

The Language of Liberty

(MPS, October 2010)

Before I thank the organisers of this conference for having invited me, and before I mention what a privilege it is to be in such august company, I want to begin this morning by genuflecting before the Gods of political correctness.

I arrived here in Australia a little over five years ago. I arrived to work in a university law school. It will surprise no one to hear me say that Australian law schools are places where the vast preponderance of people vote Labor – if not something further to the left than Labor. And just after arriving here, at one of those self-indulgent human rights conferences that, in my line of work, I'm obliged to attend from time-to-time, I soon encountered this rather bizarre (and I might add widespread) practice. This is the practice of starting a talk or speech or presentation by observing and acknowledging and repenting of some past supposed misdeed committed by one's forefathers. Heck, it doesn't even have to be one's own forefathers. It's enough if the misdeeds were those of people you yourself have absolutely no connection to whatsoever.

And here's the nifty bit. This observe-and-repent ritual comes totally without any cost to the speaker. You don't actually have TO DO anything that will atone for what you see as some past wrong. There's no real cost to you at all. Absolutely no one's life needs to be improved or made better. You don't even have to mean what you say. Just start your speech or talk with the perfunctory formulation and you can take your place with the elect – those whose moral sensibilities are so clearly superior (or so they themselves think) to everyone who refuses to play this game.

It's quite a remarkable recipe, one that allows you not only to believe that uttering a few formulaic words to begin is indeed the doing of God's work but also to feel good about yourself for doing so. Not a single *other* person's life is improved in any way, though, except for the speaker's fleeting sense of moral sanctimoniousness.

This is all too good to be true for me to miss out on the game. So, please, let me start this talk by acknowledging ... the traditional ... members of the Anglican Church,

dispossessed of their book of common prayer liturgy, of sane leadership, and of use of the magnificent Tyndale-inspired King James Bible – to say nothing of their core beliefs.

If that little parody made anyone really angry, then good. The sort of audiences before whom I usually speak would be apoplectic; I figured the underlying point would be better received by this crowd. Yet in a way I deliberately wanted to start by being offensive, at least to some of the people in the audience. You see my talk today is about ‘The Language of Liberty’ and one of the core assertions I want to make is that the only valuable sort of liberty or freedom is the sort that allows people to do or to say what others find wrong-headed, offensive, distasteful, intolerant and beyond the Pale.

The liberty only to act or speak within the bounds of agreed opinion, good taste and proper decorum and tolerance doesn’t seem all that valuable a sort of liberty to me. It doesn’t seem to carry with it many – if any – good consequences. It reminds me of the old Cold War joke when the top American official said to his Soviet counterpart: ‘In my country we have the freedom to stand before the White House and shout that the President is terrible, corrupt and stupid and nothing at all will happen to us’. The Soviet official smiled, and replied: ‘We too have that freedom to stand up and say the same thing about your President’.

In the rest of this talk I hope to do three things. Firstly, I want to say a bit more about how liberty is a contested concept. Next, I want to remind you all of the two distinct traditions or bases on which liberty can be, and has been defended. And let me be clear that I will be taking sides in that dispute. Then, thirdly, I will finish by defending the value of offensiveness when it comes to liberty. And I will here raise some tough examples where it’s not at all clear where the line ought to be drawn, and where smart, well-informed, reasonable and nice people – like this crowd here today – will simply disagree. Some will favour allowing the speech or conduct; others will favour restricting it. After all, it virtually goes without saying that no concept of liberty or freedom – no coherent, defensible one at any rate – will be so absolutist as to allow any action or any speech, whatever the consequences. The devil is in the line-drawing detail, as always.

i) *Liberty as an essentially contested concept*

As I hinted at above, people simply do not agree about the meaning or conceptual reach of the concept of ‘liberty’. My hope in this first section is simply to bring a modicum of clarification into that disagreement.

The regular place to start is with W.B. Gallie.¹ Gallie coined the idea of an ‘essentially contested concept’.² Here’s the gist of his point. Some abstract ideas or concepts are sufficiently amorphous that they cover different conceptions of the same concept.

