SCEPTICISM, HUMAN DIGNITY AND THE FREEDOM TO OFFEND

Compromising freedom of speech is not the way to secure human dignity, says **Daniel Ward**.

Murderer of civilians; contaminated, dirty body of a pig; no better than Hitler. That is how the self-proclaimed Sheikh Man Haron Monis described an Australian digger who had died fighting in Afghanistan. He did it in a letter of 'condolence' to the grieving parents. It was not the only such letter.

Monis was charged under a Commonwealth statute prohibiting use of the postal service to send 'offensive' messages. His lawyers argued that this law was invalid. If the courts agreed, Monis would walk free. It is no crime to breach an invalid law.

Judges in the NSW District Court and Court of Appeal did not agree. They found the law valid. Monis rolled the dice again, appealing to the High Court. Unusually, an even number of justices heard the appeal. Even more unusually, they split evenly over the outcome.[1]

That meant the High Court's 40,000-word 'judgment' stood for precisely nothing. The sheikh's final appeal might just as well not have happened. So the statute survived Monis' challenge. Just.

How did it come to this? How could lawyers have had a hope of arguing that the government could not prosecute Monis?

Constitutional freedom

In the 1990s, the High Court found that under our Constitution, we enjoy a so-called 'implied freedom of political communication.'[2] In practice, this means politicians can't, without good reason, take away our freedom to express ourselves on political matters. For example, a Labor government couldn't outlaw criticism of its ministers (much as News Ltd's nemesis, Senator Stephen Conroy, might have like the idea). If it tried to do so, no court would enforce the prohibition, because the law would be invalid.

I use the caveat 'without good reason.' That is not how the High Court expressed it.

The justices affirmed that government *can* make laws that whittle away at our free speech provided the court thinks those laws are 'reasonably appropriate and adapted' to serve what the court regards as a 'legitimate end.' The laws must serve that 'legitimate end' in a way that is 'compatible' with maintaining our constitutional system of government.[3] What is that system? The court calls it 'representative and responsible government.'[4] If this sounds obscure, that's because it is. And it has drawn criticism.

One critic is recently retired High Court Justice Dyson Heydon. In the sheikh's appeal, Heydon launched a wholesale attack on the 'implied freedom of political communication.' Human rights such as free speech, he said, are supposed to protect human dignity.

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Yet here, the implied freedom was invoked to protect a man who had assaulted the dignity of slain soldiers' parents. As Heydon put it, 'Why should a constitutional right be invented which is capable of injuring the right to dignity?'[5]

Sceptical basis for free speech

It is an open question whether we have a 'right to dignity.' And it is anyone's guess what such a right would look like if we had it. But it is true that human rights advocates often speak of protecting human dignity. The problem with Heydon's argument, though, is that this is not where the value of free speech necessarily lies. Instead, freedom of speech is about staving off evil—the evil that comes from allowing anyone but an autonomous individual to exercise power over that individual's own utterances. No one but you can be trusted to decide what you may say, certainly not government.

The argument need not be cast in amorphous 'human dignity' terms. Nor is it necessary to rely on any assertion that freedom of speech is somehow a 'natural right' or a 'human right.' Instead, the argument here is concerned with protecting the social benefits of free expression. Or, put more pessimistically (and accurately), it is about minimising the harm that comes from regulating expression.

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In other words, the fruits of free speech are, at their best, sweet; at worst, they are less bitter than what comes from allowing speech to be regulated. There is a loose analogy to the notion that while free markets sometimes have unwelcome effects, central planning will turn out far worse. But we need not place faith in the truth-revealing power of what Justice Oliver Wendell Holmes labelled the 'free trade in ideas.'[6] Rather, all we need recognise is that while free expression might have terrible consequences, far worse things result from granting someone the power to decide what may pass our lips.

The underlying sensibility is scepticism. Scepticism about government's (or anybody's) ability to distinguish desirable from undesirable speech. Some medieval writers advocated free religious expression on a similar basis.[7] Again, this does not necessarily have anything to do with 'human dignity.' But it does have a lot to do with intellectual humility: If I don't think anyone can be trusted with the power to regulate speech, then I necessarily recognise the limits to my own wisdom. It is an acknowledgment that I myself know as little as anyone else about what we should be prohibited from saying. It is a concession to the imperfection of human knowledge.

