "Hitler and the Genesis of the 'Final Solution': An Assessment of David Irving's Theses" (1979) 13 *Yad Vashem Studies* 73; Bauer, Y, "'Revisionism' — The Repudiation of the Holocaust and its Historical Significance" in Gutman, Y and Grief, G (eds), *The Historiography of the Holocaust Period* (1988); Madajczyk, C, "Hitler's Direct Influence on Decisions Affecting Jews During World War II" (1990) 20 *Yad Vashem Studies* 53; Shapiro, S (ed), *Truth Prevails: Demolishing Holocaust Denial: The End of the 'Leuchter' Report* (1990); Lipstadt, D E, *Denying the Holocaust: The Growing Assault on Truth and Memory* (1993).

9 For examples of attacks on Irving see "The Odious Irving", *Australia/Israel Review*, 3–16 November 1992; "Irksome Irving", *Australia/Israel Review*, 13 January–8 February 1993; "Media Backs Irving", *Australia/Israel Review*, 23 February–8 March 1993; "Irving's Appeal Doesn't Appeal", *Australia/Israel Review*, 23 March–5 April 1993; "Wising up to Irving", *Australia/Israel Review*, 6–26 April 1993; "Evil and the Media" and "Irving's Lack of Appeal", *Australia/Israel Review*, 18–31 May 1993; "Irving Queasy", *Austra-*

adamantly denies charges levelled at him that he is a neo-Nazi and an anti-Semite. The representations of Irving by those who wish to silence him and his ilk are unequivocal. In this primary level of debate, Irving is denounced as someone who is wilfully falsifying his historical account, as a loathsome hate-monger, and, worse still, as a person who foments racist violence.[10]

The controversy surrounding Irving has a second provocative dimension. If it is accepted that Irving's version of Holocaust history is false and that propagation of his views has a tendency to stimulate racial prejudice to some unspecified extent, the question arises: how should a free and open society combat such ideas? Is Irving's telling of his story of Nazi Germany beyond the limits of tolerance? In the end, the controversy generated by Irving's work has led most observers to conclude that there is a choice between two starkly conflicting alternative responses to the subsidiary free speech issue. The first is to prohibit and punish the expression of the offending ideas through State-enforced censorship.[11] The opposite response is the censure of those ideas and their supporters by the vigorous exercise of free speech through a range of private and public media and the pursuit of programmes of public education to foster racial equality and racial harmony.

This secondary debate is almost as volatile as the primary debate which rages between those who subscribe to the Irvingite school of history and those who want to silence Irving and his historiographical disciples. Those who defend Irving's right to express his opinions are severely criticised. They are thought to be insensitive to the experience of Holocaust survivors and their families, they are labelled as naïve or inflexibly attached to an extreme or absolutist version of free speech, and they are said to be retarding the struggle for equality. Worse still, they are seen by some critics as conniving at the promotion of race hatred.[12] For their part, those who oppose Irving's entry to Australia and wish to silence the expression of the Irvingite story are said to be debasing the currency of Australian democracy and opening the way up to the suppression of other unpopular ideas and opinions.[13]

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lia/Israel Review, 1–14 June 1993; "Bad Penny Irving", *Australia/Israel Review*, 29 June–12 July 1993; "Irving's Australian Campaign", *Australia/Israel Review*, 10–23 August 1993; "An Irving Irony", *Australia/Israel Review*, 23 November–6 December 1993; Commonwealth, *Parl Deb (Sen)*, 17 December 1992, 5335 (Senator V W Bourne); Commonwealth, *Parl Deb (House of Reps)*, 13 May 1993, 772 (Stephen Smith).

10 Opponents of Irving in Australia emphasise the support he receives from groups, notably the Australian League of Rights, which have been accused of propagating anti-Semitic views. For the League's supporting attitude to Irving's visit see letter to editor, *The Sydney Morning Herald*, 22 February 1993. On the League of Rights see Gott, K D, *Voices of Hate* (1965); Connell, R W and Gould, F, *Politics of the Extreme Right: Waringah 1966* (1967), ch 4; Rubinstein, W D, *The Jews in Australia* Vol 2 (1992). For a recent survey of literature on anti-Semitism see Hertzberg, A, "Is Anti-Semitism Dying Out?" *The New York Review of Books*, 24 June 1993.

11 There is a subsidiary censorship response, namely, to resort to existing law or to change the law to impose some form of civil liability. The torts of defamation or intentional infliction of emotional distress could be employed or a new statutory regime introduced. See the discussion in Part 7 below.

12 See eg Matsuda, M, "Public Response to Racist Speech: Considering the Victim's Story" (1989) 87 *Mich LR* 2320 at 2378–2380.

13 For a brief sample of the debate see the letters to the editor column of *The Age*, 11, 12 December 1992, 16, 17 February 1993, 21, 28 May 1993, 18 June 1993, 1 July 1993; *The*

Resistance to Irving's proposed Australian visit has reflected the two-dimensional nature of the controversy. First, opponents of the visit contend that permitting Irving to tell his version of modern German history will necessarily involve the Irvingites engaging in violence or will have a tendency to provoke retaliatory violence or other conduct which will threaten public order. The main arguments advanced for excluding Irving from Australia are that his opinions are particularly hurtful to Australian Jews, that he would infringe those State laws which make racial vilification and incitement to racial hatred illegal,[14] and that he would otherwise infringe Australian law by promoting or provoking violence.

In addition, opponents of Irving's proposed visit argue that, because of the hostility aroused by Irving, disagreement about the subsidiary free speech issue will itself have a tendency to provoke disruptive activities. According to this view, individuals or groups in the community who reject Irving's revisionist historiography, but who differ fundamentally on the appropriate responses to be made to Irving, may be propelled into disorderly confrontation. This is said to provide an additional justification for excluding Irving.

It needs to be recalled that Irving visited Australia in March 1986 and September/October 1987. Those visits were unremarkable in terms of their impact on public tranquility.[15] Irving's books and videotape presentations are freely available in Australia. Interviews with Irving have been broadcast on Australian radio and television. So far as I have been able to ascertain, no serious commentator has suggested that Irving's books or videotape presentations should be withdrawn from sale or the shelves of public libraries.

In 1992 Irving attracted extensive media coverage in Europe and elsewhere when he was convicted in Germany of the offence of defaming the memory of the dead[16] and then later in the year when he was deported from Canada for infringing that country's migration laws.[17] Irving had earlier travelled to Canada to act as an adviser for the defence in criminal prosecutions arising out of

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Sydney Morning Herald, 17, 20, 22 February 1993, 26 May 1993, 28 July 1993.

14 See *Anti-Discrimination Act* 1977 (NSW), ss20B–20C; *Anti-Discrimination Act* 1991 (QLD), s126; *The Criminal Code* (WA), ss76–80, 597A; *Broadcasting Services Act* 1992 (Cth), s123 (3)(e); Ferrell, R, "Legislating Against Racism" (1988) 62 *ALJ* 235; Western Australia, Law Reform Commission, *Report on Incitement to Racial Hatred* (October 1989); Gibson, J and Allen, D, "The Issue of Racial Vilification" (1990) 64 *L Inst J* 709; Victoria, Report of the Committee to Advise the Attorney-General, *Racial Vilification in Victoria* (1992); Australia, Law Reform Commission, Discussion Paper DP 48, *Multiculturalism* (1991) and Report No 57 *Multiculturalism and the Law* (1992), Ch 7; Sadurski, W, "Offending with Impunity: Racial Vilification and Freedom of Speech" (1992) 14 *Syd LR* 163.

15 Above n3 at 142. For an account of the earlier visits see Danbym, M and Balinska, M, "Irving in Australia" (1987) 21(4) *Patterns of Prejudice* 38–40.

16 The charge against Irving arose out of his statement in early 1990 that there were never any gas chambers at the Auschwitz concentration camp: see above n3 at 131; for a detailed account of the German law see Stein, E, "History Against Free Speech: The New German Law Against the 'Auschwitz' — and other 'Lies'" (1986) 85 *Mich LR* 277.

17 Above n3 at 128–131.

the propagation of Holocaust denial ideas.[18] In late 1992, at a time when there was media speculation about Irving re-visiting Australia, he was attacked as a person who claimed that the Holocaust was a hoax.[19]

Sections of the mainstream Australian media joined in the campaign of opposition to Irving's proposed visit. However, most metropolitan daily newspapers editorialised to the effect that denying Irving a vistor's visa would detract from Australia's claim to be an open society in which the expression of unpopular ideas is tolerated. These same commentators argued that the appropriate way to respond to Irving's account of the Holocaust was simply to rely on what is regarded as the overwhelming body of evidence that Hitler led a regime that engaged in a deliberate and infamous policy of achieving the Final Solution.[20]

The controversy surrounding Irving's writing and promotional activities may be analysed in a wider context. The last two decades have witnessed the emergence of new public policies of multiculturalism and, though not necessarily connected, the emergence of a new censorship movement in Australia. New State laws have been passed (or have been proposed) to outlaw speech which vilifies individuals or groups on the grounds of race, ethnicity, or national origin.[21] In the fortnight following the lodging of Irving's visa application, the then Commonwealth Attorney-General introduced in the House of Representatives amendments to the *Racial Discrimination Act* 1975 (Cth) and the *Crimes Act* 1914 (Cth) to penalise racial vilification and incitement to racial hatred. These amendments, which closely resemble the existing State racial vilification legislation, were said to be necessary to implement Australia's obligations under the International Convention on the Elimination of All Forms of Racial Discrimination.[22] In 1991 the then Kirner Government introduced a draft Racial and Religious Vilification Bill in the Victorian Legislative Council.[23] In 1993 the New South Wales Parliament passed a Bill extending the State's existing anti-discrimination legislation to the vilification

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18 See in particular *R v Zundel* (1987) 58 OR (2d) 129; Hill, L E, "The Trial of Ernst Zundel: Revisionism and the Law in Canada" (1990) 6 *Simon Wiesenthal Center Annual* 165. For the main decisions on the constitutionality of Canada's national hate speech legislation see *R v Keegstra* [1990] 3 SCR 697 (majority sustaining a high school teacher's conviction for wilfully promoting anti-semitism to his students); *R v Andrews and Smith* [1990] 3 SCR 870; *Taylor v Canadian Human Rights Commission* [1990] 3 SCR 892; Mahoney, K, "The Canadian Constitutional Approach to Freedom of Expression in Hate Propaganda and Pornography" (1992) 55 *Law & Contemp Problems* 77; Greenawalt, K, "Free Speech in the United States and Canada" (1992) 55 *Law & Contemp Problems* 5.

19 *Australian Jewish News*, 25 September 1992.

20 See eg "The Ban on Irving Should be Lifted", *The Sydney Morning Herald*, 21 May 1993. For a useful survey of editorial and other media responses to the announcement of the Minister's decision denying Irving a visitor's visa see "Media Backs Irving", *Australia/Israel Review*, 23 February–8 March 1993. For a range of responses within the Jewish community see *Australian Jewish Democrat*, Autumn 1993 and Summer 1994.

21 Above n14.

22 Ratified by Australia on 30 September 1975. For details of the proposed new laws see Commonwealth, *Parl Deb (House of Reps)*, 16 December 1992, 3886. The Bill had not been debated before the 1993 federal election. At the time this article was submitted for publication, it had been reported that Cabinet approval was being sought by the Commonwealth Attorney-General to re-introduce the amendments: *Herald-Sun*, 9 January 1994.

23 Victoria, *Parl Deb (Council)*, 27 May 1992, 1053–1055. The Bill had not been debated before the Government was defeated at the election held in October 1992.

of homosexuals.[24] There have been other calls for legislation to penalise speech which vilifies women and to outlaw pornographic representations of women on the bases that such speech is intrinsically harmful, that it is antithetical to the attainment of equality, and that the struggle for equality is more important than the protection of free speech.[25]

Cutting across these legislative changes, the High Court held in late 1992 that the Australian Constitution impliedly protects freedom of "political" expression. The boundaries of this new found constitutional freedom remain to be explored on a case by case basis. The High Court's free speech decisions suggest that there is a need for a fresh look, from a legal and constitutional perspective, at the policy behind existing and proposed racial vilification legislation.[26]

These developments have been accompanied by vigorous public debate about the appropriateness of limits on freedom of expression in Australia in specific areas such as defamation, contempt of court, the protection of journalists' sources, and contempt of parliament. It should, therefore, be small cause for surprise that the subsidiary free speech debate concerning David Irving's proposed Australian promotional tour has generated so much heat.

