

**FREEDOM OF SPEECH, DISCRIMINATING SPEECH AND TOLERATION**

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David A J Richards, *Free Speech and the Politics of Identity*

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[261] This closely written book advances a thesis, which I describe very simplistically — that freedom of speech should trump censorship of discriminating speech and more toleration would be a good thing. While this thesis is not in itself a new one, Richards' approach, using a detailed historical, comparative and public law analysis, offers some valuable insights.

In six chapters, Richards examines how various jurisdictions, in contrast to the United States, have dealt with issues of discrimination by censoring speech advancing anti-Semitism, racism, sexism and homophobia, and argues that such public laws in fact exacerbate the structural injustices they are intended to remove. In the first chapter, he introduces the subject matter and explains his methodology. Richards takes an American constitutional perspective on these issues and aims to defend that jurisdiction's stand against group libel laws, obscene materials and blasphemy. But he does not intend to defend all aspects of the American approach to free speech, and foreshadows a criticism of US case law which has rejected regulation of political campaign funding on free speech grounds. Richards declares his intention to interrogate the state of current free speech theory and the theory of anti-discrimination by using a mostly twentieth century historical approach to examine jurisdictions including Germany, Canada, Britain, Israel and America. He is interested both in political theory and the historical context behind existing laws in his chosen subject field, and he seeks to explicate and give normative force to his arguments. A particular focus he identifies early on is the world wide revulsion of Hitler's racist politics which followed the Second World War, and resulted in a national and international movement seeking to give constitutional form to higher laws, laws which recognised basic human rights, including freedom of speech and freedom from discrimination. Richards sets out to

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develop a unifying theory of both rights that is based on toleration, but which gives priority to free speech. The task he sets himself is a challenging one.

[262] Chapter Two offers Richards' theory of toleration to explain why freedom of speech should have priority as a right. He critically examines and rejects utilitarian models of free speech and also arguments from democracy, as both failing to give sufficient protection to subversive advocacy. Richards' toleration theory is a 'deontological contractualist political theory of equal respect for persons' (27). The realm of the conscience is to be protected and respected, which means respecting the moral sovereignty of dissenters from mainstream views. However, Richards states he does not mean the state cannot act to deal with dissenters who move from the realm of conscience into the realm of action and thereby threaten others.

The thesis then moves in Chapter Three to state the structural connection Richards sees in the main forms of unjust discrimination, and how they all share an abridgment of basic human rights, but in particular, freedom of conscience and speech. He then explicates this further in Chapter Four by examining the US scepticism of group libel laws and comparing it to approaches in national and international law. Chapter Five continues this theme in looking at laws of obscenity and blasphemy. Chapter Six turns to the American refusal to restrict political campaign financing, which Richards does not support because he believes restrictions in fact advance rather than hinder free speech. Richards concludes with some general observations about how the theory of toleration might be advanced.

The individual insights offered by Richards are not particularly original — for example, his discussion of the evils of sexism and how gender stereotypes have dehumanised and denied human rights to women (77) and also to gays (193), has been the subject of much scholarly discourse. However, it is in drawing together the various threads and explicating the interrelationships between the historical roots of sexism, racism and homophobia that Richards offers unique and broad insights. The book appears to be extremely well-researched and thoughtful. It is, one has to say, very learned — sometimes at the expense of accessibility. One result of this is that although each chapter concludes with a careful map of where we have been and where we are going, the repetition of sometimes quite dense theoretical language can be irritating. Although

the thesis is intended for political philosophers and lawyers, it is couched largely in the language of the jurist. It is easy to see the influence of Richards' colleagues such as Ronald Dworkin, but his writing style is not quite as attractive and engaging as Dworkin, or Posner, for example. And the discourse is somewhat imbalanced in that Richards spends more time on the arguments for prioritising free speech than on the few exceptions he would allow — he discusses very briefly the 'domain of action' where the state has the right and responsibility to protect individuals from unjust discrimination, and would in fact allow limits to speech in the workplace (208), but his manner leaves one thirsting for more. The discussion of why laws limiting campaign financing would advance rather than hinder free speech is also brief (230) compared to the balance of the discourse.

But these are descriptions, not fatal criticisms. For me, an academic civil libertarian interested in free speech, with some understanding of jurisprudence, the book came alive when it ranged comparatively over the history and current national and international laws relating to sexism, racism and homophobia. Richards describes how the first wave of women's suffrage was focussed on the vote, abolition and sexual purity, largely because speech about contraception and the sexual expression of women was still being censored, and he reminds us that the uproar and attempt to use blasphemy laws to repress Salman Rushdie's *Satanic Verses* began in India and was pursued in many countries other than the UK. And although it is not in itself a difficult exercise to find rich examples of the stupidity of censorship, the book includes many lively and apposite illustrations, such as the Lady Birdwood racial hatred trial which was abandoned in the UK in 1995 (172). Some of the discussion in the book is now unfortunately out of date — arguments about censorship of obscenity have now moved on from arguments about depictions of women (and men) in pornography, to discussion of the impact of the internet and the apparent proliferation of child-pornography. This is not Richards' fault. His theory of toleration would suggest that respect be accorded to users and collectors of such material, but that criminal laws should be used to track down those who use children in the production of it. Perhaps Richards is addressing this development in his next book.

[263] Overall, *Free Speech and the Politics of Identity* makes a strong argument that laws intended to suppress speech associated with discrimination in fact do more harm

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to discriminated minorities than good. It is a commendable book, with moments of insight.