

SPEAKING BACK: DOES COUNTERSPEECH PROVIDE ADEQUATE REDRESS FOR RACIAL VILIFICATION?

ABSTRACT

Speaking back is sometimes presented as an appropriate response by the state to hate speech. This article examines two versions of this argument. Although speaking back may be appropriate and useful in certain circumstances, by itself it does not provide adequate redress to targets of vilification. This article contends that pt IIA of the *Racial Discrimination Act 1975* (Cth) provides a form of legal protection and corrective justice that speaking back cannot provide. Unlike speaking back, these provisions operate to protect the dignity and wellbeing of members of groups targeted by racial vilification, and to authoritatively affirm that public acts of racial vilification are not acceptable in Australian society.

I INTRODUCTION

This article examines two different versions of the argument that counterspeech, or speaking back, provides an appropriate response by the state to hate speech, or vilification.¹ Scholars who oppose vilification laws commonly argue that speech is particularly valuable, and that such laws are unduly or illegitimately restrictive. Essentially, counterspeech proponents argue that ‘the remedy to be applied is more speech, not enforced silence’.² This article examines a specific but important part of the larger debate concerning the legitimacy of racial vilification laws in Australia.³

* Lecturer, College of Law and Justice, Victoria University; PhD candidate, Monash University. Email: Bill.Swannie@vu.edu.au; ORCID iD: 0000-0002-5540-8105. The author thanks Associate Professor Patrick Emerton and Dr Colin Campbell, and the editors and reviewers, for their assistance with this article.

¹ In this article, the terms ‘vilification’ and ‘hate speech’ are used interchangeably. The former is commonly used in Australia, whereas the latter is commonly used in the United States.

² *Whitney v California*, 274 US 357, 377 (Brandeis and Holmes JJ) (1927).

³ For an analysis of the relationship between free speech arguments and racial vilification laws, see Bill Swannie, ‘Are Racial Vilification Laws Supported by Free Speech Arguments?’ (2018) 44(1) *Monash University Law Review* 71 (‘Free Speech Arguments’).

This article examines counterspeech proposals in the context of Australia's national racial vilification laws, which are contained in pt IIA of the *Racial Discrimination Act 1975* (Cth) ('*RDA*'). These provisions establish a civil cause of action enabling members of groups targeted by vilification to seek legal redress for its harms. In their drafting and interpretation, these laws protect the inherent dignity, or the basic public standing, of members of target groups. Substantively and procedurally, these laws are consistent with principles of corrective justice, or the right of a person harmed by wrongful conduct to seek legal redress in respect of that conduct.

This article argues that counterspeech arguments typically misconceive (or even ignore) the significant harms of racial vilification for those targeted by such conduct.⁴ Further, this article argues that, although counterspeech may be useful and appropriate in certain circumstances, civil racial vilification laws such as pt IIA of the *RDA* are also necessary, for two main reasons. First, they enable targets of racial vilification to seek legal redress for such conduct. Second, these laws provide public assurance, by the state, that all members of society are entitled to be treated with dignity in public discourse.

The two versions of speaking back examined in this article are those of United States constitutional scholar Corey Brettschneider and Australian political scientist Katharine Gelber.⁵ Both scholars present detailed arguments as to why speaking back is an appropriate response to vilification.⁶ Brettschneider argues that the state has a duty to condemn hate speech, in order to confirm the equal worth of all members of society. However, he argues that the state cannot restrict or punish hate speech, as this would undermine the autonomy of speakers and the legitimacy of the state.⁷ Although her more recent works accept the importance of racial vilification laws,

⁴ This article distinguishes between the effects of racial vilification on different groups of people. In particular, it distinguishes between people who are 'targeted' by such conduct, and people who merely hear or observe such conduct ('audience members'). 'Target groups' are members of the particular racial group to whom an act of vilification is directed, or whom it concerns. This group is distinct from audience members, or those who see, hear or experience the vilification, but who are not members of the target group. Part IIA of the *Racial Discrimination Act 1975* (Cth) ('*RDA*') focuses on the likely effect of certain conduct on members of the target group, rather than the effect on audience members, or members of the public generally: see below Part II.

⁵ See below Parts III, IV.

⁶ On the other hand, some scholars simply indicate a preference for 'more speech' or 'speaking back', without providing substantive argument or explanation: see, eg, Augusto Zimmermann and Lorraine Finlay, 'A Forgotten Freedom: Protecting Freedom of Speech in an Age of Political Correctness' (2014) 14(1) *Macquarie Law Journal* 185. The authors state that racist ideas should be 'exposed and challenged', rather than 'simply trying to ban them': at 190.

⁷ Although Brettschneider's approach relies partly on United States constitutional doctrine, it relies more fundamentally on broader notions of political legitimacy in a liberal democracy. Therefore, his approach is relevant to liberal democracies such as Australia, even though Australia has no equivalent to the First Amendment and associated jurisprudence.

Gelber's earlier works argue that the importance of speech to human wellbeing imposes a duty on the state to provide resources to enable members of communities targeted by hate speech to respond.⁸ In these earlier works, she regards speaking back as preferable to hate speech laws, as she views the proper role of the state as *promoting* human wellbeing (including the capacity to speak), rather than *restricting* these capacities.

This article accepts that both Brettschneider and Gelber's counterspeech proposals may be appropriate and useful in certain circumstances. As highlighted in Parts III and IV of this article, Gelber and Brettschneider both argue that their version of counterspeech should be an *exclusive* remedy for vilification, rather than operating in conjunction with legal remedies. However, this article contends that pt IIA of the *RDA* provides a form of legal protection and redress that speaking back cannot provide. Part IIA operates to protect the dignity and wellbeing of members of groups targeted by racial vilification, and to affirm authoritatively that public acts of racial vilification are not acceptable in Australian society. Therefore, counterspeech proposals, *of themselves*, cannot be considered adequate, given the purposes of pt IIA.

II THE OPERATION OF PT IIA OF THE *RDA*

A *Introduction*

This Part examines the key features and operation of pt IIA of the *RDA*. It highlights that these laws enable individuals and groups targeted by racial vilification to seek a legal remedy for this wrong. This is consistent with principles of corrective justice, or the right of a victim of a legal wrong to seek redress in respect of that wrong. Scholars such as Jeremy Waldron argue that, in a liberal democracy, laws such as pt IIA operate to protect the human dignity, or the basic public standing, of members of target groups.⁹ Similar to defamation laws, pt IIA seeks to protect members of target groups from public statements that may exclude them from full and equal participation in society.

B *Part IIA Provides Redress for a Legal Wrong*

Part IIA of the *RDA* contains two main provisions. First, s 18C makes it unlawful to 'do an act' that is 'reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate another person or a group of people' if 'the act is done because of the race ... of the other person or ... the people in the group'.¹⁰ Second, s 18D establishes several exemptions from liability under s 18C. These exemptions

⁸ This article focuses on a specific aspect of Gelber's scholarship regarding state responses to hate speech: see below Part IV.

⁹ See generally Jeremy Waldron, *The Harm in Hate Speech* (Harvard University Press, 2012) ch 5.

¹⁰ The provision applies only to conduct having 'profound and serious effects': *Creek v Cairns Post Pty Ltd* (2001) 112 FCR 352, 356 [16] (Kiefel J) ('*Creek*').

provide a defence for respondents, provided they have acted ‘reasonably and in good faith’ for certain specified purposes.¹¹ In broad terms, pt IIA defines and prohibits racial vilification.¹²

Three features of pt IIA indicate that it seeks to provide redress for legal wrongs. First, pt IIA has a two-part, tort-like, structure, very similar to the cause of action for defamation.¹³ In particular, s 18C prohibits certain types of conduct, defined in broad terms. Section 18C focuses on the likely *effect* of certain conduct on members of the target group,¹⁴ regardless of the form that the conduct takes.¹⁵ Section 18D provides certain exemptions, which operate as defences for respondents, and which seek to protect certain types of speech.¹⁶ These exemptions operate similarly to defences in defamation law, in that they provide legal immunity for respondents, and simultaneously serve a broader public purpose in protecting certain types of speech.¹⁷ The second feature is that only a person ‘aggrieved’ by an alleged breach of pt IIA can seek redress in respect of that conduct.¹⁸ A two-step process applies to resolving alleged breaches. First, a written complaint may be made to the Australian Human Rights Commission, followed usually by attempted resolution by conciliation. Second, proceedings may be commenced in the Federal Court or the Federal Circuit Court, when a complaint has been terminated.¹⁹ The forms of redress that a court may order, if proceedings are successful, include a declaration, an order requiring that the unlawful conduct cease, and an order to pay compensation.²⁰ The forms of redress available to applicants are similar to the types of redress typically provided by courts in civil proceedings.

The third feature of pt IIA indicating that it seeks to provide redress for a legal wrong is s 18E, which imposes liability on an employer for breach of s 18C by an employee, where the conduct is done ‘in connection with his or her duties as an

¹¹ For an examination of the exemptions in s 18D, see Bill Swannie, ‘The Influence of Defamation Law on the Interpretation of Australia’s Racial Vilification Laws’ (2020) 26(1) *Torts Law Journal* 34 (‘Influence of Defamation Law’).

¹² See, eg, *Toben v Jones* (2003) 129 FCR 515, 535 [84]–[87] (Allsop J) (‘*Toben*’).

¹³ In respect of which, see, eg, Peter Cane, *The Anatomy of Tort Law* (Hart Publishing, 1997) chs 2–3.

¹⁴ See, eg, *Eatoock v Bolt* (2011) 197 FCR 261, 318 [241]–[242] (Bromberg J) (‘*Eatoock*’).

¹⁵ Part IIA potentially applies to a broad range of public conduct, and has been applied in: *Toben* (n 12) in respect of a public website; *Eatoock* (n 14) in respect of a newspaper article; and *Hagan v Trustees of the Toowoomba Sports Ground Trust* (2001) 105 FCR 56 in respect of a public sign at a sports stadium.

¹⁶ See, eg, *Bropho v Human Rights and Equal Opportunity Commission* (2004) 135 FCR 105, 108 [5], 122 [62], 128–9 [79]–[83] (French J) (‘*Bropho*’).

¹⁷ See generally Swannie, ‘Influence of Defamation Law’ (n 11).

¹⁸ *Australian Human Rights Commission Act 1986* (Cth) s 46P(2).

¹⁹ *Ibid* s 46PO(1). A complaint may be terminated on various grounds.

²⁰ *Ibid* s 46PO(4).

employee'.²¹ Section 18E(2) provides that an employer is not liable if it took 'all reasonable steps to prevent the employee ... from doing the act'. Imposing vicarious liability on an employer, in addition to the primary wrongdoer, assists an aggrieved person in obtaining an effective remedy.²²

Therefore, pt IIA establishes a legal wrong, and the *Australian Human Rights Commission Act 1986* (Cth) seeks to provide redress for this wrong. Significantly, a breach of pt IIA is not a criminal offence and the state is not involved in prosecuting or enforcing the provisions.²³ When pt IIA was introduced into Parliament, Attorney-General Michael Lavarch noted that it would establish a 'civil regime' by which 'the victim of alleged unlawful behaviour' could initiate a complaint and potentially obtain a remedy in relation to that behaviour.²⁴

Part IIA was enacted following the publication of three significant reports that recommended legislative protection from racially-based harassment and intimidation.²⁵ These reports were referred to when the relevant provisions²⁶ were introduced into Parliament.²⁷ In particular, the Australian Law Reform Commission's Report *Multiculturalism and the Law*,²⁸ which was referred to by the Attorney-General,²⁹ states that protection from racial vilification 'protect[s] the inherent dignity of the human person'.³⁰

²¹ *RDA* (n 4) s 18E(1)(a).

