FREE SPEECH IS FAR TOO IMPORTANT TO BE LEFT TO UNELECTED JUDGES

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Abstract

In this paper the author will begin by setting out the core philosophical basis for supporting very few limits indeed on a person's scope to speak his or her mind in a successful democracy. This will involve a short description of the John Stuart Mill, utilitarian defence of free speech – the position largely rejected by Ray Finkelstein in his Media Council Report.

The author will then turn to set out how a bill of rights works, be it a constitutionalised one or a statutory one. He will mention the Canadian, New Zealand, United Kingdom, United States and State of Victoria models. He will argue that, in essence, when you buy a bill of rights all you are buying are the line-drawing social policy decisions of the unelected judiciary, decisions that without such an instrument would be made by the elected legislators.

The bulk of the paper will then argue that the bills of rights of Canada, New Zealand, the UK and Victoria have not 'given freedom of speech a hefty leg-up', as one Australian legal commentator has claimed. Victoria is no better off in terms of scope to speak your mind than any of the 5 Australian States without a bill of rights and in some ways is worse off. The United Kingdom looks the worst of any of these jurisdictions on free speech matters, and certainly far worse than Australia, without a national bill of rights. And Canada has extensive hate speech laws.

The author will run through some of the bill of rights decisions of the unelected judges in these jurisdictions on free speech matters and then argue that free speech is far too important to be left to the Leevesons, Finkelsteins, and unelected judges, who anyway do a terrible job on that front (outside the United States). In a healthy, vibrant democracy free speech is a matter for all the voters. They are the ones that need to ensure there is as much scope as possible to hear unpopular views.

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Indeed the author will finish by noting the very close connection between the main ground for valuing democracy and the above ground for valuing lots and lots of free speech.

I INTRODUCTION

My title tells you the core thing you need to know about this talk and my position on free speech and bills of rights. Ensuring lots and lots and lots of scope for people to speak their minds in a vibrant democracy is something I strongly support and value very highly. However, entrusting the issue to a committee of ex-lawyers so they can read through the runes of the vague, amorphous moral abstractions in a bill of rights – so they can take the five words 'Right to Freedom of Expression' and then consult the findings of the courts in Canada, the UK, Europe, New Zealand, though on this one rarely the US, before also consulting a few treaties and conventions, then their own moral sensibilities, perhaps a bit of Ronald Dworkin's best fit Herculean interpretive theory, and maybe even do all this while together secretly chanting the magical words 'Right to Free Speech' while 'Kumbaya' is being hummed in the background – is not something I support.

Don't forget. These top judges are taking this radically indeterminate[1] moral rule that has been translated into the language of rights[2] ('the right to free speech') and they are deciding the scope of that entitlement; what limits on it are thought reasonable; how it interacts with other enumerated rights – none, or no more than one, of which is absolute; and usually

[1] Or in Hartian terms, a laid down rule with a rather massive 'penumbra of doubt'. See, eg, HLA Hart, *The Concept of Law* (Oxford University Press, 1961) 119.

[2] Because analytically speaking rights (normally 'others must' claims) are correlated with duties and linked together by the concept of rules. So any right can be translated into the language of rules, through this enervates the emotional oomph and sense of entitlement.

these days interpreting it on the basis of 'living tree'[3] type interpretive theory. Such a theory holds that the words themselves can remain exactly the same but – apparently in order to avoid being locked in by the drafters' and framers' and enactors' understandings of the words' meaning – that the meaning of those rights can grow and alter and shift and change as these top judges more or less see fit (meaning you, exchange one sort of being locked in for another, namely the views of a handful of judges).[4]

What is the effect of all that? It is that when you buy a bill of rights, be it a constitutionalised or statutory model, you are simply buying the views of the unelected judiciary instead of the views of the elected legislators. When you move from the Olympian heights of disagreement-finessing moral abstractions down into the quagmire of specifics, of day-to-day social policy line-drawing where nice, smart, well-informed people simply disagree – so you move from revelling in the emotive comfort of the phrase 'right to freedom of expression' down to making tough, debatable real life line-drawing calls when it comes to desirable campaign finance rules, or defamation regimes, or whether and how to have hate speech laws – my strong view is that elected legislators do better than judges. In other words, you can be a strong supporter of plenty of scope for citizens to speak their minds, as I am, and also be strongly against bills of rights, as I also am.