Take the ‘concept’ of democracy, as an example. Different people use the term ‘democracy’ in different ways; they argue about how best to use the term; and there are no agreed criteria for resolving those disputes. At core, when it comes to this concept of ‘democracy, there are ‘thins’ and ‘fats’. The thins think of democracy in procedural, unvarnished terms. For them it’s about ‘how’ governments are chosen; it’s about majoritarianism; it’s about counting everyone equally to start and then letting-the-numbers-count.

By contrast, there is the fat or substantive or morally pregnant conception of the concept of ‘democracy’. Subscribers to this view, people like Amartya Sen and almost all self-styled human rights activists, take the bare ‘how is a government chosen’ notion and build in a ‘what are the substantive outcomes it produces’ qualification. So for them, to be a democracy involves more than just majoritarianism. There has to be also, say, a minimum level of rights-respectingness or not too much illiberalism or a decent amount of equality.

Personally, I’m very much a ‘thin’³ when it comes to how best to understand democracy, not least because that understanding makes it far easier to think – and to say – that this country X is a democracy but it’s a bad one because of factors A, B or C. The morally pregnant view of democracy makes it too tempting, or too likely, to think that country X doesn’t really count as a democracy, even though this was the government the majority wanted. And the flip side of that is that it is harder to criticize, for instance, over powerful judges or EU bureaucrats for being undemocratic if their supporters can say they

1 See W.B. Gallie, “Essentially Contested Concepts” (1965) 56 *Proceedings of the Aristotelian Society* 167-198.

2 *Ibid.*

3 See my “Thin Beats Fat Yet Again – Conceptions of Democracy” (2006) 25 *Law & Philosophy* 533.

were just achieving the rights-respecting outcome that is part of the fat conception of democracy.

If you support democracy as the least-bad option going (better than EU bureaucrats, better than unelected judges, better than the top 100 academics from Harvard University), then you'll very much want the conceptual space to be able to say – on rare occasions – that this is a democracy but it's one doing nasty or illiberal things. But notice, please, that pointing out the different conceptions of fat and thin adherents does not mean there are no fuzzy borders and overlaps. There are. Even in the thinnest of thin conceptions there is some substance, some moral tests that must be met before, say, you are really voting or really letting the numbers count.

Similarly, or analogously, there are different conceptions of the concept of liberty. One split you will all be aware of is Isaiah Berlin's distinction between negative liberty (at core 'freedom from') and positive liberty (at core, 'freedom to'). That one is well discussed in the literature, to put it mildly. Here's another split that I'll focus on instead. Some conceptions of liberty are untainted by any concern for tolerance, while other conceptions are more prone to do a bit of blending of the two.

Let's take the free speech aspect of liberty. Two smart, reasonable, well-informed people can both purport to be strong adherents of free speech – but one will support laws against so-called hate speech while the other opposes them. The latter adopts a conception of free speech (or other aspect of liberty) that is individualistic or comparatively unconcerned with immediate reactions by those in society who would not share the speaker's sentiments. In some instances – but only those where we others think limits on speech would be for the speaker's ultimate benefit – this might be cashed out as a form of Benthamite anti-paternalism, of *not* limiting speech based on what we others think is good for the speaker. By contrast the former conception of free speech – the one whose holder asserts she is a big supporter of free speech while at the same time wanting fairly effective hate speech laws, or British-style defamation laws, or Obamaesque campaign finance laws, all have less individualistic or (sometimes) more paternalistic understandings factored in. In the case of hate speech it is a desire for tolerance that has been absorbed into the proper ambit or understanding of free speech and liberty; as regards United Kingdom-style defamation laws it is concern for the reputation of others in the community, and with European-style or

Obamaesque campaign finance rules it is equality and taking private money out of elections concerns that have been incorporated into the conception of free speech and liberty.

I will not pursue this further here, beyond signalling that my preference – as with the concept of ‘democracy’ above – is for the more unvarnished, more morally spartan concept or understanding of free speech or of a right to free speech or indeed of liberty. On this view free speech points against all these limits motivated by tolerance concerns or reputation concerns or equality concerns. That’s not to say free speech, as a value, ought always to prevail or that giving it free rein never produces bad long term consequences.