Insofar as the Irving case involves official measures designed to interdict the entry into Australia of ideas, propaganda and persons considered dangerous or offensive, it is not unprecedented. In the past the law has been used to punish despised minorities for the expression of highly unpopular or odious opinions. More particularly, at various times Commonwealth Governments have taken steps to prevent the entry into Australia of individuals whose ideas or activities were seen to pose a danger to the peace, order or good government of the nation.

In 1920 the Hughes Government legislated to keep out revolutionary communists.[27] In 1925 the Bruce Government attempted to deport the foreign born trade union leaders Walsh and Johnson.[28] In the 1930s the Czech left

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24 *Anti-Discrimination (Homosexual Vilification) Amendment Act* 1993; New South Wales, *Parl Deb (Assembly)* 11 March 1993, 657–660, 29 April 1993, 1821–1836, 13 May 1993, 2045–2050; New South Wales, *Parl Deb (Council)*, 18 May 1993, 2125, 20 May 1993, 2354–2356, 21 May 1993, 2532–2536, 2568–2581, 16 September 1993, 3239–3244, 3263–3266, 3284–3290.

25 See eg Scutt, J A, "Pornography and the Woman: The Political Economics of Free Speech", Paper delivered at Free Speech Committee Seminar on Sex & Censorship, Melbourne, 21 May 1993. Perhaps the shrillest exponent of this view is Catharine MacKinnon. See her *Only Words* (1993) which exhibits an authoritarian bias that is completely at odds with the struggle for equality and her exchange with Ronald Dworkin, *The New York Review of Books*, 4 March 1994. For a very detailed contrary view see Strossen, N, "A Feminist Critique of 'The' Feminist Critique of Pornography" (1993) 79 *Virg LR* 1099.

26 *Nationwide News Pty Ltd v Wills* (1992) 177 CLR 1 (invalidating statutory prohibition on use of words "calculated to bring a member of the [Industrial Relations] Commission into disrepute"); *Australian Capital Television Pty Ltd v The Commonwealth (No 2)* (1992) 177 CLR 106 (invalidating statutory prohibition on radio and television political advertising during elections and statutory provision requiring broadcasters to provide free time to political parties). For a detailed critique of the decisions see Cass, D Z,"Through the Looking Glass: The High Court and the Right to Speech" (1993) 4 *Pub LR* 229.

27 *Immigration Act* 1920.

28 *Immigration Act* 1925; Commonwealth, *Parl Deb (House of Reps)*, 25 June 1925, 456 at 459–462; *Ex parte Walsh and Johnson; re Yates* (1925) 37 CLR 36; See also Henderson, G, "The Deportation of Charles Jerger" *Labour History* No 31 (November 1976) 61.

wing propagandist Egon Kisch fought a celebrated battle with the Lyons Government to secure the right to enter Australia.[29] At the same time the New Zealand communist Gerald Griffin was excluded.[30] In the late 1940s the Chifley Government was urged by its political opponents to deport members of the Communist Party of Australia on the basis that their true loyalty was to the Soviet Union and that they were working for the overthrow of the Australian Government.[31] In the early 1950s the Menzies Government took steps to restrict the foreign travel of Australian Communists and to prevent the entry of foreign Communists into Australian because they were characterised as posing a threat to national security.[32] In 1960 a noted English anthropologist, Professor M H Gluckman, was denied entry to New Guinea on unspecified security grounds.[33] In 1982 Professor Rokuro Hidaka and his wife were refused entry to Australia on the ground of their alleged link with the terrorist Japanese Red Army organisation.[34] Most recently the Australian Government denied visitor's visas to members of the Hells Angels Motor Cycle Club. The basis of that visa denial was that the club's parent organisation in the United States was viewed by the Australian Government as an organised criminal conspiracy. That decision survived a Federal Court challenge.[35] Apart from these cases of controversial individuals, the *Customs Act* 1901 (Cth) had been regularly used throughout the first six decades of this century to prevent the entry of literature and films characterised as purveying ideas that were "dangerous" to national security or public morality.

2. *Public Order, Public Sensitivity and Visitor Entry Controls*

In early December 1992 when Irving applied to enter Australia the *Migration Act* 1958 (Cth) and the Migration Regulations made under that Act, in combination, imposed the following requirements.[36] First, where it appeared to the

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29 Commonwealth, *Parl Deb (House of Reps)*, 14 November 1934, 253–270; *R v Carter; ex parte Kisch* (1934) 52 CLR 221; *R v Wilson; ex parte Kisch* (1934) 52 CLR 234; *R v Fletcher; ex parte Kisch* (1935) 52 CLR 248; Farrell, F, *International Socialism & Australian Labour: The Left in Australia* (1981) at 215–216.

30 Commonwealth, *Parl Deb (House of Reps)*, 23 November 1934, 468; *Griffin v Wilson* (1935) 52 CLR 260.

31 Commonwealth, *Parl Deb (House of Reps)*, 2 December 1948, 3922; Commonwealth Investigation Service/ASIO, Sharkey Dossier, Australian Archives (ACT), CRS A6119/XR1, Item [226]; *The Bulletin*, 4 August 1948.

32 See Cabinet Decision No 293, 24 January 1952, Australian Archives (ACT), CRS A432/80, Item 1952/2001.

33 Commonwealth, *Parl Deb (House of Reps)*, 30 August 1960, 512–513, 514, 519, 31 August 1960, 648–662, 8 September 1960, 952–965.

34 Commonwealth, *Parl Deb (House of Reps)*, 6 & 7 May 1982, 2539.

35 *Hand v Hell's Angels Motor Cycle Club Inc* (1991) 25 ALD 667. In 1992 a man called Moses Werror was denied a visitor's visa to travel to Australia to attend a seminar dealing with Indonesia and Irian Jaya. As this article was being completed it was reported that the Commonwealth Government was being urged to deny a visitor's visa to the Russian nationalist politician, Vladimir Zhirinovsky, on the basis that he promotes anti-Semitic and other racist views: *The Age*, 24 December 1993; *The Sydney Morning Herald*, 24 December 1994; *The Australian Jewish News*, 7 January 1994.

36 Irving's application was governed by the Migration Regulations 1989. New regulations

Minister that an applicant for a visa was entitled to be granted a visa of the class applied for, the Minister was obliged to notify the applicant that the Minister proposed to grant the visa and if, and only if, the Minister was satisfied that there had been no material change in the applicant's circumstances since the application was lodged, the Minister was required to grant the visa.[37] Secondly, an applicant was entitled to be granted a visa of a specified class if the applicant satisfied the prescribed criteria in relation to the visa class.[38] In the case of the class of visa sought by Irving, these criteria included the requirement that the applicant satisfy "relevant public interest criteria". Irving demonstrated that he met all the prescribed criteria other than the "relevant public interest criteria". Thirdly, the "relevant public interest criteria" included requirements that the applicant be "of good character" ("the good character criterion") and be a person "not determined by the Minister acting personally to be likely to become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community" ("the disruptive activities criterion").[39] The disruptive activities criterion had two broad alternative elements — a concrete one, violence, and the much more problematic one, disruption. Finally, the Regulations empowered the Minister to waive compliance with the good character criterion where the failure to satisfy that requirement was the only impediment preventing the applicant from meeting the public interest criteria.[40] So far as is relevant, the power to grant a waiver depended upon the Minister being satisfied "that undue harm would be unlikely to result to the Australian community if the visa ... was granted."[41]

Irving was faced with two difficulties in satisfying the public interest criteria. The first was the fact that the regulations provided that an applicant was to be taken not to be of good character if the applicant had been deported from another country.[42] Accordingly, because of his deportation from Canada, Irving was, as required by the Migration Regulations, to be taken not to be of good character and therefore needed to secure a ministerial waiver. The second difficulty was the existence, particularly within the Australian Jewish community, of vehement opposition to the grant of a visa to Irving. The President of the Executive Council of Australian Jewry, leaving little to the historical imagination, said that Irving was a "beer hall rabble rouser". He described Irving as a threat to freedom in Australia because he would "incite the gullible to racist violence."[43] The then Minister (The Hon Gerry Hand, MP) was to prove receptive to representations from the Jewish community and departmental

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came into effect on 1 February 1993: see Migration (1993) Regulations SR 367 of 1992. However, there was no major change in the visa entitlement requirements that applied to Irving's application.

37 *Migration Act* 1958, s24.

38 Regulation 41(1). See now reg 2.12.

39 Regulation 2.

40 Regulation 143.

41 Ibid.

42 Regulation 4(1)(a)(i)(D).

43 *The Age*, 12 December 1992.

advice to the effect that, because of his revisionist Holocaust historiography, Irving's presence in Australia threatened to result in undue harm to the Australian community, including violence.[44]

To understand the impact of the Full Court's decision in *Irving* it is necessary to refer at this stage to what has happened to the legislation since Irving lodged his visa application. The present law on visitor entry controls reflects extensive changes effected by the Migration (1993) Regulations and, more particularly, by the *Migration (Offences and Undesirable Persons) Amendment Act* 1992 (Cth) ("the *Undesirable Persons Amendment Act*"). Since the date when Irving applied for a visa a major element of the controls has been transferred from the regulations to the Act.[45] The *Undesirable Persons Amendment Act* inserted new sections 180A, 180B and 180C in the *Migration Act* 1958 largely in response to the decision of the Federal Court in the *Hell's Angels* case in 1991.[46] Section 180A entitles the Minister to refuse to grant a visa or an entry permit to a person if the Minister is satisfied that the person is not of good character[47] or if the Minister is satisfied that, if the person were allowed to enter or to remain in Australia, the person would:

(i) be likely to engage in criminal conduct in Australia; or

(ii) vilify a segment of the Australian community; or

(iii) incite discord in the Australian community or in a segment of that community; or

(iv) represent a danger to the Australian community or to a segment of that community, whether by way of being liable to become involved in activities that are disruptive to, or violence threatening harm to, that community or segment, or in any other way.

A decision under section 180A is subject to review on the merits by the Administrative Appeals Tribunal.[48] If the Minister, acting personally, intends to make a decision under section 180A, section 180B provides that if the Minister decides that, because of the seriousness of the circumstances giving rise to the making of the decision, it is in the national interest that a person be declared to be an excluded person, the Minister may give a certificate declaring the person to be an excluded person. A decision to which such a declaratory certificate applies is not reviewable on the merits.[49] However, such a decision must be notified to each House of the Parliament within 15 sitting days after it is made and can be disallowed under the *Acts Interpretation Act* 1901 (Cth).[50]

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44 See eg "The Silencing of David Irving", *The Sydney Morning Herald*, 22 February 1993.

45 That part of the regulatory scheme contained in the regulations has been re-cast, but the basic structure of the visitor entry scheme remains the same. See Migration (1993) Regulations, Part 672 and Schedule 4.

46 Above n35.

47 Section 180A(2)(a). The Minister may have regard to the person's past criminal conduct or the person's general conduct. The Minister may be satisfied that the person is not of good character because of associations with another person, or with a group or organisation, who or that the Minister has reasonable grounds to believe has been or is involved in criminal conduct: s180A(2)(b).

48 Section 180(1).

49 Ibid.

50 Section 180B.

This revised disruptive activities criterion, which came into operation on 24 December 1992, is wider and more alarming than that which it has replaced. In Parts six and seven of this article the defects of the amended disruptive activities criterion are identified and an alternative approach is recommended.

3. *The Case Presented to the Minister*

The Minister's consideration of Irving's visa application was undertaken in a climate of controversy because of the speculation which had built up in the second half of 1992 about an impending visit by Irving. In addition, Irving drew public attention to his visa application by releasing a media statement several days before the application was made in London. The strong opposition to the proposed visit, especially in Australian Jewish publications, such as the *Australian Jewish News* and *Australia/Israel Review*, and Irving's response to that opposition were to form part of the background material which the Minister was to consider.

