

Pauline Hanson, Free Speech and Reconciliation

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Pauline Hanson's comments in parliament on the so-called 'race issue' have been divisive. She has referred to 'the privileges that Aboriginals enjoy over other Australians' and has been critical of 'the so-called 'guilt' or 'Aboriginal Industry' putatively generated and defended by 'the fat cats, bureaucrats and do gooders' who are said to feed off it.¹ Ms Hanson has spoken, often inaccurately but with legal impunity, giving rise to a number of questions about the rights, duties and special privileges of parliamentarians especially where the issues of recognition and reconciliation are concerned.

In the Westminster tradition parliamentarians enjoy enormous speech freedoms. These freedoms affirm the sovereignty of parliament, facilitate the cut and thrust of parliamentary politics and perhaps most importantly, ensure that the truth will out. It is imperative that our parliamentarians are able to speak candidly without fear of the consequences.²

While I wish to affirm the sovereignty of parliament and its right to police its own breaches of privilege I argue here, not only that parliamentarians in general have a stronger obligation than private citizens to speak truthfully and justly, but that Australian parliamentarians have a special obligation to speak carefully and thoughtfully when referring to any issue affecting the original inhabitants of this nation.

Freedom of speech and expression is, of course, one of the most important themes in liberalism. For Justice Michael Kirby 'individual self-expression' is a 'vital attribute' of a free society' and is just as important as 'the protection of life itself'. The capacity to criticise the government, he adds, 'is a vital protection against tyranny'.³ That freedom of speech is a precondition of representative democracies was recently validated by the Australian High Court decisions which found in the constitution an implied right to freedom of political communication. The court found that since Australia is an (effective) representative democracy, guarantees of freedom of communication or discussion could justifiably be implied as a necessary condition of the practice of representative democracy.⁴

But even the most vehement defender of free speech admits that there is no such thing as an absolute right of speech. As the late Justice Lionel Murphy noted: 'free speech is only what is left over after due weight has been accorded to the laws relating to defamation, blasphemy, copyright, sedition, obscenity, use of insulting words, official secrecy, contempt of court and parliament, incitement and censorship'.⁵ Every Australian is, therefore, restrained in her/his speech by these various conditions. All of us, that is, except for parliamentary representatives speaking from within the hermetic environment of the parliamentary chamber. Notwithstanding the fairly modest constraints imposed by standing orders and the informal bridle of party discipline, parliamentarians may more or less say what they like, protected as they are by section 49 of the constitution against questioning or impeachment 'in any court or tribunal' outside of parliament'.⁶

Libertarians, while they may not always like what Pauline Hanson has to say, argue strongly for her right to speak as she does. Free-speechers often say that race hate speech is a legitimate aspect of public debate.⁷ The freedom to say ‘nasty, vicious, wrongheaded, and downright evil’ things is regarded as essential for the functioning of a vital democracy.⁸ Some regard controls on racist speech as a form of ‘mind control’ — a popular mainstay here is, of course, the inevitable slippery slope type of argument which runs along the lines: ‘once you suppress one form of speech, the way is certainly open to suppress others. Where would it end?’⁹ Others suggest that government suppression of hate speech deprives members of the group subject to race-hate ‘important, if distressing knowledge’.¹⁰ It has even been suggested that ‘offensive graffiti and race hatred are often the only means of self expression of some sections of the community’.¹¹

Perhaps the best known liberal defender of the importance of free speech is John Stuart Mill, and it is to his views on the subject that free speechers invariably reference when defending their ‘right’ to speak. Mill was a passionate advocate of free expression because he regarded it as an essential precondition of the achievement of human happiness and ‘the mental well-being of mankind’. He provides a number of persuasive arguments against the suppression of speech. Firstly, the suppressed opinion may be true and ‘to deny this would be to assume our own infallibility’. Secondly, even if the ‘received opinion’ is true, it will only be a ‘living truth’ rather than ‘a dead dogma’ if it is ‘fully, frequently, and fearlessly discussed’.¹² Thirdly, it is generally the case that ‘conflicting doctrines ... share the truth between them’; a lively dialectic between competing points of view is necessary to, and constitutive of, intellectual progress.¹³ Mill even tells us that the suppression of an opinion we know to be true is an ‘evil’.¹⁴ On this basis, the right of Pauline Hanson and other public figures to denigrate and disseminate misinformation about indigenous Australians would seem to be permissible. But it will be shown that there is a conflict between Mill’s defence of free of speech and his views on representative government, in particular his preference for the ‘trustee’ over the ‘delegate’ form of parliamentary representation.