No, that is simply to say that in my view one should keep the concept of liberty (or one of its sub-parts such as free speech) as unvarnished or ‘thin’ as possible. We want room to be able to say ‘free speech demands X but in this instance that would be bad’ rather than having to say (à la fat conceptions of democracy) that ‘because it would in this instance be bad, this is not a proper understanding of free speech or, more generally, of liberty’. But as I have tried to make clear, my preference is certainly a contested one as to the best conception of the concept of liberty, and indeed democracy.

ii) Two different grounds for valuing or defending or supporting liberty

I am going to cut straight to the chase in this section. In addition to liberty being an essentially contested concept, it is also the case that it has been defended or valued on two quite different bases. Put differently, and broadly speaking, there are two distinct traditions that support liberty. One can be described as the natural law tradition or the deontological school of thought if you want some philosophical oomph when you speak. The other tradition that highly values liberty is utilitarian (or slightly more broadly consequentialist).

A talk on the language of liberty must mention both these traditions or outlooks. Let’s start with the natural law crowd. Some of you, at least the Americans, will already be thinking of Thomas Jefferson, the American Declaration of Independence, and claims about self-evident truths. Then there’s all the Catholic natural law thinking. And there’s Kantian deontological formulations. These, and more, all differ but they share the core precept that liberty (sometimes recast as autonomy) is a good-in-itself. It is an ultimate goal; it has intrinsic value. And that core position can influence how one talks about liberty (for instance, in terms of it being self-evidently good or inherently valuable).

If we translate the discussion of liberty over into the realm of law, and of human rights, then this natural law tradition is the dominant one in today's world. The bulk of those who argue for the right to free speech or the right to freedom of association or the right to freedom of religion and so on think these are intrinsic goods, goods-in-themselves. You can think of it as a strong-rights theory, because the value of the right is *not* taken to rest on some outcome it produces.

One way of understanding the post-World War II situation is in terms of the rebirth or renaissance of natural law thinking. In more practical terms that more or less equates to the post-Second World War triumph of American constitutionalism with its *uber*-powerful judges interpreting an enumerated list of moral entitlements in the language of rights – all of them being vague, amorphous, indeterminate but emotively attractive, absolutist sounding and, because they are pitched up in the Olympian heights of moral abstractions, able to finesse plenty of disagreements down in the quagmire of day-to-day social policy line-drawing. These judges are empowered, under this model, to gainsay and second-guess the elected branches based (partly at least) on their own understanding of what is rights-respecting and what is a reasonable limit on rights.

Not all that many people realise that at the end of World War II only two democracies had Bills of Rights – the US and France. And France's was not justiciable. Some six decades on and all democracies have these things save for us in Australia. (We can quibble about Israel and its Basic Laws.) As I said, in the lifetime of many still alive we've experienced the triumph of American constitutionalism, at least in this sense of there being a written constitution with an enumerated list of attractive moral abstractions that are handed over to unelected judges to be given specific content as cases arise.

Getting back to my larger point, this strong rights or deontological or good-in-itself or natural law way of valuing and defending the rights in bills of rights and, indeed, liberty itself, is the majority position or tradition today in the West. Talk to just about any self-styled human rights supporter and you will soon discover he or she brings, whether explicitly or implicitly, this sort of framework or understanding to the table.

So, I daresay, do most strong supporters of liberty.

But there is a second, quite different tradition or basis for supporting liberty, and indeed rights. Let me show my hand upfront and tell you it's the one I find persuasive.

You can trace this tradition back to my all-time favourite philosopher David Hume if you want, or further back still, but it gets its most straightforward treatment from Jeremy Bentham and John Stuart Mill. This is the consequentialist or utilitarian defence of liberty (and, for that matter, rights). On this view the only ultimate good-in-itself is human welfare or happiness.⁴

It should be fairly obvious to you how this instrumentalist or consequentialist or utilitarian tradition goes about defending or valuing liberty. It goes something like this: We support or value liberty because we see – looking empirically at places that protect it to a high extent and those that do not – that human beings have much greater welfare and happiness in the former, in places where there is plenty of individual freedom and liberty. That's why liberty is so important. Because it's so obviously delivering good consequences, on average, over time.