Or to put it more bluntly, free speech is too important, far too important, to be left to the judiciary. Indeed there is a fundamental connection

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[3] See Jim Allan, 'The Curious Concept of the "Living Tree" (or Non-Locked-In) Constitution' in G Huscroft and B Miller (eds), *The Challenge of Originalism* (Cambridge University Press, 2011), 179–202.

[4] I make this argument at length in James Allan, 'The Three "R's" of Recent Australian Judicial Activism: *Roach*, *Rowe* and (No)'Riginalism' (2012) 36 *Melbourne University Law Review* 743.

between the bases for supporting democracy and democratic decision-making, on the one hand, and the bases for thinking near-on wide open free speech is the way go to in such societies, on the other. In both instances there is a core level trust in the abilities of your fellow citizens, both to choose their representatives and also to hear, evaluate and assess information and speech.

If the preponderance of one's fellow citizens in a vibrant, long-established democracy such as Australia really are too gullible, too feeble-minded, too prone to succumb to the passions of the moment when they hear Holocaust deniers, or sarcastic denouncers of allegedly misdirected affirmative action benefits, or glitzy *ad hominem* TV election ads, or really almost any of the scenarios that fall under the aegis of hate speech laws, if – to put the point succinctly – most Australians simply cannot be trusted to hear such speech, then I cannot see on what basis they can be trusted to vote.

In the rest of this talk I want to do four things. Firstly, I will take you ever so briefly through what I think is the most convincing and powerful ground for valuing lots of free speech, the John Stuart Mill, utilitarian basis. Many of you will be well acquainted with that rationale so I will be quick. Secondly, I will run through how a bill of rights works, again very briefly. I am not at all sure as many of you will be acquainted with the mechanics of these instruments, but I will nevertheless still be brief. Thirdly, and this is a crucial component of this talk, I will argue that judges do not deliver the goods when it comes to free speech (at least not outside the US). They are not to be trusted with something this important and abdicating such an issue to them is a big mistake. So I will run through a bit of case law from Canada and the UK. I will have a look to see if the State of Victoria – the only Australian State with a bill of rights

– scores better or worse than the others on free speech grounds (hint: it's worse there). I will note that it is judges and ex-judges such as Leveson and Finkelstein who seem keen to disparage the abilities of your average citizen and who think what those citizens can hear needs to be filtered. I will even read out a few quotes from Ray Finkelstein's Report that should make any free speech adherent doubt that this issue should ever be left in the hands of judges. And then I will finish by reminding you again of the close connection between the reason why the Millian desire *not* for an absolute, unfettered scope for all to speak their minds, but rather for more such scope than other outlooks and rationales allocate – with Mill's fundamentally optimistic premises about the capacities of ordinary citizens to perceive the best answer from amongst the cauldron of competing views – is closely connected to what I take to be the strongest argument for democracy, which you may not be surprised to hear is likewise a utilitarian, Benthamite, Millian one.

II WHY VALUE FREE SPEECH?

Here is the famous reason given by John Stewart Mill:

> The peculiar evil of silencing the expression of opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more those who hold it. If the opinion is right, they are deprived of the opportunity to exchanging error for truth; if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.[5]

In essence, then, the point to having lots of free speech is to ensure that views we dislike, find distasteful, and even despise get an airing. Anyone

[5] John Stuart Mill, *On Liberty* (Modern Library, first published 1859, 2002 ed) 18–19.

can be in favour of allowing speech he likes. But allowing others to hear what you agree with accomplishes next-to-nothing; it delivers no good consequences, at least none other than allowing adherents of this view to feel good about themselves, to feel puffed-up and self-righteous.

