BOOK REVIEW

Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies by Ian Cram (Aldershot: Ashgate Publishing Ltd, 2006) pages 1–233. Price US$99.95 (hardcover). ISBN 0 7546 2365 3.

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CONTENTS

I INTRODUCTION

This book provides a comparative constitutional perspective on some current hot topics in speech regulation, including hate speech, commercial speech and electoral speech, and examines them from an analytical framework of political philosophy. Central elements of libertarianism, communitarianism and civic republicanism, insofar as they are relevant to the theme of speech regulation, are outlined early on; and form a set of central considerations which are revisited throughout the book as specific cases and examples are discussed. Thus, the decisions of courts in, for example, the regulation of electoral broadcasting, are considered within the framework of values upheld in electoral regulations and the broader purposes these values might serve from the perspective of philosophical considerations about why speech is important and deserving of protection. This makes the book interesting and contributes elements that often do not feature in other literature which contains a similarly close consideration of individual judgments.

II A CIVIC REPUBLICAN BASIS FOR SPEECH REGULATION

The overall argument Ian Cram makes is that society works best when decisions are made by informed and equally participatory citizens in a deliberative manner. This is an argument derived from civic republican literature, especially

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the work by Cass Sunstein.[1] Although not original, it is an interesting premise from which to consider the decisions that courts do, and should, make. This framework gives rise to the central questions of what is required for citizens to be able to participate in deliberation and what is the role of the courts in creating and sustaining these conditions.

Cram's central normative claim is that the courts should have a role to play in promoting and ensuring democratic deliberation. This premise is justified through his analysis of the relative usefulness of libertarian, communitarian and civic republican ideas when applied to the regulation of speech, and his conclusion that the civic republican concept of a community of equal citizens participating in democratic deliberative decision-making is ideal. From this premise emerges a path through the maze of competing speech claims, since the centrally conceived task for the courts is to ensure deliberative decision-making, which is reliant upon an informed citizenry.

Cram's argument is counterposed to the ideas of Jeremy Waldron and Adam Tomkins, among others, who have argued that Parliament is the best place for decision-making in contested and controversial areas such as speech regulation.[2] Cram points out, as do others, that Waldron's ideal of legislative decision-making is rose-tinted.[3] However, Cram provides a more robust defence of judicial review than simply the pragmatic and empirical claim that parliamentary majoritarianism can, and does, have the potential to infringe on human rights. His defence of judicial review lies more strongly in his view of the particular role that the courts can play in expressing and defining constitutional values such as equality and dignity, as well as liberty.[4] The second chapter of the book affirms his view that judicial review has a role to play in 'promoting the conditions for vigorous democratic debate among a community of political equals'.[5] He argues that the roles of judicial review are the result of the shortcomings of majoritarianism in protecting rights, and more interestingly, deliberative democracy's requirement that all participants — including those with less communicative power — should be able to be heard.[6] As a comparativist, Cram also defends jurisdictional differences, adding that judicial review ought to be able to achieve its goal while respecting differences in legal frameworks and political cultures.[7] Having advocated this role for the courts, Cram spends the subsequent chapters detailing how this might occur.

[1] See, eg, Cass Sunstein, 'Beyond the Republican Revival' (1988) 97 *Yale Law Journal* 1539; Cass Sunstein, 'Political Equality and Unintended Consequences' (1994) 94 *Columbia Law Review* 1390.

[2] Ian Cram, *Contested Words: Legal Restrictions on Freedom of Speech in Liberal Democracies* (2006) 11–12, 21. See also Adam Tomkins, *Our Republican Constitution* (2005) 124–30; Jeremy Waldron, *Law and Disagreement* (1999) 289–91.

[3] Cram, above n 2, 26.

[4] Ibid 205–7.

[5] Ibid 12.

[6] Ibid 19–20.

[7] Ibid 28.

III HOT TOPICS

Individual chapters are devoted to electoral regulation,[8] election campaign financing, hate speech, sexually expressive material and commercial speech. In each chapter, Cram interweaves consideration of how decisions in controversial cases have reflected alternative and competing philosophical bases with a critique of those decisions which he argues have fallen short — either in their protection of speech that matters or in their regulation of speech that harms.

An example of speech protection is electoral advertising which, however offensive it might be to some people, is an important example of speech which contributes to informing the citizenry of their electoral options at a time when the provision of such information ought to be prioritised over other competing values. In pre-election periods, electors are acutely aware of an imminent contest for office and are arguably more attuned to, and prepared to consider, competing arguments by candidates and parties. So Cram argues that the decision of the House of Lords to uphold a BBC prohibition on the screening of advertisements by the ProLife Alliance[9] is an example of only 'lip service' being paid to the importance of political speech.[10] Since, in his view, speech is important to the extent that it contributes to the development and maintenance of an informed and deliberative citizenry, this decision cannot be justified.