In fact, if liberty (or any other value such as equality or fraternity) did not increase good consequences – if it consistently made humans unhappy, distraught and filled with suffering – then as Bentham regularly mockingly asked, 'Why would anyone want to promote liberty and defend it?'. We value it and cherish it precisely because we saw that it was those in the liberty-lacking Soviet world who sought to flee to the liberty-rich West, not vice versa. Likewise, we see that people, as a strong generalisation, like being free to make their own choices. But it's that fact of the tendency liberty has to be instrumentally good, to increase overall social welfare or happiness, that makes liberty a good thing.

Bentham and even Mill both cashed things out in consequentialist terms. Sure, they differed slightly on a few things. Bentham was the most anti-paternalistic person going. Save for children, drunks and the insane, and Bentham thought no one knew what was best for you, better than you. Or more carefully put, although he in no way thought people were particularly good at aiming for and achieving their own happiness and welfare – just look at the divorce rate – he did think that any alternative (of your friends deciding for you or government welfare workers deciding or psychiatrists deciding) would do worse – probably much worse.

4 Bentham talked of 'pleasure' but he meant it in the widest sense of anything at all – going to the opera, watching the sunset – that gave pleasure, not in today's sense which tends to more easily collapse into sensual or sensory pleasure. So 'happiness' may be the better word these days.

Mill was slightly more paternalistic. Some pleasures for him were higher ones – say, the opera over the booze up – meaning that there was more scope for him to think that appropriately educated others might, as good paternalists, on occasion know what was better for you than you do.

Yet that is to quibble. My point today is that this tradition provides the second ground or basis for invoking the language of liberty and for defending and valuing that liberty.

Perhaps it is some innate need to be contrarian in me, but as I said above I find this consequentialist defence of liberty much more convincing than the natural law one. Notice I say ‘more convincing’ rather than ‘perfect’ or ‘without flaws’. One of the troubles for me with the Jeffersonian asserters of self-evident truths and the deontological Kantian ‘this is an inherent good-in-itself’ crowd is that these non-instrumental approaches appeal ultimately to one’s own moral antennae for spotting what is self-evident or imperative or to some implicit pipeline to God for what is, and is not, a good-in-itself. And that is highly problematic because people disagree about self-evident goods. For every spotter of liberty there is one for equality. For every strong rights proponent of civil and political liberties, there’s one saying social and economic liberties ought to be pre-eminent. Disagreement seems to collapse into a contest over whose sensibilities or moral perspicacity is superior. There is no way, really, to resolve disputes when I assert ‘X is self-evident’ and you counter by saying ‘No, Y is self-evident’.

The consequentialist defenders of liberty, and of rights more generally, force debate to be about likely future consequences in terms of human welfare. People can disagree here too, for sure. But these will often be empirical arguments about likely future consequences that time will resolve. We will still have core arguments about what counts as welfare or happiness, and how to measure it, but these seem less encompassing and less extensive to me than what the natural law tradition delivers. (Think about abortion here and you may see my point).

At any rate, let me stress that my preferred defence of liberty – the Millian, Benthamite, utilitarian one – is these days a minority taste. It wasn’t before the Second World War, at least outside the United States, but it is in today’s Western World. It’s still a strong tradition, but it’s not as prevalent as the reborn and relabelled natural law strand or tradition, these days packaged as ‘human rights’ thinking.

iii) *No pain, no gain – liberty and offensiveness*

We've now seen that liberty is an essentially contested concept and that, broadly speaking, it can be valued and defended on two main bases: i) As a good-in-itself whose worth is self-evident, inherent and non-instrumental; or ii) In instrumental terms, because of its tendency (on average, over time) to produce good consequences for those who enjoy it.

Having sketched that out we are now in a position to go back to where we started to consider offensiveness and its relation to liberty. Imagine a hypothetical spectrum. At the near end we have only actions and speech that everyone else (or almost everyone else) likes and thinks beneficial. No one is offended by these actions and words. No one wants them silenced. At the other end, the far end, we have the most offensive, obscene, untrue and disliked actions and speech imaginable. Here, virtually everyone is offended; virtually everyone thinks the claims expressed to be untrue; virtually no one thinks the actions and words beneficial. Many want them silenced.

Now I take it most will concur that at the near end of the spectrum, where all is agreement and harmony and people sitting in circles holding hands and singing 'Kumbaya', the concept and language of liberty does little work. Or if it does do anything, I'm not clear what that is. Being free and at liberty to say and do what everyone else wants you to say and do is not a liberty or freedom you will ever have to fight for; it will make little difference to anything.