For a liberal like Mill, the only grounds for limiting speech are to prove that it causes ‘harm’ to the interests of others. Part of the difficulty about speech is that it is impossible to show with certainty that a particular speech act actually caused harm. Civil libertarians are generally loathe to acknowledge the harm of speech. Andrew Norton argues, for example, that ‘[t]here is little evidence to suggest that racist propaganda is a significant source of racist views, rather than a reflection and reinforcement of pre-existing prejudices’,¹⁵ while Carl Cohen asserts that although ‘[w]ords can hurt ... there is a great difference between verbal hurts and physical blows’.¹⁶ Tony Katsigiannis says, quite accurately, that ‘[w]hatever one may think of the nexus between speech and action, there has never been any conclusive proof of a causal connection between the two’.¹⁷ Even those who acknowledge the harm of speech deny that it outweighs the harm of suppressing it.¹⁸ One way of getting around the speech/action nexus is to argue that racist speech is itself harm, rather than a cause of harm. As Solomon and Tatz suggest: ‘Sticks and stones do break bones and words not only hurt, but maim and kill. It is nonsense to argue verbs and adjectives are of no moment, unworthy of criminal prohibition. Words have power. Words influence actions. They create reality’.¹⁹ In the case under consideration

here, they represent a significant obstacle to the process of recognition and reconciliation.

Speech which impugns the dignity of any racial group undoubtedly 'inflict[s] severe emotional distress and makes minority members of a society more susceptible to overt acts of discrimination and hatred'.²⁰ We know intuitively, yet cannot prove absolutely, that racist speech damages the social and civil standing of its targets. Damage to reputation leads, of course, to economic loss, as even the most stalwart defenders of free speech will admit.²¹ And we all know that when the reputation of any group or person is consistently denigrated and impugned their speech inevitably becomes less valued.

Therefore, although it cannot be proved, our intuition is that Hansonite speech either causes harm or constitutes harm. For example it is reported that 'Asian community leaders believe Pauline Hanson's immigration stance has led to a rising tide of racial abuse', with a lawyer representing a recently vilified woman remarking: "Ms Hanson's comments had given racists a "license to vilify" other people on the grounds of race'.²² The NSW Anti-Discrimination Board has reported a 'one-third rise in the number of complaints' which its president, Chris Puplick, attributes to a Hanson-led 'souring of tolerance' in the nation.²³ Even the Howard government has tacitly admitted the harm of Hansonite speech by setting up a task force to counter its effects in Asia. Significantly, no such counteractive was initiated domestically underlining that the harm it sought to ameliorate related to the adverse effects of Hanson's speech on foreign trade.²⁴

What would Mill say to all of this? What would be his attitude to Hansonite speech?

Mill does tell us that '[t]he case of a person who solicits another to do an act, is not strictly a case of self-regarding conduct. To give advice or offer inducements to any one, is a social act, and may, therefore ... be supposed amenable to social control'. But he also makes the important point that: 'Whatever is permitted to do, it must be permitted to advise to do. The question is doubtful, only when the instigator derives a personal benefit from his advice: when he makes it his occupation, for subsistence or pecuniary gain, to promote what society and the state consider to be an evil'.²⁵ No one can doubt the sincerity of Ms Hanson's belief in her own comments and it would be difficult to prove that any advantage she gained would satisfy Mill's requirement here, though I believe she would come close since it could be argued that she has made it her profession to agitate. But the issue of 'whatever is permitted to do, it must be permitted to advise to do' is an ambiguous one because parliamentary speech, immune from legal sanctions, may in fact incite to do what is by no means permitted to do.

In a recent volume of the *Journal of Applied Ethics* Jenny Teichman examined a case which concerned the philosopher Peter Singer. In 1989 Singer addressed Austrian, Swiss and German conference audiences by defending the ethical acceptability of euthanasia. Singer argued that: 'No [human] infant, defective or not, has as strong a claim to life as a person'. According to Teichman he claimed that it is morally defensible 'to kill seriously defective infants' and in some circumstances, normal ones. His arguments were met with noisy protests and audiences who demanded that he 'shut up'.²⁶ He was also prevented from speaking in various professional and public fora.²⁷ In a fierce paper war that erupted after

the event Singer argued that the audiences had failed to recognise his right to freedom of expression.²⁸

Teichman argues, convincingly I think, that no such right had been infringed. She noted that ‘the right to free expression does not mean that we may say anything at all, to anyone at all, anywhere at all’. People who are guests or visitors in a foreign country have, she says ‘some obligation to be sensitive to local concerns’. Singer was a guest in the protesters’ countries, and guests, she suggests, ‘have some obligation to be tactful and circumspect’. Both Singer and the conference organisers had, in her opinion, failed to take account of the fact that in Germany and Austria the topic of euthanasia ‘has uniquely horrible historical associations’ and therefore their actions constituted ‘a manifestation of gross insensitivity’. This seems to me to be a reasonable, if not particularly philosophical, observation. Moreover I endorse her equally sensible concluding remark that ‘insensitivity is not usually, perhaps not ever, a necessary ingredient in the untrammelled search for philosophical truth’.²⁹