No, the value in lots of scope for people to speak their minds is so that we can hear views we dislike and think wrong. It is hearing those views that has such good long-term consequences for society. It creates a cauldron of competing views where over time the idiotic ones will be found out. We'll get closer to truth than when government overseers (and that includes judges) are in place to tell us what we can hear.

Here is how the late Christopher Hitchens summarises the general Enlightenment views of Mill and Voltaire and Milton. Hitchens says:

> It's not just the right of the person who speaks to be heard, it is the right of everyone in the audience to listen, and to hear. And every time you silence someone you make yourself a prisoner of your own action because you deny yourself the right to hear something. In other words, your own right to hear and be exposed is as much involved in all these cases as is the right of the other to voice his or her view.[6]

There you have it. That, in brief, is the Millian and utilitarian case for lots of free speech. It rests on a core level optimism about the abilities and capacities of one's fellow citizens (which is an obverse way of saying that those who subscribe to it do *not* see themselves as morally and intellectually superior beings who need to restrict what their poor, benighted fellow citizens can hear and read). But of course most of you

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[6] Christopher Hitchens (Debate delivered at Be It Resolved: Freedom of Speech Includes the Freedom to Hate, Hart House, University of Toronto, 15 November 2006). Hitchens argued the affirmative position.

will be well acquainted with that rationale so I will move on to outline, again briefly, how bills of right work.

III WHAT A BILL OF RIGHTS DOES NOT DO

Here is how bills of rights work. These instruments enumerate a series of moral abstractions in the language of rights. They set out a list of vague, amorphous, indeterminate rights-entitlements, all emotively charged and appealing, that operate at such a high level of abstraction that they finesse disagreement. You find more or less the same sort of substantive civil political rights in them all.[7] There will be a right to freedom of expression, to freedom of religion, to freedom of association, to a fair trial, to unreasonable searches and seizures, and more.

Of course, there is always the half-hint with bills of rights that these entitlements are absolute, or almost absolute, when in fact a moment's thought tells you such guarantees cannot be absolute. You cannot say anything at all, for example, even in the US. You cannot counsel murder. You cannot deal in child pornography. The hint of absoluteness, however attractive, is a mirage.

And that tells you the key fact about bills of rights. They increase power at the point-of-application because these rights that are articulated up in the Olympian heights of disagreement-finessing moral abstractions need to be given detailed content down in the day-to-day quagmire of real life social policy line-drawing. And down there people who can all agree with the amorphous abstraction (say, 'right to a fair trial') will disagree massively amongst themselves on what that abstraction entails. So in a

[7] The vast preponderance of bills of rights are post-World War II. You get some outlying enumerated rights in very old bills of rights like America's; say the right to bear arms. Even its right to property is rare in more modern bills of rights.

UK example related to the above 'right to a fair trial', the legislature passed a Bill to reduce slightly what sort of cross-examination questions could be put to a rape complainant. But the judges disagreed and had a different opinion.[8] And with a bill of rights in place, even the UK's statutory version, the judges' views prevailed.

So what a bill of rights does is that it increases judicial power at the expense of the elected legislature's power. It enervates democracy. Under the simplistic sloganeering of 'Don't You Want Your Rights Protected' obfuscations, unelected judges make a whole lot more important social policy decisions.

In Canada and the US this enhanced judicial power flows from the fact their bills of rights are entrenched in the constitution and so judges have a power to invalidate, to strike down, any statutes and laws they – the judges – happen to believe are inconsistent with any of the enumerated rights. It is a mighty power and for partisans of democracy, like me, the judges use that power mightily often.

