

J.S. Mill's Boundaries of Freedom of Expression: A Critique

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In Memory of Geoffrey Marshall (1929–2003): scholar, mentor, friend

Abstract

The essay opens with some background information about the period in which J.S. Mill wrote. The discussion revolves around the concept of blasphemy which Mill considered to be highly problematic. Tagging unpopular views as 'blasphemous' amounted to abuse of governmental powers and infringed on the basic liberties of the out-of-favour speakers. The discussion on blasphemy sets the scene to the understanding of Mill's concerns, his priorities and consequently his emphasis on the widest possible liberty of expression. Section 2 presents the Millian principles that are pertinent to his philosophy of free speech: liberty and truth. Section 3 analyzes Mill's very limited boundaries to freedom of expression, asserting that the consequentialist reasoning had led Mill to ignore present tangible harm. It is argued that democracy is required to develop protective mechanisms against harm-facilitating speech.

Introduction

John Stuart Mill was one of the most important liberal political philosophers of the 19th Century. In my previous article, I criticized his elastic paternalism designed to prevent people from inflicting harm upon others as well as upon themselves, from soft paternalism on issues like compulsory education to hard paternalism on very private matters such as marriage, having children, and divorce by consent.² The aim of this article is to offer a comprehensive critique

¹ I thank Richard Oliver Colin, Herb Morris, Alex Tsesis, Clare McGlynn, Steve Darwall, Eric Barendt, Kath Gelber, Wayne Sumner, and Nick Zangwill for their sharp and constructive comments. The article is dedicated to the memory of Geoffrey Marshall with whom I had many hours of deliberations on the scholarship and influence of J.S. Mill. I cannot think of a better teacher.

² R. Cohen-Almagor, 'Between Autonomy and State Regulation: 'J.S. Mill's Elastic Paternalism', *Philosophy* **87** (4) (October 2012), 557–582.

of his limited discussion on free speech limitations as presented in *On Liberty*. By his own account, *On Liberty* (1859) was his most salient text. In his *Autobiography*, Mill wrote about *On Liberty*: ‘None of my writings have been either so carefully composed or so sedulously corrected as this.’³ This book is designed to celebrate individuality and freedom. However Mill hardly spoke about limitations to freedom of expression. In the entire book, there is only one paragraph and a single footnote (!) in which Mill explained what the boundaries should be. In both places, Mill was concerned with incitement. Clearly, Mill was far more interested in preaching freedom of expression than prescribing boundaries to it. The Millian consequential reasoning on the exclusion of incitement from the Free Speech Principle was adopted by philosophers, political scientists and the courts across the democratic world.⁴ Mill had made strong contribution to making consequentialism fashionable. He has helped to form one of the most important theories in the history of moral philosophy. Indeed, Mill’s views on freedom of expression have granted him a place among the forefathers of liberal ideology.

On Liberty has inspired the writing of many subsequent liberal philosophers. Freedom of expression deserves protection because it enhances individualism and public goods. Liberals concede that certain expressions might be very harmful yet argue that they should be protected not because of their inherent value but despite it; because the protection of such expressions promotes the virtue of tolerance;⁵ because it enhances individualism and personal autonomy;⁶

³ J.S. Mill, *Autobiography* (Oxford: Oxford University Press, 1971), 144.

⁴ D.O. Brink, *Mill’s Progressive Principles* (Oxford: Oxford University Press, 2013); S.D. Smith, ‘Is the Harm Principle Liberal?’, *American J. of Jurisprudence* 51 (2006), 1–38; George Kateb, ‘The Freedom of Worthless and Harmful Speech’, in Bernard Yack (ed.), *Liberalism without Illusions* (Chicago: University of Chicago Press, 1996), chap. 15.

⁵ Frederick Schauer, ‘Free Speech on Tuesdays’, *Law and Philosophy* 34 (2015), 119–40; Bican Sahin, *Toleration: The Liberal Virtue* (Lanham, MD: Lexington Books, 2010); Glen Newey, ‘Tolerance as a Virtue’, in John Horton and Susan Mendus (eds), *Toleration: Identity and Difference* (London: Macmillan, 1999), 38–64; David Heyd (ed.), *Toleration: An Elusive Virtue* (Princeton: Princeton University Press, 1996).

⁶ C.E. Baker, ‘Autonomy and Hate Speech’, in Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy* (Oxford: Oxford University Press, 2009), 139–157.