Pauline Hanson seems to be in a similar position to that of Singer here. Ms Hanson is, of course, an Australian citizen; Australia is not technically a foreign country to her. Nevertheless, I think a case could be made that our special historical relationship to indigenous Australians demands of her (or any Australian parliamentarian) a particular degree of sensitivity whenever she ascends the special platform of parliament to speak on matters which concern them. And although Ms Hanson could not legally be described as a guest in this country, there is a sense in which all non-indigenous Australians could be described as *defacto* guests. As settlers and uninvited guests, non-indigenous Australians might well be under some special obligation to demonstrate a special kind of respect or sensitivity to our unwilling hosts here, the original inhabitants. Australia may be thought of as a special case of *denial* (as opposed to *acceptance* as in the case of the Austrian and German audiences) of our melancholy past. The surrogate for an insensitive line on euthanasia in this case is Hanson’s insensitivity to the particular and long standing problem Australian settlers have with the issue of recognition. Hanson fails to take full account of the particular meaning her sentiments have for a nation that *still* resists vigorously a complete and honest confrontation with its past, a nation that continues to be formally recognised by Amnesty International as a systematic violator of the rights of indigenes;³⁰ a nation that still affords its original inhabitants third world health standards; where an official white Australia policy was not technically dismantled until the seventies and where indigenous Australians were not entitled to vote until the sixties. Australia has a prime minister who publicly and openly declines to apologise for the tragedy of the stolen children and disparages the practise of teaching Australian children an honest account of our nation’s history.³¹ Australia is a place where a former prime minister feels ‘comfortable’ enough to mount a public platform and explain that land rights are a bad idea for people ‘who had never invented tools — not even a wheel’.³² It is now a widespread assumption that the next federal election will be based on ‘the race issue’,³³ a chilling portent that Australia is set to supersede South Africa as the most infamous pariah nation of the developed world.³⁴

John Howard’s reluctance to condemn Hanson suggests a strange and symbiotic relationship between them, with Hanson’s uninhibited and unpolished political style providing a convenient outlet for the repressed sentiments of the nation’s leader.³⁵ In the end our prime minister simply endorsed Hansonite sentiment by saying that it

insulted Australians to be told they had ‘a racist and bigoted past’.³⁶ He made it clear that he wanted Australians to feel more ‘relaxed and comfortable’ about themselves and their identity and that he took ‘a more optimistic view of our past than some do’;³⁷ thereby repudiating a view already officially sanctioned by our nation’s previous leader.³⁸ He celebrated the fact ‘that people could now ‘talk about certain things without living in fear of being branded as a bigot or a racist’;³⁹ conceding that his views in some respects coincided with those of Hanson.⁴⁰ Senator Herron followed suit. He defended the Howard government’s reluctance to formally apologise for injustices associated with the stolen children by appealing to the principle of majority rule and denying the importance of political and moral leadership: ‘If you’re going to speak on behalf of the nation’, he said, ‘then the nation must support it’.⁴¹

Howard’s attitude signalled a significant and depressing abrogation of the hard won progress we had made towards the advancement of recognition and reconciliation. When we compare his sentiments to those expressed by the former Prime Minister Paul Keating at the celebrated Redfern Address we are put in mind of an analysand who, after years of tortuous analysis, finally effects a profound psychological breakthrough only to renounce it all in the following session.

Paul Keating had declared that Australia was on the verge of passing a difficult ‘test’, one it had for so long ‘failed’ in:

[I]n truth, we cannot confidently say that we have succeeded as we would like to have succeeded if we have not managed to extend opportunity and care, dignity and hope, to the indigenous people of Australia ... This is a fundamental test of our social goals and our national will: our ability to say to ourselves and the rest of the world that Australia is a first-rate social democracy, that we are what we should be—truly the land of the fair go and the better chance. There is no more basic test of how seriously we mean these things. It is a test of our self-knowledge. Of how well we know the land we live in. How well we know our history. How well we recognise the fact that, complex as our contemporary identity is, it cannot be separated from Aboriginal Australia. How well we know what Aboriginal Australians know about Australia ... [T]he starting point might be to recognise that the problem starts with us non-Aboriginal Australians. It begins, I think, with that act of recognition. Recognition that it was we who did the dispossessing. *We* took the traditional lands and smashed the traditional way of life. *We* brought the diseases. The alcohol. *We* committed the murders. *We* took the children from their mothers. *We* practised discrimination and exclusion. It was our ignorance and our prejudice. And our failure to imagine these things being done to us.⁴²

Keating concluded on an optimistic, though unprophetic, note: ‘We cannot imagine’ he said, that ‘Aboriginal people today will be denied their place in the modern Australian nation ... We cannot imagine that we will fail ... I am confident that we will succeed in this decade’.⁴³

Yet Australians are still struggling to establish an identity they feel they can live with.⁴⁴ Of all the invaded territories in the developed world we are, arguably, the nation which has experienced the greatest difficulty in facing up to our historical identity. We seem particularly unable or unwilling to confront our status as invaders. One reasonable explanation for this might be that many of us are descendents of inadvertent invaders; the original convict population was dragged here kicking and

screaming under less than auspicious circumstances. And none of us had any say in the fact that we were born here. But the fact remains that those of us who are descended from the original settlers, convict or otherwise, continue to benefit from that invasion simply by virtue of the fact that we are not Aboriginal and therefore free of the legacies of colonial dispossession and paternalistic controls that were exercised over the original population. Non-Aboriginal Australia continues to celebrate its 'nationhood' in a quite conscious tradition of invasion: the bi-centenary of 1988, for example, celebrated 200 years of white rule, similarly the centenary of federation, another non-Aboriginal milestone, is constantly touted as an appropriate moment for the shift to a republic, a fact which signals our intention to remain wilfully ignorant of the full implications of that tradition.