²² See, eg, *Hollis v Vabu Pty Ltd* (2001) 207 CLR 21, in which the High Court held that a bicycle courier service was vicariously liable for an injury caused to a pedestrian by the negligence of its employee courier: at 46 [61] (Gleeson CJ, Gaudron, Gummow, Kirby and Hayne JJ).

²³ Some scholars criticise the lack of state involvement in enforcing pt IIA, arguing that racial vilification is a 'public wrong': see, eg, Katharine Gelber and Luke McNamara, 'Private Litigation to Address a Public Wrong: A Study of Australia's Regulatory Response to "Hate Speech"' (2014) 33(3) *Civil Justice Quarterly* 307 ('Private Litigation') 312–13.

²⁴ Commonwealth, *Parliamentary Debates*, House of Representatives, 15 November 1994, 3341 (Michael Lavarch, Attorney-General) ('Second Reading Speech').

²⁵ *Royal Commission into Aboriginal Deaths in Custody* (National Report, 15 April 1991) vol 5, [213] ('*Royal Commission*'); Australian Law Reform Commission, *Multiculturalism and the Law* (Report No 57, 14 April 1992) [7.47] ('*Multiculturalism*'); Human Rights and Equal Opportunity Commission, *Racist Violence* (Report, 27 March 1991) 299–300.

²⁶ Racial Hatred Bill 1994 (Cth) cl 6, inserting *RDA* (n 4) pt IIA.

²⁷ Second Reading Speech (n 24) 3336–7.

²⁸ *Multiculturalism* (n 25).

²⁹ Second Reading Speech (n 24) 3336.

³⁰ *Multiculturalism* (n 25) [7.44]. In *Eatock* (n 14), Bromberg J stated that s 18C protects against 'conduct which invades or harms the dignity of the individual or group': at 325 [267].

Regarding the seriousness of the harms of racial vilification, the Human Rights and Equal Opportunity Commission's ('HREOC') Report *Racist Violence*,³¹ also referred to by the Attorney-General, emphasised that 'racial hostility'³² is not merely 'hurt feelings and injured sensibilities'.³³ Rather, such conduct has 'adverse effects on the quality of life and well-being of individuals or groups who have been targeted because of their race'.³⁴ The National Report of the *Royal Commission into Aboriginal Deaths in Custody* ('*Royal Commission*') in particular highlighted that Aboriginal Australians are often subject to racial harassment.³⁵

The provisions of pt IIA focus on the effect of particular conduct on members of the target group.³⁶ In *Eatoock v Bolt* ('*Eatoock*'),³⁷ Bromberg J held that the words 'reasonably likely, in all the circumstances', establish an objective test. Specifically, s 18C establishes a 'reasonable victim' test, requiring courts to determine the response of a reasonable member of the target group.³⁸ However, other Australian vilification legislation focuses on the effect of particular conduct on the relevant audience, rather than on the target. For example, s 20C the *Anti-Discrimination Act 1977* (NSW) ('*ADA* (NSW)') regulates conduct that 'incite[s] hatred towards, serious contempt for, or severe ridicule of' members of a particular racial group. This provision focuses, as do equivalent provisions in other states and territories,³⁹ on the likely response of other people towards members of the target group.⁴⁰ Whereas pt IIA focuses on the effect of particular conduct on members of identifiable groups, provisions such as s 20C of the *ADA* (NSW) focus on more generalised harms to society. Indeed, incitement is a criminal law concept, and it particularly concerns conduct likely to cause public disorder or a breach of the peace.⁴¹

³¹ *Racist Violence* (n 25).

³² *Ibid* 299.

³³ *Ibid*.

³⁴ *Ibid*.

³⁵ *Royal Commission* (n 25) vol 4, [28.3.35].

³⁶ Members of a group can be *targeted* by vilification in two main ways. First, particular words or epithets may be directed at them, in a face-to-face encounter. Alternatively, the vilification may not be so 'direct', but may be about a racial group of which they are a member: see, eg, Richard Delgado and Jean Stefancic, 'Four Observations about Hate Speech' (2009) 44(2) *Wake Forest Law Review* 353, 361 ('Four Observations').

³⁷ *Eatoock* (n 14).

³⁸ *Ibid* 318–19 [243]–[244], 320–1 [250]–[251].

³⁹ *Discrimination Act 1991* (ACT) s 67A(1)(e); *Anti-Discrimination Act 1975* (NSW) s 20C; *Anti-Discrimination Act 1991* (Qld) s 124A; *Civil Liability Act 1936* (SA) s 73; *Anti-Discrimination Act 1998* (Tas) s 19(a); *Racial and Religious Tolerance Act 2001* (Vic) s 7.

⁴⁰ *Kazac v John Fairfax Publications Ltd* [2000] NSWADT 77, [18]; *Catch the Fire Ministries Inc v Islamic Council of Victoria* (2006) 15 VR 207, 231–2 [67] (Nettle JA), 251 [141] (Neave JA) ('*Catch the Fire Ministries*').

⁴¹ *Catch the Fire Ministries* (n 40) 211–12 [14] (Nettle JA).

C *Dignitary Harms and the Need for Legal Regulation*

As mentioned above, the provisions of pt IIA seek to protect the human dignity of members of groups targeted by racial vilification. Similarly, Waldron argues that racial vilification laws are justified, and indeed necessary, based on the dignitary interests of targets of such conduct.⁴² Waldron's arguments have particular relevance to the provisions of pt IIA, because these provisions focus on the harms of racial vilification as experienced by members of target groups.

Waldron argues that racial vilification⁴³ gives rise to *constitutive* harms to members of target groups.⁴⁴ That is, these harms are direct and immediate, rather than merely consequential (such as increasing the risk of violence or discrimination, by people who are influenced or incited by the vilification).⁴⁵ Waldron argues that racial vilification undermines the basic public standing of members of target groups. He highlights the similarity between defamation and vilification, in that both involve public disparagement.⁴⁶ Whereas defamation concerns the public standing of a particular *individual*, vilification concerns the standing of members of a particular racial group.⁴⁷

Waldron emphasises the importance of the state respecting every person's equal citizenship in a liberal democracy. In particular, he focuses on the importance of enacting racial vilification laws, to demonstrate that the state requires every member of society to respect the equal standing of members of minority racial groups. In doing so, Waldron emphasises the harm done by the publication of vilifying words and images to the sense of public assurance, or security, experienced by members of racial groups.⁴⁸ He highlights that members of minority racial groups are more likely to be subjected to vilifying conduct, and this conduct may effectively silence and exclude them from participation in education, employment and political activities.⁴⁹ Similarly, the HREOC's *Racist Violence* Report states that racial vilification laws are

⁴² See Waldron (n 9) ch 5.

⁴³ Waldron refers to 'hate speech', which includes racial vilification: *ibid* 27.

⁴⁴ *Ibid* 166–8. See also Katharine Gelber and Luke McNamara, 'Anti-Vilification Laws and Public Racism in Australia: Mapping the Gaps between the Harms Occasioned and the Remedies Provided' (2016) 39(2) *University of New South Wales Law Journal* 488, 500, 505 ('Mapping the Gaps').

⁴⁵ Waldron (n 9) 166–8. Gelber and McNamara argue that laws such as the *Anti-Discrimination Act 1977* (NSW) protect against consequential, rather than constitutive, harms: Gelber and McNamara, 'Mapping the Gaps' (n 44) 491, 500, 505.

⁴⁶ Waldron (n 9) ch 3. Section 18C of the *RDA* (n 4) applies only to conduct done 'otherwise than in private'. As emphasised by the Attorney-General when the provisions were introduced to Parliament, pt IIA 'does not prohibit people from expressing ideas or having beliefs, no matter how un-popular the views may be to many other people. The law has no application to private conversations': Second Reading Speech (n 24) 3337.

⁴⁷ Waldron (n 9) 41–2, 44–5.

⁴⁸ *Ibid* 45.

⁴⁹ *Ibid* 7–10, 33, 66–8.

necessary to protect members of vulnerable racial groups from being excluded from full participation in society.⁵⁰

Waldron argues that racial vilification laws are justified and necessary to provide public assurance of each person's human dignity.⁵¹ Like defamation laws, these laws restrict certain conduct that may harm others. However, in a liberal democracy based on equal citizenship, these laws seek to ensure the basic good standing of every member of society.

Although Waldron does not refer explicitly to principles of corrective justice, these principles are consistent with his arguments.⁵² His dignity-based arguments emphasise the interests and rights of members of groups targeted by racial vilification. However, he also emphasises the obligations on members of society to respect the rights of others in their public conduct.⁵³ Further, he highlights the role of the state in enacting laws that protect the dignity of members of target groups. Reciprocal rights and duties, provided by the state and enforced through proceedings commenced by individuals, are the essential aspects of corrective justice.⁵⁴

Waldron's arguments regarding the importance of legal regulation of racial vilification, based on protecting the dignity of members of target groups, provide a powerful explanation and justification for the provisions of pt IIA of the *RDA*. These provisions seek to redress the constitutive harms caused by racial vilification to members of target groups. Like defamation laws, pt IIA seeks to enable those harmed by certain expressive conduct to seek legal redress to restore their dignity, or basic standing in society.⁵⁵

However, Waldron acknowledges that racial vilification laws need to balance the importance of protecting the dignity of members of target groups, on the one hand, with protecting certain types of speech that is considered to be valuable, on the other.⁵⁶ He argues that lawmakers must balance these competing interests. This

⁵⁰ *Racist Violence* (n 25) 299–301.

⁵¹ Waldron (n 9) 82–3.

⁵² Waldron bases his defence of racial vilification laws on John Rawls' conception of a 'well-ordered society': *ibid* 66–9. This is a society in which all members owe certain duties to one another, as opposed to a libertarian society.

⁵³ *Ibid* 93–4.

⁵⁴ See, eg, Ernest J Weinrib, 'Corrective Justice in a Nutshell' (2002) 52(4) *University of Toronto Law Journal* 349, 356.

⁵⁵ The similarities and differences between the law of defamation and pt IIA are examined in Swannie, 'Influence of Defamation Law' (n 11). Similarly, Robert C Post argues that defamation law seeks to protect the inherent dignity of all members of the community, amongst other interests: see Robert C Post, 'The Social Foundations of Defamation Law: Reputation and the Constitution' (1986) 74(3) *California Law Review* 691, 693, 710.

⁵⁶ Waldron (n 9) 171–2.

approach stands in strong contrast to scholars such as C Edwin Baker,⁵⁷ who argue for an absolutist approach to protection of speech, which denies the state any role in regulating speech.⁵⁸

Waldron's balancing approach is consistent with the provisions of pt IIA, which provide exemptions to liability. As mentioned above, there is no liability under pt IIA if the relevant conduct is done for one of the specified purposes, and 'reasonably and in good faith'. Therefore, pt IIA provides legal protection against dignity-harming speech, but it also protects speech (in the sense of making it immune from liability) in certain circumstances.⁵⁹

The next two Parts of this article examine, in turn, Brettschneider's and Gelber's speaking back approaches. As mentioned above, both scholars argue that counter-speech provides an appropriate response by the state to hate speech, rather than enacting racial vilification laws such as those in pt IIA.