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because it protects the dignity of the person;⁷ because it encourages toleration in other spheres and situations;⁸ because it fosters democracy;⁹ because it serves as a check on government,¹⁰ or because protecting freedom of expression is likely to bring more good than evil.¹¹ John Stuart Mill did not devote much attention to defining the scope of tolerance toward the intolerant since his main concern was to promote the ideas of liberty and justice, not to circumscribe them.

The essay explains the Millian free speech philosophy within the legal and social context of Victorian Britain. The concept of freedom of expression in 19th Century England was limited compared to our understanding of the concept in 21st Century England. Mill emphasizes the widest possible liberty of expression in his social context because public expression critical of existing social institutions was rigorously suppressed, as exemplified by harsh legal penalties against blasphemy of Christianity. Mill was against suppression of religious opinions and prayers as blasphemous, speaking about an indefeasible right to hold any religious views one likes and to engage in any prayers, short of injury to others. Mill set out his argument with a particular goal in mind, that of freeing public opinion in the context of Victorian Britain where access to public discussion was legally and economically restricted.

⁷ William Ruger, 'Free Speech Is Central to Our Dignity as Humans', *Time Magazine* (3 June 2016), <http://time.com/4355651/free-speech-human-dignity/>

⁸ L.C. Bollinger, *The Tolerant Society* (Oxford: Clarendon Press, 1986).

⁹ Alexander Meiklejohn, *Political Freedom* (NY: Oxford University Press, 1965).

¹⁰ Thomas Scanlon, 'A Theory of Freedom of Expression', in R.M. Dworkin (ed.), *The Philosophy of Law* (Hong Kong: Oxford University Press, 1977), 153–171; T.M. Scanlon, 'Freedom of Expression and Categories of Expression', *University of Pittsburgh Law Review* **40** (4) (Summer 1979), 519–550; T.M. Scanlon, 'Content Regulation Reconsidered', in Judith Lichtenberg (ed.), *Democracy and the Mass Media* (NY: Cambridge University Press, 1995), 331–39; Thomas Scanlon, *The Difficulty of Tolerance* (Cambridge: Cambridge University Press, 2003); Frederick Schauer, *Free Speech* (New York: Cambridge University Press, 1982) and Schauer, 'The Cost of Communicative Tolerance', in R. Cohen-Almagor (ed.), *Liberal Democracy and the Limits of Tolerance* (Ann Arbor: University of Michigan Press, 2000), 28–42.

¹¹ Jonathan Gilmore, 'Expression as Realization: Speakers' Interests in Freedom of Speech', *Law and Philosophy* **30** (2011), 517–539.

This article succinctly presents the Millian principles that are pertinent to his philosophy on free speech: liberty and truth. While referring to different writings of Mill, the focus is on freedom of expression in *On Liberty*. Mill's very limited boundaries to free expression are explained and scrutinized, arguing that the Millian consequentialist reasoning, which fears potential harmful consequences, may lead to ignore present tangible harm. It is argued that democracy requires governments to develop protective mechanisms against harm-facilitating speech.

1. Freedom of Expression in 19th-Century England

The political culture of 19th-Century England was significantly different from present day England in crucial political, economic and cultural respects relevant to our discussion. First, equality before the law left much to be desired. There was one law for the poor, another for the rich.¹²

Second, more than 25% of the population was living at or below subsistence level.¹³ Robert Owen wrote that the poor and working classes of Great Britain and Ireland exceeded fifteen millions of persons, or nearly three-fourths of the population of the British Islands.¹⁴

Third, during the early decades of the century daily newspapers were mostly sold for seven pence or more, a prohibitive price well beyond the ability of the poor.¹⁵ The London *Daily Telegraph* broke new grounds in 1855 when it reduced its price to one penny. Shortly thereafter, other newspapers followed suit.¹⁶

¹² Joss Marsh, *Word Crimes* (Chicago and London: University of Chicago Press, 1998); David Nash, *Blasphemy in Modern Britain: 1789 to the Present* (Aldershot: Ashgate, 1999).

¹³ Alan Kidd, *State, Society and the Poor in 19th-Century England* (Houndmills: Palgrave Macmillan, 1999); A.W. Ager, *Crime and Poverty in 19th-Century England* (London: Bloomsbury, 2014).

¹⁴ Robert Owen, *A New View of Society* (1816), <http://www.marxists.org/reference/subject/economics/owen/ch01.htm>

¹⁵ It reached an unprecedented circulation of 270,000. J.H. Wiener, 'The Nineteenth Century and the Emergence of a Mass Circulation Press', in Martin Conboy and John Steel (eds), *The Routledge Companion to British Media History* (London and New York: Routledge, 2015), 206–14.