Irving's visa application stated that the purpose of his visit was to promote his recent books on the high-ranking Nazi officials, Hermann Goering and Josef Goebbels. The application disclosed that since his previous visit to Australia Irving had been convicted of an offence in Germany and had been deported from Canada. Irving later wrote directly to the Minister supplementing his application by supplying copies of material documenting his responses to the attacks on him. Irving sought to rely, first, on the fact that he had appealed his German conviction and, secondly, on a claim that his deportation from Canada was for what he characterised as a technical infringement of Canadian law which he argued may have been engineered by his opponents to prevent him from expressing his opinions in Canada.[51] Irving provided the Minister with a copy of a letter he had sent to the *Australian Jewish News* responding to the attack on him which represented him as a person who had called the Holocaust a hoax. That letter summarised Irving's findings based on three decades of archival research and concluded with the following remark:

> Clearly there is the substance for a compelling public debate — though this is not the topic of my forthcoming visit. If the organised Jewish community tries to suppress such a debate, whether by violence, or window-smashing, or blackmail (methods they have employed in Britain and North America), they will only increase anti-Semitism, which I utterly deplore.[52]

In his consideration of Irving's application, the Minister's decision was guided, in part, by the Controversial Visitors Policy prepared by the Department of Immigration, Local Government and Ethnic Affairs (DILGEA) to assist decision-making.[53] Section 9.1.1 of the Policy was in the following terms:

> Visitor policy seeks to exclude from Australia persons who have planned or participated in, or been active in promoting politically motivated violence or criminal violence including particularly acts of terrorism; and/or are likely to

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51 Above n3 at 128.

52 Id at 127.

53 DILGEA was renamed the Department of Immigration and Ethnic Affairs on 24 March 1993.

> propagate or encourage such actions during a visit to Australia. It also seeks to exclude persons who may pose some threat or harm to the Australian community.

Section 9.1.2A of the Policy was in the following terms:

> A proposed visit by a person, the presence of whom in Australia may precipitate the sort of vigorous or controversial debate which may take place in a democratic society, is not sufficient reason to refuse that person a visa.

The DILGEA advice to the Minister disclosed some sensitivity to the potential which Irving's proposed visit carried for causing distress to the Jewish community. This, it seems, reflected determined lobbying of the government by the Jewish community. It is, of course, perfectly understandable that Holocaust denial is a source of deep upset, if not intense animosity, for Australian Jews. So far as it is possible to ascertain from the Full Court's decision, and save for a passing reference to section 9.1.2A of the Controversial Visitors Policy, the departmental advice did not purport to identify the competing free speech interest in detail or to provide a balanced assessment of the competing interests. The Ethnic Affairs Policy and Project Section of DILGEA drew the Minister's attention to the Racial Discrimination Amendment Bill 1992[54] and expressed the view that it did not believe that Irving's activities in Australia would be likely to infringe the proposed new prohibitions.

The Racial Discrimination Amendment Bill that was tabled in 1992 would have created a new criminal offence of intentional stirring up of racial hatred (proposed section 59 of the *Crimes Act* 1914) and would have rendered racial vilification unlawful (proposed sections 19A and 19B of the *Racial Discrimination Act* 1975). The proposed criminal offence would be applicable only to a "racially offensive" (as defined) "public act" (as defined) done "with the intention of stirring up hatred" and it seems likely that the DILGEA advice to the Minister rested on assessment that Irving's book promotional activities would fall well outside that limited ambit. In the case of racial vilification the proposal did not render unlawful "anything said or done reasonably and in good faith ... (b) in the course of any statement, publication, discussion or debate made or held for an academic, artistic or scientific purpose or any other purpose in the public interest ... ".[55] It is probably less difficult to see how Irving could have taken the benefit of this critical limitation.

The Minister was advised that the Controversial Visitors Policy was not clearly applicable to Irving unless it could be shown that the visit would be likely to encourage violent neo-Nazism.

The Department of Foreign Affairs and Trade was consulted as provided for in the Controversial Visitors Policy and advised that it had no opposition to the proposed visit on foreign policy grounds. Similarly, the Australian Security Intelligence Organization advised that it had no opposition to the grant of a visa to Irving.[56] The Department of Prime Minister and Cabinet adopted

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54 Above n22.

55 Section 19B(2) Racial Discrimination Amendment Bill 1992 (Cth).

56 Pursuant to s17(1)(c) of the *Australian Security Intelligence Organization Act* 1979 (Cth), ASIO has responsibility for advising Ministers in respect of matters including protection of, and the people of, the Commonwealth, the States and the Territories from politically

a different position. Its assessment was that there was "more than sufficient grounds for refusing a visa if that were the Minister's inclination". Those grounds were not, however, identified for the Minister.

During the time that Irving's application was under consideration there was much public debate about the merits of the application, including contributions from Irving, and Irving also made further vigorous representations to the Minister urging that his application be granted.[57]

4. *The Minister's Decision*

On 8 February Minister Hand made a decision in the following terms: "Visa issue is refused on the grounds that he is likely to become involved in activities disruptive to the Australian community or a group within the Australian community".[58]

The effect of this decision was that it could not be said that Irving had failed to satisfy the "relevant public interest criteria" only because he had been taken not to be of good character. The Minister did not suggest, nor was there any material before him to suggest, that the dissemination of Irving's books in Australia had caused any disruption within the Australian community. It was to be said later in the Full Federal Court that the Minister's decision revealed a misunderstanding of the operation of the Regulations as a result of which the Minister effectively denied himself the power to waive compliance with the good character criterion. Because the Minister was convinced that he should make a positive determination that Irving failed to satisfy the "disruptive activities" criterion, he seems not to have considered whether he should resort to his waiver power.[59] From what is known publicly about the decision-making process, the Minister's approach to Irving's application seems, however, to be equally consistent with a deliberate decision to by-pass the waiver provision.

Irving was notified by the Australian High Commission in London that his visa application had been denied because he did not satisfy the disruptive activities criterion. On 8 March 1993 the Minister wrote to Irving explaining his denial of Irving's application. Mr Hand acknowledged that there was vigorous opposition to Irving's proposed visit and that there had been suggestions that his decision inflicted a blow to fundamental freedoms in Australia:

> While I do not accept that view [ie that his decision inflicted a blow to fundamental freedoms in Australia] since your books are freely available in Australia to those who may be interested in your opinions, this is not germane to my

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motivated violence and the promotion of communal violence. This is a difficult legislative scheme to interpret. Nevertheless, if, for example, there was evidence that Irving had participated in violent activities in Germany or Canada, as some of Irving's critics allege, it is safe to assume that the intelligence gathering agencies of the Commonwealth would have advised differently.

57 Above n3 at 130.

58 Above n2 at 548.

59 Above n2 at 543 (Ryan J), 547 (Lee J), 556 (Drummond J).

> decision in your case. Equally, the fact that persons may be affronted by your opinions is not relevant. What is of concern, is the effect that your presence in Australia will have within the community ...
>
> Among the matters which I have considered is whether you were likely to become involved in activities disruptive to, or giving rise to violence threatening harm to, the Australian community or a group within the Australian community.
>
> In all the circumstances, I am satisfied that if I had approved your proposed visit your activities in relation to the promotion of your books would have been disruptive to the Australian community or a group within the Australian community and that you do not, therefore, meet the requirements of the law for entry to Australia.[60]

It is clear from the whole of the material relied on by the Minister in making his decision and later in defending himself against Irving's judicial review application, that the Minister's decision was not based on any evidence or material that supported the violence element of the disruptive activities criterion. It is doing no more than to narrate what occurred to observe that the Minister paid lip service to the free speech implications of the visa denial option.

5. *Judicial Review of the Minister's Decision*

The Federal Court had before it all the material which was considered by the Minister, but no additional evidence was led from the Minister. The gist of the decision by French J was that, on the basis of the material put before him, it was open to the Minister to be satisfied that Irving did not comply with the disruptive activities criterion.[61] In French J's considered view, the disruptive activities criterion was directed at a range of situations from, on the one hand, "a temporary division or rift that will heal with the passage of time" to, on the other hand, "the acute manifestation of some pre-existing division".[62] Without defining its boundary, French J added that there is "a threshold below which it could not be said on any view that communal response to the activities of a visitor to this country would involve disruption."[63] Relying on the decision of the Full Court in *Hand v Hell's Angels Motor Cycle Club Inc*,[64] French J held that the disruptive activities criterion involved a factual assessment and determination of the likely behaviour of a person seeking to enter Australia. The ministerial determination necessarily involved a judgment of risk and, provided that the determination was confined to risks intended to be covered by the regulations, it would not be questioned on the merits in judicial review proceedings.[65]

In my opinion, the decision of French J was unduly deferential to the Minister's position and insufficiently concerned with the scope which the then

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60 Above n3 at 134.

61 Id at 137. Irving contended that the Minister's decision (a) breached the rules of natural justice, (b) was made in the absence of evidence or other material to justify it, (c) involved the failure to take relevant considerations into account, (d) took irrelevant considerations into account, (e) involved the exercise of a personal discretion at the direction of another person, and (f) was made for an improper purpose.

62 Id at 139.

63 Id at 139–140.

64 Above n35.

65 Above n3 at 139.

statutory scheme provided to trespass on free speech. French J took the view that the Minister had not rested his decision on the potential which the expression of Irving's views had to affront some sections of the Australian community.[66] French J's approach to the disruptive activities criterion reveals a concern for the free speech issue, but accepts that the Minister had properly considered the issue. Insofar as the Minister purported to weigh up the free speech implications, his approach seems to have been that, provided there was some way in which Australians might have access to Irving's opinions, it could be said that restricting further access was not a material restriction. French J simply accepted the Minister's assessment that his determination to deny Irving a visa would have no impact on the availability of Irving's books in Australia. The Minister's attitude, as vindicated by French J, appears to have been that there can be a kind of rationing of free speech. Or, in other words, free speech could be curtailed without being denied.[67]

Irving appealed to the Full Federal Court. The Full Court's decision is best understood by, first, considering the judges' interpretation of the relevant regulations, and then examining the application of the regulations so interpreted to the whole of the material to which the Minister had regard in deciding to deny Irving a visa.

A. The Statutory Interpretation Issue

Ryan, Lee and Drummond JJ delivered separate reasons for decision, but in most respects the differences between the judges are marginal. Each judge held that because the Minister had made an affirmative personal determination on the disruptive activities criterion, namely, that Irving was "likely to become involved in activities disruptive to, or violence threatening harm to, the Australian community or a group within the Australian community", the appeal turned on the narrow point of whether there was evidence or material on which the Minister could reasonably have concluded that Irving was likely to become involved in activities of the specified kind.[68] Each of the three main components of the disruptive activities criterion was subjected to close scrutiny by the Full Court.

(i) "to be likely"

In this respect the Full Court did not disagree with the interpretation given to the words by French J following the interpretation which had been embraced by the Full Court in *Hand v Hell's Angels Motor Cycle Club Inc*.[69] It was held

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66 Id at 137–138.

67 Id at 139–140. Some media commentators who were opposed to Irving being granted a visitor's visa drew attention to what appeared to be a rise in racist speech in Australia in recent years, but at the same time argued, paradoxically, that free speech advocates supporting Irving's visa application ought to take note of the fact that, because it had been sparsely enforced, State legislation prohibiting racial vilification and incitement to racial vilification (see n14) had produced little restrictive impact on free speech. This school of thought echoed the rationing approach to free speech, namely, that those who were interested to know Irving's holocaust denial views could read his books. But Irving's presence in Australia to give voice to his view of history was not to be tolerated: see eg Bone, P, "A Test of Our Tolerance", *The Age*, 14 April 1993.

68 Above n2 at 543 per Ryan J.

69 Above n35 at 672.

that, in the relevant context, the meaning of these words was such that the determination that there is a likelihood of an event occurring calls for more than a showing that there is a mere chance or possibility.[70] This aspect of the Full Court's decision is, with respect, beyond dispute. There is no reason of principle why the term "likely" should not be given a literal meaning as equivalent to reasonable certitude. This component is considered again below in the context of the evidentiary standards applicable to the ministerial decision-making process.