An example of speech regulation, in which the harm of speech has been insufficiently recognised, is the presumption in the United States in favour of content-neutrality in First Amendment jurisprudence, such as in *RAV v City of St Paul, Minnesota* ('*RAV Case*').[11] Cram argues that this presumption, which has invalidated hate speech regulation in the United States, risks insufficient recognition of the effects of hate speech on involvement in democratic deliberation by 'hitherto under-represented groups'.[12] Since the purpose of speech regulation is to ensure democratic deliberation, where hate speech threatens that deliberation, its restriction is justified. He argues that constitutional jurisprudence ought to signal 'the equal worth of groups at the margins of community life'[13] and, for the notion of an inclusive society to be meaningful, hate speech ought to be met with an appropriate legal response, which allows for restrictions to be imposed.[14] Cram's arguments concerning sexually expressive material are similarly based on his assessment that such material contributes little to democratic deliberation and thus ought to be more easily regulated.[15]

One might disagree with some of the more specific conclusions Cram draws. For example, he forcefully argues that the US Supreme Court in the *RAV Case* rejected a previously existing hierarchy of speech which privileged and granted

[8] This includes bans on political parties, regulation of election broadcasts, and restrictions on issue advocacy and the right to vote and stand as a candidate.
[9] *R (Prolife Alliance) v British Broadcasting Corporation* [2004] 1 AC 185.
[10] Cram, above n 2, 54.
[11] 505 US 377 (1992).
[12] Cram, above n 2, 133.
[13] Ibid 137.
[14] Ibid 137–8.
[15] Ibid 142.

greater presumptions in favour of political speech as compared with commercial, hateful or sexually expressive speech.[16] However, expressed in that way, it does not necessarily represent a generally held view of the impact of the *RAV Case* on First Amendment jurisprudence. This is because the *RAV Case* has tended to be seen as having extended some of the norms of protected categories of speech (in particular, content-neutrality and viewpoint-neutrality) to unprotected categories of speech.[17]

Additionally, Cram's view that sexually expressive material lacks virtually any social contribution seems almost a little prurient, particularly given his lack of differentiation between types of pornography.[18] Clearly, much sexually expressive material makes little positive contribution to progressive views in relation to social conditions. Indeed, it arguably has a very forceful role to play in producing a general view of women as predominantly sexual and passive beings. If the idea underpinning decisions in favour of speech protection ought to be that it assists in the maintenance of conditions in which the citizenry can become informed deliberators, then sexually explicit imagery which demeans women arguably reduces their ability to both be informed deliberators and be perceived as such by others. Thus, the regulation of material demeaning women *could* be justified. However, there is such a myriad of material demeaning women that is not sexually explicit — think of your average household cleaner or food preparation advertisement — that it is hard to draw the line here. This argument concerning sexually explicit imagery, as in many free speech arguments, draws out the lines of tension in particularly interesting and potentially contradictory ways.

IV CONCLUSION

Although I have attempted to emphasise the more interesting philosophical aspects of Cram's argument, the book is also heavy on the detail of individual judgments. At times it is difficult to wade through this empirical material to locate the thread of the broader argument. Additionally, a wide range of cases is drawn upon without a systematic comparison of, say, just three or four jurisdictions being undertaken. While there is an emphasis on cases from the United Kingdom, Europe, the US and Canada, other jurisdictions also feature, including Germany (in relation to the banning of political parties), New Zealand (in relation to their Bill of Rights) and Australia. The book probably could have benefited from a concentration on fewer cases, with greater emphasis on the broader argument.

Nevertheless, the book is a well-researched, up-to-date and comprehensive account of some speech controversies in those jurisdictions that are of most relevance to those with an interest in the field. It would be of particular interest to students, especially higher level students with a good general knowledge of

[16] Ibid 130, 135.

[17] James Weinstein, *Hate Speech, Pornography, and the Radical Attack on Free Speech Doctrine* (1999) 75; L W Sumner, *The Hateful and the Obscene: Studies in the Limits of Free Expression* (2004) 71. I am grateful to Adrienne Stone for discussion helping me to clarify this point.

[18] Cram, above n 2, 140–2.

the law or comparative political systems, who are new to free speech controversies. It may also be useful to more experienced readers who want to update their knowledge of key cases, events and controversies.