¹⁶ *Ibid.*, 208. See also Theophila Carlile Campbell, *The Battle of the Press* (London: A. & H.B. Bonner, 1899), <http://www.gutenberg.org/files/38370/38370-h/38370-h.htm>

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Fourth, the level of illiteracy was significantly high: 47% in 1820 and 24% in 1870 (compared to 1% in 2003).¹⁷

Fifth, freedoms of belief, of expression and of publication were qualified.¹⁸

Sixth, the scope of tolerance was limited especially on matters of religion.¹⁹ In the 1820s, Deists (belief in the existence of a God on the evidence of reason and nature only, with rejection of supernatural revelation) were prosecuted for casting doubt on scripture. Thus, for instance, in 1827 Robert Taylor was sentenced to one year in prison and to provide £1,000 in recognisances²⁰ after he denounced Christianity as a 'mischievous fable'.²¹ Radical journalists like Richard Carlile were prosecuted and imprisoned for publishing blasphemous newspapers and for reprinting Thomas Paine's *Age of Reason*.²² Thomas Paine's *Age of Reason* opposed tyrannical readings of the Bible and condemned attempts to convert Jews, Muslims and Huguenots. Paine argued that large sections of the bible, including the creation story, were myths.²³

Blasphemy is defined as a contemptuous or profane act, utterance, or writing concerning God or a sacred entity.²⁴ Lord Chief Justice Abbott said: 'In this Court we assume that the Christian religion is true. I am

¹⁷ Max Roser, 'Literacy', in *Our World in Data* (2014), <http://www.ourworldindata.org/data/education-knowledge/literacy/> [Online Resource]. Radical activists and movements surmounted this problem in working class communities by reading out aloud radical newspapers to 'illiterate' working class audiences. Radical activists would hold large open air meetings and practice their brand of free speech through these meetings.

¹⁸ G.J. Holyoake, *The Case of Thomas Pooley the Cornish Well Sinker* (London: Holyoake and Co., 1857), and Holyoake, *The Co-operative Movement Today* (London: Methuen, 1891).

¹⁹ David Nash, *Blasphemy in Modern Britain*, and Nash, *Blasphemy in the Christian World: A History* (Oxford: Oxford University Press, 2010).

²⁰ A bond by which a person undertakes before a court or magistrate to observe some condition, especially to appear when summoned.

²¹ David Nash, *Blasphemy in Modern Britain*, 88–89; *Deism—Oaths in Courts of Justice—Petition of Robert Taylor*, HC Deb 29 November 1826, Vol 16, cc171-8, <http://hansard.millbanksystems.com/commons/1826/nov/29/deism-oaths-in-courts-of-justice>

²² David Nash, 'Blasphemy in Victorian Britain? Foote and the Freethinker', *History Today* 45(10) (October 1995), 13–19, at 14.

²³ David Nash, *Blasphemy in Modern Britain*, 76–77.

²⁴ The Free Dictionary, <http://www.thefreedictionary.com/blasphemies>

anxious to give every possible latitude of defence, but I cannot permit the introduction of blasphemy; I cannot allow this day's proceedings to form a precedent that might be dangerous in future times'.²⁵

Religion remained a highly sensitive matter throughout the 19th Century and the Taylor case did not constitute enough deterrence to stop people from voicing anti-conformist views. In the 1840s, the law on blasphemy was invoked to imprison people who uttered agnostic or critical remarks against the church.²⁶ In 1841, Charles Southwell started a weekly atheistic publication, the *Oracle of Reason* and was shortly thereafter arrested for blasphemy. Southwell suggested that the Bible was not the product of God but the outpourings of some devil. He was convicted and sentenced to £100 fine and a year's jail sentence.²⁷ George Jacob Holyoake volunteered to edit the paper and was subsequently prosecuted for disseminating atheism. Holyoake was the founder of organized Secularism, and the first Chairman of the Rationalist Press Association. His crime was to say: 'I do not believe there is such a thing as a God'.²⁸ He also implied that the salaries of clergymen should be reduced. His choice of words, deemed offensive, related to class concerns. Mr Justice Erskine said that Holyoake was 'convicted of uttering language'.²⁹ Two minutes of 'his own words' cost Holyoake six months in Gloucester gaol. The court made it clear that poor men had no right to use their own words to express their own opinions.

On release from prison, Holyoake formed *The Movement* journal, later re-named *The Reasoner*, which became one of the most important periodicals of the nineteenth century, championing Chartist principles,³⁰ political reform and the emerging secularist movement. *The*

²⁵ Theophila Carlile Campbell, *The Battle of the Press*.