(ii) "to become involved in"

Ryan and Drummond JJ each concluded that the activities on which the disruptive activities criterion is predicated need not be likely to be engaged in by the visa applicant. It is enough for the Minister to assess the applicant as likely to be "involved" in the sense "of being bound up or connected with them, by, for example, providing a focal point or cause or occasion for them."[71] Lee J held that the words "involved in" required evidence or material "to show that there was a probability that a proposed visitor would be the cause of, or inspiration for, those events."[72] This required a showing that the connection with the occurrence of disruptive activities involved more than the mere presence of the visitor in Australia at the time the activities occurred. In Lee J's view, if the mere presence of the visitor was intended to be enough to satisfy the disruptive activities criterion, it would have been a simple matter for the criterion to have been so expressed. Drummond J noted that the regulations did not condition the disruptive activities criterion on a determination that the visitor was not likely to take part in disruptive activities. The visa applicant could be said to be likely "to become involved in" activities disruptive to the Australian community where the disruption was predicted to arise from the activities of others responding to the applicant's own activities. The words "to become involved in" embraced "a wider range of connections between [the intending visitor] and those activities than does the concept of participation by a person in such activities."[73] A determination about the likely effects of the visitor's lawful conduct could also trigger the denial of a visa for failure to comply with the disruptive activities criterion.[74]

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70 Above n2 at 543 (Ryan J), 551 (Lee J), 557 (Drummond J).

71 Id at 543 per Ryan J.

72 Id at 551.

73 Id at 558–559.

74 Drummond J based this conclusion on the premise that the visitor's lawful conduct could lead to the visitor being bound over for the purpose of preventing a breach of the peace. This analysis was based on *Forbutt v Blake* (1981) 51 FLR 465 at 475–476 following *Wise v Dunning* [1902] 1 KB 167. It is suggested, with respect, that this analysis is imperfect. An interpretative approach which is less antagonistic to the effective protection of freedom of expression, but still troubling, is to be found in *Cozens v Brutus* [1973] AC 854. An alternative, and it is submitted far more preferable, approach which is protective of controversial or provocative lawful behaviour can be found in *Beatty v Gillbanks* (1882) 9 QBD 308 (setting aside unlawful assembly conviction of leaders of Salvation Army street procession which attracted violent opposition).

(iii) "activities disruptive to ... the Australian community or a group within the Australian community"

The Full Court purported to make it clear that the disruptive activities criterion was not to be read as enabling the Minister to prevent the spirited and heated debate which a free and open society not only tolerates but also actively encourages. Ryan J concluded that in context the adjective "disruptive" was to be given its ordinary English meaning:

> That requires the activities to be likely to have the effect of polarising two sections of the Australian community, or two elements of a group within that community, to an extent, beyond mere disagreement or controversy, which threatens, in a harmful way, the normal cohesiveness of the community or the group. It is not enough for the activities to be likely to cause pain, distress, or offence within the Australian community or a group within it. On the other hand, I am not persuaded that the supposed breakdown or division needs to be accompanied by physical violence as that would subsume the second element imported by the stipulation that the applicant not be determined by the Minister to be likely to be involved in "violence threatening harm to the Australian community or a group within it".[75]

Lee J held that the targeted "activities" were more than vigorous expressions of support for, or opposition to, the opinions of another. The statutory language

> connotes actions designed to divide or to rend the cohesiveness of the community. A broad range of events, including minor breaches of the peace, would not be conduct to which [the disruptive activities] criterion (c) was directed. That conduct would entail divisive acts the community would not be expected to tolerate.[76]

Lee J did not elaborate on how the regulation identifies what the community can be expected to tolerate.

Drummond J interpreted the term "disruptive" in the same way as French J had done.[77] He held that the Controversial Visitors Policy accurately reflected the intention of the Regulations and, in particular, of the then public interest criteria. The Minister had to be satisfied that the presumptive activities, that is the activities which Irving was intending (or was understood to be intending) to pursue in Australia, answered the description of being disruptive to the Australian community or a group within that community in the sense of such activities leading to "forcible community division".[78] It was necessary that there must be "conflict of the kind which, while not necessarily involving actual violence, has the potential to degenerate into violent behaviour on the part of some".[79] It is submitted that Drummond J's use of the concept of "forcible community division" as being implicit in the concept of disruptive activities is not helpful. It is expressed in too abstract a way to enable a clear workable standard to be discerned and applied.

In his judgment Drummond J also uses the words "clash", "strife", "conflict", "vehement confrontation" and "violence ... on other than a limited

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75 Above n2 at 543–544.
76 Id at 551.
77 Id at 557–558.
78 Id at 558.
79 Ibid.

scale" to map out the boundaries of the forbidden realm of disruptive activities.[80] It is submitted that these terms do not help either since they are no less abstract and thus are equally open to widely divergent interpretations. For example, it is to be expected that in a healthy democratic society there will be the "clash" of ideas and opinions, "strife", and "conflict". Drummond J's linking of that language with the "potential" for violence is also fraught with difficulty of understanding and application since "potential", like "tendency", will seldom be susceptible to reliable objective measurement.

In this respect, Drummond J's reasoning is similar to that which is traditionally used to justify the law of sedition. It is, with respect, deficient because it rests the exercise of a fundamental democratic entitlement on the inherently vague test of the supposed bad or dangerous tendency of speech and speech-related conduct to endanger public order.[81] It is so vague that there is no sure way of knowing in advance whether a particular course of conduct is forbidden or restricted. Drummond J noted that different levels of violence may be involved in the consideration of the disruptive activities criterion, but that the criterion could be satisfied by "conflict in the form of vehement confrontation and strife between divisions in the community which does not involve actual violence".[82] With respect however, this interpretative approach is unrealistic and unduly restrictive of individual and collective political action. Australia is not so fragile a society that it cannot tolerate the public expression of opinions in circumstances in which audiences are permitted to do their best by, for example, "vehement confrontation" to ensure that the speaker is not heard. This is the stuff of politics in a free and open society. Australia has a long history of turbulent protest, noisy politicking and toleration of the heckler. But the heckler's free speech rights stop short of subjecting the speaker or the audience to violence or physical intimidation and the state has a responsibility to protect the speaker and the audience from violence or physical harrassment. The primary focus of law enforcement and public order responses to violent reactions to the expression of unpopular opinions should be appropriate control of the instigators of the violence not the silencing or prior restraint of the person(s) giving voice to the offending opinions.

In fairness to him, it needs to be said that Drummond J was the only one of the three judges who, albeit in passing, directly adverted to the clash of important public interests that might have to be confronted by the Minister in deciding a controversial visa application. Drummond J frankly concluded that, as he interpreted the statutory language applicable to Irving's case, the right of free speech could be thwarted by the so-called "hecklers' veto":

> It is the existence of a real risk that some Australians will, as a result of a person's presence here, be subjected by other Australians to a situation involving conflict that criterion (c) [the disruptive activities criterion] is aimed at. When a claim is made that a society which accords real, as opposed to token, respect for freedom of speech should admit a visitor, the Regulations in my view nevertheless require the balance to come down against freedom of speech, if such

80 Above n2 at 558.

81 Bloustein, E J, "The First Amendment 'Bad Tendency' of Speech Doctrine" (1991) 43 *Rutgers LR* 507; Maher, L W, "The Use and Abuse of Sedition" (1992) 14 *Syd LR* 287.

82 Above n2 at 558.

> a risk exists. So construing the Regulations and, in particular, criterion (c), has the result that a person can be lawfully excluded from entry to Australia where he has only limited opposition within the Australian community, but that opposition is prepared to threaten violence in demonstrating their opposition to him, if he is allowed into the country. This can make freedom of speech a hostage to the willingness of a few already living in Australia to break the law. But I think the Regulations bring the balance down between freedom of speech and the preservation of order and calm within the Australian community in this way.[83]

If this is a correct statement of the law, it carries with it the potential for abuse by decision-makers since it provides an obvious pretext for excluding a visitor for reasons that have to do with the unpopularity or provocative nature of the visitor's viewpoint rather than with a genuine concern to protect public order. All that is necessary to bring about abuse of power is for those who wish to silence the visitor's expression of the unpopular opinion to allege that there will be disruption involving some level of physical harassment or intimidation of the visitor or retaliatory violence and to whip up fear by constantly repeating the allegation. A responsible decision-maker faced with such a claim should ignore such pressure and ask the obvious question: Where is the clear and convincing evidence that the predicted violence is likely to occur and will be such that the normal law enforcement agencies will be powerless to prevent or control it or any ensuing disruption?

In my view, the Full Court's interpretation of the disruptive activities criterion, applied to the similar criterion introduced by the *Undesirable Persons Amendment Act*, fails to make clear to an intending applicant who proposes to voice unpopular ideas whether there is an enforceable entitlement to a visitor's visa. This is contrary to the clear legislative policy of unequivocal specification of entitlement as the basis for administrative decision-making under the *Migration Act*.[84]

B. The Application Issue

The remaining issue for the Full Court was to examine the way in which the Minister and French J had dealt with the evidence and material on which the Minister had rested his decision. All three judges in the Full Court held that Irving's allegation in his letter to *Australian Jewish News* that "the organized Jewish community tries to suppress such a debate, whether by violence, or window-smashing, or blackmail (methods they have employed in Britain and North America)"[85] did not amount to evidence or material reasonably supporting a conclusion that his proposed activities in Australia would be likely to be disruptive to the Australian community or the Jewish community.[86] It is submitted that this was the only conclusion that the Court could reach in assessing the probative value of the material on which the Minister had relied.

Ryan J held[87] that here was no evidence or material before the Minister which would support a conclusion that would apply to the activities in which

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83 Above n2 at 559.
84 Commonwealth, *Parl Deb (Senate)*, 5 April 1989, 922–928.
85 Above n2 at 551.
86 Id at 544–545 (Ryan J), 550–552 (Lee J), 557–559 (Drummond J).
87 Id at 544.

Irving could be regarded as likely to become involved. Ryan J agreed with Drummond J that the most that the evidence or material would support regarding the likely impact of Irving's visit looked at from either the perspective of those who thought Irving should be permitted to enter or from the perspective of the Jewish community. The only active division that could be imputed to the community was at this secondary level of the controversy — what Ryan J called the Voltarean free speech controversy was at a secondary level.[88] But it was necessary to recall that Irving's books had been freely available in Australia for a considerable time without any apparent disruptive effect on the Jewish community.

Thus, for Ryan J[89] there were only two bases on which the Minister could have attained the requisite degree of satisfaction that the disruptive activities criterion operated to justify the denial of a visa. The first was that there was likely to be disruption to the Australian community because of the discord which Irving's presumptive activities would engender between proponents of free speech and a united Jewish community. The second was that the same activities were likely to be disruptive of the Jewish community. Neither basis for denying a visa was supported by the evidence or material before the Minister. Given the basically peaceful way in which the secondary level debate has raged to date, it is very difficult to envisage a situation in which it could reasonably be demonstrated that the requisite degree of such disruption would be likely to occur.

Lee J also held[90] that French J was in error in holding that the Minister could rely on Irving's letter to *Australian Jewish News* to support such a finding. There was nothing in the material before the Minister to support a finding that Irving's book promotion activities in Australia could lead to conflict of the kind adverted to by Irving in the letter to such a degree as to be disruptive to the Australian community. There was simply no evidence that such events were likely to occur. "There was no rational connection between the material before the Minister and a determination that Irving was likely to be involved in activities disruptive to the Australian community".[91]

According to Drummond J, the Minister was not entitled to rely on the unsubstantiated assessment of the Department of Prime Minister and Cabinet that sufficient grounds existed for excluding Irving. Contrary to what French J had decided, the Minister was bound to have regard to the peaceful circumstances surrounding Irving's earlier visits to Australia. The Minister had not in his letter to Irving revealed his reasons for the conclusion he had reached to deny the application. The allegations against Irving in the *Australia/Israel Review*[92] did not, in the absence of confirmatory material, provide a basis for the Minister to be satisfied that he could rely on the disruptive activities criterion. However, Drummond J held that there may be circumstances in which media

88 Ibid.
89 Ibid.
90 Id at 552.
91 Ibid.
92 Above n9.

comment might be sufficient to justify the Minister in refusing a person entry to Australia. This dictum invites the same criticism that has been offered in response to Drummond J's remarks about the hecklers' veto.