By contrast, in the United Kingdom and New Zealand, and indeed the State of Victoria here in Australia, they have statutory bills of rights (which, of course, is not overly surprising in the first two of these jurisdictions which lack written constitutions). Here, there is no judicial power to strike down the legislature's laws. Instead, judicial power is augmented by means of a reading down provision (or a 'do everything you possibly can to read all other statutes in a manner that you judges consider to be a rights-respecting' way) and a Declarations power provision.[9] With the former the UK judges sometimes seem to think

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8 *R v A (No 2)* [2001] UKHL 25.

9 I outline elsewhere in detail how these provisions greatly increase judges' power. See James Allan, 'Statutory Bills of Rights: You Read Words in, You Read

virtually any reading of other statutes – however wrong or however much not intended by Parliament – is okay.[10] And with the latter the empirical record in the UK (and Canada for that matter with its somewhat analogous section 33 override or notwithstanding clause) is that the judges' views always win out, every single time without exception, to the extent that the Oxford legal academic, and keen bill of rights supporter, Aileen Kavanagh, thinks (approvingly in her case) that judges in the UK are now functionally as powerful as US ones.[11]

And that, in brief, is what any justiciable bill of rights does. It transfers power to judges. So if you buy one of these instruments you are in essence largely just buying the future views of judges instead of sticking with the future views of elected legislators.

IV THE JUDGES DON'T DELIVER THE FREE SPEECH GOODS

Let us now move to the heart of this talk, my claim that judges operating a bill of rights do not deliver the goods when it comes to free speech; outside the US they are far too inclined to opt for so-called 'reasonable limits' on speech, or for other rights-articulated values and interests; and hence that this abdication of the protection of free speech to the judges carries with it bad long-term consequences, not least by seeming to absolve the elected legislators from having themselves to be protectors of free speech.

Words out, You Take Parliament's Clear Intention and You Shake It All About – Doin' the Sankey Hanky Panky' in Tom Campbell, K D Ewing and Adam Tomkins (eds), *The Legal Protection of Human Rights: Sceptical Essays* (Oxford University Press, 2011) 108–26; James Allan, *The Vantage of Law* (Ashgate, 2011).

[10] See *Ghaidan v Godin-Mendoza* [2004] 2 AC 557, which has been repeatedly affirmed.

[11] See, eg, Aileen Kavanagh, *Constitutional Review under the UK Human Rights Act* (Cambridge University Press, 2009).

We can start our survey of how judges[12] fail to deliver the free speech goods by turning to my native Canada and its hate speech laws. At the national level Canada has *Canadian Human Rights Act*, RSC 1985, c H-6, s 13 that deals with speech 'that is likely to expose a person to hatred or contempt' ('Section 13'). Of course even a passing acquaintance with the Mark Steyn-*Macleans* magazine saga in Canada would suffice to show that this Section 13 hate speech law there can have, and does have, a significant effect on free speech. It stifles it! It diminishes what people can say, not least by means of the 'chilling effect' of the mere threat of being dragged before some trumped-up human rights commission where the complainant has every single dollar of his or her legal costs paid for by the taxpayer while the accused – the party alleged to have transgressed these hate speech provisions – has to pay his or her own way, which in the case of Steyn and *Macleans* was over $2 million in legal costs. So even if, at the end of the day, you win (as Steyn did), you lose.

What has the Supreme Court of Canada made of this Section 13 when holding it up against the *Canada Act 1982* (UK) c 11, sch B pt I ('*Canadian Charter of Rights and Freedoms*') and its 'freedom of expression' right (*Canadian Charter of Rights and Freedoms* s 2)? Well, in *Canada (Human Right Commission) v Taylor*,[13] a 5–4 majority decision, the top Canadian court upheld the constitutionality of the Section 13 regulation of what was considered hate speech under which civil remedies are available aimed at compensating complainants and discouraging speakers outside the criminal law. In brief, the majority

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[12] And on this issue of ensuring lots and lots of scope for people to speak their minds under the aegis of a 'right to freedom of expression' I am explicitly exempting US judges and US case law. Of course the US judges fall down on a good many of the other rights provisions. And their gainsaying powers – when well used and when not well used – still seriously enervate democracy.