What, then, are the fruits of free speech? Perhaps foremost among them is greater understanding (which is not the same as truth). Where self-expression is uninhibited, our view of the world is likely to be clearer. We are privy to the infinite variety of human thought; all of it is allowed into the open, palatable or otherwise. Opinions and sentiments of all stripes are exposed to criticism.

Free speech therefore fosters debate. If we are offended, insulted or humiliated by someone's views, the onus is on us to explain why, and to persuade others to reject them. Citizens must fight their own battles, within the limits of the law.

This, indeed, is why it is wrong to claim that free speech absolutism lowers the quality of public discourse by countenancing offensive expression that is 'no essential part of any exposition of ideas.'[8] Far from lowering the standard of debate, freedom of speech raises it. Bans on offensive speech stifle any dialogue as soon as someone is offended. That person now holds the trump card: the threat of legal sanction. Where expression is free, though, the debate is allowed to continue, often enriched by the offensive remark.

Perhaps even more importantly, freedom of speech is an acknowledgment that our identity as individuals is defined in large part by our thoughts. We express our thoughts in speech. An attack on speech is therefore an attack on the expression of one's identity. True it is that legal protection of free speech allows us to assault others' identity by targeting central aspects of it, such as ethnicity. The racist is as free to speak as the liberal. No doubt

most of us find racism repugnant. But does this mean we ought to ban expressions of it?

Perils of speech regulation

At this point we come to the perils of regulating speech, particularly offensive speech. Where government bans offensive expression, the primary goal is to spare its possible targets anguish. That comes at some cost, however. We lose the chance to be exposed to a view, to understand its origins, challenge, debate, and possibly refute it. We are also deprived of an opportunity to refine our own views in the process. Human insight is sacrificed for the sake of insulating people from the pain of being offended. And we simply cannot foresee the full extent of the insight into the human condition that we might lose by banishing any particular sentiment from public discourse. In short, this is a price not worth paying.

The theory of a hierarchy of racial intelligence, for example, is deeply offensive and distressing to many.[9] Yet if that leads us to ban discussion of the theory, we also lose the opportunity to debate its expositors, and we sacrifice the greater understanding of race and intelligence that would come from that debate.

Even more alarmingly, when we grant government power over the extent to which someone might express an offensive part of his identity, we thereby give in-principle blessing to governmental control over the expression of our own identity as well. For there is always the danger that our own thoughts will wind up on the wrong side of the line that the authorities draw between the acceptable and the unacceptable.

Here's the point: If you're at all sceptical about humans' capacity (including your own) to know what expression should be silenced, then you're bound to condemn laws banning offensive speech. If government bans people from causing offence, then someone has to decide what qualifies as 'offensive.' And with that comes the power to decide what people can and can't say. It is a tremendous power, and we should bear in mind that it is extravagant no matter who exercises it.

When parliament leaves it to judges to clarify what is 'offensive,' it passes the buck from one branch of government to another, turning judges into censors. Should we trust judges, any more than politicians, to make the right choices about the thoughts we may communicate?

The danger is that with too much power judges become oligarchic. Though in Old Testament times the Israelites had a go at rule by judges[10] (an experiment with which Egypt seems to have flirted in recent months), there is nowadays little comfort in the idea of a near-unaccountable elite deciding what expression is acceptable. But politicians, too, pose a threat. With them, the risk is majoritarian tyranny. A parliamentary majority might simply ban whatever speech it dislikes. Are we, then, left with the Scylla of majority control and the Charybdis of judicial censorship?

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And indeed one way of interpreting the First Amendment—the so-called 'absolutist' approach—is simply to take it at face value. Some Supreme Court justices, particularly Hugo Black, have done so. On this view, the First Amendment takes speech out of the hands not only of politicians but also of judges.

Here is Justice Black's classic statement:

> I read 'no law … abridging' to mean no law abridging … I do not believe that any federal agencies, including Congress *and this Court*, have power or authority to subordinate speech and press to what they think are 'more important interests.'[11]

There is no rider or caveat on the First Amendment subjecting it to court-prescribed exceptions. There is no 'appropriate and adapted' test. There is nothing authorising judges to get into the business of deciding what are the 'legitimate' ends of government.