The result of the appeal was that the Full Court ordered that the matter be remitted to the Minister for reconsideration consistent with the Court's decision. At the time of writing, the fate of Irving's application was still undecided.

6. *Administrative Law Implications*

In this part of the article the administrative decision-making aspects of the Irving case are examined and an argument is advanced for a revision of the existing decision-making framework. It is argued that the suggested framework would, if implemented, make for fairer and more efficient decision-making.

A. *The Merits in* Irving

It is submitted that the Full Court's decision in *Irving* is in accordance with the Act and Regulations that were applicable at the time Irving's visa application was considered by the Minister. On the quite narrow point which the case involved the decision was a straightforward application of judicial review on a conventional ground. The decision reveals just how skimpy, generalised and speculative the material before the Minister was — so much so that for Lee J it was open to characterise the Minister's decision as being manifestly unreasonable.[93] The Federal Court, yet again in the context of *Migration Act* decision-making, has had to administer a reminder to the Commonwealth Government about the basics of administrative decision-making.[94] However, it is also submitted that the Full Court's decision amply demonstrates that the existing regulatory scheme is inadequately constructed insofar as the maintenance of public order and public sensitivity to unpopular ideas are recognised as relevant factors in visitor visa decision-making.

B. *The Current Entry Entitlement Criteria*

One of the major advances achieved by the extensive reforms to Australia's migration law that have been continuously implemented since the enactment of the *Migration Amendment Act* 1989 has been the replacement of administratively determined entitlement criteria by legislatively prescribed criteria.[95]

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93 Above n2 at 552 relying on *Chan Yee Kin v Minister for Immigration and Ethnic Affairs* (1989) 169 CLR 379 (decision denying application for recognition of refugee status set aside as so unreasonable that no reasonable decision-maker could have made it). French J did not deal with this issue except to conclude in passing that Irving had failed to demonstrate that there was no rational connection between the material before the minister and the assessment that he made, see above n3 at 141–142.

94 For illustrative examples in the High Court see *Kioa v West* (1985) 159 CLR 550; *Park Oh Ho v Minister for Immigration and Ethnic Affairs* (1989) 167 CLR 637; *Chan*, ibid; *Haoucher v Minister for Immigration and Ethnic Affairs* (1990) 169 CLR 648. More recently, the decision of Burchett J in *Fuduche v Minister for Immigration, Local Government and Ethnic Affairs* (1993) 117 ALR 418 provides further evidence that there is a systemic tendency to flawed decision-making within the *Migration Act* framework.

95 I have been greatly assisted by a reading of Cooney, S, "The Codification of Migration Pol-

For the most part, the legislative criteria are expressed in terms that are clear and susceptible to proof. Sections 180A–180C of the *Migration Act* contain two fundamental defects. First, the entry criteria are imprecisely expressed and, secondly, the result of that imprecision is that the criteria create serious problems of proof and will lead in controversial cases both to injustice and to an unjustified diversion of scarce decision-making resources. In this setting it is inevitable that administrative decision-making will be problematic. Add to this the Minister's capacity to make what is, essentially, a decision resting on pragmatic political considerations and all the ingredients are present to attract successful judicial review.

(i) Precision

It is submitted that the entry entitlement criteria applicable since the commencement of the *Undesirable Persons Amendment Act* fall far short of conformity with a stringent requirement of precision that is necessary for proper decision-making. Where the basic democratic right of freedom of expression is at stake, precision in the specification of the visa entitlement standard is essential. This principle does not have to rest on any constitutional provision, but as indicated below, it may well now be imposed as a necessary concomitant of the newly recognised implied constitutional right to free speech.

As well, since the High Court has held that there is such a right, it is suggested that it will necessarily be a relevant consideration in those cases where the denial of some statutory right or benefit produces an adverse effect on the exercise of the constitutionally protected right.[96]

The more precise the statutory language is the more readily it will be understood by decision-makers and visa applicants alike, and the more readily it will be susceptible to proof. The Irving case demonstrates the unsatisfactory result in primary decision-making that is produced when the statutory language lacks precision. The disruptive activities criterion as it then stood was, despite the Full Court's careful interpretation of the statutory language, incurably vague in its three central elements. It is arguable that the validity of the regulations was open to attack on the grounds of uncertainty[97] or unreasonableness or lack of proportionality.[98] The validity of the regulations was not

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icy: Excess Rules?", Unpublished LLM Minor Thesis, University of Melbourne, 1993.

96 See in this regard Bayne, P, "Administrative Law, Human Rights and International Humanitarian Law" (1990) 64 *ALJ* 203.

97 The scope which Australian administrative law provides for attacking delegated legislation on that ground is limited. See *King Gee Clothing Co Pty Ltd v The Commonwealth* (1945) 71 CLR 184; *Canns Pty Ltd v The Commonwealth* (1946) 71 CLR 210; *Television Corporation Ltd v The Commonwealth* (1963) 109 CLR 59; Pearce, D, *Delegated Legislation in Australia* (1977).

98 Bayne, P, "Reasonableness, Proportionality and Delegated Legislation" (1993) 67 *ALJ* 448. Bayne aptly draws attention to the High Court's decision in *Clements v Bull* (1953) 88 CLR 572 as a source of a proportionality limitation. Although it is not clear from the report of the case, this was a case of politically motivated abuse by a regulatory agency (the Melbourne Harbour Trust Commissioners) of its power to make regulations for the management of its port facilities. It was specifically aimed at curbing the holding of meetings by waterfront unions controlled by the Communist Party of Australia (CPA) and the prosecution of Ted Bull was part of the plan to curb the influence of the CPA on the waterfront. The High Court's decisions in the *Free Speech* cases (see above n26) provides

in issue in *Irving* and the relocation of the exclusionary criteria in the Act precludes such an attack on conventional administrative law grounds relevant to the validity of delegated legislation. It may be, however, that in some future case the High Court will be asked to consider whether the newly discovered implied constitutional freedom of political speech has any application to vague restrictions on freedom of expression such as those imposed by sections 180A–180C of the *Migration Act* 1958.[99]

In this regard, it should be noted that in the past judges in the Anglo-Australian tradition, schooled in positivist jurisprudence, and not faced with the free speech and due process constraints imposed on their US brethren via the First and Fourteenth Amendments respectively, have been less concerned by fuzzy statutory language. They have employed dictionaries to unearth the ordinary and natural meaning of statutory words and have assumed that the general populace will invest such words with the same or a similar meaning and thus be clear in advance of their own personal conduct as to how the statutory language defines their rights and liabilities. In *Cozens v Brutus*[100] Lord Reid exemplified this dominant judicial cast of mind by stating, in the context of a dispute about the extent to which Parliament had intended to trespass upon fredom of expression and expressive conduct, that the words "threatening", "abusive" and "insulting" did not have to be given a specially wide or specially narrow meaning. "They are all limits easily recognisable by the ordinary man. Free speech is not impaired by ruling them out ... Insulting means insulting and nothing else."[101] At the same time, Lord Reid thought that the term "affront", which the Divisional Court had held in that case was synonymous with "insult", was too vague a word to be helpful.[102] Yet Lord Kilbrandon, who thought that "insulting" was "an ordinary uncomplicated English word", also stated that words such as "insult", "insolence" or "affront" were as much or as little in need of interpretation.[103]

The real vice of the regulations applicable to Irving's visa application was that they failed to identify with sufficient precision the evil which they were intended to guard against.

First, there was no way of ascertaining in advance whether any given course of post-entry conduct would be such as to enable a determination to be made that the intending visitor would be "likely" to "become involved" in the conduct. Secondly, the regulations as interpreted by the Full Court make it very difficult, if not impossible, to determine whether any proposed conduct will fall within the would be standard of "activities disruptive to ... the Australian community or a group within the Australian community".[104] With respect to both French J and the Full Court, no amount of probing of the statutory language is likely to produce a clear specification of that standard. The term "disruptive" as used in

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some support for the applicability of a proportionality test.

99 For a discussion of how this issue has been litigated in the United States see Shapiro, S R, "Ideological Exclusions: Closing the Border to Political Dissidents" (1987) 100 *Harv LR* 930.

100 *Cozens*, above n74.

101 Id at 862–863.

102 Id at 862.

103 Id at 867.

104 Above n2 at 543.

the superseded regulations and now in section 180A is far too elusive a concept on which to base so important a legal entitlement. It is in the nature of a democratic society that there will be vigorous debate and disagreement and that such debate and disagreement will, from time to time, lead to peaceful disruption — the streets may be filled with demonstrators, the education system and public utilities may be shut down, commercial and industrial dislocation may occur, and so on. We rightly tolerate such "disruption" even though many citizens find such conduct distasteful, if not threatening.

Furthermore, even where there is some risk of violence it is wrong in principle to guard against such risk by denying the exercise of free expression without making an assessment of the magnitude of the risk and the capacity of law enforcement agencies to prevent the risk crystallising or to control violent disturbances.

Lee J's approach[105] to disruption refers to activities which threaten the "cohesiveness" of the community. This, likewise, is too abstract an idea in this context. Inasmuch as it refers to conduct involving more than minor breaches of the peace and divisive acts that the community would not be expected to tolerate, it seems to contemplate a situation far short of that in which there is a threat to the continuation of the basic institutions. Lee J indicates that this will be a matter for the judgment of the Minister and acknowledges that consideration would need to be given to the availability of the existing law relating to public order to control against adverse consequences of allowing a controversial person to enter Australia. This is an important guiding principle, but the broadness and vagueness of the statutory test is such that there will inevitably be scope for disagreement about what factors are relevant in any given case. It is surely preferable to exclude such disagreement by precise legislative specification of the entry criteria.

(ii) Confining Discretion

The definitional deficiencies of the disruptive activities criterion are accentuated by the scope which the Minister has to exercise some discretion in making a determination as to whether an applicant is "likely" to become involved and generally as to what type and weight of evidence or material will be sufficient to sustain a Minister's decision. Although the Federal Court in *Irving* has held that "likely" requires what appears to be a high level of satisfaction, the Minister has the final substantive say in assessing the risks associated with the applicant's behaviour. Even where the entry criteria are defined with precision the Minister will retain some discretion at the evidentiary level. In the *Hell's Angels* case the Full Court provided one example of this in the fact that the weight to be attached to an individual relevant matter or a combination of matters is a question for the Minister and it is beside the point that a court entrusted with judicial review of the Minister's decision might, if deciding the matter for itself on the merits, have taken an entirely different view about questions of weight.[106]

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105 Id at 551.
106 Above n35 at 672.

In a situation where the substantive criteria are so imprecise as the criteria in section 180A are, this residual evidentiary discretion is highly unsatisfactory.

C. The 1992 Amendments — A Lost Opportunity

The debate on the Bill for the *Undesirable Persons Amendment Act* is notable for the lack of debate on the policy embodied in sections 180A–180C. Members and Senators paid almost no attention to these provisions in the Committee stages of the debates. The Minister told the Parliament that policy guidelines would be developed to assist decision-making under sections 180A–180C. The Opposition in the Senate drew attention in passing to the extensive censorship power which the new provisions gave to the Minister. However, the Government's policy was not questioned in any methodical way and the amendments were passed in an end of session legislative stampede without, for example, any consideration of the underlying policy issues by the Senate Scrutiny of Bills Committee. Given that the storm over the Irving case was then brewing, the Government's amendments should have been seized on to enable a full debate to be conducted on the free speech/racial vilification controversy that Irving's proposed visit had provoked.[107]

D. A Suggested Approach

(i) The Appropriate Criteria

Section 180A is at least as vague as the superseded regulations[108] and, arguably, is even more imprecise than the regulations. In addition to the undefined concept of "disruptive activities", we now have the undefined phrases/words "segment of the Australian community", "criminal conduct", "vilify", "incite", and "discord", and the utterly unsatisfactory grab-bag formulation, "in any other way".[109]

From the perspective of fair and efficient administrative decision-making, how should the entry entitlement criteria be cast to take appropriate account of public order concerns? If the objectives of clarity, ease of understanding and susceptibility to proof are to be achieved, the existing scheme should be repealed and replaced with provisions that are much more limited in the authority they confer on the Minister to exclude visitors. Specifically, the Act should limit the Minister's authority to deny a visitor's visa to those situations in which there is a clear showing that the applicant has a record of participation in violence,[110] or will instigate or otherwise engage in physical violence, or will engage in serious criminal conduct, or will provoke so serious a threat to

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107 Commonwealth, *Parl Deb (Sen)*, 12 November 1992, 2845–2846, 7 December 1992 at 4286–4292, 8 December 1992, 4473–4478; Commonwealth, *Parl Deb (House of Reps)*, 17 December 1992, 4121–4126, 18 December 1992, 4147–4161.