[13] [1990] 3 SCR 892 ('*Taylor*').

held that Section 13 infringed the freedom of expression guarantee but that this infringement was justifiable under *Canadian Charter of Rights and Freedoms* s 1, the abridging provision. Dickson CJ for the majority pointed to such factors as the reduced worth of hate speech, the fact the remedies were civil (not penal) in nature and the importance of the goal of protecting minorities in arguing that the Section 13 free speech infringement was justified. What we can take from this *Taylor* decision is that the *Charter*, or more accurately put 'the interpretation of some vague, amorphous rights guarantee and equally indeterminate reasonable limits provision' by a majority of the then top Canadian judges, did nothing to extend freedom of speech.

If you dislike Section 13 the judges let you down. If you like Section 13 they ended up adding nothing to the equation. Or rather they added nothing other than what follows from the assumption that the answer to all political disputes can be (and should be) found by vetting laws against constitutionalised rights provisions (as interpreted by a committee of ex-lawyers), an assumption open to serious doubt.[14] And one that makes it harder to repeal such legislation once the top judges, even on a 5–4 basis, have given it a tick of being in accord with what (they happen to think, by majority vote) are people's timeless, transcendent fundamental rights.

Now I know that *Saskatchewan Human Rights Commission v Whatcott*[15] has been argued at the Supreme Court of Canada, with the decision due in the not too distant future. And this *Whatcott* case involves a constitutional challenge to Saskatchewan's *Saskatchewan Human Rights Code*, SS 1979, c S-24.1, s 14(1)(b) hate speech law, on the basis that it

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14 See, eg, Adam Tomkins 'In Defence of the Political Constitution' (2002) 22 *Oxford Journal of Legal Studies* 157, 170.

15 [2013] SCC 11 ('*Whattcott*').

infringes the *Canadian Charter of Rights and Freedoms* s 2 freedom of expression and/or freedom of religion guarantees, and so is implicitly asking the top judges there to reconsider, and over-rule, *Taylor*.

But in the meantime the elected legislature, at least at the national level, has made the point moot. A private member's Bill has been passed through Canada's lower house of Parliament, the House of Commons, repealing Section 13. The Bill is now before the wholly unelected upper house Senate – I kid you not, this Canadian Senate is an unelected body full of placemen and party hacks with the odd Olympic gold medallist or top novelist or scientist thrown in to dilute the embarrassment – and this Canadian Senate never, ever vetos (or in most cases does) anything. So this Bill soon will pass. Canada's awful Section 13 national hate speech law will be removed the way it should be – by the elected legislature, not by the courts.[16]

I could go on also to point out that the *Canadian Charter of Rights and Freedoms* has done very, very little to expand the scope to speak one's mind in the context of the defamation law regime there.[17] But instead let us cross the Atlantic and see what the bill of rights there has added to free speech.

And what we see is that again the judges fail to deliver the free speech goods. Again, they add nothing, save to take these issues out of the legislature and, by pseudo-legalising them, put them ultimately in the hands of the courts (which then fail to deliver the free speech goods).

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[16] But note that once a precedent like *Taylor* is in place, repeal by the legislature becomes, if anything, more difficult. Such precedents have a tendency somewhat to lock in legislation.

[17] I do make that argument, though, elsewhere. See James Allan, 'The View From Down Under: Freedom of the Press in Canada' (2012) 58 *Supreme Court Law Review* 147.

The UK has a statutory bill of rights, the *Human Rights Act 1998* (UK) c 42 ('*HRA*'), which incorporates the *Convention for the Protection of Human Rights and Fundamental Freedoms*[18] ('*ECHR*'). *ECHR* art 10 guarantees 'the right to freedom of expression', which is detailed to include the 'freedom … to … impart information and ideas without interference by public authority'. So what happened when a litigant relied on this right when the BBC refused to televise the ProLife Alliance Party's election broadcast that contained graphic images of aborted foetuses?

