

DOWN INTO THE DETAILS

You may not be the free speech advocate you think you are.

In my short ten to twelve minutes I want to do three things. Firstly, I want to give you a potted account of the two main philosophical schools of thought in the Western tradition that support classical liberalism generally, and support plenty of scope for free speech more particularly.

Next I want to make this claim—I want to argue that at some point in order to test someone’s commitment to free speech you have to put aside the abstract arguments and look to see his or her answers in specific scenarios as to whether speech should be tolerated or suppressed. Put differently, up in the Olympian heights of abstractions virtually everyone can—and in fact just about everyone does—claim to be in favour of free speech. Heck, even Tim Wilson’s colleague the Race Relations Commissioner purports to believe in free speech. So does Mr. Finkelstein. So does the Green Party. So I say we need to descend down into the quagmire of real-life free speech issues to see where people stand.

If you are in favour of suppressing speech in some rare scenario here or there, say incitement to murder or blocking publication of a new, easy-to-make biological weapon, then I say that is still quite compatible with a strong attachment to free speech. But as the instances grow of when you would silence speech, the plausibility of your being “committed to free speech” becomes ever more tenuous. If preferencing someone’s desire not to be offended counts more for you than allowing lots of scope for articulating views that will inevitably offend others, you’re not really a free speech adherent. Put bluntly, many people who profess an attachment to free speech palpably do not have one. So I will run through some real life scenarios and you can decide for yourselves if you’d allow or suppress speech.

Lastly, I want to test your patience (and I suppose the patience of Liberal senator Dean Smith, my fellow panellist and member of this government

that broke its pre-election promise on this) and say a few words about hate speech and Section 18C.

Two Ways of Supporting Free Speech

In the liberal tradition you have your Capulets and your Montagues, or call them your natural law believers and your consequentialists. The former is the home of Locke, and Jefferson, and many of the thinkers of the Enlightenment that came from continental Europe and especially France. The latter is the home of John Stuart Mill, and Bentham, and Hume, and that part of the Enlightenment we would trace back to Scotland. Let me lay my cards on the table. I am firmly in Mill’s and Hume’s camp. I am a consequentialist (of which utilitarianism is a sub-branch).

But let’s start with natural law arguments, which are of the sort where you claim something is a good-in-itself (a right to equality, perhaps, or to property, or to free speech). Hence on this way of thinking we humans are entitled to these things just because we are humans; or because of some convoluted social contract argument; or because that’s what a benevolent, theistic God wants. We are entitled to this claimed thing regardless of the consequences that are likely to attach to granting it to us. For me, natural law claims are nothing more than repackaged theology. At core they are other-worldly, and unconvincing. They work especially badly in the realm of free speech. And I say that while thinking that Tim Wilson’s defence of free speech is essentially a natural law one. But he won’t



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mind the disagreement, as he's the only Human Rights Commissioner we have who believes in free speech.

Then there is the utilitarian or consequentialist defence of rights, and more particularly of free speech. As I said this is the home of the great J. S. Mill, who in his teens edited Bentham, and who ultimately ties the value of free speech to the good consequences that flow in societies where people have very few limits on what they can say. Sure, there are real harms when people's feelings are hurt; or they are insulted; or someone utters hate-filled words. But the good consequences of allowing that speech outweigh the bad.

To start, even wrong-headed and hurtful speech can force those who hold more defensible views to think again and better justify their opinions, not to forget the further benefit of having to articulate them more persuasively. And pretty wide-open speech creates a crucible of competing opinions where over time the better will push out the worse. Or at least it will if you are optimistic about the capacities of your fellow citizens—all the plumbers and secretaries and everyone else—to discern better arguments from worse. If you think they are as morally capable as you are. Such optimism, alas, is not shared by the world's Finkelsteins and dare I say by more than a few of the self-styled human rights brigade and those employed at Ultimo headquarters. But if I can return to my core point, it is that even false opinions can and do have a consequentialist value for Mill.

Then there are all the dangers of over-reach when somebody (the government usually) has the power to decide who can say what. At some point the regulator will go too far. (Think Andrew Bolt here, my friends.) All rules, however framed, will inevitably be over-inclusive at some point. And that knowable-in-advance bad consequence must be factored in from the start.