III DEMOCRATIC PERSUASION

A Introduction

Brettschneider argues that the state should protect free speech and promote equality.⁶⁰ Specifically, he argues that the state should not regulate hate speech 'coercively', as this would restrict 'public discourse', or political discussion. However, he argues that the state must 'speak back' to hate speech, as such speech can undermine the democratic values on which rights — including free speech — are based.

Brettschneider's approach — which he labels 'democratic persuasion' — is generally consistent with United States constitutional law, including the exceptionally strong protection of speech under the Supreme Court's interpretation of the First Amendment.⁶¹ However, Brettschneider also draws on political philosophy and

⁵⁷ C Edwin Baker, 'Harm, Liberty, and Free Speech' (1997) 70(4) *Southern California Law Review* 979. Absolutist approaches to free speech are more commonly associated with the United States than with Australia.

⁵⁸ *Ibid* 979, 1003–4.

⁵⁹ In *Bropho* (n 16), the Federal Court held that the requirement that the relevant conduct be done 'reasonably and in good faith' entails a degree of proportionality between the purpose of the relevant conduct and the harm it is likely to cause: at 128 [79] (French J), 141–2 [139]–[140] (Lee J). For an examination of this requirement, see Swannie, 'Influence of Defamation Law' (n 11) 61–3.

⁶⁰ Corey Brettschneider, *When the State Speaks, What Should It Say?: How Democracies Can Protect Expression and Promote Equality* (Princeton University Press, 2012) ('*State Speaks*').

⁶¹ See, eg, Frederick Schauer, 'The Exceptional First Amendment' in Michael Ignatieff (ed), *American Exceptionalism and Human Rights* (Princeton University Press, 2005) 29. Therefore, Brettschneider's work can be considered a defence of current United States doctrine regarding free speech.

particularly on the democratic importance of free speech.⁶² Therefore, his arguments regarding democratic persuasion are relevant to other liberal democracies, such as Australia.

Brettschneider argues that his approach to hate speech avoids two ‘dystopias’ that face liberal democracies. First, he seeks to avoid a ‘hateful society’, in which citizens are formally equal, but in which members of certain groups are subject to systemic exclusion and discrimination.⁶³ He argues that the state must engage in ‘democratic persuasion’ to avoid this outcome. The second dystopia is an ‘invasive state’, in which the private conduct of individuals (including their speech) is regulated by the state in an oppressive way.⁶⁴ As will be explained below, Brettschneider regards hate speech laws as being ‘invasive’ in an undemocratic way.

B *What Is Democratic Persuasion?*

As outlined above, Brettschneider’s approach has both a positive and a negative aspect. He argues that, although the state must not regulate hate speech, it must ‘speak back’ (or respond) to such conduct. The ways in which the state may respond to hate speech will be outlined below. However, it is important first to establish *why* he regards the state as duty-bound to respond to hate speech.⁶⁵

Brettschneider’s arguments have an appealing symmetry, in that the reasons for the state’s negative duties also explain why the state must speak back. His central argument is that, in a liberal democracy, the state must treat all citizens as free and equal.⁶⁶ This conception of a liberal democracy has a particular resonance in the United States, with its history of slavery and segregation, and its constitutional articulation of racial equality.⁶⁷

Brettschneider argues that the principle of free and equal citizenship is so central to liberal democracy that it imposes a positive duty on the state to respond to hate speech.⁶⁸ The state must do this in order to maintain its democratic legitimacy.⁶⁹

⁶² Brettschneider, *State Speaks* (n 60) 72–9.

⁶³ *Ibid* 10.

⁶⁴ *Ibid*.

⁶⁵ As mentioned above, this article focuses primarily on the positive duty of the state to speak back, rather than the negative duty (not to regulate speech). For an examination of the negative duty, see, eg, Swannie, ‘Free Speech Arguments’ (n 3) 75, 79, 106.

⁶⁶ Brettschneider, *State Speaks* (n 60) 81.

⁶⁷ *United States Constitution* amend XIV. Brettschneider’s arguments are based on formal, rather than substantive, conceptions of equality. Treating people as formally equal — regardless of race — may in fact reinforce unequal power structures.

⁶⁸ Brettschneider, *State Speaks* (n 60) 68.

⁶⁹ Corey Brettschneider, ‘Democratic Persuasion and Freedom of Speech: A Response to Four Critics and Two Allies’ (2014) 79(3) *Brooklyn Law Review* 1059, 1065–6 (‘Democratic Persuasion’).

By responding, the state demonstrates that it does not condone, and is not complicit (by its silence) in such conduct. Further, by responding to hate speech, the state demonstrates its equal regard for all citizens.

Significantly, Brettschneider argues that the state's duty to respond to hate speech is owed *to the general public*, or society generally.⁷⁰ Unlike the provisions of pt IIA of the *RDA*, the state's duty to respond is not owed to individuals or members of particular racial groups targeted by vilification. It cannot, therefore, be considered a legal right to have the state respond to any particular instance of hate speech. This is because Brettschneider regards the harm of hate speech as a harm to democracy itself, in that it undermines the ideal of free and equal citizenship.⁷¹

Brettschneider's theory of democratic persuasion distinguishes strongly between the *expressive* and *coercive* functions of the state. As outlined above, he argues that the state may (and, indeed, must) use its expressive functions to promote equality.⁷² However, he argues that the state must not use its coercive powers to restrict or punish hate speech. Brettschneider regards speech (including hate speech) as an individual right.⁷³ He argues that coercive restriction of speech interferes with the *autonomy* of individuals to participate in 'public' or 'political' discourse, which undermines the democratic legitimacy of the state.⁷⁴ Although the state must remain neutral in relation to viewpoints in its coercive role, in its expressive role it may (and, indeed, must) promote the values of democracy and, in particular, free and equal citizenship.⁷⁵

Brettschneider argues that the state is able speak back to hate speech in three main ways. The first is through formal education and, in particular, through promoting awareness of the civil rights movement, and its main proponents and achievements.⁷⁶ The second is through funding civil rights groups, and other groups that promote various forms of equality, and by not funding groups that undermine the ideal of free and equal citizenship.⁷⁷ Third, the state may speak back through its officials, publicly

⁷⁰ Brettschneider, *State Speaks* (n 60) 80, 87, 105.

⁷¹ On the other hand, Waldron argues that the harms of vilification are direct and personal. He argues that vilification harms the dignity, or essential worth, of members of groups whom it targets: Waldron (n 9) 5.

⁷² Brettschneider, *State Speaks* (n 60) 85–8.

⁷³ *Ibid* 79.

⁷⁴ *Ibid* 81, 105.

⁷⁵ *Ibid* 87.

⁷⁶ *Ibid* 96–104. Brettschneider emphasises in particular the importance in the United States of the public holiday on Martin Luther King Jr Day, and public monuments commemorating civil rights leaders.

⁷⁷ *Ibid* 110–11. In this aspect, there is some overlap between Brettschneider's argument and Gelber's conception of speaking back — examined in Part IV of this article — which emphasises the role of state-supported community responses to hate speech. It may be argued that decisions by the state to fund, or not to fund, certain groups, may be 'coercive', in that the state may effectively punish groups for expressing certain views by deciding not to fund them. However, this issue is beyond the scope of this article.

condemning acts of hate speech and promoting notions of political equality and free and equal citizenship.⁷⁸

Brettschneider's third form of speaking back is the most significant for the purposes of this article, as it involves the state responding to particular incidents of hate speech. In relation to this aspect, Brettschneider makes three significant points. First, he argues that the state must not only promote equality in general terms, but must promote awareness of the *reason* for rights (that is, the principle of free and equal citizenship).⁷⁹ This is because, as outlined above, he regards promoting the ideal of free and equal citizenship as central to the legitimacy of the liberal democratic state. Promoting the *reasons* for rights also helps to explain to citizens the 'inverted' (or paradoxical) nature of rights such as free speech, which (he argues) can be exercised in a manner that seems contrary to their purpose.⁸⁰

Second, Brettschneider emphasises that democratic persuasion is not directed to hate speakers, but to the general public.⁸¹ The relevant audience is the 'population at large', as the purpose of responding is for the state to demonstrate to the public that it does not condone such conduct, and publicly to affirm the principles of free and equal citizenship.⁸² Third, democratic persuasion does not require the state publicly to condemn *all* incidents of hate speech.⁸³ Rather, the state responds only when the democratic principle of free and equal citizenship is so clearly and seriously undermined that the legitimacy of the state is thereby threatened.⁸⁴ In other words, the state merely has a 'generalized obligation to promote the ideal of free and equal citizenship'.⁸⁵

C *Evaluation of Democratic Persuasion*

Brettschneider's conception of democratic persuasion particularly emphasises the interests and perspective of speakers, listeners, and members of the public.⁸⁶ He argues that both speakers and listeners have an interest in 'free' (or unrestricted) speech.⁸⁷ In addition, as outlined above, the state owes a duty to the general public to demonstrate its respect for every person's free and equal citizenship. Thus, Brettschneider's

⁷⁸ Ibid 94.

⁷⁹ Ibid.

⁸⁰ Ibid 108.

⁸¹ Ibid 87.

⁸² Ibid. Also, pragmatically, Brettschneider acknowledges that hate speakers (such as the Ku Klux Klan) may not be dissuaded from their views by democratic persuasion, or any other type of persuasion.

⁸³ Brettschneider, 'Democratic Persuasion' (n 69) 1077.

⁸⁴ Ibid.

⁸⁵ Ibid.

⁸⁶ Brettschneider, *State Speaks* (n 60) 77–8.

⁸⁷ Ibid. In particular, Brettschneider emphasises the importance of the state respecting the autonomy of both speakers and listeners.

account of free speech, and of the democratic legitimacy of the state, is based on the state respecting individual autonomy and, in particular, the ability of individuals to exercise their capacity to reason with each other.⁸⁸ Democratic legitimacy, he argues, depends on the state respecting the autonomy of speakers and listeners ‘to make any argument and to hear any argument that they wish’.⁸⁹

Notably absent from Brettschneider’s account, however, is any consideration of the perspectives and interests of members of groups targeted by hate speech. This stands in strong contrast to his emphasis on the individual rights and interests of *speakers*, including hate speakers.⁹⁰ According to his conception of democratic persuasion, the autonomy of individual speakers is harmed by legal restrictions on hate speech.⁹¹ However, Brettschneider does not seem to acknowledge that members of target groups may be harmed in similar ways by incidents of racial vilification.

Brettschneider’s conception of democratic persuasion does not sufficiently acknowledge the harms of vilification, nor does it adequately protect the interests of members of groups targeted by such conduct. First, it is unclear when the state’s duty to respond to hate speech applies. The standard set by Brettschneider — a clear threat to the principle of free and equal citizenship — appears extremely vague and very high.⁹² This standard does not appear to take into account the individual and cumulative harms of vilification for members of target groups.

Second, Brettschneider focuses almost exclusively on the relationship between citizens and the state. Therefore, he focuses on the perceived risks of regulation, including the dangers of the ‘invasive’ state. As an American constitutional scholar, it is understandable for Brettschneider to focus on the ‘vertical’ aspect of constitutional rights (being the rights of citizens *against* interference by the state).⁹³ However, he appears to ignore the ‘horizontal’ aspect of rights (rights of citizens as against each other).⁹⁴ Therefore, Brettschneider focuses on the apparent need to limit the ‘coercive’ role of the state, particularly regarding speech, rather than the role of the state in providing appropriate redress for the harms of hate speech.⁹⁵

⁸⁸ Brettschneider, ‘Democratic Persuasion’ (n 69) 1078.