As for the far end of the spectrum, I'm going to make an assumption. I'm going to assume that none of us is a complete absolutist who believes that in a society of 22 million or 330 million there need be no limits at all on one's liberty to say or do as he or she pleases. At the very least, I will assume we all agree on the need to prohibit the counselling of murder, or the possession of child pornography (assuming further that we agree on what that is).

The point for today is that when it comes to limiting liberty and freedom – to telling us where they would draw the line as far as preventing others from speaking or acting as they wish – different people fall at different points along the spectrum. I suspect that like me, many in this audience would position themselves a good way farther out towards the far end

of the spectrum (the ‘give others plenty of scope to offend and tell lies’ end of the spectrum) than the average or median. Yet even conceding that likelihood, the fact remains that we here today would disagree amongst ourselves, just as the many smart, reasonable, well-informed, nice people in society at large disagree, many of whom you’d be happy to share a drink with despite your disagreement.

And yet all of you – all of us – would still use the language of liberty to describe our position. In that subset of liberty to do with free speech, we would likewise all say that we value the right to free speech. And yet down in the nitty-gritty of specifying when liberty (in the thin, unvarnished sense) and free speech concerns ought to lose out to other values and concerns, across a range of examples it is unlikely any two of us would always agree.

Let’s consider some recent examples. To start, here’s a pretty easy one from my perspective, though as a native born Canadian I regretfully have to concede that it appears not to be so easy to many Canadians. This is the *Macleans and Mark Steyn versus the Canadian Human Rights Commission* hate speech example. Let me be upfront and explicit. My sympathies all lie with Steyn. But here’s the thing, even though no one asserts (or can sustain the case) that Steyn was factually incorrect or in error in the excerpts from his *America Alone* that was published by the weekly *Macleans* magazine, a good many people say it was hate speech anyway. And that can only be because concerns about tolerance and perhaps social cohesion, for them, trump the freedom and liberty to speak one’s mind, however offensive to some sub-group in society. Yet notice again that the language of liberty and of free speech is fluid enough for even Steyn’s accusers and the Commission itself to say they are supporters.

That seems a relatively easy case to me, the views of many of my overly sensitive and politically correct fellow Canadians notwithstanding, because there was really no question about the truth of Steyn’s claims. And one would *normally* suppose that any liberty or free speech worth its name, is a liberty to speak the truth – though I concede that even here most of us would put in qualifiers about, say, publishing how to build nuclear bombs or selling state secrets that endanger lives. But when it’s just a straight out contest between a) saying what is true and b) blocking it because it is offensive to some sub-group (as distinct from, say, likely to lead to atomic bombs being built and detonated), then I would have thought that those on the side of liberty ought to opt for a). But it is evident that not everyone agrees with me, such is the fluidity of the language of liberty.

Here's a second example where self-declared proponents or adherents or fans of liberty (and more specifically, of free speech) can differ. This is the case of the United Kingdom's libel laws, and in particular the lawsuit launched by the British Chiropractic Association ('BCA') against the science writer Simon Singh. In April of this year the BCA dropped its libel claims but not before Singh had spent huge amounts of time and money defending himself.

Now I may not be the most disinterested, impartial person as far as giving you an account of this case goes. You see I'm a long time member of first the New Zealand Skeptics and since arriving here the Australian Skeptics. These are groups that meet once a year and much of that time together involves laughing at anyone who believes in alternative medicine – as though homeopathy's claim that a substance diluted to one atom per universe, together with metaphorical talk of the water 'remembering' the now long diluted-away substance, could be anything other than rubbish. And this is in some ways my favourite organisation going, though in part that's probably because there are so few lawyers as members.

But enough of that digression. What happened in the Singh case is that Singh wrote a piece in the *Guardian* newspaper questioning some aspects of chiropractic and going so far as to suggest that the BCA promoted bogus treatments for childhood asthma. The BCA chose not to sue the *Guardian* – and this is very rare in defamation proceedings because plaintiffs almost always go after the deep pockets – but only to sue Singh. (Make of that what you will.)