Understood this way, the First Amendment allows very little scope for judges to impose their subjective policy preferences on the law. If politicians abridge the freedom in any way, then they are acting unconstitutionally. It doesn't matter whether judges have sympathy for their motivations. There is none of the wriggle room that our High Court has given itself to get into policy questions. As US Chief Justice John Roberts put it, the First Amendment is itself the only policy that matters: 'The First Amendment itself reflects a judgment by the American people that the benefits of its restrictions on the Government outweigh the costs.'[12]

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Of course, there is always the thorny question of what constitutes speech as opposed to action. If you threaten someone verbally, are you speaking or are you *doing*? Both American and Australian judges have to grapple with this. There is some latitude here for judicial policy preferences to enter the picture.

Nor has US First Amendment jurisprudence taken the absolutist path. The Supreme Court has carved out a number of categories of expression that receive no First Amendment protection and can therefore be regulated or banned. Child pornography is an example.[13]

When all is said and done, though, the First Amendment holds out the possibility of a right to free speech that minimises the scope for both judges and politicians to get into the censorship racket. And even such power as US judges have (perhaps regrettably) arrogated to themselves pales in comparison to the thinly disguised discretion the High Court has given itself with the 'appropriate and adapted' caveat to the Australian implied freedom.

Free speech and 'human dignity'

But what happens if we reject the sceptical argument made here in favour of an absolutist stance on freedom of speech? We might instead side with the human rights advocates and decide that it is preferable, after all, to protect 'human dignity' above all else. Would this necessarily lead us to ban the diatribes of someone like Monis, as Heydon seemed to suggest? If it's dignity that motivates us, then it appears we might want to shield a dead soldier's parents from Monis' scurrilous invective.

'Dignity' arguments about free speech are not new. Jeremy Waldron, a distinguished legal philosopher based in the United States, has contended on 'human dignity' grounds that hate speech ought to be banned.[14] Revealingly, though, he explicitly excluded mere 'offensive speech' from his understanding of 'hate speech.'[15]

If we are to debate free speech in 'dignity' terms, the first point to note is that 'dignity' is a nebulous concept. Like 'freedom,' 'justice' and 'equality,' its meaning may be contested ad nauseam. Nevertheless, if we content ourselves with a working definition for present purposes, it seems respect must be central to it. Dictionaries tell us one has dignity if one is worthy of respect. 'Human dignity' might be regarded as a human's worthiness of a certain level of respect merely by virtue of his humanity. Failure to accord someone that respect is an attack on his dignity.

The second point is that we are talking about *human* dignity. We don't have the luxury of concerning ourselves only with the respect we think due to upright citizens. 'Human dignity' must be something everyone has. Unsettling though it may be, that includes Man Haron Monis.

Monis had views about Australia's military involvement in Afghanistan. Presumably they were strongly held. They seem to have had their origins, at least partly, in Monis' religious beliefs. These kinds of beliefs are central to a person's identity. Our revulsion does not make them any less so.

Now, it is hard to see how one can respect a man without allowing him to express his identity. A person's identity—the amalgamation of race, gender, beliefs, family history, and so on—is inseparable from the person's humanity. If you don't respect a man's identity sufficiently to tolerate his expression of it, then you don't respect the man. It is an affront to his dignity. What is more, in the case of speech-regulating laws, it is an affront perpetrated by an entire society through its legislators. It isn't simply a matter of one citizen disrespecting another.

Some might say Monis was perfectly free to express his religious beliefs and views on the Afghanistan war in a non-offensive manner. This riposte, though, ignores the extent to which one's sentiments are inseparable from the manner in which they are expressed. 'F**k war' simply is not the same as 'Down with war.'[16] Though the charm of the expletive is perhaps a little shop-soiled, it still conveys a distinct message. The precise words chosen are integral to the character of the view expressed. The fact that in a general sense both slogans express disapproval should not deceive us into thinking they are merely alternative means of expressing a single sentiment.

In any event, even if we could neatly disconnect the sheikh's beliefs from the way in which they were given voice, those beliefs themselves would probably remain offensive to many. Does that mean Monis simply forfeits his ability to express his identity and thereby surrenders his dignity?