Just as in Canada with hate speech laws, the UK House of Lords judges, by majority (4:1), held that the right to free speech under the *HRA* and *ECHR* would *not* override the legally mandated taste and decency obligations governing the content of all programmes that a broadcaster may screen.[19] In the end, and after much litigation, the bill of rights and judges added nothing, siding with the legislation's goal of not offending over the free speech concern to allow a political party's election broadcast that was factually accurate and relevant to a lawful policy on which its candidates would be standing for election.[20]

Or we can move from the UK back home to look at free speech concerns in the only State in Australia with a bill of rights, namely Victoria. Take the first two years of operation of the *Charter of Human Rights and Responsibilities Act 2006* (Vic), Victoria's statutory bill of rights. And consider media suppression orders or 'gag orders' handed down by the

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18 Opened for signature 4 November 1950, 213 UNTS 222 (entered into force 3 September 1953), as amended by *Protocol No 14 to the Convention for the Protection of Human Rights and Fundamental Freedoms, amending the control system of the Convention*, opened for signature 13 May 2004, CETS No 194 (entered into force 1 June 2010).

19 *R v British Broadcasting Corporation, Ex parte Prolife Alliance* [2003] 2 All ER 977.

20 This is the point made by the dissenting Lord Scott.

courts during that period, because imposing limits on what the press can report is surely a worry (to put it as kindly as is humanly possible) for those of us who favour lots of scope for people to be free to speak their minds. And to provide some context compare the number of such gag orders made in Australia's only bill of rights State to the number made in that same period in New South Wales, without a bill of rights and with almost 2 million more inhabitants.[21]

Here are the numbers. Between 2006–2008 in Victoria there were 627 gag orders made and in New South Wales there were 54 gag orders made.[22] In other words, the State with 30 per cent more people and no bill of rights issued less than a tenth (a mere 8.6 per cent) as many suppression orders against the media reporting what it deemed needed to be reported. And the State issuing nearly 12 times as many of these gag-the-press orders was the one that had a bill of rights and that had an explicit *Charter of Human Rights and Responsibilities Act 2006* (Vic) s 15 right to freedom of expression provision. The ambitions of bill of rights supporters should be made of sterner stuff (however much they are all honourable men and women).

Having had a look at some free speech bill of rights outcomes in Canada, the UK and Victoria, let me finish this section by reminding you that with a bill of rights in place it will be the unelected judges who will be deciding the scope to be granted to freedom of expression, what limits on this right are reasonable, how this right is to be balanced against the other

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21 In June of 2010 Victoria's population was approximately 5.55 million and New South Wales's was approximately 7.24 million.

22 See Chris Merritt, 'Judges Get Message on Suppression Orders' *The Australian* (online), 22 November 2010 <http://www.theaustralian.com.au/media/judges-get-message-on-suppression-orders/story-e6frg996-1225958007311>.

enumerated rights, and which interpretive approach to the instrument as a whole to adopt.

So the general philosophical attitude to free speech that the judge brings to these tasks will matter. In Australia and the UK we have had two judges[23] running important inquiries into media regulation. For those who are insouciant, or even optimistic, about handing more free speech decision-making powers to unelected judges – the inevitable effect, as I have argued, of a bill of rights – perhaps it might help for me to quote retired Federal Court Judge Ray Finkelstein's own words from his public inquiry into media regulation[24] ('*Finkelstein Report*') that reported on 28 February 2012. In the course of recommending a new regulatory body, a 'News Media Council', funded by government and whose decisions would ultimately be enforceable by punitive sanctions, Finkelstein in chapter two rejects and criticises the John Stuart Mill defence of great scope for free speech that I set out above. Indeed Finkelstein is highly sceptical (even condescending) of the capacities of ordinary citizens to evaluate what they hear and to engage in debates in which truth ultimately prevails.