⁸⁹ Brettschneider, *State Speaks* (n 60) 81. See also at 105.

⁹⁰ *Ibid* 79.

⁹¹ *Ibid*.

⁹² See, eg, Frank I Michelman, ‘Legitimacy and Autonomy: Values of the Speaking State’ (2014) 79(3) *Brooklyn Law Review* 985, 993–4.

⁹³ See, eg, Jud Mathews, *Extending Rights’ Reach: Constitutions, Private Law and Judicial Power* (Oxford University Press, 2018).

⁹⁴ *Ibid*. Mathews argues that courts in the United States focus predominantly on the vertical, rather than the horizontal, aspect of constitutional rights: at 9.

⁹⁵ However, Brettschneider acknowledges that ‘citizens in their relationships with each other could threaten values of free and equal citizenship’: Brettschneider, ‘Democratic Persuasion’ (n 69) 1089.

Third, Brettschneider assumes that all hate speech is valuable, because it is part of public discourse.⁹⁶ For example, he argues that hate speech laws prevent ‘citizens ... [from] develop[ing] and affirm[ing] their own political views’.⁹⁷ Further, he argues that such laws undermine the legitimacy of the state, as they prevent citizens from ‘dissent[ing]’,⁹⁸ and they force hate speakers to ‘come to particular conclusions about politics’.⁹⁹ In the free speech literature, discussion and debate on political issues is considered particularly valuable, as it is considered essential for democratic self-government.¹⁰⁰ Therefore, scholars argue that the state cannot legitimately regulate speech on these topics. However, speech that is ‘political’, in terms of its subject matter, occasion or context, may nonetheless be harmful in terms of the public standing of members of the target group.¹⁰¹

Brettschneider argues that it is illegitimate for the state to regulate speech in *any* circumstances. Similar to scholars such as Baker,¹⁰² Brettschneider contends that laws that exclude even one citizen’s voice from debate undermine both that individual’s autonomy and the legitimacy of the state.¹⁰³ However, as Brettschneider argues, the state must show equal respect for *all* citizens in order to be democratically legitimate. Whereas he emphasises the importance of the state respecting the autonomy of speakers and listeners,¹⁰⁴ racial vilification laws protect the autonomy of members of groups targeted by hate speech, which is equally important.

As stated above, Brettschneider opposes hate speech laws, on the grounds that they are ‘coercive’ and ‘punitive’. However, these descriptions seem to have in mind *criminal* laws. These descriptions apply less to civil laws, which seek mainly to provide redress for legal wrongs,¹⁰⁵ and are less coercive than criminal laws.¹⁰⁶

⁹⁶ Ibid 1082.

⁹⁷ Brettschneider, *State Speaks* (n 60) 72.

⁹⁸ Brettschneider, ‘Democratic Persuasion’ (n 69) 1082.

⁹⁹ Brettschneider, *State Speaks* (n 60) 78. He also argues that hate speech laws ‘punish ... [hate speakers] for their views’: at 81.

¹⁰⁰ See, eg, Eric Barendt, *Freedom of Speech* (Oxford University Press, 2nd ed, 2007) ch 5. See especially Alexander Meiklejohn, *Free Speech and Its Relation to Self-Government* (Harper & Brothers, 1st ed, 1948).

¹⁰¹ Robin West, ‘Liberty, Equality, and State Responsibilities: Review of Corey Brettschneider’s *When the State Speaks, What Should it Say?*’ (2014) 79(3) *Brooklyn Law Review* 1031, 1037.

¹⁰² Baker (n 57) 1011–12.

¹⁰³ Brettschneider, ‘Democratic Persuasion’ (n 69) 1065–6.

¹⁰⁴ Brettschneider, *State Speaks* (n 60) 78.

¹⁰⁵ Robin West (n 101) 1043.

¹⁰⁶ A finding of civil liability under pt IIA of the *RDA* (n 4), for example, may involve a certain amount of social stigma and embarrassment. However, this is less than the stigma attaching to a criminal conviction. Criminal offences, and convictions, arguably express the ‘community’s outrage at certain behaviour’: Luke McNamara, *Regulating Racism: Racial Vilification Laws in Australia* (Institute of Criminology, University of Sydney Law School, 2002) 36–9.

Even if civil racial vilification laws are considered ‘coercive’, they may nonetheless be *justified*. This is because such laws operate to protect members of target groups from the harms of hate speech.

Brettschneider’s conception of democratic persuasion offers some form of response by the state to hate speech. However, scholars such as Robin West highlight that this response is directed towards the general public, rather than towards members of target groups.¹⁰⁷ On the one hand, it is appropriate for the state publicly, though merely verbally,¹⁰⁸ to affirm principles of equal citizenship, and to condemn hate speech. However, democratic persuasion does not provide any form of redress for those harmed by such conduct, and members of target groups may therefore legitimately regard this as hypocritical and ineffective. Further, West argues that Brettschneider’s approach merely pays lip service to the concept of free and equal citizenship, and that it effectively legitimates inequality for members of target groups.¹⁰⁹

In summary, Brettschneider’s work is valuable in that it highlights the importance of individual autonomy and democratic legitimacy in the modern state. However, Brettschneider regards the harms of hate speech as being merely a matter of abstract values. He argues that hate speech is ‘an attack on the public, democratic values of freedom and equality’.¹¹⁰ On the other hand, scholars such as Waldron and West argue that civil racial vilification laws operate to provide protection from *harm*. Therefore, in a democratic state that values equal citizenship, civil racial vilification laws play an important role. Specifically, such laws protect the basic public standing of members of target groups, and enable targets to seek redress for such conduct. This flows naturally from Brettschneider’s acknowledgement that ‘citizens in their relationships with each other could threaten values of free and equal citizenship’.¹¹¹ Therefore, Brettschneider’s argument that vilification laws are illegitimate, and that democratic persuasion is preferable to such laws, is unconvincing.¹¹²

The next Part of this article examines a different conception of speaking back, which seeks to promote individual wellbeing, rather than democratic values.

¹⁰⁷ Robin West (n 101) 1036–7.

¹⁰⁸ As outlined above, Brettschneider’s conception of ‘democratic persuasion’ also involves state funding decisions. However, such measures similarly provide no redress for targets of vilification.

¹⁰⁹ Robin West (n 101) 1037–8. Democratic persuasion may therefore be regarded as essentially a defence of current First Amendment doctrine and practice in the United States.

¹¹⁰ Brettschneider, ‘Democratic Persuasion’ (n 69) 1082.

¹¹¹ *Ibid* 1089.

¹¹² Part V of this article applies Brettschneider’s arguments to pt IIA.

IV ENHANCING HUMAN CAPABILITIES

A Introduction

Gelber presents a different articulation of speaking back to that of Brettschneider. Gelber's approach requires the state to assist and support members of target groups to speak back to hate speech. It is based on capabilities theory, a theory of social justice developed by political philosopher Martha Nussbaum from the work of economist Amartya Sen.¹¹³

This article focuses on a specific aspect of Gelber's scholarship regarding state responses to hate speech, which is set out in a monograph,¹¹⁴ and several subsequent articles and book chapters.¹¹⁵ This aspect will be referred to as her 'original' approach. Broadly, this approach argues that the state has a duty to assist members of target groups to respond to incidents of hate speech. Gelber argues that this approach is preferable to hate speech laws, which she opposes on free speech grounds.¹¹⁶ In other words, Gelber's original approach posits speaking back as the only form of redress for targets of hate speech.

In her recent work on hate speech, Gelber appears to accept the legitimacy, and indeed the importance, of legal regulation of hate speech.¹¹⁷ Nonetheless, for a range of

¹¹³ See Part IV(B) of this article.

¹¹⁴ Katharine Gelber, *Speaking Back: The Free Speech Versus Hate Speech Debate* (John Benjamins, 2002) ('*Free Speech Versus Hate Speech*').

¹¹⁵ Katharine Gelber, "'Speaking Back": The Likely Fate of Hate Speech Policy in the United States and Australia' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies over Free Speech* (Oxford University Press, 2012) 50 ('The Likely Fate'); Katharine Gelber, 'Reconceptualizing Counterspeech in Hate Speech Policy, with a Focus on Australia' in Michael Herz and Peter Molnar (eds), *The Content and Context of Hate Speech: Rethinking Regulation and Responses* (Cambridge University Press, 2012) 198 ('Reconceptualizing Counterspeech'); Katharine Gelber, 'Nussbaum's Capabilities Approach and Freedom of Speech' in Francesca Panzironi and Katharine Gelber (eds), *The Capability Approach: Development Practice and Public Policy in the Asia-Pacific Region* (Routledge, 2012) 38 ('Nussbaum's Capabilities Approach').

¹¹⁶ Gelber argues that 'it is appropriate to respond to ... [the harms of hate speech] by providing the educational, material and institutional support which would enable the victims of hate speech to speak back': Gelber, *Free Speech Versus Hate Speech* (n 114) 117. She also juxtaposes 'enhancing participation in speech' (one goal of her approach), with 'punish[ment]' and 'restrict[ion]': at 135–7. She argues that her approach, being based on capabilities theory, is 'support-oriented', rather than punitive or restrictive: at 119. Gelber refers approvingly to the notion that hate speech should be 'answered', rather than 'banned', and emphasises the importance of an 'exchange of ideas': at 10–11.

¹¹⁷ See especially Katharine Gelber, 'Freedom of Political Speech, Hate Speech and the Argument from Democracy: The Transformative Contribution of Capabilities Theory' (2010) 9(3) *Contemporary Political Theory* 304 ('Freedom of Speech'). In this work,

reasons, it is valuable to examine her original speaking back approach. First, Gelber is one of Australia's leading scholars on free speech and hate speech laws. Second, she has never explicitly disavowed her original approach. Third, her speaking back approach has not been examined in the mainstream legal academic literature. Finally, her original approach presents a comprehensive alternative to Australia's racial vilification laws. Therefore, although this article does not accept that Gelber's original approach as *preferable* to racial vilification laws, this approach usefully highlights some key features of those laws.

B *Capabilities Theory*

Gelber's original approach — which she labels 'speaking back', or 'counterspeech' — is based on Martha Nussbaum's conception of human capabilities as fundamental entitlements.¹¹⁸ This section briefly outlines the key features of capabilities theory.

Nussbaum argues that all members of society are entitled to be provided by the state with sufficient resources to enable them to function in certain ways.¹¹⁹ Her conception of fundamental entitlements is itself based on the concept of human capabilities as developed by economist Amartya Sen. Sen argues that a society can be regarded as just only if all its members are able to exercise particular substantive freedoms.¹²⁰ He argues that justice depends on a fair distribution of economic and material resources within a given society.¹²¹

Sen regards certain freedoms as being essential to human wellbeing and development.¹²² His conception of capabilities therefore focuses on human wellbeing, rather

Gelber argues that hate speech imperils not merely individual capabilities, but also the process of democratic deliberation and public discourse. On this basis, she argues that regulation of such conduct is justified: at 306, 319–20. It is not intended as a criticism to say that Gelber's views on this topic appear to have changed. Rather, it is merely recognition of her evolving views on complex issues. Also, capabilities theory — on which her original approach is largely based — was developing rapidly at the time.