Then there are the good consequences from not allowing anyone to play the self-styled victim, the good that flows from having to grow a thick skin. Where do you think Muslims are better integrated into society? In the U.S., where there are no hate speech laws at all? None. Or in France and Denmark and whole swathes of continental Europe where hate speech laws pervade the legal systems?

When weighing up the good and bad consequences, you need also to remember, as this Millian account makes plain, that everyone is in favour of speech that flatters and praises and says what a witty fine-fellow is Jim. The value and point of supporting free speech lies only in protecting speech you don't like. Even in North Korea you can say nice things about the Kims. The good consequences for society flow from being able to say the not nice things.

So Mill's defence of liberalism, and of free speech, is precisely of this Benthamite consequentialist flavour. You throw all the consequences into the pot—some admittedly bad—and you see if allowing some particular type of speech is on balance a good idea. For Mill not all speech was allowable on this 'what are the overall consequences' test. But there isn't all that much that should be silenced. So Mill was in no sense an absolutist about free speech. But he would allow a heck of a lot more than most commentators in Australia today. I am much of Mill's way of thinking. And I think his framework for addressing the issue is significantly preferable to the mysticism and theology that, in my view, lies at the heart of natural law thinking.

From the Olympian Heights Down to the Quagmire of Detail

Let's take it for granted that everyone from Julia Gillard to the plaintiffs in the Bolt litigation would proclaim an attachment to the abstract principle of free speech and descend now from that sort of disagreement-finessing abstraction to a series of specific scenarios down in the quagmire of day-to-day life in democracies such as Australia where concerns about free speech become relevant. I will give you a series of instances where free speech is a core concern. You decide if you would allow the speech or not. My claim is that if you're on the side of suppression more than two or three times, you are not the free speech adherent you think you are.

- A newspaper columnist discusses affirmative action benefits flowing to Aboriginal people and argues that such benefits ought not to go to those who are one-sixteenth or one-thirty-second Aboriginal. Take it as read that he really, really hurts some of their feelings.

Would you allow that speech or not? What if the columnist gets some facts wrong? What if his tone is a bit mocking and sarcastic?

- Some firebrand cleric preaches to his followers and incites them to violence. Would you allow that speech or not? What if the cleric does not incite them to violence but instead simply incites hatred for some group. Allow that, or not?
- Some evangelical Christian is a strong opponent of homosexuality. He writes fliers condemning the practice in very strong terms. Would you allow that speech or not? If you would allow that, what if the evangelical man argues that all homosexuals are going to hell? Or that they should not be allowed to be teachers or ever to adopt children?
- What if some publication published drawings mocking Christ's crucifixion? Would you allow that or not? If you would, change it from mocking Christ to mocking Mohammed in some way. Would you allow that or not? If not, is it only because you are afraid for your life? If that is your (rather refreshingly honest) answer, what do you think should be done about the fact that fear is the sole thing preventing such speech? Do you think such violent tactics would work if, once threatened, every major publication (which otherwise would not publish these distasteful and mocking drawings) now publishes them for three straight days with the caveat that the drawings will be run for a further week again if any violence is visited on anyone? (For what it is worth, I believe that would end the threats.)
- On the subject of religion, if someone writes something that is considered as blasphemous by a small group of adherents of some religion or other, would you allow that speech or not? What if the numbers complaining grew to half, three-quarters, or most such adherents? Allow or not?
- How about the Corporal Manning example. Here we have someone who has joined (and so agreed to all the limits that go with being a member of) the U.S. Army. This person then finds he has access to military secrets, and for non-monetary reasons opts to take them and publish them. Do you agree that once caught, and convicted, he should be subject to the full force of the law? Would it matter to you whether people were killed because of the information that was stolen and leaked? Does the length of his jail time matter to you, in this case basically for life?