108 The main consequential changes in the regulations were effected by Migration (1993) Regulations SR 1992, No 367.

109 If the High Court gives the new found constitutional right to freedom of political expression substance, it is difficult to appreciate how a restriction on expression defined or conditioned by reference to speech-related conduct manifested "in any other way" could withstand a constitutional challenge.

110 Under s180A(2)(a) the Minister is entitled to have regard to applicant's past criminal record in determining whether the applicant is a person who should be denied entry to Australia on the ground that the person "is not of good character".

public tranquility that there is no doubt that it will be beyond the capacity of the law enforcement authorities of the States and the Commonwealth to maintain order. The criterion should make it plain that there can be no hecklers' veto and that those who seek to disrupt a speaker who engages in peaceful and otherwise lawful conduct should be the target of appropriate law enforcement action not the person(s) whose presence has attracted the organised violent disruption. It should not be open to deny a visa on the basis that the applicant's mere presence may be a threat to public safety.[111]

(ii) The Evidentiary Requirement

The suggested criteria demand a high standard of proof. In *Irving* Drummond J drew attention to the importance of exacting an appropriate evidentiary standard:

> If someone is prepared to make allegations of matters discreditable to a visa applicant and that, without more, can constitute material reasonably sufficient to satisfy the Minister that the applicant does not meet the requirements of the Regulations entitling him to enter Australia, the expression in the Controversial Visitors Policy of the intent of the legislative scheme would be very much a token acknowledgment only of the freedom of debate that is said to be acceptable in a democratic society such as this.[112]

The nature of the material relied on by the Minister in denying David Irving's visa application does not promote confidence in the Department's approach to the type of evidence or material or the required degree of satisfaction.[113]

7. *Free Speech Implications*

Apart from promoting fair and efficient decision-making, the approach suggested above is also intended to protect the vital national interest in the promotion and preservation of free speech.[114] It would give effect to what should be an ideological "open door" policy to visitors who do not pose any real threat of harm to the Australian community and who otherwise satisfy the

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111 To justify denial of a visa there ought to be a definitive showing of risk in the sense of a clear and present danger as articulated by the US Supreme Court in *Brandenberg v Ohio* 395 US 444 (1969). In that case the Court pushed the First Amendment to its outermost limits by protecting even speech which advocates violence. The state may not "forbid or proscribe advocacy of the use of force or of law violation except where such advocacy is directed to inciting or producing imminent lawless action and is likely to produce such action". Id at 447.

112 Above n2 at 566.

113 See also the Minister's Policy Directions No 1 of 1991 reproduced in Burnett, R, Cronin, K, Bitel, D and Jones, M, *Australian Immigration Law* (1993) para [135,060].

114 For a brief sample of some of the recent literature see Bollinger, L C, *The Tolerant Society: Freedom of Speech and Extremist Speech in America* (1986); Dworkin, R, "The Coming Battles Over Free Speech", *The New York Review of Books*, 11 June 1992; Fish, S, "There's No Such Thing as Free Speech and It's a Good Thing, Too", in Berman, P (ed), *Debating PC* (1992); Mahoney, K, above n18; Wolfson, N, "Free Speech Theory and Hateful Words" (1991) 60 *U Cin LR* 1; Stefancic, J and Delgado, R, "A Shifting Balance: Freedom of Expression and Hate-Speech Restriction" (1993) 78 *Iowa LR* 737; Kessler, M, "Legal Discourse and Political Intolerance: The Ideology of Clear and Present Danger" (1993) 27 *Law & Soc R* 559. For a very useful historical survey of the hate speech debate in the United States, see Walker, S, *Hate Speech: The History of an American Controversy* (1994).

visitor entry criteria. There seems to be no good reason why visitors should be treated differently to Australian residents. Their free speech rights should not be curtailed to any greater extent than would be justified with respect to Australian residents. And it is not only the free speech rights of the intending visitor, but also the corresponding rights of Australian audiences to hear the visitor's opinions that are implicated in fashioning an appropriate legislative and administrative policy.

The discussion which follows does not purport to be anything more than a broad identification of, on the one hand, the newly emerging contemporary justifications for censorship and, on the other hand, the case in favour of according to free speech an elevated importance in our democratic arrangements. Although the Full Court in *Irving* was not invited to undertake a detailed consideration of the underlying free speech issue, the decision and its implications as regards the application of the amended legislative criteria to future similar controversies ought properly to be evaluated in the context of the contemporary debate about the legitimate scope of free speech.[115]

The revised exclusionary criteria in sections 180A–180C of the *Migration Act* have the potential for being applied to exclude from entry into Australia visitors who are associated with a range of "harmful" or "offensive" ideas. The vague legislative standard for entry entitlement is open to enforcement which is arbitrary or responsive to interest group pressure or enforcement policies which reflect prevailing attitudes and fashions about what ideas are politically correct or acceptable and those which are not.[116] Linking the supposed "dangerous tendencies" of ideas and expressive conduct with a legal entitlement is, as a matter of democratic principle, not a suitable basis for making decisions about entry into Australia any more than it is a suitable basis for regulating conduct that involves the permanent population. It is to be regretted that, like its related State racial vilification statutes, the *Undesirable Persons Amendment Act* has, as regards the characterisation of ideas as "dangerous", effectively resurrected under a new guise the obsolescent law of sedition.[117]

As indicated in the introductory section, there is a much wider debate underway in Australia about whether traditional liberal or libertarian arguments in favour of maximising legal protection of free speech should yield to other social concerns especially in the context of demands for strengthened legal promotion and protection of a broad array of equality rights. The legislative changes of late 1992 represent a further victory for the new censorship movement.

There is, in my view, cause for concern that the imprecise criteria introduced by the *Undesirable Persons Amendment Act* will undermine the administration

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115 A detailed and illuminating examination of the competing arguments can be found in the majority and minority judgments of the Supreme Court of Canada in *R v Keegstra* above n18.

116 For a range of Australian views on "political correctness" see Bennett, D (ed), *Cultural Studies: Pluralism & Theory*, Melbourne University Literary and Cultural Studies Vol 2 (1993) at 183–210; Hughes, R, *Culture of Complaint: The Fraying of America* (1993); Fitzgerald, R, "Political Correctness: Good Intentions, Disastrous Consequences", *Overland*, No 134, Autumn 1994, 57.

117 The words "incite discord" in s180A of the *Migration Act* 1958 are redolent of the oppressive formulation "incite disaffection" in the sedition provisions of the *Crimes Act* 1914 (Cth). For a detailed discussion on the law of sedition in Australia see Maher, above n81.

of the visitor visa system by becoming unduly influenced by an elastic approach to "offensiveness" and "harm" that is a central feature of the new regimes of censorship that have emerged in the last two decades. There is, for example, an assumption in much of the literature advocating the punishment of offensive speech, whether it is characterised as promoting racial hatred, religious bigotry, sexual inequality or other vices, that such speech is so powerful that it paralyses and victimises targeted individuals or minorities or disadvantaged groups. Some pro-censorship commentators go even further and altogether disregard the distinction between speech and conduct and treat so-called "hate speech" as a form of violence.[118]

The pro-censorship discourse on the evils of racist and other forms of "hate speech" frequently reveals a particular metaphysical bias and a very relativist approach to objectivity and historical and other truth.[119] It is characterised by a distinctively ideological vocabulary which is replete with terms like "victim", "disempowered", "silence", "subordination", "degradation", "self hatred", "stigmatisation", "dehumanising", denial of "personhood", and so on. It is argued by proponents of censorship that "hate speech", in all its manifestations from occasional individually directed epithets or taunts to organised vilifying propaganda, by its very nature, necessarily inflicts serious "psychic harm" on targeted individuals or entire groups, as the case may be.[120]

This assumption of a generalised vulnerability and victimisation of disadvantaged or other minorities has been used to construct two wholly new but closely related justifications for punishment of some selected categories of offensive speech. One justification is based on the objective of preventing and redressing the psychic harm that such speech is said to inflict on "defenceless" individuals or members of the target group. The other is based on the contention that tolerance of racist or other forms of bigoted speech involves a "silencing" of minority voices and thereby promotes inequality and that the the struggle for equality transcends the protection of free speech. These categorically different justifications were seized on by the majority of the Supreme Court of Canada in *R v Keegstra* in which the majority rejected a challenge to the constitutionality of Canada's criminal prohibition of hate propaganda.[121]

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118 Delgado, R, "Words That Wound: A Tort Action for Racial Insults, Epithets, and Name-Calling" (1982) 17 *Harv CR-CL LR* 133; Matsuda, M, "Language as Violence v Freedom of Expression: Canadian and American Perspectives on Group Defamation" (1989) 37 *Buffalo LR* 337. An argument that the wilful promotion of racial hatred was equivalent to violence or threats of violence was advanced in *R v Keegstra* above n18 at 730–733 and 829–832. Cases of threats of violence, verbal or written, provide a clear illustration of how freedom of expression can be justifiably curtailed. See eg *R v McCrossen* [1991] Tas R 1. Some feminists equate pornography with rape: see MacKinnon above n25. The speech/conduct distinction is, of course, problematic. There is not space here to enter into the debate about how to distinguish permissible speech and impermissible conduct. For a provision that would encounter severe First Amendment problems see s3 of the *Football (Offences) Act* 1991 (UK) (prohibition on indecent or racist chanting at designated football matches) and *RAV v City of St Paul* 120 L Ed 2d 305 (1992).

119 In my use of the term "metaphysical" I am borrowing, in part, from the work of Ronald Dworkin. See eg his "Women and Pornography", *The New York Review of Books*, 21 October 1993.

120 See eg the works referred to in nn12, 114 and 118.

121 Above n18 at 746–749. The Supreme Court of Canada has also applied a similar approach in sustaining the constitutionality of censorship of pornography: see *R v Butler* [1992] 1

It is easy enough to appreciate that "hate speech" can be hurtful and threatening. However, there is also clear evidence that not all members of racial, ethnic, religious, or political groups and minorities who are the target of offensive speech regard themselves as fragile or helpless victims. Nor are such persons so lacking in personal or collective strength, self respect and pride that they are condemned to sit idly by when subjected to vilification and racial epithets or other forms of bigotry.

That is not to suggest, however, that some groups or individuals may, for one reason or another, be poorly equipped to fight back against racist speech and thus, in a metaphorical sense be "silenced". The argument is simply that the offence involved is not, in itself, reason enough to bring the weight of the law to bear to "silence" and punish those whose views give offence even if most civilised folk would regard those views as obnoxious. The utility of a case by case basis of assessment of the nature and degree of harm, if any, attributable to the expression of offensive views or the depiction of degrading images, and a requirement that the plaintiff should allege and prove such harm, should not be under-estimated. There may well be situations where offensive speech or speech-related conduct may have provable direct and tangible adverse results that are beyond toleration. For example, the expression or display of racist or sexually explicit views or images in the workplace may, arguably, be part of a pattern of wider conduct which is so pervasive as to constitute a tangible form of harassment or hostility that unjustifiably interferes with an individual's right to work. In this context, however, it is especially important that the inherently imprecise concepts of "harassment" and "hostile environment" not be used to subvert the expression of opinions simply because they are offensive.[122]

Racist speech can just as plainly serve to reinforce disgust, whether it is that of the general public or the targeted group, and to fortify a community's determination to fight back with the truth. This function is at the core of traditional libertarian justifications of free speech. The best recent illustration of this comes from those members of the Australian Jewish community who, whilst they are repulsed by him, nevertheless heap scorn on David Irving and denounce his historiography as bogus. There is no trace in the Jewish press of the paralysing impact of the Irvingite story. There is no trace of stigmatisation or self hatred. On the contrary, in the best tradition of vigorous free speech, there is the clear, strong and proud voice of contempt for Irving's position. The pages of the *Australia/Israel Review*, the *Australian Jewish News* and the *Australian Jewish Democrat* in the years 1992–1994, whilst calling for the exclusion of Irving from Australia (to a lesser extent in the case of the *Australian Jewish Democrat*), demonstrate graphically the strength of the argument that the most powerful response to hate speech is more speech and that a free

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SCR 452.