¹¹⁸ See, eg, Martha Nussbaum, 'Capabilities as Fundamental Entitlements: Sen and Social Justice' (2003) 9(2–3) *Feminist Economics* 33, 55 ('Fundamental Entitlements'). See also Martha C Nussbaum, *Women and Human Development: The Capabilities Approach* (Cambridge University Press, 2000) 7–8, 12, 202–3 ('*Women and Human Development*').

¹¹⁹ Nussbaum, 'Fundamental Entitlements' (n 118) 55; Nussbaum, *Women and Human Development* (n 118) 66, 98–9.

¹²⁰ Amartya Sen, *Development as Freedom* (Alfred A Knopf, 1999) ('*Development as Freedom*'). See also Amartya Sen, 'Elements of a Theory of Human Rights' (2004) 32(4) *Philosophy and Public Affairs* 315, 332, 335–7.

¹²¹ Sen, *Development as Freedom* (n 120) 66.

¹²² *Ibid* 86. Sen draws on liberal theories of justice regarding the importance of individual liberty: at 63–7.

than individual liberties per se.¹²³ For Sen, access to a sufficient level of resources is essential for human wellbeing.¹²⁴ Sen emphasises that members of differently situated groups may require different levels of resources to meet their basic needs. For example, people with a disability may require more, or different, levels of resources, in order to have equal access to all opportunities.¹²⁵ He defines capabilities as a person's 'freedom to achieve actual livings that one can have reason to value'.¹²⁶ Fundamentally, whether a person is free depends on whether the circumstances of the person's life provide 'real opportunities of judging the kind of life they would like to lead'.¹²⁷

Nussbaum develops Sen's economic theory into a theory of social justice involving obligations on the state. She argues that certain human capabilities are 'fundamental' (or 'basic') to human wellbeing, and that the state therefore has a duty to assist every member of society to enable them to exercise these capabilities.¹²⁸ Enabling all members of society to do or to be certain things is required by notions of human dignity.¹²⁹ The state must not merely provide formal legal rights, but must also provide 'affirmative material and institutional support' to enable every person to exercise these fundamental capabilities.¹³⁰

Nussbaum's conception of fundamental entitlements therefore imposes *positive* duties on the state. Specifically, the state must provide appropriate material, educational and institutional support to enable individuals to exercise certain fundamental capabilities.¹³¹ This positive obligation on the state — to promote the welfare of members of society — distinguishes Nussbaum's approach from negative conceptions of liberty, under which the state merely abstains from interfering with certain individual rights and interests.¹³²

¹²³ His conception of 'capabilities' is based on notions of human 'flourishing' that can be traced to Aristotle and John Stuart Mill: John Kleinig and Nicholas G Evans, 'Human Flourishing, Human Dignity, and Human Rights' (2013) 32(5) *Law and Philosophy* 539, 540–3.

¹²⁴ Sen, *Development as Freedom* (n 120) 77.

¹²⁵ *Ibid* 67–81.

¹²⁶ *Ibid* 73 (emphasis omitted).

¹²⁷ *Ibid* 63. Sen's conception of capabilities emphasises the importance of reason and being able to make decisions regarding one's life.

¹²⁸ See Nussbaum, 'Fundamental Entitlements' (n 118) 55. See also Nussbaum, *Women and Human Development* (n 118) 202–3.

¹²⁹ Nussbaum, 'Fundamental Entitlements' (n 118) 40.

¹³⁰ *Ibid* 38.

¹³¹ *Ibid* 38, 55.

¹³² Nussbaum's capabilities approach is a theory of *substantive* freedoms, in that members of different social groups may receive different amounts and types of assistance, in order to enable them to fully participate in society.

Nussbaum provides a list of 10 ‘central human capabilities’.¹³³ These are: life; bodily health and integrity; senses, imagination and thought; emotions; practical reason; affiliation with other people and other species; play; and control over one’s political and material environment.¹³⁴ Nussbaum emphasises that each listed capability is underpinned by notions of human dignity.¹³⁵ In other words, these capabilities are what every member of society is entitled to be provided with by the state, as they are essential to ‘a life worthy of human dignity’.¹³⁶

C *Speaking Back*

Gelber’s original speaking back approach explicitly draws on Nussbaum’s work. Specifically, Gelber argues that speech has a ‘prominent and central role’ in Nussbaum’s capabilities approach,¹³⁷ particularly due to its importance in supporting human development.¹³⁸ Gelber emphasises two aspects of Nussbaum’s articulation of human capabilities that highlight how participation in speech can contribute to human development.¹³⁹ First, participation in speech can develop a person’s ability to think and reason, and therefore to exercise choice over their life.¹⁴⁰ In particular, Nussbaum emphasises the importance of being able to exercise ‘practical reason’, in order to make choices regarding one’s life.¹⁴¹ This includes ‘being able to participate effectively in political choices that govern one’s life; having the right of political participation, [and] protections of free speech and association’.¹⁴² Second, Gelber argues that speech facilitates the formation and maintenance of personal relationships.¹⁴³ This picks up on Nussbaum’s emphasis on the importance of *affiliation*, or the ability to form and maintain relationships with other people, as an important part of human wellbeing and development.¹⁴⁴

¹³³ Martha C Nussbaum, *Frontiers of Justice: Disability, Nationality, Species Membership* (Harvard University Press, 2006) (*Frontiers of Justice*). See also Nussbaum, ‘Fundamental Entitlements’ (n 118) 41–2.

¹³⁴ Nussbaum, *Frontiers of Justice* (n 133) 76–8.

¹³⁵ *Ibid.*

¹³⁶ *Ibid.* 78. For a critique of Nussbaum’s conception of capabilities, see Susan Moller Okin, ‘Poverty, Well-Being, and Gender: What Counts, Who’s Heard?’ (2003) 31(3) *Philosophy and Public Affairs* 280.

¹³⁷ Gelber, ‘Nussbaum’s Capabilities Approach’ (n 115) 41.

¹³⁸ Gelber, *Free Speech Versus Hate Speech* (n 114) 40–7. See also John Stuart Mill, ‘On Liberty’ in Alan Ryan (ed), *Mill: Texts, Commentaries* (WW Norton, rev ed, 1997) 52. Mill presents an influential account of the importance of speech in human development.

¹³⁹ Gelber, *Free Speech Versus Hate Speech* (n 114) 42. Gelber argues that speech has a ‘constitutive’ role in the formation of individual capabilities: see Gelber, ‘Freedom of Speech’ (n 117) 306, 315.

¹⁴⁰ Gelber, *Free Speech Versus Hate Speech* (n 114) 42.

¹⁴¹ See Nussbaum, ‘Fundamental Entitlements’ (n 118) 41–8.

¹⁴² Nussbaum, *Frontiers of Justice* (n 133) 76–7.

¹⁴³ Gelber, *Free Speech Versus Hate Speech* (n 114) 41.

¹⁴⁴ Nussbaum, ‘Fundamental Entitlements’ (n 118) 41–8.

Gelber's original speaking back approach, like Brettschneider's approach, has both a negative and a positive aspect. Gelber argues that restricting or punishing hate speech is not supported by a capabilities-based approach. This is because the role of the state is to *promote* capabilities, rather than *limit* them.¹⁴⁵ Therefore, the state must support members of target groups to respond to such conduct, as it interferes with their fundamental entitlements by effectively silencing and marginalising them. Gelber argues that hate speech 'imperil[s] the realization of central human functional capabilities by ... disempowering, marginalizing, and silencing'.¹⁴⁶

In practical terms, Gelber's speaking back approach involves two distinct stages. First, following the reporting and verification of an act of vilification by the target group to the state, the state provides appropriate material support to members of the target group, to enable them to respond.¹⁴⁷ Second, members of the target group respond to the hate speech. Gelber argues it is crucial that members of the target group (rather than the state) respond, as the fundamental purpose of speaking back is to *empower* members of the target group, by enabling them to participate in speech.¹⁴⁸ She emphasises the importance of a *community* response, particularly in involving members of the group initially targeted.¹⁴⁹ Therefore, even if the initial vilification was targeted at particular individuals, those individuals need not be involved in speaking back.

Gelber emphasises that speaking back may take many different forms. For example, the state might provide 'assistance [to a vilified community] to draft and publish a reply in the press in response to an earlier article'.¹⁵⁰ Alternatively, the state may provide resources for 'a community awareness campaign to combat racist stereotypes'.¹⁵¹ Other possible types of assistance include the state providing

resources to generate a community awareness campaign or advertisements; the production of newsletters, pamphlets, or posters; the development of anti-racism awareness campaigns in workplaces; subsidizing community art projects; or assistance to create a media item for broadcasting and dissemination within the community where the hate speech occurred.¹⁵²

¹⁴⁵ Gelber, *Free Speech Versus Hate Speech* (n 114) 119. Like Brettschneider, Gelber focuses on the relationship between the state and the individual, rather than focusing on interpersonal rights and duties.

¹⁴⁶ Gelber, 'Reconceptualizing Counterspeech' (n 115) 213.

¹⁴⁷ Gelber, *Free Speech Versus Hate Speech* (n 114) 119.

¹⁴⁸ *Ibid.* See also Gelber, 'The Likely Fate' (n 115) 62.

¹⁴⁹ Gelber, 'Reconceptualizing Counterspeech' (n 115) 215.

¹⁵⁰ *Ibid.* 214.

¹⁵¹ Gelber, 'The Likely Fate' (n 115) 53.

¹⁵² Katharine Gelber, 'Speaking Back' in Adrienne Stone and Frederick Schauer (eds), *The Oxford Handbook of Freedom of Speech* (Oxford University Press, 2021) 249, 263 ('Speaking Back').

As these examples suggest, speaking back need not be done immediately, nor in the same circumstances as the initial hate speech.¹⁵³ Rather, the response will usually come later, and will be general in nature. Importantly, however, the response should ‘appeal to the same community to which the hate speakers appealed’.¹⁵⁴ Therefore, the audience should be as similar as possible to that of the initial vilification, as the response seeks to contradict the message in that vilification.¹⁵⁵ Also, the hate speaker need not be — indeed, should not be — identified or responded to specifically.¹⁵⁶ Therefore, Gelber’s speaking back approach focuses on the relevant *audience*, rather than the source of the vilification.

Gelber argues that her speaking back approach effectively counteracts the silencing and disempowering effects of vilification on its targets, by enabling them to contradict the message in the hate speech.¹⁵⁷ By supporting members of the target group to respond publicly to the same audience as that of the hate speech, members of the group are able to correct (in the minds of the audience) the false and harmful claims made in the vilification.¹⁵⁸

D *Evaluation of Gelber’s Speaking Back Approach*

Gelber’s speaking back approach offers the *possibility* of empowering targets of hate speech. Certainly, her approach is more likely to do so than approaches that merely recommend or encourage targets to speak back without any assistance. For example, Baker argued that targets of hate speech have a *choice* as to how they respond to such incidents.¹⁵⁹ Further, he argued that targets may respond ‘as a victim ... [or] as a critic of the speaker’, and that ‘the possibility always exists for a hearer to use the available information in creating or maintaining an affirmative identity’.¹⁶⁰

¹⁵³ Ibid 261.

¹⁵⁴ Gelber, *Free Speech Versus Hate Speech* (n 114) 123.

¹⁵⁵ Ibid 114, 123.