²⁶ The Blasphemy Act 1697 (9 Will 3 c 35) was an Act of Parliament that made it an offence for any person, educated in or having made profession of the Christian religion, by writing, preaching, teaching or advised speaking, to deny the Holy Trinity, to claim there is more than one God, to deny the truth of Christianity and to deny the Bible as divine authority. See http://community.worldheritage.org/articles/Blasphemy_Act_1697

²⁷ David Nash, *Blasphemy in Modern Britain*, 92–93.

²⁸ Joss Marsh, *Word Crimes*, 117.

²⁹ *Ibid.*, 118.

³⁰ The Chartist movement was comprised of working-class people who campaigned for parliamentary reform. The name came from the People's Charter, a bill drafted by William Lovett in May 1838. It contained six demands: universal manhood suffrage, equal electoral districts, vote by ballot, annually elected Parliaments, payment of members of Parliament, and abolition of the property qualifications for membership. Chartism grew

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Reasoner published reports on controversial cases,³¹ including a 32 page report on Thomas Pooley. The Pooley case is discussed below.

Against this background, J.S. Mill preached in *On Liberty* his liberal ideas for the widest possible freedom of expression and against governmental suppression of opinions.³² Mill was primarily concerned with the dissemination of religious, moral and political opinions. He did not address free speech topics that are very fashionable today, such as defamation, frivolous (and not so frivolous) gossip, or divulging sensitive security information. Mill argued that there is no certain and universal rule for determining whether an opinion is useful or pernicious, and that if one assumes such power to decide between the two, then that person is a despot. In

out of the protest against the injustices of the new industrial and political order in Britain. See Stephen Roberts, 'The Chartist Movement 1838–1848', *BBC* (20 June 2011), http://www.bbc.co.uk/history/british/victorians/chartist_01.shtml, and UK Parliament, <http://www.parliament.uk/about/living-heritage/transformingsociety/electionsvoting/chartists/overview/chartistmovement/>

³¹ Henry Hetherington was indicted for publishing *Haslam's Letters to the Clergy of all Denominations*, whose arguments were directed against passages in the Old Testament which were deemed cruel and immoral. For this crime, Hetherington was imprisoned for four months. See Lesley Stephen and Sidney Lee (eds), 'Henry Hetherington (1792–1849), in *Dictionary of National Biography* (London: Oxford University Press, 1949), <http://www.historyhome.co.uk/people/hetherin.htm>. Hetherington was out of favour and targeted by the English elite because he refused to pay the press tax. At that time, every copy of a newspaper was required to be impressed with a four penny stamp. Hetherington believed that the working people needed knowledge and news, and he refused to pay for a tax that prevented them from acquiring information. For publishing *The Poor Man's Guardian* without a stamp, Hetherington was imprisoned twice, each time for six months. See Literary Anecdotes, 'Henry Hetherington (1792–1849)', <http://www.ourcivilisation.com/smartboard/shop/anecdotes/c19/hthrgn.htm>

³² In *Principles of Political Economy* (New York: D. Appleton And Company, 1885), <http://www.gutenberg.org/files/30107/30107-pdf.pdf>, esp. Book 2, Chapter 1, Mill advocated abolition of all exceptional laws, especially those relating to the press, public meetings, and associations; in short, of all laws which hinder the free expression of ideas and thought. At the same time, Mill did not believe that freedom of expression can be used as a justification or excuse for committing crimes. For further discussion of the period, see Jonathan Riley, *Mill on Liberty* (London: Routledge, 1998), 29–53.

the context of the time, those ideas were perceived to be radical.³³ Mill was troubled by the prosecution of opinions and stood for the right of people like Carlile, Holyoake and Pooley to express their unconventional views.

Mill believed that the justice system should render equal justice to the believer and to the unbeliever, to the rich and to the poor. He thought ideas should be judged by their content and their contribution to public debate, not by the manner they were uttered. The poor are not astute and articulate as the rich. Their manners are unrefined and crude. Mill (1883) thought it was unfair to judge the poor and the uneducated by the same standards applied to the privileged classes.³⁴ Carlile's language might have been 'abusive' in the ears and minds of the refined yet it had a place and should have been heard. Mill fought against unjust laws that made speech a privilege for the privileged.