It is sometimes observed that Australians are obsessed with discovering or forging an independent identity. Linda Burney suggests that the 'real reason' for this obsession 'is that the Aboriginal element of Australian identity has always been left out'. 'Real Australia', she suggests, will only emerge after an honest recognition of 'what has really happened'.⁴⁵ Keating had acknowledged this necessity in his Redfern address. He understood that the national psyche needed to excavate, probe and come to terms with the sad memories of its childhood. This painful but quite necessary task has been met with vigorous resistance by our current leaders who are behaving a bit like bewildered parents challenged by the reproaches and revelations visited upon them by their adult children. The repressed memories of our past are out once and for all; they cannot and should not be stuffed back into the recesses of our common psyche. Regret about the past need not check optimism for the future; quite the opposite. Recognising and apologising will discharge the ponderous freight of the history and open the way to a better, though by no means easier, future. An honest recognition of our status as invaders will enable us to get off the analyst's couch once and for all; it will permit us, at last, to move on and build a nation upon the solid foundations of 'what really happened' and the just consequences that would undoubtedly flow from that recognition. Some might perceive Hanson's views as, in a perverse way, a legitimate aspect of that process. One could argue, that she has brought latent Australian racism to the surface and thereby made it easier to deal with. I am more inclined to the view that she is a catalyst of a regression to counterproductive anger and denial.

In the Singer case, Jenny Teichman made an important distinction between 'free expression, which is a basic right' and the 'special right or privilege ... of regular access to public platforms' which accompanies 'certain jobs and professions' and which could not therefore be universalised.⁴⁶ Depriving Singer access to a special platform from which to speak did not constitute an infringement of any of his basic rights. Similarly, sequestered and protected parliamentarians should appreciate that they speak from an exceptionally *privileged* position which carries with it a strict obligation to speak at all times with consideration.

Parliamentarians enjoy almost complete freedom of speech according to the rationale that the 'necessity of freedom of speech outweighs any countervailing danger of misuse'. Parliamentarians may not be called to account in any other legal forum for statements made in parliamentary proceedings and misuses of parliamentary privilege are expected to be handled by parliament itself.⁴⁷ Even speech that is 'inspired by improper motives or untrue or misleading' is a matter to be resolved 'entirely within the jurisdiction of the House'. This arrangement embodies a

recognition that when weighting the importance of several competing rights, in this case, 'the right to freedom of speech, the right to allow parliaments to act uninhibited and the right to conduct trials with all the evidence available to the court' the 'right of parliament to act uninhibited' is trumps.⁴⁸ And it is entirely proper for a representative democracy to affirm the sovereignty of its parliament. But how do we deal with a case like Hanson's speech which appears to be an abuse of parliamentary privilege but which commits no technical breach of standing orders? What right does the electorate have to call her to account?

When Hanson speaks in parliament and exercises her 'special' and particular privilege to speak with impunity she should be made aware that such a privilege carries with it enormous responsibilities. Freedom of speech implies an equal access to that speech but parliamentary speech is utterly one sided.⁴⁹ Private citizens cannot raise matters of privilege themselves but may seek to persuade a member to do so on their behalf. And it wasn't until the parliamentary Privileges Act of 1987 that contempt by defamation of parliament was abolished.⁵⁰ But a parliamentarian can say whatever s/he likes about indigenous Australians within the refuge of the parliament and yet those whose reputations are directly harmed by that speech have no right in law to seek redress.

In *On Representative Government* Mill provides a lengthy excursus on the distinction originally made by Edmund Burke between different styles of parliamentary representation, that is between the delegate and the trustee style.⁵¹ Mill had particular objections to the notion of the delegate parliamentarian related to his abiding fear of the tyranny of the majority and the suffocating effect of popular opinion or 'common sense' notions upon progress and the general well being of the society. '[T]he delegation theory of representation' he wrote, 'seems to me false, and its practical operation hurtful ... no words can exaggerate the importance in principle of leaving an unfettered discretion to the representative: for it would then be the only chance, under universal suffrage, for any other opinions than those of the majority to be heard in parliament'. It is incumbent on the electorate, says Mill:

to be unremitting in their search for a representative of such calibre as to be entrusted with full power of obeying the dictates of his own judgment; that they should consider it a duty which they owe to their fellow countrymen, to do their utmost towards placing men of this quality in the Legislature; and that it is of much greater importance to themselves to be represented by such a man, than by one who professes agreement in a greater number of their opinions.⁵²