Now in part this case was a dispute over truth, truth being a defence to any libel claim. In part it was also about the balance struck in the United Kingdom between free speech and liberty concerns on the one hand, and the protecting of reputations against false slurs concerns on the other. Put simply and bluntly, the Americans are much less concerned about untrue damage to reputations than are the Brits. Yet I suspect that none of us would give no protection at all to people's reputations against false claims. In fact even the Americans give this some protection, and more if you're not a public figure.

I don't want to get bogged down on the competing merits of UK and US libel law regimes. Just notice that in the Singh case it was at least in part about truth. Sure, in the UK system the defendant Singh has the evidentiary burden of proving the truth of what he wrote – and any lawyer will tell you there's a world of difference between something being true in fact and your being able to prove it in court. For our purposes, however, we can again see

that both sides were inclined to use the language of liberty. Moreover, and unlike the Steyn case, both sides were at least in part making truth claims. It's just that the BCA wanted a judge, or the evidential burden of proof, indirectly to resolve the truth claims rather than the court of public opinion.

It will be obvious to all by now that my sympathies were overwhelmingly with Singh.

Before moving to a third example pause for a moment and notice that this Singh scenario falls plainly in the middle of the main ground John Stuart Mill gave for preferring very few limits indeed on what people can say. Not surprisingly, because recall I told you that Mill, like Bentham, was an unashamed utilitarian, this main Millian justification was in terms of future good consequences. Leave people almost always free to speak as they like and in the ensuing battle of ideas truth will out – or in more pessimistic terms, it is more likely to emerge than if people are silenced. So for the benefit of getting at truth and true assertions (and from there to increased human welfare or happiness, on average, over time), we override hurt feelings, offended sensibilities, the worldviews of spine aligners, the possibility of outright lies being spread, and anything short of concrete harm to others. (Time does not allow here for more than signalling that anti-Singhians and anti-Steynians and indeed all sorts of people who think speech should be more restricted, can and do *themselves* use Mill's harm principle simply by saying that not just physical harm to others but psychological harm too should count.)

I find that consequentialist 'truth will out' justification on behalf of comparatively wide open liberty outcomes a very compelling one, but that won't, by now, be a surprise.

I will now skip over the example of the US broadcaster Ann Coulter being intimidated away – by crowds, by a speech-stifling anticipatory letter from the university provost (one we subsequently learnt he was instructed to write by the university President, and former Canadian Liberal Party Justice Minister), by lack of university willingness to safeguard the venue – from speaking at the University of Ottawa (again, sadly and embarrassingly, in my native Canada) and turn to a few examples where even those who place much importance on liberty may differ as to their preferred outcome.

Take the burkha ban in France, in Turkey, and mooted elsewhere. Should we as a society leave Muslim women free to cover up all but their eyes, or not? Liberty and freedom concerns at first glance point unmistakably towards a 'yes' answer. But that is to make the

assumption that some, most, all or maybe just a majority of women who wear the burkha actually want to do so, as opposed to being forced to do so by husbands, fathers, or men in the wider society. How can one know? You could ask them, but that may be in the presence of men or in the context of a fear that husbands or fathers will learn of any answer other than – ‘Yes we want to wear this’.

And of course even if we could be completely assured that a majority or preponderance of women wore the burkha because that’s what they wanted, rather than what some group of menfolk wanted, you’d still have room to make a pretty common paternalistic retort. It would run along the lines of: ‘Well, you may well really and actually want that now, but that’s because your life experiences and education have been so stunted. Just as with the person who prefers a bottle of Passion Pop or even Mateus to a Grange Hermitage, a little education and some further life experiences will show you that your “true” preference is not to wear this’.

That’s the out-and-out paternalistic argument – the we know better than you what’s good for you argument – that is also available. As I mentioned above, its lineage or genealogy goes back to Mill, definitely not to Bentham who thought the best percentages or hit rate (on average, over time) would come from simply asking people (assuming they felt free to answer honestly), avoiding all the paternalistic ‘true’ best interests talk and lines of thinking.

I have to confess I’m a Benthamite on this one, though I suspect there will be no shortage of Millians here. Yet be that as it may, notice again that the language of liberty is elastic enough to embrace both sides of the burkha ban controversy.