The real problem is that Monis' expression of opinions integral to his identity was harmful to others. Indeed, at least on Heydon's view, it went beyond mere harm. It was a full-fledged assault on the parents' dignity. Therefore, to respect Monis' dignity was to jeopardise someone else's.

But now we have a picture that, at the very least, is not quite so clear as Heydon had suggested. 'Human dignity' cuts both ways. It is not certain that the argument will necessarily lead us to favour laws against offensive speech.

Dignity and self-reliance

When we consider what is commonly labelled 'undignified,' the picture becomes even murkier. If anything is undignified, it's a lack of self-reliance—an infantile dependence on others. In 'human dignity' terms, then, another problem with laws banning offensive conduct is their message that we should feebly rely upon the authorities for self-validation. They encourage those who are offended not to engage in debate but instead to run to institutions of power for cover. A prime example was the civil case against Andrew Bolt for offending various public figures who identify as Aboriginal. Is it more dignified to slink to the courthouse seeking governmental vindication of one's identity, or instead take up the cudgels of public debate?

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In contrast to Australian laws banning offensive expression, American free speech doctrine is imbued with the deep-rooted value of resilient self-reliance. Courts' published judgments are peppered with the idea of 'counterspeech'; the appropriate response to reprehensible expression is to condemn it, not to ban it.

In 1984, Gregory Lee Johnson burned an American flag in a Dallas protest. It was an outrageously offensive act in a country where the stars and stripes have a near-mystical aura. Johnson was prosecuted and convicted under a Texas statute prohibiting desecration of the national flag.

The Supreme Court found the conviction violated the First Amendment.[17] Adopting Justice Louis Brandeis' description of the American founding fathers as 'courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government,'[18] Justice William Brennan affirmed that '[t]he way to preserve the flag's special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong.'[19]

And again, '[w]e can imagine no more appropriate response to burning a flag than waving one's own, no better way to counter a flag burner's message than by saluting the flag that burns.'[20]

There was no question of the grieving parents targeted by Monis running to the courts; the case was a prosecution launched by the state. But that doesn't alter the message conveyed by the lawmakers: 'Leave it to us.'

If anything strips us of our dignity, it is our obedience to that command—our acquiescence in the notion that we need government to shield us from words. We can all understand how anyone receiving letters from someone like Monis would want him jailed. In our darker moments, we all want those who offend us silenced. But should the law really give comfort to that weaker side of our nature? And if it does, can it really be said to protect our dignity?

Endnotes

1 *Monis v. The Queen* (2013) 87 ALJR 340.
2 *Nationwide News Pty Ltd v. Wills* (1992) 177 CLR 1; *Australian Capital Television Pty Ltd v. Commonwealth* (1992) 177 CLR 106.
3 *Lange v. Australian Broadcasting Corporation* (1997) 189 CLR 520; *Coleman v. Power* (2004) 220 CLR 1.
4 *Lange* (1997) 189 CLR 520, as above.
5 *Monis v. The Queen*, as above, 390.
6 *Abrams v. United States*, 250 US 616, 630 (1919).
7 Chris Berg, *In Defence of Freedom of Speech: From Ancient Greece to Andrew Bolt* (Melbourne: Institute of Public Affairs, 2012), 23–52.
8 *Chaplinksy v. New Hampshire*, 315 US 568, 572 (1942) (Murphy J).
9 See Chris Berg, *In Defence of Freedom of Speech*, as above, 155.
10 See *Ramirez de Arellano v. Weinberger*, 745 F.2d 1500, 1550–51 (CADC 1984) (Scalia J, dissenting).
11 *Smith v. People of the State of California*, 361 US 147, 157–9 (1959) (emphasis added).
12 *United States v. Stevens*, 130 S.Ct. 1577, 1585 (2010).
13 *New York v. Ferber*, 458 US 747 (1982).
14 Jeremy Waldron, *The Harm in Hate Speech* (Cambridge: Harvard University Press, 2012).
15 As above, 15.
16 See *Cohen v. California*, 403 US 15 (1971).
17 *Texas v. Johnson*, 491 US 397 (1989).
18 *Whitney v. California*, 274 US 357, 377 (1927).
19 *Texas v. Johnson*, 491 US 397, 419 (1989).
20 *Texas v. Johnson*, 491 US 397, 420 (1989).