Regarding speech in general, to Mill's mind the 'gravest' sin of a speaker is 'to argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion'. The 'greatest mischief' of sophistic purveyors of 'received opinion' is to direct it against 'the comparatively defenceless' (ie dissenters). The 'calumny' of stigmatising 'those who hold any unpopular opinion' arises from the fact that those who hold unpopular opinions are 'in general few and uninfluential, and nobody but themselves feels much interested in seeing justice done them; but this weapon is, from the nature of the case, denied to those who attack a prevailing opinion'. The worst effect of 'unmeasured vituperation employed on the side of the prevailing opinion' is that it stifles sensible debate. Though Mill discourages legal sanctions to control intemperate speech, he enjoins the public to

condemn anyone 'whose mode of advocacy' is characterised by 'malignity, bigotry ... intolerance or ... want of candour'. By contrast Mill is generous in his praise for the orator who abstains from the use of 'vituperative language', exercises 'cautious avoidance of unnecessary offence' and '*who has calmness to see and honesty to state what his opponents and their opinions really are*'.⁵³

I have mentioned that Mill abhorred the 'tyranny of the majority' and the enervating effect of 'received opinion'. It is well known that Pauline Hanson has made a virtue of the fact that her views are a product of 'common sense', her personal 'experience as a mother of four children' and as 'a businesswoman running a fish and chip shop'. It is also widely accepted that Ms Hanson was elected to parliament on the strength of her views on the race issue. Since the citizens of Oxley apparently share her views, presumably this means that they are entitled to have these views aired in the federal parliament. And from what she has said on record, in terms of Edmund Burke's famous distinction between the delegate and the trustee, Ms Hanson classes herself as an example of the former variety. She has explicitly identified herself as a delegate with a mandate from the constituency of the people of Ipswich.⁵⁴

Normally, when the right to speak freely collides with the rights of others to protect their reputation, the defamed person has a right to seek financial compensation for any damage caused to their reputation by the public speaker.⁵⁵ But when Hanson speaks in parliament she not only defames Aborigines who have no legal redress, she also impugns the reputation of *all* Australians in the eyes of the world. Ms Hanson does not speak as a private citizen; she speaks as a representative of the Australian people, so naturally her words are taken to be *representative* by those too far removed from Australian politics to be aware of its subtleties. The fact that our prime minister did not respond swiftly to the provocative speech of Ms Hanson possibly underlined his tacit acquiescence to it. As one reader wrote to the *Sydney Morning Herald*: 'Howard has spoken out at last, but is it too little and too late? The debate is, of course, not about free speech. If Howard was truly, vehemently opposed to the Hanson-type views he should exercise his own right to freedom of speech and come out thumping the table, if that's what he truly believes'.⁵⁶ This perception of our leadership was reiterated in the foreign press,⁵⁷ a perception we might have avoided had Hanson opted to comport herself as a trustee rather than a delegate.

For Mill, the main problem with the delegate approach to representation is that sometimes the majority opinion is wrong, ill-considered or unjust. That is why he insists so strongly that the electorate is duty bound to actively seek out representatives who are disciplined, informed, and of the highest ethical calibre.

If the majority of Australians shared Hanson's views, would it still be proper for her to prosecute them so vigorously? Is democracy simply about the decisions we make on our cantakerous days? Pauline Hanson is, no doubt, a hard working, single mother who must frequently feel frustrated by the sometimes grinding inefficiency and apparently incomprehensible rationale of much of governmental practise. The business of governing is extremely complex, highly professionalised and invariably opaque to those standing outside it or unfamiliar with its workings. In post-industrialised societies of time-poor specialisers the parliament has a mandate to operate in our best interests and on our behalf. parliament is, to be sure, the peoples' house but does this mean that all its activities should be driven by public opinion polls? The same dilemma confronts us when we consider the duties of courts. How

far should our courts go in reflecting public opinion? Would a fair, ethical and workable legal system result from judgements made solely on the basis of opinion polls?

More immediately, promulgators of racist speech should be aware that we are obliged by various of our international treaties to avoid giving public vent to speech which could be interpreted as racist. When the institution of parliamentary privilege is used as a shield for racist speech we are in breach of our international covenants.⁵⁸ Though United Nation covenants do stress the importance of free speech they place even greater emphasis on the importance of protecting individuals from expressions of 'racial hatred'. Article 20 (2) of the *International Covenant of Civil and Political Rights*, to which Australia is a signatory, states that 'any advocacy of national, racial or religious hatred that constitutes incitement to discrimination, hostility or violence shall be prohibited by law'. In addition, signatories to the *International Convention for the Elimination of All Forms of Racial Discrimination* are bound to declare:

an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin.⁵⁹

The problem with Hansonite speech is that parliamentary privilege provides immunity from such legal sanctions as these covenants would otherwise demand, therefore it would be preferable if our leaders in parliament exercised caution in the one domain where it matters most, taking care to uphold the spirit of such treaties.