122 For a controversial example from the United States see *Robinson v Jacksonville Shipyards Inc* 760 F Supp 1486 (MD Fla 1991) (harrassment constituted by the presence in workplace of pictures of women in various stages of undress and in sexually suggestive or submissive poses and by remarks, which were demeaning of women, made by employees and supervisers). See also *Meritor Savings Bank v Vinson* 477 US 57 (1986); *Harris v Forklift Systems Inc* 126 L Ed 2d 295 (1993) and the decision of the Equal Opportunity Tribunal in Western Australia in *Horne v Press Clough Joint Venture* [1994] *EOC* ¶92–591.

and open society should rely on the ultimate power of truth to prevail over falsity.[123] There is in the response of the Jewish community to the proposed Irving visit — to borrow the famous aphorism of Justice Brandeis — clear evidence to show that "the remedy to be applied is more speech, not enforced silence."[124] One of the features of the secondary level debate about Irving is that he is, almost without exception, represented in the mainstream media as a revisionist historian of Nazi Germany. Rightly or wrongly, this conveys the clear message that he deserves to be treated as a crank who peddles a preposterous version of the history of Nazi Germany.[125]

There is, of course, nothing novel about penalising behaviour, including speech, regarded as "objectively" offensive. All Australian States have laws which prohibit "offensive behaviour" in a public place. For decades these laws were enforced in a repressive manner. They were used to protect the sensibilities of ordinary folk wounded or outraged by the public use of profanity and especially by the use of the two most famous four letter Anglo-Saxon expletives or by other sexually suggestive speech.[126] That these statutory provisions are far too broadly cast is clear enough from the use that has been made of them down the years not only to protect the supposed moral sensibilities of the right thinking citizenry, but also to stifle protest and dissent from the time of the First World War, during the Great Depression of the 1930s, during the anti-Communist hysteria of the late 1940s and the early 1950s[127] and through to the anti-Vietnam War protest movement.[128]

The issue is not whether speech like Irving's is capable of being hurtful in some diffuse way. Clearly it is. No doubt equally (if not more) painful for Jews (and others who suffered at the hands of the Nazis) than the so-called hate propaganda of David Irving would be the sight of individuals taking to the streets in Nazi uniforms and insignia.[129] The real issue is whether the right to express offensive opinions and engage in offensive expressive conduct should be restricted in any way in order to provide a punitive response to generalised claims that such expression necessarily inflicts transient or lasting

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123 Above nn9 and 20. The Victorian Committee, above n14, noted that although some responses to its inquiry indicated that there were targets of racial vilification who were strengthened in their personal self-esteem, most responses indicated that there were some adverse effects. These "varied from the relatively minor — eg, a short-lived feeling of being offended — to the very serious — for example, people who had become reclusive because of the intimidation to which they had been subjected". Id at 16.

124 *Whitney v California* 274 US 357 at 377 (1927).

125 See eg Irving's letter, *The Weekend Australian*, 22–23 January 1994 and the response *The Weekend Australian*, 29–30 January 1994.

126 See eg *Attorney-General v Twelfth Night Theatre* [1969] Qd R 319.

127 See eg *Worcester v Smith* [1951] VLR 316 (arrest of Communist demonstrator on charge of offensive behaviour arising out of participation in anti-Korean War protest outside US Consulate in which banners displaying "offensive" anti-American messages were used).

128 See eg *Samuels v Hall* [1969] SASR 296. Contrast *Ball v McIntyre* (1966) 9 FLR 237.

129 In the United States attempts to suppress a peaceful demonstration by uniformed members of the US Nazi Party failed on First Amendment grounds: *National Socialist Party of America v Village of Skokie* 432 US 43 (1977); *Village of Skokie v National Socialist Party of America* 366 NE 2d 347 (1977); *Village of Skokie v National Socialist Party of America* 373 NE 2d 21 (1978); *Collin v Smith* (1978) 447 F Supp 676; 578 F 2d 1197 (1978) cert den 439 US 916 (1978); Neier, A, *Defending My Enemy: American Nazis, the Skokie Case and the Risks of Freedom* (1979).

emotional and other intangible harm. Proponents of the censorship solution to racial, religious and other forms of what is broadly termed "vilification" or "hate speech" frequently argue that there is something particularly shocking and offensive about this form of speech. It is treated as involving a higher level of indignity and as being categorically different from other forms of offensiveness.[130] Interestingly, much of the pro-censorship literature proceeds on the assumption that the targeted material will be easy to identify or that it should be the beholder's experience which definitively determines whether disputed material should be proscribed. This helps to explain why the proponents of censorship frequently fail to define what it is that they are targeting.

In the US scholars such as Richard Delgado and Mari Matsuda have developed a case for a range of legal inhibitions of so-called hate speech based on an ideology of dominant group subordination of racial and ethnic minorities.[131] There is not space here to examine this work in detail, but Matsuda's assessment and prescriptions invite a skeptical response at least because (a) the definition of punishable racist speech is drawn so narrowly that it fits very uncomfortably, if not in contradiction, with the sweeping analytical and dogmatic treatment which precedes it, (b) it depends on a paradoxical distinction in kind or degree between racist speech directed at dominant group members and that directed at subordinated group members so that only the latter would be subjected to criminal penalty, (c) it skates over the way that class can be a source of unequal treatment across the boundaries of race, religion and ethnicity, (d) it allows for context to produce varying legal outcomes as, for example, in the case of racist slanging between different subordinated groups, and (e) because "harm" seems to be whatever the qualifying class of "victim" says it is.

These new censorship lines of argument are to some extent supported by reliance on the fact that through the existing torts of defamation, intentional infliction of emotional distress, malicious prosecution, and injurious falsehood, our legal system already acknowledges some forms of intangible harm are rightly compensible.[132] Moreover, support for greater censorship is drawn from the fact that through the law of criminal libel and the the statutory offensive behaviour provisions, the infliction of psychic harm tending to create public offence or to bring about a breach of the peace is punishable. Proponents of the

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130 See eg the work of Matsuda above n12 at 2359; Delgado, n114. For a detailed Australian analysis see Sadurski, above n14 at 185–195.

131 Above nn12 and 114.

132 The existing law of torts recognises that in some limited situations intentionally and negligently inflicted psychological injury, not consequential upon physical injury is compensible. On the former see *Wilkinson v Downton* [1897] 2 QB 57. On the latter see *Jaensch v Coffey* (1984) 155 CLR 549. In each case the plaintiff is required to prove damage. This could not reasonably be regarded as an onerous requirement. For detailed examination see Fleming, J G, *The Law of Torts* (8th edn, 1993), 31–35, 159–166; Mullany, N and Handford, P R, *Tort Liability for Psychiatric Damage: The Law of "Nervous Shock"* (1993). Those scholars who draw support for proposals to outlaw hate speech from the coverage existing torts, such as defamation, provide for wounded feelings, almost invariably assume that there is universal support for the widest form of existing liability when, in fact, the argument is superficial since there is significant support for greater protection of freedom of expression at the expense of the protection of the intangible interest in good reputation.

new censorship laws thus see their proposals as a natural and necessary, if belated, progression if a free and open society is serious about the struggle against prejudice and the quest for equality.

Of course, the scope of existing tort liability for such harm represents a balancing of interests in freedom of personal action, including freedom of expression, as against the freedom to be secure from harmful interference with personal action and the freedom to engage in civic activity. Insofar as the use of epithets or other forms of speech actually inflict harm that gives rise to civil liability under existing regimes, the law has, it is submitted, gone far enough. In the case of the law of defamation there is strong support for the view that it has gone too far. There is also a vigorous debate about whether life should be breathed into the obsolescent offence of criminal libel.[133]

Moreover, in most existing civil liability regimes psychic harm, like bodily injury, needs to be proved by a plaintiff.[134] Where psychic injury is not consequential upon physical injury something more than transient upset or shock must be shown.[135] Curiously, however, — or perhaps because of the perplexing metaphysical foundations of the new censorship movement manifested in the fudging of the speech/action distinction — some proponents of hate speech laws seem to want to have it both ways by asserting that the harm said to be caused by hate speech is at once both palpable and yet simultaneously so diffuse as to be enormously difficult, if not impossible, to prove that its existence should be presumed.[136]

The real danger which the generalised "offensiveness" and "psychic harm" approaches to legal liability (civil and criminal) present is that they admit of no clear workable definition and inevitably catch within their net of forbidden speech and speech-related conduct the expression of a wide range of ideas across the left-right political spectrum including ideas held deeply by those opponents of Irving who see the combination of censorship and criminal sanctions as the solution to the particular problem of racist speech. In the context of visitor entry entitlement criteria this is especially reflected in the very wide range of interpretations that can be given to words like "vilify" or "hatred" or "discord" in section 180A of the *Migration Act*.

What then of the companion argument that tolerating Irving's presence in Australia would be inimical to the quest for equality? The new censorship movement contends that tolerating hate speech humiliates or frightens the vilified groups into silence and that such groups are thereby effectively denied free speech.[137] This position, like the psychic harm thesis, also rests upon

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133 *Grassby v R* (1992) 62 A Crim R 351 (unsuccessful prosecution for attempted criminal defamation).

134 In some causes of action, notably libel, damage is presumed and the plaintiff may or may not wish to lead evidence relevant to the assessment of damages. See Tobin & Sexton, *Australian Defamation Law and Practice* (1991), paras [20,005] and [21,030].

135 See *Jaensch v Coffey* above n132.

136 See eg Mahoney, K, above n18 at 85 ("hate propaganda constitutes a serious attack on psychological and emotional health" and "the harms caused by hate propaganda are often difficult to detect, either immediately or ever") and at 87 (adopting a judicial assessment that "the harm of hate speech is significant and the truth value marginal").

137 In the context of contemporary academic legal scholarship see particularly the work of Fish, S, above n114 and "Not of an Age, But for All Time: Canons and Postmodernism"

highly controversial claims about the nature of power relations and appropriate speech in contemporary society many of which have emerged with the steady decline around the world in the appeal of the theory and practice of Marxism and the emergence of a new kind of Puritanism.

Much of the impetus for the renewed support for state censorship in the last 15 years has been provided by new ways of theorising about law. Especially in the United States, this new theorising has been influenced by certain fashions in contemporary French literary and cultural theory, including its most impenetrable, relativist or reductionist forms, and the related broad ideological movements known as postmodernism and post-structuralism and their subsets. In line with the postmodern conception — here, admittedly, crudely summarised — everything in life is "socially constructed text" which has to be "deconstructed". For some practitioners in the postmodern realm, "objectivity", "truth" and "free speech" are chimeras. In this intellectual domain it is also easy, if not *de rigueur*, to fudge the speech/conduct distinction. Moreover, the traditional liberal democratic or libertarian concern for individual rights of everyone, in preference to a concern for the collective rights of disadvantaged minorities, is branded in the new theorising about law as a dominant group construct and an elitist fetish. It is in this cloying and narcissistic environment of what have been described as "people of sensitivity", "individuals with exquisite sensibilities", and "professional offence takers"[138] that the political correctness movement, the centrepiece of which is the claim that there is a disapproved corpus of ideas affecting race, ethnicity and gender (and, sometimes, religion), to be stigmatised and to be penalised if expressed, has emerged as such awful blight on the academic landscape and has made some headway in the wider community. Ironically, there is clearly something of the postmodernist in David Irving in his extraordinary attempt to deconstruct the Holocaust.

The main conceptual difficulty with equality-based justifications for censorship is that they appear to assume that the right to freedom of expression somehow necessarily entails implementation of a legal enforcement mechanism so that at all times and in all respects free speech is equally free for all citizens.[139] But, for example, whatever the imbalance in political power and whatever institutional inequalities there are in relation to access to the mass media (and in fact this latter barrier affects almost everyone not just the "dominant" groups), and despite whatever reasonable measures are available to enable more voices and viewpoints to be heard, it is Utopian to believe that freedom of expression can be ladled out in medicinally correct measures. It is profoundly misconceived and a dangerous position to argue that equality in

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(1993) 43 *J Leg Ed* 11 could be starting points for the uninitiated. See also Fish, S, "Fraught With Death: Skepticism, Progressivism, and the First Amendment" (1993) 64 *U Col LR* 1061. In the latter article Fish is very scornful of arguments in favour of free speech but, paradoxically, prefers to sit on the fence when specific issues such as racist speech are raised.