¹⁵⁶ Ibid 89, 123. As outlined above, Gelber argues that a punitive or restrictive approach to vilification is not supported by capabilities theory. Similarly, Brettschneider emphasises that, when the state speaks back to hate speech, it must not insult or demonise hate speakers, as this would be coercive rather than persuasive: Brettschneider, *State Speaks* (n 60) 89.

¹⁵⁷ Gelber, *Free Speech Versus Hate Speech* (n 114) 89, 123.

¹⁵⁸ Ibid.

¹⁵⁹ Baker (n 57) 992.

¹⁶⁰ Ibid. Similarly, Wojciech Sadurski states that victims of racial vilification ‘may easily “turn on ... [their] heels and leave the provocation behind”’: Wojciech Sadurski, ‘Offending with Impunity: Racial Vilification and Freedom of Speech’ (1992) 14(2) *Sydney Law Review* 163, 195, quoting Joel Feinberg, *The Moral Limits of Criminal Law* (Oxford University Press, 1988) vol 2, 91.

Similarly, Judith Butler argues that targets can exercise their ‘agency’ by ‘resignifying’ words used against them.¹⁶¹ For example, she contends that targets can appropriate abusive language and terms previously considered racist or derogatory. In particular, Butler argues that members of target groups can use parody and music as powerful tools to neutralise derogatory language and descriptions.¹⁶² Gelber distinguishes her speaking back approach from Butler’s, which does not involve the state providing any material or financial support or assistance to targets of hate speech.¹⁶³ Her approach, Gelber emphasises, *requires* the state to provide such assistance and support.

Gelber therefore seeks to address one of the main obstacles preventing targets from being able to speak back — lack of resources, and the consequent lack of access to a public platform. As Gelber highlights, those who recommend speaking back often assume that all people have access to the resources needed to respond to incidents of hate speech.¹⁶⁴ On the other hand, Gelber’s approach takes this lack of resources into account, and requires the state to provide such resources. Providing these resources enables targets to present an alternative viewpoint, which may ‘counter the message contained in the original speaker’s utterance’.¹⁶⁵

As mentioned above, Gelber’s counterspeech approach seeks to empower members of target groups by providing support and assistance, enabling them to respond to incidents of racial vilification. This approach may empower members of target groups, in certain circumstances, by enabling them to make a public response to racist messages. For example, it may be effective when a particular speaker, who is a member of the target group, already has some standing in the wider community.¹⁶⁶

¹⁶¹ Judith Butler, *Excitable Speech: A Politics of the Performative* (Routledge, 1997) 15, 41. See also Nadine Strossen, *Hate: Why We Should Resist It with Free Speech, Not Censorship* (Oxford University Press, 2018).

¹⁶² Butler (n 161). Butler particularly emphasises the use of parody and rap music by people of colour in the United States to highlight issues of racial injustice.

¹⁶³ Gelber, *Free Speech Versus Hate Speech* (n 114) 131.

¹⁶⁴ Gelber, ‘Speaking Back’ (n 152) 254, 258. The assumption of a level playing field in terms of people’s capacity publicly to express their views is a central tenet of many conceptions of free speech: see, eg, Barendt (n 100).

¹⁶⁵ Gelber, ‘Speaking Back’ (n 152) 256.

¹⁶⁶ For example, in 1993, Australian Football League player Nicky Winmar famously responded to racial abuse by spectators during a match by lifting his jumper and pointing to his skin, indicating his pride in his Aboriginality: see, eg, Matthew Klugman and Gary Osmond, *Black and Proud: The Story of an Iconic AFL Photo* (NewSouth, 2013). Brettschneider refers repeatedly to the influence on the public of speeches made by prominent figures in the American civil rights movement and, in particular, Dr Martin Luther King Jr: Brettschneider, *State Speaks* (n 60) 95. Maxime Lepoutre emphasises that the effectiveness of counterspeech depends largely on the personal characteristics, reputation and credibility of the particular speaker: see Maxime Lepoutre, ‘Hate Speech in Public Discourse: A Pessimistic Defense of Counterspeech’ (2017) 43(4) *Social Theory and Practice* 851, 862, 864–5.

However, in many circumstances, Gelber's counterspeech approach is unlikely to be appropriate.¹⁶⁷ This includes situations where the vilification is repeated, and where the vilifier is a powerful public figure, such as a media presenter.¹⁶⁸ In these circumstances, speaking back by members of the target community may not change the views of audience members. This is because the initial act of vilification may effectively discredit members of the target groups, meaning that their words and views are not taken seriously by members of the public thereafter.¹⁶⁹

Further, when the vilifier is a repeat offender, it is not appropriate to expect targeted communities to respond repeatedly.¹⁷⁰ The burden on target communities of responding to repeated vilification cannot be considered reasonable. As mentioned above, such communities often also experience other forms of disadvantage, such as economic and political vulnerability. Rather, it is the responsibility of the state to conduct public education programs, and to fund anti-racism campaigns and groups.¹⁷¹

Members of target groups who respond publicly to hate speech may legitimately fear that doing so will expose them to further, more intensified, hate speech, or even violence.¹⁷² This is particularly so when the hate speech involves threats, abuse or racial epithets made directly to a person or to specific members of a particular racial group.¹⁷³ Although Gelber acknowledges such instances of hate speech,¹⁷⁴ her

¹⁶⁷ Questions regarding the *effectiveness* of speaking back (or of racial vilification laws) often blur into questions regarding their *appropriateness*: see, eg, Gelber, 'Speaking Back' (n 152). Effectiveness is ultimately an empirical question, which is beyond the scope of this article. Rather, this article focuses on the issue of *appropriateness* (which includes issues of effectiveness).

¹⁶⁸ Several reported Australian racial vilification decisions involved Aboriginal complainants and newspaper respondents: see, eg, *Eatock* (n 14); *Bropho* (n 16); *Creek* (n 10); *Clarke v Nationwide News Pty Ltd* (2012) 201 FCR 389 (Barker J).

¹⁶⁹ Gelber and McNamara, 'Private Litigation' (n 23) 333.

¹⁷⁰ *Ibid.* For example, Gelber and McNamara refer to prominent radio presenter Alan Jones: at 329–33.

¹⁷¹ See, eg, 'Racism. It Stops with Me', *Australian Human Rights Commission* (Web Page, 2020) <<https://itstopswithme.humanrights.gov.au/>>.

¹⁷² See, eg, Caroline West, 'Words That Silence?: Freedom of Expression and Racist Hate Speech' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies over Free Speech* (Oxford University Press, 2012) 222, 234–5. See also Laura Beth Nielsen, 'Power in Public: Reactions, Responses, and Resistance to Offensive Public Speech' in Ishani Maitra and Mary Kate McGowan (eds), *Speech and Harm: Controversies over Free Speech* (Oxford University Press, 2012) 148, 156–60.

¹⁷³ See, eg, Delgado and Stefancic, 'Four Observations' (n 36) which refers to two main types of vilification — 'direct' (or face-to-face), and 'indirect': at 361.

¹⁷⁴ Gelber, *Free Speech Versus Hate Speech* (n 114) 13.

focus is on less direct forms of hate speech, such as newspaper articles.¹⁷⁵ In any case, Gelber's approach seeks to avoid the issue of physical danger to targets of hate speech in two ways. First, she argues that speaking back 'need not be immediate [or be done] in the same circumstances as the [original] hate speech'.¹⁷⁶ She conceives of speaking back as being temporally and (perhaps) geographically removed from the original incident. However, as mentioned above, speaking back is directed to the same audience as the original hate speech. Second, even if the hate speech is directed at a particular person, that person need not speak back.¹⁷⁷ Rather, with state support, a response from members of the particular racial group targeted by the hate speech is generated.

Although Gelber's approach addresses two obvious concerns regarding targets speaking back, another three concerns remain. First, although Gelber argues that members of target groups are *empowered* by responding to hate speech, members of such groups may in fact regard this as extremely burdensome and unfair.¹⁷⁸ Even though the state provides material resources to members of target groups, responding takes time and energy that they may well prefer to direct to other activities. Such individuals may already experience certain forms of disadvantage, such as low income and low levels of education.¹⁷⁹ Further, members of groups targeted by vilification may legitimately regard such conduct as a moral (if not legal) wrong against them, to which the state (rather than they) should respond.¹⁸⁰

Second, scholars argue that hate speech has the effect of reducing the credibility of members of the target group,¹⁸¹ as is contended by Gelber and Luke McNamara.¹⁸² Racially derogatory words (or images) may cause those who hear them not to believe

¹⁷⁵ Ibid ch 4. Some scholars argue that face-to-face encounters are not the proper subject of legal regulation. See, eg, Waldron (n 9) who argues that hate speech laws should be limited to 'permanent' or 'enduring' instances, rather than isolated forms such as verbal utterances: at 116–18. Brettschneider also brackets direct threats and intimidation in his discussion of hate speech: Brettschneider, *State Speaks* (n 60) 76.

¹⁷⁶ Gelber, 'Speaking Back' (n 152) 261.

¹⁷⁷ Ibid. Individual targets may be too traumatised and fearful to respond, even at a later time. They may also experience shame, embarrassment and humiliation: Nielsen (n 172) 161–2.

¹⁷⁸ Gelber, 'Speaking Back' (n 152) 258. Gelber's work does not address many important practical issues such as who applies for funding or who from the target community organises a response.

¹⁷⁹ On the other hand, speaking back is optional, and any member of the target group may respond. Therefore, the burden of responding may be shared.

¹⁸⁰ See below Part V.

¹⁸¹ See, eg, Caroline West (n 172) 245. See also Catharine A Mackinnon, *Only Words* (Harvard University Press, 1993) 64.

¹⁸² Gelber and McNamara, *Private Litigation* (n 23) 333–4.

members of particular racial groups, or not to take them seriously.¹⁸³ This is part of the ‘silencing’ effect of hate speech.¹⁸⁴ Gelber argues that hate speech renders marginal the voices and views of members of the target groups in public discourse, by treating them as inherently subordinate or inferior.¹⁸⁵

Gelber emphasises the importance of the state providing resources to enable target groups publicly to present an alternative viewpoint. However, the silencing effects of vilification may prevent this message from being taken seriously by audience members. The effectiveness of this approach therefore depends on a range of factors, including the nature of the hate speech, and the relevant audience.¹⁸⁶

Therefore, the mere provision of resources by the state may not, by itself, restore the credibility or authority of members of target groups. This is because of the powerful and enduring effects of hate speech, and the often significant power imbalance between vilifiers and members of target groups. Gelber argues that racial vilification is often used by ‘powerful racially defined groups [to] circumscribe less powerful racially defined groups to limit the way they are able to participate in society’.¹⁸⁷ She emphasises the power disparity between members of particular groups, arguing that racial vilification often involves a ‘systemic power asymmetry between the speaker and the hearer’.¹⁸⁸ For example, scholars note that some popular radio and television presenters have repeatedly vilified Aboriginal Australians and other minority racial groups.¹⁸⁹

Finally, Gelber implicitly frames hate speech as merely a disagreement, or a difference of opinion. For example, she states that the purpose of speaking back is to present an alternative viewpoint. However, hate speech in the form of racial abuse or insults contains no rational argument, and effectively, therefore, no alternative viewpoint can actually be presented.¹⁹⁰ Scholars such as Laura Beth Nielsen argue

¹⁸³ Caroline West (n 170) 239–43. Cartoons that mock or ridicule members of certain racial groups, such as Aboriginal Australians, could readily be pointed to as an example. But see *Bropho* (n 16) in which the Federal Court held that a racially-based cartoon did not to infringe pt IIA of the *RDA* (n 4), as it was done ‘reasonably and in good faith’ under s 18D.