Mill did not regard free speech as an absolute right. Though he regarded speech as normally beneficial and at worst harmless, he did recommend its restriction in cases which threatened 'public order or the survival of the state'⁶⁰ (though it is doubtful whether Hansonite speech would qualify as this dangerous). And he placed stricter than usual standards upon the speech of parliamentary representatives. It is also important to bear in mind that Mill did not advocate freedom of speech as an end in itself but as a means towards the higher goals of self-cultivation, self-improvement and general progress. He believed that freedom to speak and think for ourselves enabled us all 'to attain the mental stature' of which we are 'capable'.⁶¹ Mill did not seek for a republic of aimless chatterers but rather one of thoughtful, candid debaters. There is only 'one mode' for acquiring the 'wisdom' necessary for such a community, Mill tells us, and this is by 'hearing what can be said about it by persons of every variety of opinion, and studying all modes in which it can be looked at by every character of mind'. An opinion can only be properly settled on once a person 'has sought for objections and difficulties, instead of avoiding them, and has shut out no light which can be thrown upon the subject from any quarter'. Such a method should become 'a steady habit' in order to avoid what Mill derides as the 'fatal tendency of mankind to leave off thinking about a thing' after it becomes a truism. Society inevitably stagnates in 'the deep slumber of ... decided opinion'.⁶² Mill reminds us of the key role of government in cultivating an electorate of the character he requires — indeed, he considered it to be the hallmark of any government worth its salt: 'the most important point of excellence which any form of government can possess', he declared, 'is to promote the virtue and intelligence of the people themselves'.⁶³

What was perhaps most significant about this case was the High Court's opinion that freedom of communication was to be understood not as an individual right, but more properly as a social condition. It was argued by Justices Deane and Toohey that certain speech acts could be justifiably curtailed by 'what is reasonably necessary for the preservation of an ordered society or for the protection or vindication of the legitimate claims of individuals to live peacefully and with dignity'.⁶⁴ According to Justice Brennan, the relevant considerations would include 'the extent to which the protection of the other interest itself enhances the ability of the Australian people to enjoy their democratic rights and privileges'.⁶⁵

The problem with the liberal insistence on the right to free speech is the assumption that any act which does not *demonstrably* cause harm to another person is purely personal. But since the type of speech necessary to the practise of representative democracy is, by definition, uttered in a social context, we should never in confidence assume that its consequences are purely personal nor that harm can be avoided should the listener take the advocate's advice and simply avert her/his eyes or close her/his ears. The other problem with the liberal defence is that it tacitly assumes that we all have equal access to the right of speech. This, of course, is rarely the case, particularly where minority groups such as indigenous Australians are concerned. As Mari Matsuda says, equality is a precondition of truly free speech 'because the right of speech is meaningless to people who don't have equality'.⁶⁶

Free speechers often call on Mill to defend their views. What they may sometimes overlook is that Mill did not view speech as an absolute right but made many qualifications as to its proper use, *especially* where parliamentarians were concerned. Though he by no means advocated controls on parliamentary speech, he demanded that opinions expressed on the special platform of parliament be informed, thoughtful, and aware of any potential harm to 'defenceless' minorities. Unlike many modern libertarians, Mill was well aware of the conflict that exists between the ideals of free of speech and the conditions necessary for good representative government and a just political order. Nations seeking reconciliation with indigenes must be particularly mindful of what these conditions are and of how best to secure them.