138 See generally "The Politics of Political Correctness", Special Issue of *Partisan Review*, 1993, (60)4; "The Pen is Mightier than the Sorehead", Special Issue of *The Nation*, 17 January 1994; Greve, M, S, "Yes: Call It What It Is — Censorship" (1994) 80(2) *ABAJ* 40.

139 For a very useful and vigorously argued contribution to the debate in the context of the High Court's recent free speech cases see Cass, above n26.

this context calls for the exclusion of "offensive" or "harmful" statements. The touchstone of equality should be opportunity not a state-enforced regime of temporal and factual parity and ideological conformity.

Certainly, freedom of expression can be said to thrive when many voices are heard. However, it is in the nature of true freedom of expression that, regardless of the content and merits of the views being expressed, some voices will be heard and listened to and some will not. That is not to say that we should be complacent about the ways in which individuals or groups experience difficulty in getting their message across to the intended audience. Far from it. The liberal or libertarian attachment to maximising freedom of expression emphasises, however, that the price of such freedom in terms of the potential for speech to shock and offend is a necessary one inasmuch as freedom of expression is an end in itself rather than simply as a means to an end. Recent history is replete with examples of the far greater price that is paid if the State takes it upon itself to enforce ideological orthodoxy.

"Racist" or "hate" speech, like pornography, has as many definitions as it has supporters and enemies. Ronald Dworkin has observed in the closely related context of demands for censorship of pornography as a means of securing equality for women, that the conceptual difficulty of the equality arguments is that the right to free speech cannot include "a right to circumstances that encourage one to speak and a right that others grasp and respect what one means to say." Nor can it include "a right to whatever respectful attention on the part of others is necessary to encourage [a person] to speak [the person's] mind and to guarantee that [the person] will be correctly understood."[140] On the contrary, one of the purposes of free speech is to create controversy and disagreement. For libertarians, there can be no quarantining of disapproved ideas since truth can emerge even, if not especially, out of the struggle between ideas that seem to have absolutely no redeeming merit.

The implications of censoring Irving are clear enough and need to be confronted. Who is to determine which forms of "harmful" offensive speech are to be penalised? The slippery concepts of "vilification", "offensiveness", "discord" and "psychic harm" could, it is suggested, be used to outlaw flag desecration,[141] to revive the common law of blasphemy and extend it to all creeds and not merely Christianity,[142] to silence or restrict the discussion, or dissemination of information about, controversial medical procedures, which might, for example, include abortion,[143] or to punish women (or for that matter,

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140 See Dworkin above n119 and Cass above n26.

141 In 1989, 1990 and 1991 M R Cobb, the National Party member for Parkes (NSW) in the House of Representatives introduced a Crimes (Protection of Australian Flags) Bill to make it an offence to desecrate or otherwise dishonour the Australian national flag. See eg Commonwealth, *Parl Deb (House of Reps)*, 30 May 1991, 4304–4305. The Supreme Court of the United States has rebuffed recent attempts to use the criminal law to punish flag burning. See *Texas v Johnson* 491 US 397 (1989); *United States v Eichmann* 496 US 310 (1990).

142 In *R v Chief Metropolitan Stipendiary Magistrate; ex parte Choudhury* [1991] 1 QB 429, in the context of a proposed prosecution of the publisher of Salman Rushdie's novel, *The Satanic Verses*, the Queens Bench Divisional Court held that the common law of blasphemy was confined to the protection of Christianity; Poulter, S, "Towards Legislative Reform of the Blasphemy and Racial Hatred Laws" [1991] *Public Law* 371.

143 The Supreme Court of the United States has recently rejected a challenge on First Amend-

men) who, on Anzac Day, peacefully denounce all soldiers as rapists or war criminals.[144] Or, an incitement/vilification/hate speech statute might be used to punish a militant aboriginal for denunciation of white colonial attitudes. In her dissent in *R v Keegstra* McLachlin J provides examples of how a provision, far less broadly cast than paras (i) and (ii) of section 180A(1) of the *Migration Act* 1958, could be used to strike at the expression of a wide range of opinions that are unpopular and thus can have a "chilling" effect on the expression of ideas that are not intended by the legislature to be within the broad prohibition.[145]

One of the striking features of some postmodern analysis, including its supporters in the legal academy, is the emphatic rejection of high culture, especially Western high culture, as a form of "dominant group" oppression. These critics regard the Enlightenment as a sham. They deride Voltaire's and Mill's arguments for free speech. Indeed, some of the proponents of the new censorship are not above propagating their own highly offensive stereotyping of all "dominant group" members as inherently and irredeemably racist. In this setting there is the prospect of a "hate speech" statute being used to suppress the performance of a work like *The Merchant of Venice* for its tendency to promote anti-semitism and a real risk that contemporary literary creativity will be adversely affected because authors will be stigmatised for expressing unapproved ideas. In *Keegstra* McLachlin J offers the example of a writer who may be disinclined to create an ethnic characterisation such as Shylock.[146] In the same way, the question might be posed: should *Titus Andronicus* be suppressed because there are some men and women who see its shocking plot having a tendency to denigrate women? Some of the most zealous postmodernist supporters of the new censorship movement, like Stanley Fish, quite seriously ask us to accept that suppression of *The Merchant of Venice* would, in any event, not necessarily be such a bad thing.[147] These seemingly well-meaning promoters of cultural diversity and access are, in fact, providing the basis for an alarmingly authoritarian creed which is the antithesis of diversity and tolerance. It is clearly not intended as an outcome of this type of analysis, but it is, for example, precisely the claim that "offensive" speech is a form of tangible violence that has led sections of the Islamic community around the world to resort to murder and threats of murder to punish Salman Rushdie for the highly offensive content of his novel *The Satanic Verses*.

8. *Responding to Racist Speech*

There are fundamental issues at stake in the application of the *Migration Act* and Migration Regulations in a situation like that in *Irving*. We need, however, to avoid a false debate. First, the debate is not about whether racist

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ment grounds to the validity of federal regulations which prohibited the use of public money for counselling concerning, or advocacy of, the use of abortion as a method of family planning: *Rust v Sullivan* 114 L Ed 2d 233 (1991).

144 Of course, it may well be possible to use existing offensive behaviour or breach of the peace statutes to punish such speech: see eg *Forbutt v Blake* above n74.

145 Above n18 at 858–860.

146 Id at 860.

147 See Fish, above n137.

speech is desirable. It is, instead, about the appropriateness of the response to racism including racist speech. There is a need to consider very carefully the efficacy of censorship as a means of combatting racism. Those, like this writer, who acknowledge that there is a pressing need to counter racist and other forms of bigoted speech remain to be convinced that attempted suppression of "bad" or "dangerous" ideas via the criminal or civil law will produce any change in the underlying social causes of racial prejudice and discrimination. David Irving's disciples are not likely to change their attitude to the Holocaust simply because he is excluded from Australia or because they are punished for holding and expressing opinions any more than would be the case if the law made it an offence to believe and proclaim that the planet Earth is flat. Opposition to Irving's entry to Australia will probably do as much to promote him in the eyes of those profoundly misguided individuals who want to believe that the Holocaust did not happen or who thrive on the Hitlerite assessment that all that is wrong with the world can be laid at the door of some vast Jewish-Bolshevik conspiracy.[148] If the proponents of hate speech laws and exclusionary administration of the visitor visa laws believe that punishing a few individual hate speech propagandists is going to remove prejudice, they are likely to be grievously disappointed.[149] As one Canadian civil libertarian has observed: "if history has any practical lesson to offer in this connection, it is that minds and ideas — evil or otherwise — offer a protean resistance to repression".[150]

Secondly, it cannot be stressed too much that opposition to the exclusion of David Irving from Australia is not based on an "absolutist" approach to free speech although it does accord to free speech a priority position in the scale of democratic values. There are, of course, many existing limits on free speech including, for example, those situations in which some forms of speech and other expressive conduct are employed in discriminatory practices which are prohibited by the *Racial Discrimination Act* 1975 and comparable State legislation. The real question is always — where to draw the line. If, as the High Court has decided, the Australian Constitution rests on an affirmation of freedom of thought, freedom of expression and freedom of association being recognised as high order democratic values, then any proposal for imposing further limits on those basic freedoms should necessarily attract intense scrutiny and be convincingly justified before being enacted.[151]

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148 See Sydnor, above n8.

149 See the discussion by McLachlin J in *R v Keegstra*, above n18 at 859–860. Ironically, some supporters of the new forms of censorship frequently rely on the paradoxical argument that although all forms hate speech are harmful it will only be a small amount of such speech which will be prosecuted and thus the threat to vigorous free speech is minimal. It is said that legislative proscriptions will be more important for their symbolic effect.

150 Dixon, J, "The Keegstra Case: Freedom of Speech and the Prosecution of Hateful Ideas" in Russell, J (ed), *Liberties* (1989).

151 See in passing in this regard the dissenting judgment of Einfeld J in *Minister for Foreign Affairs and Trade v Magno* (1992) 37 FCR 298; 114 ALR 409 (majority sustaining the validity of special regulations made pursuant to the *Diplomatic Privileges and Immunities Act* 1967 said to be necessary to carry out Australia's international obligations and specifically enforcing the removal of protest crosses displayed outside the Indonesian Embassy in Canberra on the basis that the presence of the crosses could lead to a breach of the peace or impairment of the dignity of the mission).

At a specific level, there may be other consequences as the newly discovered constitutional right evolves. For example, does the implied right to freedom of speech require that a law, which otherwise might permissibly restrict free speech, must satisfy a certainty test? Could such a law be declared invalid on the ground of vagueness? It is submitted that a requirement of precision is highly desirable so as to give the right substance.[152]

In the context of how Australia sees itself in the community of nations, sections 180A–180C of the *Migration Act* 1958 reveal a fragile view of Australia as an open society — a society that is afraid of ideas and lacking conviction in the power of truth. If there is community acceptance of the proposition that freedom of expression is a bulwark of a free society, then it is essential that we acknowledge that such freedom includes the freedom to shock and offend. If not, then we need to accept the implications for arbitrary and repressive censorship enforcement. Irvingite ideas are already circulating in a variety of forms in Australia. It is hard to resist the conclusion that if proponents of "hate speech" legislation are serious about the need to redress the harm such speech inflicts and in their commitment to bring about less inequality, the Irving books and videos should also be suppressed. Even though most censorship proponents decline to go so far, no doubt because such a response is manifestly extreme, the danger is that once one set of "dangerous" ideas or one medium for expression of "dangerous" ideas is silenced, there is a kind of respectability created for the silencing of other ideas and media. Similarly, it would be wrong if disruptive elements, including those who are prepared to resort to violence, could hold free speech hostage by threatening to make trouble simply because they take exception to the ideas being expressed. Unfortunately, the Full Court's decision in Irving may, unwittingly, give comfort to such elements.

In the end, however, despite the reservations advanced above about its ambiguous commitment to free speech as a democratic value, the decision of the Full Federal Court in *Irving* is to be applauded as regards the specific dispute because it set aside a decision that was clearly inimical to the preservation of free speech in Australia.

Postscript

As this article was being prepared for publication the Commonwealth Government announced that it had again denied Irving's visa application this time on the basis that Irving did not meet the good character requirement in section 180A.[153]

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152 See eg *Cox v Louisiana* 379 US 559 (1965) and, for a more recent example, *Gentile v State Bar of Nevada* 115 L Ed 2d 888 (1991). For a detailed exposition on the position in the United States see Tribe, L H, *American Constitutional Law* (2nd edn, 1988), 1023–1039.

153 *The Age*, 4 May 1994; *The Sydney Morning Herald*, 4 May 1994; Answer to Question Without Notice, Minister for Immigration and Ethnic Affairs, Commonwealth, *Parl Deb (Sen)*, 3 May 1994, 2.