Mill appreciated Holyoake's work for the underprivileged. On many issues, Mill and Holyoake saw eye to eye, aiming to promote change in conservative English society. Holyoake fought for secular education, for the rights of the working classes, for the co-operative movement³⁵ and for profit-sharing schemes, for the secret ballot and for international peace.³⁶ He wanted recognition that his own words are equal to others and have the right to be heard. He wanted a voice, and Mill wanted to empower him, and others. Holyoake drew inspiration from Mill's work *The Principles of Political Economy* (1848).³⁷ Like Mill, Holyoake strove to find a path between socialism and capitalism. Mill regularly corresponded with Holyoake and provided him with intellectual support for many of his social campaigns for the rights of the working classes

³³ J.S. Mill, 'Law and Libel and Liberty of the Press', in Geraint L. Williams (ed.), *John Stuart Mill on Politics and Society* (Glasgow: Fontana, 1976), 143–169, at 148.

³⁴ John Stuart Mill, *The Collected Works of John Stuart Mill, XXV – Newspaper Writings December 1847 – July 1873 Part IV* [1847], <http://oll.libertyfund.org/titles/mill-the-collected-works-of-john-stuart-mill-volume-xxv-newspaper-writings-part-iv>

³⁵ Holyoake (*The Co-operative Movement Today*) explained that the original object of co-operation was to establish self-supporting communities distinguished by common labour, common property, common means of intelligence and recreation. The aim was to create an ethical communal life for the working people.

³⁶ Edward Royle, 'George Jacob Holyoake', *Journal of Liberal History*, 67 (Summer 2010), 35–37.

³⁷ John Stuart Mill, *The Principles of Political Economy*, <http://www.gutenberg.org/files/30107/30107-pdf.pdf>

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and for his own right to voice opinions without fear of public opinion or the law.

Mill's *On Liberty* (1859) draws upon Holyoake's experiences and struggles. Thomas Pooley's trial became a *cause célèbre* when Mill spoke for his right to voice an opinion on controversial issues. In *On Liberty* Mill wrote:

It will be said, that we do not now put to death the introducers of new opinions; we are not like our fathers who slew the prophets... It is true we no longer put heretics to death... But let us not flatter ourselves that we are yet free from the stain even of legal persecution. Penalties for opinions, or at least for its expression, still exist by law; and their enforcement is not, even in these times, so unexampled as to make it at all incredible that they may some day be revived in full force.³⁸

Mill then went on to describe the Pooley case: 'In the year 1857, at the summer assizes of the county of Cornwall, an unfortunate man, said to be of unexceptionable conduct in all relations of life, was sentenced to twenty-one months' imprisonment for uttering and writing on a gate some offensive words concerning Christianity.'³⁹ Mill thought this was counter-productive, unjust and unfair. Pooley was entitled to advocate ideas. Mill called for change.⁴⁰

The Pooley trial was distinctly problematic and attracted wide attention. Controversies relating to freedom of expression, religion and class all came into the mix. Pooley was a feeble-minded, poor labourer who contested Christianity and stood against a highly biased court: the presiding judge, Sir John Taylor Coleridge, was the father of the prosecutor, John Duke Coleridge. Yet again, the courts held that freedom of expression existed only within the confines of Christianity and that they would not tolerate what they considered as blasphemy when uttered by poor people.⁴¹ The law

³⁸ J.S. Mill, *Utilitarianism, Liberty, and Representative Government* (London: J. M. Dent, 1948), Everyman's edition, 90.

³⁹ Ibid.

⁴⁰ The United Kingdom abolished its laws against blasphemy in England and Wales in 2008 with the passage of the Criminal Justice and Immigration Act. Section 79 abolished the common law offences of blasphemy and blasphemous libel in England and Wales. See <http://www.legislation.gov.uk/ukpga/2008/4/section/79>

⁴¹ Surely the crime itself did not have as an element of the offense one's membership in one class or another, whatever the biases of the government officials might be. If Darwin, who was not, I believe, poor, had publicly, in Trafalgar Square, asserted that belief in a personal God was an infantile and

was ill-defined, enabling the ‘great and the good’ judges to put into bad effect their prejudices and tastes, making irrelevant considerations the main arbiters in the matters at hand.

The common liberal interpretation of Mill is that any speech that falls under the category of advocacy is immune to restrictions. Only forms of instigation which bring about instant harm are punishable, and these cases constitute the exception to the free speech principle.⁴² I do not think Mill had religion in mind. On religion, Mill seemed to think that even if certain expressions are offensive to the dignity of the person, they still should be tolerated because of the utility they produce in enhancing freedom and the search for truth.