Endnotes

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- 3 The Hon Mr Justice Michael Kirby, 'Freedom of Expression — Some Recent Australian Developments', *Commonwealth Law Bulletin*, vol 19, October 1993, pp 1778-81; p 1778.
- 4 See *Nationwide News Pty Ltd v Wills* (1992) 108 ALR 681 (concerning the validity of a section of the Industrial Relations Act which purports to prohibit criticisms of the Industrial Relations Commission), and *Australian Capital Television Pty Ltd v Commonwealth of Australia* 1992, 108 ALR 577 (concerning the validity of pre-election bans of political advertising).
- 5 Colin Tatz and Tamsin Solomon, 'Race Hate Bill Will Staunch the Flow of Words That Kill', *Australian*, Wednesday, 22 March 1995, p 122.
- 6 See also Parliamentary Privileges Act, 1987, Section 16.
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- 8 See, for example, Carl Cohen, 'Free Speech and Political Extremism: How Nasty Are We Free To Be?', *Law and Philosophy*, vol 7, 1989, pp 263-79; 263.
- 9 G A Moens, 'Eroding Our Rights: Towards Mind Control', *Australia and World Affairs*, no 23, Summer, 1994, pp 21-30; 29.
- 10 For a good review of the different arguments here see, Anne Flahvin, 'Hate Speech', op. cit.
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- 16 Cohen, 'Free Speech', op. cit., p 273.
- 17 Katsigiannis, 'Opponents', op. cit., pp 26-7.
- 18 See Flahvin's notes on the views of Sadurski and Massaro ('Hate Speech', op. cit., pp 334-35).
- 19 Tatz and Soloman, 'Race Hate Bill', op. cit., p 122.
- 20 Freya Carteck, 'Vicious but Vital Voices', *Australian Press Council News*, vol 6 no 4, November 1994, pp 1-3; 2.
- 21 This point was argued in a landmark American case on the constitutionality of an ordinance defining pornography as a civil rights violation. In this case, Circuit Judge Easterbrook held that freedom of speech is trumps even where its particular exercise causes and perpetuates civil inequality. Judge Easterbrook argued: 'we accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. Yet this simply demonstrates the power of pornography as speech. All of these unhappy effects depend on mental intermediation. Pornography affects how people see the world, their fellows, and social relations. If pornography is what pornography does, so is other speech'. *American Booksellers Association, Inc. v Hudnut* 771 F.2d, 323, 329, 1985.
- 22 *Daily Telegraph*, 14 October 1996.
- 23 'Releasing the board's annual report, Mr Puplick said he was "deeply concerned" about the upsurge in complaints "by those most in need of protection" including Aborigines, non Anglo-Saxons, homosexuals and women ... What is particularly disturbing however is the increase by 25% in the number of complaints from the Torres Strait Islanders ... Mr Puplick said he was concerned that the recent debate about immigration and the flood of letters to newspapers and comment on talkback radio had "made a virtue out of intolerance ... Tolerance is almost being characterised as a weakness"'. *Daily Telegraph*, 18 October 1996.
- 24 'The number of student visas to Australia has fallen by 19.7 percent since the advent of Ms Hanson. A Malaysian property investor has frozen a proposed \$40 million development in Australia because of concerns about racism ... And a Melbourne based cosmetics exporter ... was asked by Asian buyers to remove the "Made in Australia" labels from its products because of concern that the Australian brand image had become a commercial liability'. Peter Hartcher, 'How the Hanson Image Hits our Links with Asia', *Financial Review*, 6 June 1997. Richard Jinman reported that: 'Tourism Taskforce's chief executive, Mr Christopher Brown, estimated the decline in Asian business had cost \$20 million'. Richard Jinman, 'Asians Lined Up to Take a Sound Bite On Hanson', *Sydney Morning Herald*, 28 July 1997. See also Cathy Prior, 'Hanson Backlash Threatens Revenue', *Australian*, 17 June 1998, p 47; Jennifer Sexton, 'The View from Thailand', *The Australian Financial Review*, 5 June 1997; Leonie Lamont, 'What Australia's Top Business Leaders Think of Hanson', *Sydney Morning Herald*, 21 July 1997; and Leonie Lamont, 'Tarnished Image May Cost Young Their Jobs', *Sydney Morning Herald*, 21 July 1997; Michael Kroger, 'The Casualties of Hansonism', *Options*, 7 November 1997; Greg Sheridan 'Elite Unit to Fight Hanson in Asia', *Australian*, 7 August 1997.
- 25 Mill, *On Liberty*, op. cit., p 109.
- 26 Jenny Teichman, 'Freedom of Speech and the Public Platform', *Journal of Applied Philosophy*, vol 11 no 1, 1994, pp 99-105.
- 27 For further details here see: P Singer, 'A German Attack on Applied Ethics: A Statement by Peter