Here are two last examples, also hard cases and also likely to split self-confessed liberty advocates. One has to do with forcing parents to give their children vaccines. Should the state mandate this, or simply recommend it? You might be surprised, or you might not, to hear that I’m on the side of compulsion on this one. In the UK, after the scare about the MMR vaccine and a supposed link to autism – not to mention the then Prime Minister Blair and his guru visiting wife refusing for ages to say whether they had given the vaccine to their children – and vaccination rates have dropped enough to bring back into play diseases that had nearly been eradicated. For me the good consequences of trumping liberty concerns and forcing vaccination, even when we take a long-term view and count all the negatives that could possibly be associated with limiting freedom, are here too plain to ignore.

Observe, however, that the natural law or deontological or ‘this is self-evident’ supporter of liberty does not really possess the tools to undertake this ‘weigh up the likely consequences’ of liberty concerns versus fewer deaths of children concerns. Yes, yes, I know that deontologists weigh up rights against one another, some untrumpable and others not, and on occasion they weigh up rights against large or massive overall welfare concerns, but all this seems to me to be either consequentialism in disguise – consequentialism with some sort of plucked from the air extra weighting for whatever is taken to fall under the aegis of ‘rights’ – or consequentialism between rights, and in both cases relies on dollops of built-in value judgements that seem, at core, to rest on claims to self-evidence, or on gut instinct, or the like. Put it no higher than this, all deontological weighing exercises are admittedly vague with no obvious criteria in addition to consequences other than the weigher’s own sense of what is morally untrumpable or in need of rights-respectingness.

Admittedly I find all natural law claims – on the libertarian right as much as on the communitarian or ‘right to housing, health and education’ left – as equally other worldly. It’s like a sort of theology to me, and as I lack that gene I admit to being unswayed by the force of the position. No doubt a good number of MPS members will want to tell me why I’m wrong on this. And I look forward to that.

My pre-emptive reply, though, is simply to say that consequentialist defences of liberty and free speech, in my view, are every bit as robust as their non-consequentialist cousins, but also much more likely to win over the uncommitted for whom likely future good consequences are more compelling than confessions of what persons X, Y and Z find to be self-evident.

My last example is spanking. (And I mean by parents of their children, not the sort that requires fieldwork in Amsterdam.) New Zealand recently repealed the law that gave parents a legal defence against criminal assault charges when they spank their children with reasonable force. That’s a careful, more long-winded way of saying that it’s now illegal to spank your children in New Zealand. Now we could certainly look at that decision in terms of political correctness run wild, and I for one would be prepared to concede that New Zealand is much more PC than Australia, though not as far gone as my native Canada.

Instead, though, consider the issue of spanking through the prism of liberty and the language of liberty. Whose liberty or freedom is to count – the parents’ or the child’s? One assumes children don’t want to be spanked, though in 15 or 20 years they may well be glad

they were spanked. That means that if you cash this debate out in terms of liberty – and like me you come down in favour of spanking – then you unavoidably and inevitably end up having to ignore or discount the liberty interests of the child. (And recall, for what it's worth, that the noted anti-paternalist Bentham made an exception for children – he thought others, and especially parents, *could* know what is best for children (sometimes, at any rate) better than the children themselves could; or at least that they had a higher hit rate than the children themselves.)

Again, I think the consequentialist supporter of liberty is better placed to do this analysis of spanking and liberty than the Kantian, Jeffersonian or deontological supporter.

iv) Conclusion

In this talk or paper I have tried to provide a few thoughts on the language of liberty. Not only is this concept essentially contested, and open to being defended and valued on two quite distinct bases, it is also a concept that when applied to some real life disputes will not, by itself, resolve those disputes. Different people will take different sides, though all of them be professed supporters of liberty as a moral abstraction and though all of them be nice, well-informed, smart and good company in the bar afterwards.

Put differently, the language of liberty is sufficiently malleable that sometimes that language alone will not be decisive. You can take that as an indirect plea for it to be understood and defended in consequentialist terms, or not. One might go on, perhaps, to consider Burke's claim that 'Liberty cannot exist without order and virtue'. But I suspect I have gone on too long already. Let me finish in the way I ought to have begun, by thanking MPS, Greg Lindsay, and all the organisers for having invited me to this wonderful event.

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