2. Mill’s Arguments for Freedom of Expression

The Millian principles in support of freedom of expression are well versed in the literature. They were explored by many scholars⁴³ thus here I assert them rather than argue or justify them, reflecting on their exposition in *On Liberty* as well as in other writings in order to set the scene for discussion on Mill’s boundaries of free expression. Two important principles guided Mill’s thinking on freedom of expression: Liberty and Truth. Mill regarded them as

an unwarranted belief, and that the idea of an everlasting life was unintelligible and merely offered as an opiate for the deluded poor of the world, then he could have faced blasphemy charges. Astute people were careful when formulating such ideas in public, not wishing to provoke the attention of the authorities or to test their tolerance. The point that I am making is that, in practice, blasphemy charges were made against people of a certain economic class and against journalists who identified with them. For further discussion, see Alan Cabantous, *Blasphemy – Impious Speech in the West from the Seventeenth to the Nineteenth Century* (NY: Columbia University Press, 1998).

⁴² R. Cohen-Almagor, *Speech, Media, and Ethics* (Houndmills and New York: Palgrave-Macmillan, 2005).

⁴³ John Skorupski, *John Stuart Mill* (London & New York: Routledge, 1989); John Gray, *Mill on Liberty: A Defence*. London: Routledge & Kegan Paul, 1996); Raphael Cohen-Almagor, ‘Ends and Means in J.S. Mill’s Utilitarian Theory’, *Anglo-American L. Rev.* **26** (2) (1997), 141–74; Jonathan Riley, *Mill on Liberty* (London: Routledge, 1998); K.C. O’Rourke, *John Stuart Mill and Freedom of Expression* (London: Routledge, 2001); Will Cartwright, ‘John Stuart Mill on Freedom of Discussion’, *Richmond Journal of Philosophy* **5** (Autumn 2003), 1–7; J. Riley, ‘J.S. Mill’s Doctrine of Freedom of Expression’, *Utilitas* **17** (2) (July 2005), 147–79; Brink, *Mill’s Progressive Principles*.

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valid since they have passed, in his opinion, the utilitarian test: they are important because of their conduciveness to the Ultimate Principle of Utility. They are designed to bring happiness, to enrich the world with good, and to avoid evil. Insisting that 'happiness is the *sole end* of human action', Mill argued that 'According to the Greatest Happiness Principle... the ultimate end... is an existence exempt as far as possible from pain, and as rich as possible in enjoyments, both in point of quantity and quality.'⁴⁴

In formulating his Liberty Principle, Mill began by saying that the only freedom which deserves the name is that of pursuing our own good in our own way, 'so long as we do not attempt to deprive others of theirs, or impede their efforts to obtain it' or, in other words, so long as we do not harm others.⁴⁵ Acts of whatever kind, which without justifiable cause, do harm to others, may be, 'and in the more important cases absolutely require to be', controlled by the 'unfavourable sentiments, and, when needful, by the active interference of mankind'.⁴⁶ People should receive their proper share, that is, that part which concerns themselves: '[T]o individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society' for 'liberty consists in doing what one desires.'⁴⁷

Mill valued both the defensive (negative liberty) and the assertive (free spirit). Negative liberty is valued as being the condition for the development and assertion of the free spirit.⁴⁸ Mill valued freedom for its contribution to autonomy and to the realization of the higher potential of the individual. Liberty is desired as part of happiness and is consequently a component of that end, as well as a means to it. It is a means to reason, and the midwife of individuality which enables the pursuit of what we consider to be good. In turn, liberty also contributes to the development of civilization; for without it, progress is impossible. Mill explained that this principle applied only to 'human beings in the maturity of their faculties', not to children or to barbarians.⁴⁹

⁴⁴ J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, 6, 11, 36.

⁴⁵ *Ibid.*, 90.

⁴⁶ *Ibid.*, 114.

⁴⁷ *Ibid.*, 132, 152.

⁴⁸ J.S. Mill, 'Law and Libel and Liberty of the Press', in Geraint L. Williams (ed.), *John Stuart Mill on Politics and Society* (Glasgow: Fontana, 1976); G.L. Williams, 'Mill's Principle of Liberty', *Political Studies* XXIV (1976), 132–40.

⁴⁹ J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, 73.

Mill emphasized that society has a case for interference when a certain conduct is intended to inflict harm upon other person. In his unequivocal phrasing, Mill advocated '[T]hat the only purpose for which power can be rightfully exercised over any member of a civilised community, against his will, is to prevent harm to others.'⁵⁰ Interference, then, may be justified if the conduct to be deterred is harmful to others, or, to put it differently, if the end is self-protection. Mill used the terms 'harmful', 'hurtful', 'injure', and 'cause evil' interchangeably.