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- A rather well known actor doing work in a different country describes a minority group as "coloured people." Would you allow that or not? If you would not want the government to suppress it, what about if private citizens caused such a huge outcry that the actor (for reasons to do with his career, or perhaps out of sincere regret) gave a grovelling apology? Do you like that outcome, or not? What if in that country the phrase "people of colour" was perfectly acceptable but the phrase "coloured people" was not? Would that matter to you? Or what if the largest lobby group for this minority was known as the "National Association for the Advancement of Coloured People"? Relevant or not?
- A journalist has a source who alleges misconduct by the security services in their fight against terrorism. The source is credible and gives information to the journalist who publishes it. The government takes the journalist to court threatening jail if the source is not revealed. Should such a journalist be allowed to publish without revealing her source? Does it matter to you whether the journalist put the allegation to the government first and gave it the chance to respond?

- And let's finish with the hoary old example of the Holocaust denier. Would you allow that speech? If so, what if a group of neo-Nazis were to organise a march through a suburb of a town where they knew that over half the population was Holocaust survivors. Would you allow that march to proceed?

As I said, if you ask people in the abstract virtually everyone will claim to be in favour of free speech. To separate the wheat from the chaff you need to get down to specifics. So if you find yourself on the side of speech suppression in more than two or three of these examples I suspect you're not the free speech supporter you may imagine you are. And my sense is that there are fewer supporters of free speech in the West today than you might think or wish to be the case. Certainly I don't see enough evidence of it amongst our MPs (both sides of politics) or on the massively subsidised by taxpayers ABC.

And Now to 18C to Finish

I will be brief here, as so much has already been written on this topic. To start, on no conceivable reading of the great liberal philosopher J. S. Mill would offense (as in 'oh my feelings have been hurt') ever be allowed to trump speech. Secondly, when I voted for this government last election I thought that it, like me, was on Mill's side of the debate. Thirdly, on issues of principle it is infinitely preferable to put something to the Senate and to have it blocked than not to put it to the Senate at all. Fourthly, I really haven't got a clue what "Team Australia" means or why the fear of hurt feelings of some sub-group of citizens in this country ought to override repeal of a statutory provision where that repeal would have significantly good consequences for this country. No doubt Dean Smith when it is his turn to speak will enlighten us all on that.

And for comparative purposes, let me repeat what I mentioned already and what many of you already knew. In the United States there are no hate speech laws at all. None. Zero. Meanwhile continental Europe's democracies bend over backwards to enact such laws. And yet if you look to see where the sort of groups that make up "Team Australia" do

better, including in terms of integrating into public life and being treated with respect, it is in the U.S. Hands down.

And if you doubt that political will and conviction can overcome the self-styled victims' brigades, you need to go and talk to Canadian prime minister Stephen Harper. You see, two years ago he got Canada's national equivalent of Section 18C repealed. He took at least as much abuse as Mr. Abbott for pushing the repeal. He did it through a Private Member's Bill. There were claims the sky would fall. For Jews. For Muslims. For Native Indians. You name it. Not a single horror prediction has come true. I'm betting members of the Green Party of Australia and even our Race Relations Commissioner are still prepared to travel to Canada. To visit there. To holiday there.

So please allow me to close by offering you all two quotes from two great thinkers. Thomas Jefferson famously once said that "the price of liberty is eternal vigilance." In the Western world these past three or four decades you would be hard pressed to describe the overriding attitude to freedom, and in particular to freedom of speech, as amounting to vigilance in its defence.

Then there is my favourite philosopher of all time, and wonderful person to boot, the core figure in the Scottish Enlightenment, of whom Adam Smith once said "he was the most nearly perfect man I've ever met." I refer to David Hume. And Hume once said: "It is seldom that liberty of any kind is lost all at once." No. You lose it in small steps when well-meaning people reckon it's not worth the effort to defend. And Cabinet Ministers put their careers and chauffeur-driven cars, and perhaps a core belief that they can do more good if they stay, ahead of resigning from Cabinet when a government fails even to put a needed repeal package to the Senate. And MPs worry more about the immigrant vote than upholding a core Western value. And so some small piece of our freedom to speak remains off-limits because that is the easier path for plenty of people.

Hume's point is that taking away the next piece is easier still. We came close to that with Julia Gillard's proposed media laws. I am much of Hume's mind.