¹⁸⁴ Gelber, ‘Speaking Back’ (n 152) 257.

¹⁸⁵ *Ibid.* Therefore, vilification has *political* implications, as it may prevent members of target groups from participating, or being heard, in public discourse or debate on political topics. Effectively, it may exclude members of target groups from influencing public debate. On this basis, it may be regulated: Gelber, ‘Freedom of Speech’ (n 117) 320.

¹⁸⁶ For example, an audience with entrenched racist views is unlikely to be persuaded by even the most eloquent response to vilification.

¹⁸⁷ Gelber, *Free Speech Versus Hate Speech* (n 114) 73.

¹⁸⁸ *Ibid.* 87. Support from the state may go some way to ameliorating this power disparity.

¹⁸⁹ See, eg, Gelber and McNamara, ‘Private Litigation’ (n 23) 318–31.

¹⁹⁰ Caroline West (n 172) 235–6.

that there can be no reasoned response to a verbal epithet.¹⁹¹ Similarly, Waldron notes that there is no scientific basis for claims or assertions of racial inferiority, or superiority.¹⁹² Therefore, there is no logical basis for speaking back to such claims, in order to continue a ‘debate’, or to seek to disprove the truth of such claims.¹⁹³ In response, Gelber argues that even threats and insults can be responded to on a general level.¹⁹⁴

Overall, speaking back by members of target groups can present an alternative viewpoint to, or challenge the message in, certain hate speech. However, for several reasons, including the silencing effect of hate speech, responding in this way may not be effective in all circumstances, and therefore may not empower members of such groups. Indeed, as mentioned above, Gelber’s recent work supports the legitimacy of racial vilification laws.¹⁹⁵ In particular, her recent work emphasises that hate speech imperils not merely individual capabilities, but also the process of democratic deliberation and public discourse.¹⁹⁶ Gelber’s recent work highlights the strong connection between the personal impacts of hate speech on members of target groups, and its political impacts (such as that it effectively excludes members of target groups from participating in, and influencing, public debates, including debates concerning their rights and status).¹⁹⁷ Given the seriousness of these harms, Gelber’s recent work regarding Australia’s racial vilification laws does not refer to her original speaking back approach.¹⁹⁸ She therefore appears, implicitly, to accept that such laws are justified and necessary.

The next Part of this article will compare the operation of pt IIA of the *RDA* with the two speaking back approaches examined in this article.

¹⁹¹ Nielsen (n 172) 157 n 9, 164.

¹⁹² Waldron (n 9) 195.

¹⁹³ Swannie, ‘Free Speech Arguments’ (n 3) 107–10. However, speaking back may change public attitudes, at least over time.

¹⁹⁴ For example, Gelber suggests that speaking back could be an appropriate response where an Aboriginal Australian woman is racially vilified by two strangers at a service station: Gelber, *Free Speech Versus Hate Speech* (n 114) 22, 69. Further, in response to a wooden cross being burnt at night in the front yard of a home of people of colour in the United States, she argues that ‘[t]he production and local distribution of a newsletter, or the holding of neighbourhood community meetings to seek to counter the racist content of the attack may have been warranted.’: at 132.

¹⁹⁵ Gelber, ‘Freedom of Speech’ (n 117) 320.

¹⁹⁶ *Ibid.*

¹⁹⁷ *Ibid.*

¹⁹⁸ See, eg, Gelber and McNamara, ‘Private Litigation’ (n 23).

V COUNTERSPEECH ALONE IS NOT SUFFICIENT REDRESS

A Introduction

This article has so far examined Brettschneider's conception of democratic persuasion, which requires the state to respond to hate speech, and Gelber's (original) speaking back approach, which requires the state to support members of target groups to respond to hate speech.¹⁹⁹ This article accepts that these approaches may be appropriate and effective for certain purposes and in certain circumstances. However, this Part argues that neither of these approaches, taken by themselves, provides sufficient redress to targets of racial vilification. Specifically, these approaches do not provide the types of protection and redress provided by pt IIA of the *RDA*.

It is important to note that both Brettschneider's and Gelber's approaches regard counterspeech as an *exclusive* remedy for hate speech. Brettschneider is explicit in this regard, as he considers hate speech laws democratically illegitimate.²⁰⁰ Gelber's opposition to hate speech laws is implicit by comparison, but is nonetheless apparent. For example, her work juxtaposes 'maximising participation in ... speech' (a major goal of her approach), with 'punishment' and 'restriction'.²⁰¹ She argues that her approach, being based on capabilities theory, is 'support-oriented', rather than punitive or restrictive.²⁰² Her work refers approvingly to the notion that hate speech should be 'answered', rather than 'banned', and emphasises the importance of an 'exchange of ideas'.²⁰³

B The Purposes of Racial Vilification Laws

Civil racial vilification laws, such as pt IIA of the *RDA*, serve two broad purposes. First, they provide redress to members of target groups who are harmed by vilification. Second, they set standards of behaviour that all members of society must comply with. This section examines these two purposes in more detail.

As outlined above, pt IIA makes certain conduct unlawful, and a person aggrieved by such conduct may seek redress. In other words, racial vilification is recognised as a legal wrong against members of target groups. Further, targets have a legal right, provided by the state, to protection from vilification. This provides a form of corrective justice to members of target groups.²⁰⁴ This is not to say that current

¹⁹⁹ A third approach, briefly outlined above, is Gelber's current approach, which, although not positing speaking back as an exclusive remedy for hate speech, regards it as operating in conjunction with racial vilification laws.

²⁰⁰ See, eg, Brettschneider, *State Speaks* (n 60) 105–7.

²⁰¹ Gelber, *Free Speech Versus Hate Speech* (n 114) 117, 130–1.

²⁰² *Ibid* 119.

²⁰³ *Ibid* 10–11.

²⁰⁴ See, eg, Weinrib (n 54) for an influential account of corrective justice.

processes for seeking redress for an alleged breach of pt IIA are without flaws, or that members of target groups always receive adequate redress.²⁰⁵

However, even scholars who criticise these laws highlight that they enable members of target groups to seek redress for racial vilification.²⁰⁶ This enables members of such groups to vindicate their public standing and dignity, through a process provided by law. For example, in *Eatoock*, Bromberg J ordered the respondent to publish a correction notice in the newspaper where the offending articles were initially published.²⁰⁷ This ‘expressive’ remedy provided appropriate vindication of the claimant’s rights.²⁰⁸

The second purpose of racial vilification laws is to establish minimum standards of behaviour applying to all members of society. Indeed, the National Report of the *Royal Commission* emphasised that legislation proscribing racial vilification can have a powerful educative role, particularly in relation to changing attitudes and defining socially acceptable behaviour.²⁰⁹

As highlighted above, Brettschneider emphasises the importance of the *expressive* role of the state in responding to racial vilification.²¹⁰ However, he appears to limit this expressive role to the executive and judicial branches of the state.²¹¹ In contrast, critical race scholars such as Richard Delgado and Jean Stefancic argue that the state expresses its values primarily through laws that it enacts, and through court decisions that interpret and apply legislation.²¹² By enacting and enforcing laws, the state defines and reinforces acceptable standards of behaviour. Particularly in relation to addressing public racially-based behaviour, laws play a significant role. For example, laws prohibiting racial discrimination and segregation are regarded as significant advancements towards equal rights, or free and equal citizenship. Therefore, civil racial vilification laws are both expressive and coercive. Further, Brettschneider’s

²⁰⁵ Gelber and McNamara highlight that most racial vilification complaints are resolved privately in conciliation, rather than publicly in court. They regard this as inappropriate, given the ‘public’ nature of the wrong. They also highlight practical difficulties in accessing and succeeding in legal proceedings, and the risk of adverse costs orders if unsuccessful: Gelber and McNamara, ‘Private Litigation’ (n 23) 333–4; Gelber and McNamara, ‘Mapping the Gaps’ (n 44) 495–6, 509–11.

²⁰⁶ See, eg, Gelber and McNamara, ‘Mapping the Gaps’ (n 44) 508.

²⁰⁷ *Eatoock* (n 14) 366 [468]; *Eatoock v Bolt [No 2]* (2011) 284 ALR 114, 117–19 [13]–[23] (Bromberg J).

²⁰⁸ See, eg, Adrienne Stone, ‘The Ironic Aftermath of *Eatoock v Bolt*’ (2015) 38(3) *Melbourne University Law Review* 926, 938–40. The decision in *Eatoock* (n 14) is examined further in the following section.

²⁰⁹ *Royal Commission* (n 25) vol 4, [28.3.1].

²¹⁰ Brettschneider, *State Speaks* (n 60) 95.

²¹¹ *Ibid.*

²¹² See, eg, Richard Delgado and Jean Stefancic, *Understanding Words That Wound* (Routledge, 2004). See also Charles R Lawrence III, ‘If He Hollers Let Him Go: Regulating Racist Speech on Campus’ [1990] (3) *Duke Law Journal* 431.

argument that the state expresses its values primarily through public statements, public education programs, and funding decisions is questionable. Rather, laws such as pt IIA express the standards of conduct required of all members of society. Empirical research by Gelber and McNamara confirms that members of groups subject to public vilification use racial vilification laws to seek public vindication (through a court or tribunal hearing and determination) for the wrong committed against them.²¹³

Brettschneider argues that the state should verbally condemn racial vilification, but should not pass laws to restrict or regulate such conduct. However, Robin West argues convincingly that states that condemn racial vilification, without regulating it, are hypocritical, and complicit in such conduct.²¹⁴ Further, responding in the way advocated by Brettschneider suggests that the state — despite its public statements — does not take the harms of racial vilification seriously.²¹⁵ Enacting civil racial vilification laws enables members of communities targeted by such conduct to seek justice.²¹⁶

C Part IIA Is Proportionate and Justified

As mentioned above, both Gelber and Brettschneider oppose hate speech laws. For different reasons, they favour an absolute prohibition on regulating speech. Part IIA of the *RDA*, on the other hand, seeks to provide protection from the harms of vilification, while also permitting discourse on a range of topics. In other words, pt IIA restricts speech in a proportionate and justified way.

The structure of pt IIA requires courts to consider, first, whether the particular conduct is likely to be harmful, as defined in s 18C, and second, whether it was justified in terms of s 18D. The second issue involves consideration of the subject matter of the relevant conduct, and also whether it was done proportionately, or reasonably. Section 18D exempts certain types of conduct from liability, including statements or publications made ‘in the public interest’.²¹⁷ Such statements are at the core of political arguments for free speech.²¹⁸

The way in which courts balance the competing considerations of protecting targets from harm and allowing discourse on public interest topics is illustrated by the decision

²¹³ Gelber and McNamara, ‘Private Litigation’ (n 23) 333. In *Creek* (n 10), Kiefel J noted the importance of court orders that would vindicate the applicant (an Aboriginal woman) ‘in the eyes of her own community’: at 360 [34].

²¹⁴ Robin West (n 101) 1037–8.

²¹⁵ *Ibid.*

²¹⁶ *Ibid.*

²¹⁷ *RDA* (n 4) ss 18D(b)–(c).