In turn, truth is conducive to happiness because most people do not feel comfortable living in a lie. Mill emphasized the quest for truth which is both an important as well as an expedient endeavor.⁵¹ Only truth freely gained and freely held is of value. Truth is the keystone of Mill's plea for liberty of thought and expression, and it is also of salient importance in his discussion of liberty of action. Mill explained that every opinion should be checked against experience. When opinion is verified by experience and observation, then we have sufficient grounds for holding it to be true. This, of course, does not guarantee that it is true. One can never be sure that the truth in one's possession is the truth, the whole truth, and nothing but the truth. This is especially true for the realm of religion and spiritual beliefs as one should not make one's own belief a trump card to subdue other beliefs. We can never be sure where the truth lies, hence all our answers must be tentative: a universal, single truth is not, and cannot be found.

According to Mill, we can never be sure that the opinion we are endeavouring to stifle is a false one; and even if we were to be sure, stifling it would still be an evil.⁵² False opinions are to be tolerated for the sake of the true, for it is impossible to draw any clear line that would distinguish between true and false views: 'If even the Newtonian philosophy were not permitted to be questioned, mankind could not feel as complete assurance of its truth as they now do'.⁵³ We

⁵⁰ Ibid.

⁵¹ Ibid., especially chapter 2.

⁵² Ibid., 79.

⁵³ Ibid., 83. For discussion and critique of the Truth Principle, see Maurice Cowling, *Mill and Liberalism* (Cambridge: Cambridge University Press, 1963); Geoffrey Marshall, *Constitutional Theory* (Oxford: Clarendon Press, 1971); Frederick Schauer, *Free Speech: A Philosophical Enquiry* (New York: Cambridge University Press, 1982: 27–34); Kent Greenawalt, *Speech, Crime and the Uses of Language* (New York: Oxford University Press, 1989: 16–26); Irene M. Ten Cate, 'Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses', *Yale Journal of*

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should always question common beliefs which are held as 'truths', for truth is an ideal that we should continue to test and reaffirm.

The argument for truth is essentially an argument against coercion. Mill opined: 'whatever might be the evils of freedom, they could not be worse than the evils of restraint'.⁵⁴ Mill feared equally the tyranny of a minority, and the tyranny of the majority. Both startled him. He was keenly aware of the government's tendencies to abuse its power and, at the same time, feared the tyranny of the masses. The public, through the development of democratic agencies, might exhibit intolerance to some out-of-favor opinions. Discrimination against views would limit public discourse and people's ability to promote their views through disputation with other, rival opinions. Instead of investing in consolidating opinions and elucidating thinking, people might resort to the option of stifling opinions. And censorship alarmed Mill. Any form of coercion *qua* coercion was repugnant.

Two crucial considerations for advocating the Truth Principle were offered: The infallibility and the vitality arguments. The infallibility argument is based on the assumptions that (1) there are beliefs which admit of, or have a claim to holding of the truth, in areas which it is impossible to hold with certainty any belief to be true; and that (2) any intolerance of opinions involves, ipso facto, a claim to infallible knowledge.⁵⁵ Even those opinions which we are confident in their truthfulness must be exposed to scrutiny and doubts.⁵⁶ Those who assume that they know what the truth is provide reasons against pursuing a constant inquiry and debate, which deprive humanity of exploring further truths, with the result of inserting sticks in the wheels of progress. Thus Mill wrote: 'If all mankind minus one were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one

Law & the Humanities 22 (1), Article 2 (2010), <http://digitalcommons.law.yale.edu/yjrh/vol22/iss1/2>; Eric Barendt, *Freedom of Speech* (Oxford: Clarendon Press, 2005: 8–14), and Barendt 'Thoughts on A Thinker-based Approach to Freedom of Speech' (in writing).

⁵⁴ Mill, 'Law and Libel and Liberty of the Press', 150. See also R. Cohen-Almagor, 'Why Tolerate? Reflections on the Millian Truth Principle', *Philosophia* 25 (1–4) (1997), 131–152.

⁵⁵ For critique of the Infallibility Argument, see Alan Haworth, 'On Mill, Infallibility, and Freedom of Expression', in Glen Newey (ed.), *Freedom of Expression: Counting the Costs* (Newcastle: Cambridge Scholars Publishing, 2007), 168–190, at 170–177.

⁵⁶ J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, 83.

person, than he, if he had the power, would be justified in silencing mankind.’⁵⁷

It was not for the sake of the dissenter that Mill denied the right of society to silence her, but rather for the sake of truth and progress. Silencing of an opinion is resembled to ‘robbing the human race’.⁵⁸ Mill urged this argument in support of his demand for tolerance in the spheres of politics, morality, religion, and taste, spheres that are frequently invaded by intolerance.