- Singer', *Journal of Applied Philosophy*, vol 9 no 1, pp 85-91.
- 28 He was supported in this position by Thomas Mautner, 'Repressive Intolerance', *Quadrant*, June, 1993, pp 33-5.
- 29 Teichman, 'Freedom of Speech', op. cit., p 103.
- 30 See *Amnesty International Report*, Amnesty International Publications, 1997.
- 31 *Canberra Times*, 25 October 1996; *Sydney Morning Herald*, 25 October 1996 and 26 October 1996.
- 32 Transcript of address by the Right Honorable Sir John Gorton, *Prime Ministers on Prime Ministers Lecture Series*, Old Parliament House Canberra, 12 November 1997.
- 33 See, for example, Margo Kingston, 'Race is On For Next Election', *Sydney Morning Herald*, 8 November 1997, p 35.
- 34 As Malcolm Fraser recently noted 'An Australia noticeably influenced by the One Nation party would be a pariah among civilised nations' (Malcolm Fraser 'Hearts Must Guide Response to Hanson', *Australian*, 7 May 1997).
- 35 Andrew Jakubowicz, 'Fear and Loathing in Ipswich', *Australian Rationalist*, no 42, Summer 1996-7, pp 6-13; 6-7.
- 36 *Canberra Times*, 25 October 1996; *Sydney Morning Herald*, 25 October 1996 and 26 October 1996.
- 37 *Sydney Morning Herald*, 26 October 1996, pp 12-13.
- 38 'I profoundly reject the black armband view of Australian history. I believe the balance sheet of Australian history is a very generous and benign one', Prime Minister John Howard, *Weekly House Hansard*, 30 October 1996, p 4. For an enlightening and exhaustive treatment of this subject see Mark McKenna, 'Different Perspectives on Blackarmband History', *Research Paper No 5*, 1997-98, Department of the Parliamentary Library, Parliament House, Canberra.
- 39 Transcript of John Howard's, Address to the Queensland Division of the Liberal Party State Council, 22 September 1996, p 4.
- 40 '[T]here has been I believe in the Australian community a deep seated rejection of the politically correct and distorted view of Australian history and I have played a major role myself in rejecting that very negative view of Australian history and to some extent, she's also tapping into that'. Transcript, radio interview with Neil Mitchell, 3AW, Melbourne, 30 April 1997.
- 41 *The 7.30 Report*, ABCTV, 28 May 1997.
- 42 Paul Keating, (in a speech written by Don Watson) 'The Redfern Park Speech', Sydney, 10 December 1992, Launch of International Year for the World's Indigenous People, pp 227-31; 227-8; 231.
- 43 Ibid.
- 44 A phrase taken from G Page and Poaraar, *The Great Forgetting*, Canberra, 1996.
- 45 Linda Burney, President of NSW AECG Inc, 'Transcript of a Speech Given at the Opera House', March 1993, pp 7-8.
- 46 With regard to Singer, she concluded: 'The German and Austrian protests against Singer temporarily deprived him of the privilege of access to a platform but were not attacks on the basic right of free expression' (Teichman, 'Freedom of Speech', op. cit., p 99). And yet, Teichman seems reluctant to acknowledge the significant implications for the important principle of academic freedom here. For further discussion see Singer, 'A German Attack on Applied Ethics', op. cit.
- 47 'How Parliament Deals with Breaches of Privilege', *Committee Bulletin*, vol 5 no 8, August 1994, pp 6-10.
- 48 O'Brien, 'Parliamentary Privilege', op. cit., pp 573-5.
- 49 Though an important distinction between the Senate and the House of Representatives should be noted here: the Federal Senate opted to adopt the recommendation of a Joint Select Committee on Parliamentary Privilege and establish a 'right of reply procedure available to persons who feel they have been defamed or otherwise adversely affected by comments made in the parliament'. It was the first House in the world to date to do so. The House of Representatives did not, however, follow suit. *Committee Bulletin*, 'How Parliament Deals with Breaches of Privilege', op. cit., p 6.
- 50 Ibid., pp 6-7.
- 51 In this distinction the delegate feels obligated to replicate precisely the views of her/his (narrow) constituency, while the representative or trustee feels mandated to exercise her/his own judgement and to act on behalf of and in the interests of the nation in general.
- 52 J S Mill, 'Representative Government', in J Gray (ed.), *On Liberty and Other Essays*, Oxford,

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- 1991, pp 382-3.
- 53 Mill, *On Liberty*, pp 60-1 (my emphasis).
- 54 On delivering her maiden speech to Parliament, Ms Hanson declared: 'Everything I have said is relevant to my electorate of Oxley, which is typical of mainstream Australia ... As an independent I am confident that I can look after the needs of the people of Oxley and I will always be guided by their advice'. Pauline Hanson, Commonwealth of Australia, Parliamentary Debates, Representatives, 10 September 1996.
- 55 Kirby, 'Freedom of Expression', op. cit., pp 178-80.
- 56 *Sydney Morning Herald*, 26 October 1996.
- 57 See Mark Baker, 'Bangkok Press attacks PM again on Hanson', *Sydney Morning Herald*, 8 May 1997; Richard McGregor, 'Hanson Courts a Regional Disaster', *Australian*, 24 July 1997; Leonie Wood, 'Thai Press Highlights Criticism by Hanson', *Age*, 14 August 1997; 'Asia Gags on Pauline's Poison', *Bulletin*, 29 July 1997; Don Greenlees, 'Asia Hails Cabinet Attacks on Hanson', *Australian*, 8 May 97; Tony Boyd, 'Human Rights, Hanson Jeopardise Japan's Support', *Financial Review*, 11 June 1997; Robert Lusetich, 'Leading US Paper Slams Howard's Lame Response', *Australian*, 28 August 1997.
- 58 O'Brien, 'Parliamentary Privilege', op. cit., p 586.
- 59 Cited in Melinda Jones, 'Extremist Speech and Australian Democracy', *The Cross-Examiner*, vol 3 no 1, Autumn, 1995, pp 10-15; 14.
- 60 Jones, 'Extremist Speech', op. cit., p 13.
- 61 Mill, *On Liberty*, op. cit., p 39.
- 62 Mill, *On Liberty*, op. cit., p 25; 49.
- 63 Mill, 'Representative Government', op. cit., p 226.
- 64 *Nationwide* per Deane and Toohey, op. cit., pp 727.
- 65 *Nationwide* per Brennan J, op. cit., pp 707.
- 66 Cited in Flahvin, 'Can Legislation Prohibiting Hate Speech be Justified?', op. cit., p 333. Matsuda is, of course, speaking of the American context where speech is always trumps. Here we might want to think of communication rights as dependent on other rights. Along these lines Melinda Jones has argued that 'in a democratic multicultural society' principles of free speech should 'be moderated by ... democratic commitment to treat all people with equal concern and respect'. In effect, this means that 'not all speech will be equally valued ... [therefore] it is appropriate to curtail racist speech'. Jones, 'Extremist Speech', op. cit., p 15.