²¹⁸ See, eg, *Barendt* (n 100) 160. For example, certain defences to defamation, such as fair comment, depend on the publication being made on a matter of public interest. Broadly, public interest refers to any matter that is or may be of concern to the general public: at 159–60.

in *Eatock*. In this case, the respondents (a prominent media commentator and a widely-circulated newspaper) published statements alleging that certain ‘fair-skinned Aboriginals’ sought and received certain tax-payer funded benefits.²¹⁹ They argued that this was an honest opinion, or a fair report, on the political issue of who should be entitled to government payments and other benefits. Justice Bromberg accepted that the issue of who is entitled to certain taxpayer funded payments was, broadly speaking, one of public interest.²²⁰ However, his Honour held that the exemptions in s 18D did not apply, as the statements were not published ‘reasonably and in good faith’,²²¹ because statements in the publication concerning particular individuals were inaccurate, and sarcastic and inflammatory in their tone and language.²²²

Justice Bromberg held that pt IIA does not prohibit the discussion of a person’s racial identification, or even the genuineness of that identification.²²³ However, the respondent’s conduct could not be justified under the s 18D exemptions in this case due to the lack of care and prudence exercised in publishing the articles.²²⁴ Therefore, the respondents were found liable due to the careless and harmful manner in which the statements were published, rather than due to the particular ideas or viewpoint expressed.

Similarly, defamation law imposes civil liability on individuals for public statements that lower a person’s standing in the community. Even statements involving matters of government or politics may incur liability. When those statements refer to particular individuals, and they are made either maliciously or without reasonable care, they may be subject to civil liability.²²⁵ Wojciech Sadurski argues that racial vilification concerns statements *about groups* (as distinct from statements about individuals) and that such statements are by definition ‘speech on public matters’.²²⁶ Further, and by reference to the case of *Beauharnais v Illinois*,²²⁷ he contends that racial vilification is a ‘contribution to public debate about racial relations’.²²⁸ However, as the *Eatock* case illustrates, pt IIA applies to statements about individuals, as well as groups.

Significantly, pt IIA does not ban or prohibit the expression of certain political views. Rather, s 18D requires courts to consider the subject matter of the publication (and particularly whether it is ‘of public interest’),²²⁹ and also the nature and

²¹⁹ *Eatock* (n 14) 270 [3], 276 [32], 280 [49] (Bromberg J).

²²⁰ *Ibid* 344 [361], 359 [431].

²²¹ *Ibid* 358 [425], 362 [447].

²²² *Ibid* 358 [425].

²²³ *Ibid* 364–5 [461].

²²⁴ *Ibid* 358 [425], 362 [447]–[449].

²²⁵ See, eg, *Lange v Australian Broadcasting Corporation* (1997) 189 CLR 520, 576 (Brennan CJ, Dawson, Toohey, Gaudron, McHugh, Gummow and Kirby JJ).

²²⁶ Sadurski (n 160) 179.

²²⁷ 343 US 250 (1952).

²²⁸ Sadurski (n 160) 191.

²²⁹ *RDA* (n 4) s 18D(c)(i).

circumstances of the publication. Whether the publication concerned a matter of public interest is an important consideration. This is appropriate, however, as public discussion of issues concerning race are an important part of public discourse or political discussion and debate in a modern multicultural democracy.²³⁰

Part IIA does not prevent discussion of issues concerning race, such as ‘the attributes of [people of] different races, immigration and asylum policy, or the desirability of integrated or segregated employment and housing policies’.²³¹ However, pt IIA specifically seeks to protect members of particular racial groups from the dignitary harms of racial vilification. Courts take into account the particular circumstances of the vilification, such as the type and extent of the likely harm, and the degree of care taken by the respondent to minimise this harm.²³²

Deterrence of certain conduct is primarily the role of the criminal law.²³³ However, civil laws may also influence public behaviour, by establishing norms of behaviour.²³⁴ Although pt IIA of the *RDA* primarily seeks to vindicate the public standing of members of groups targeted by racial vilification, it may also operate to *deter* such conduct.

Scholars such as Gelber and McNamara highlight the seriousness of the harms of racial vilification.²³⁵ They argue that these harms are primarily *constitutive* in nature, including the impairment a person’s sense of security, and their ability to participate fully in society.²³⁶ Similarly, Waldron argues that racial vilification seriously undermines the dignity of members of target groups,²³⁷ and Gelber describes hate speech as a ‘discursive act of discrimination’.²³⁸ Therefore, given the seriousness of these harms, *deterrence* of such conduct is an important goal, rather than merely responding after the event.

²³⁰ Jürgen Habermas argues that public discourse, or discussion leading to the formation of public opinion, should be unrestricted in democratic societies. Like Brettschneider, Habermas argues that this is essential for the democratic legitimacy of the state: see generally Jürgen Habermas, *Theory of Communicative Action*, tr Thomas McCarthy (Beacon Press, 1984) vol 1.

²³¹ Barendt (n 100) 172.

²³² In *Bropho* (n 16) the Court held that the requirement in s 18D that the relevant conduct be done ‘reasonably and in good faith’ involves consideration of proportionality, or whether the relevant conduct was done with reasonable care, having regard to its purpose and its likely harm: at 128 [79] (French J), 141–2 [139]–[140] (Lee J). See also Swannie, ‘Influence of Defamation Law’ (n 11) 61–3.

²³³ See, eg, Gelber and McNamara, ‘Private Litigation’ (n 23) 312–13, 316.

²³⁴ Cane (n 13) 38.

²³⁵ Gelber and McNamara, ‘Mapping the Gaps’ (n 44) 500–7.

²³⁶ *Ibid* 505–7.

²³⁷ See above Part II(C).

²³⁸ Gelber, *Free Speech Versus Hate Speech* (n 114) 9.

Breach of pt IIA operates to impose civil liability on respondents, which (we may infer) deters people from engaging in hate speech. On the other hand, counterspeech by the state involves no real consequences for vilifiers,²³⁹ and therefore is unlikely to deter racial vilification. Speaking back therefore fails members of groups targeted by racial vilification in two ways. First, it fails to confer rights on members of target groups to seek redress in respect of particular incidents of vilification. Second, it fails to prevent or deter such conduct in the future. Racial vilification laws such as pt IIA confer rights and impose duties. Like defamation laws, pt IIA deters harmful conduct by attaching civil liability to it. The provisions impose certain duties on all members of society in respect of their public conduct. Specifically, pt IIA prohibits offensive racially-based behaviour that damages the basic public standing, or dignity, of members of the target group.

Political philosopher Maxime Lepoutre favours counterspeech on the grounds that hate speech laws are likely to have two unintended consequences. First, they may fail to capture subtle or sophisticated hate speech, and therefore they permit speech that is harmful but lawful.²⁴⁰ Second, such laws may be used to silence members of minority groups.²⁴¹ Lepoutre argues that state counterspeech is ‘flexible’, and therefore it avoids the first concern,²⁴² and is less restrictive, so it avoids the second concern.²⁴³

These concerns have no real application to pt IIA of the *RDA*. As mentioned above, the operation of pt IIA depends on the *effect* of certain conduct on members of the target group. The relevant conduct must be ‘reasonably likely, in all the circumstances, to offend, insult, humiliate or intimidate’²⁴⁴ a reasonable member of target group.²⁴⁵ Part IIA therefore is capable of applying to subtle or sophisticated racial vilification. This is illustrated in *Eatoock*, where the impugned newspaper articles were found to infringe pt IIA partly on the basis that they invoked harmful racial stereotypes regarding Aboriginal Australians.²⁴⁶

There is no evidence, either, that pt IIA has been used to silence members of minority groups. This may be due to pt IIA being a civil provision, rather than involving

²³⁹ Brettschneider argues that the state should avoid ‘demonizing’ individuals, when it publicly condemns hate speech. For this reason, he argues that the state should focus on the ideas or message presented, rather than the vilifier: Brettschneider, *State Speaks* (n 60) 89. See also Lepoutre (n 166), who argues that vilifiers may be ‘disaffected citizens’, who are merely expressing that disaffection: at 860–1.

²⁴⁰ Lepoutre (n 166) 870–1.

²⁴¹ *Ibid* 875.

²⁴² *Ibid* 870–1.

²⁴³ *Ibid* 877.

²⁴⁴ *RDA* (n 4) s 18C(1)(a).

²⁴⁵ *Eatoock* (n 14) 318–19 [243]–[244], 320–1 [250]–[251].

²⁴⁶ *Ibid* 330 [294], [297]–[298]. Justice Bromberg also relied on other reasons, such as the factual inaccuracies in the articles, and the sarcastic tone: see above Part V(C).

criminal sanctions. Also, courts must consider ‘all the circumstances’ when applying the provisions.²⁴⁷ Therefore, it is unlikely that a claim brought by a member of a majority racial group against a member of minority group would meet this threshold. Finally, claims that do not involve ‘profound and serious effects, not to be likened to mere slights’ will not infringe pt IIA.²⁴⁸ This threshold is more likely to be met by conduct which targets members of a disadvantaged or minority racial group.

In summary, the provisions of pt IIA enable members of groups targeted by racial vilification to seek legal redress in respect of that wrong. These laws also establish a standard of conduct, applying to all members of society, regarding racial abuse. Therefore, these laws offer forms of protection and redress not provided by counterspeech proposals. Finally, they are unlikely to have the unintended consequences presented by scholars such as Lepoutre.

VI CONCLUSION

This article has examined Brettschneider and Gelber’s different speaking back approaches to racial vilification. Both scholars argue that racial vilification laws are objectionable on free speech grounds, and that speaking back is a preferable response. Gelber’s account involves the state supporting members of target groups to speak back to vilification. She argues that this empowers such communities, and that it publicly challenges racist ideas. Brettschneider, on the other hand, argues that the state itself should publicly respond to racial vilification in certain circumstances. He argues that this promotes the ideal of free and equal citizenship, on which the political legitimacy of the state ultimately rests.

Both approaches have serious limitations. Gelber’s approach places considerable burdens on members of target groups, in terms of responding to incidents of racial vilification. It also fails to acknowledge that vilification may effectively discredit members of target groups in the eyes of the general public. Therefore, Brettschneider’s conception of democratic persuasion by the state may hold more promise. Unlike members of target groups, the state has authority to speak on behalf of all members of society.

This article examined these arguments in the context of the provisions of pt IIA of the RDA, which are civil laws enabling individuals and members of groups targeted by racial vilification to seek legal redress for this wrong. These laws recognise the serious harms of racial vilification, particularly regarding its impacts on the public standing, or dignity, of members of target groups. In terms of procedure and substance, they provide a form of corrective justice to such groups, by recognising racial vilification as a legal wrong, and enabling targets to seek redress from a particular wrongdoer. In their drafting and interpretation, these laws emphasise the

²⁴⁷ *RDA* (n 4) s 18C(1)(a).

²⁴⁸ *Eatoock* (n 14) 325 [268], quoting *Creek* (n 10) 356 [16] (Kiefel J).

importance of redressing the harms experienced by individuals and groups targeted by acts of racial vilification.

In light of the provisions of pt IIA, counterspeech proposals do not provide adequate redress to targets of racial vilification. Clearly, the state has a role in speaking back (or responding) to incidents of racial vilification, apart from enacting racial vilification laws. The state does this, for example, through education programs, and by funding anti-racism campaigns and groups. However, these initiatives, although important, do not provide legal redress for members of target groups, as pt IIA does. Laws such as those in pt IIA — which *prohibit* racial vilification, thereby vindicating the public standing of members of target groups, as well as deterring such conduct in the future — are necessary to protect the dignity of individuals and groups targeted by racial vilification, and to enforce standards of acceptable behaviour for all members of society.