> There is real doubt as to whether these capacities are present for all, or even most, citizens and, even if they are, both speakers and audiences are often motivated by interests or concerns other than a desire for truth – including, of course, the desire to make money and personal, political and religious motivations.[25]

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23 In Australia it was an ex-judge.

24 R Finkelstein, Report to Minister for Broadband, Communications and the Digital Economy, *Independent Inquiry into the Media and Media Regulation*, 28 February 2012 ('*Finkelstein Report*').

25 Ibid 30.

Yuck! What patronising tosh! One wonders why ordinary citizens are allowed to vote on this world view. And of course the whole point of the proposed 'News Media Council' is made abundantly clear by Finkelstein. It is to restrict speech, as he explicitly states.

> It could not be denied that whatever mechanism is chosen to ensure accountability speech will be restricted. In a sense, that is the purpose of the mechanism.[26]

Personally, I don't want judges anywhere near my free speech. Give me the democratic process any day. For all its admitted sins, it is the least bad option going, and far preferable to the judges.

V FREE SPEECH AND DEMOCRACY

Contrary to Mr Finkelstein's outlook, the Millian support for abundant free speech rests on a fundamentally optimistic view about the capacities of ordinary citizens, and their ability (on average, over time) to discern the best or least bad or closest to truth answer from amongst the cauldron of competing views that have been expressed, even where some are offensive, snide and manipulative. For Mill, and me, there is no super-elite in society with better moral antennae, more reliable reasoning and sifting skills, purer motivations, and all the rest of the justifications employed to support aristocracy throughout the ages (and not infrequently, at least implicitly, to support oversight by today's aristocrats, the judges).

And of course it is exactly and precisely that same confidence in one's fellow citizens that underpins support for democracy. It is a trust that on average, over time, the majority will get things right, will do better than

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[26] Ibid 52.

any sub-set of judicial or other unelected overseers – which, unsurprisingly, is the Benthamite / Millian argument in favour of democracy. It is the belief that this sort of decision-making has the best long-term consequences; that it delivers the goods, better than any other.

I am much of Mill's and Bentham's views on both these issues. I support abundant scope for free speech. I also support untainted democratic decision-making over the souped-up role given to judges under a bill of rights.

Let me conclude by reminding you of something that the American legal philosopher Lon Fuller, way back in 1949, put into the mouth of his fictional Justice Keen in his famous mock-hypothetical 'The Case of the Speluncean Explorers'.[27] This judge, responding to the ever present temptation for top judges to fix up what *they see* as the moral and rights-related failings of the elected legislature, argues for resisting that temptation. Good long-term consequences flow from leaving these hard, difficult issues (including, I might add, ensuring lots and lots of scope for free speech) with the people and their elected representatives.

> Now I know that the line of reasoning I have developed in this opinion will not be acceptable to those who look only to the immediate effects of a decision and ignore the long-run implications of an assumption by the judiciary of a power of dispensation … But I believe that judicial dispensation does more harm in the long run than hard decisions. Hard cases [where judges follow the clear intention of the elected legislature despite the presumed rights-related deficiencies that entails for the case at hand] may even have a certain moral value by bringing home to the people their own responsibilities toward the law that is ultimately their creation, and

[27] Lon Fuller, 'The Case of the Speluncean Explorers' (1949) 62 *Harvard Law Review* 616.

> by reminding them that there is no principle of personal grace that can relieve the mistakes of their representatives.[28]

I am much of Justice Keen's mind, and more so still when certain enthusiasts present bills of rights as all-purpose, pre-packaged principles of grace that can (in some mysterious, ineffable way) relieve the mistakes of their elected representatives. As with much else – no, even more than with anything else – free speech is far too important to be left to unelected judges.

[28] Ibid 636–7.