In turn, the vitality argument suggests that without free exchange of ideas the common views would be rigid, lack adaptability, and soon turn into a dead dogma. However true an opinion may be, if it is not fully, frequently, and fearlessly discussed, it will cease to be held as a ‘living truth’.⁵⁹ Mill warned against the despotism of custom. In other words, it is not only important to hold true beliefs but also to have clear understanding of these beliefs, being cognizant of the reasons for holding them. Religion without reflection might become a coercive force upheld by believers who are not open to dispute and debate. Social pressures and fashionable modes of thinking inhibit thought and opinion. This combative attitude toward other beliefs closes the mind, and stifles knowledge and understanding of religion rather than enhancing its contributing powers. Consequently matters of belief will be held as a closed, persistent dogma. This would alienate people, disserve religion, undermine liberty, and infringe the pursuit of truth.

Although acknowledging the fact that, indeed, ‘the dictum that truth always triumphs over persecution is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes’,⁶⁰ Mill reasoned that free and open discussion is bound to bring about truth. In a somewhat similar way to Adam Smith’s belief in the ‘invisible hand’ function in regulating the economic powers of the market, Mill believed in such a ‘hand’ which regulates the ‘market-place of ideas’, leading to the discovery of truth. Truth in the long run never fails to prevail over error: it may be extinguished once, twice, or many times, but in the course of the ages there will generally be found persons to rediscover it.

This process of challenging common beliefs is so vital for revealing the truth that Mill was willing to invent artificial opinions to

⁵⁷ Ibid., 79.

⁵⁸ Ibid.

⁵⁹ Ibid., 95.

⁶⁰ Ibid., 89.

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challenge the prevailing ones: 'So essential is this discipline to a real understanding of moral and human subjects, that if opponents of all important truths do not exist, it is indispensable to imagine them, and supply them with the strongest arguments which the most skilful devil's advocate can conjure up'.⁶¹ Mill even went so far as to argue that 'the well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested'.⁶² Contestation is important to maintain the vitality of beliefs.

Three important observations are warranted. First, it is only because we allow free speech that we are able to entertain some provisional truths as a basis for taking decisions or formulating legislation. We have the freedom to contest such truths and to replace them at will.⁶³ Second, it is not simply having true beliefs that Mill valued but it is the way in which the truth is held. People are not like sheep.⁶⁴ He valued holding beliefs that were formed by employing one's rationality, with knowledge and awareness of the significance of these opinions and the grounds for holding them. Mill also appreciated the willingness to change beliefs in light of new argument and evidence. Without knowing the grounds of an opinion, that opinion 'abides as a prejudice, a belief independent of, and proof against, argument – this is not the way in which truth ought to be held by a rational being. This is not-knowing the truth. Truth, thus held, is but one superstition the more, accidentally clinging to the words which enunciate a truth.'⁶⁵

Third, Mill dreaded indoctrination or lack of reflection as it inhibits progress.⁶⁶ Progress of mankind depends on the development

⁶¹ Ibid., 97–98.

⁶² Ibid., 103.

⁶³ Geoffrey Marshall, *Constitutional Theory*; R. Cohen-Almagor, 'John Stuart Mill', in Clifford G. Christians and John C. Merrill (eds), *Ethical Communication: Five Moral Stances in Human Dialogue* (Columbia, MO.: University of Missouri Press, 2009), 25–32.

⁶⁴ J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, 125.

⁶⁵ Ibid., 96. For further discussion, see Gray, *Mill on Liberty*; C.L. Ten, *Mill on Liberty* (Oxford: Clarendon Press, 1980), 124–143; H.J. McCloskey, *John Stuart Mill: A Critical Study* (London: Macmillan, 1971), 118–30; Manley H. Thompson, 'J.S. Mill's Theory of Truth: A Study in Metaphysics and Logic', *The Philosophical Review* **LVI** (3) (May 1947), 273–92.

⁶⁶ In his 1832 essay 'On Genius', 1832 (in John M. Robson [ed.], *John Stuart Mill, The Collected Works of John Stuart Mill*,

of individuality, through liberties enjoyed by every person. Social progress should be achieved only through individuality and the pursuit of Truth. In Chapter 3 of *On Liberty* Mill writes that when a person's conduct is ruled not by his character but by 'the traditions or customs of other people', one of the 'principal ingredients of human happiness, and quite the chief ingredient of individual and social progress is lacking.'⁶⁷ The love of liberty and the love of improvement are progressive. Progress is a continuous process. Writing to Carlyle in 1834, Mill asserted: 'Though I hold the good of the species... to be the ultimate end... I believe with the fullest belief that this end can in no other way be forwarded but by... each taking for his exclusive aim the development of what is best in *himself*.'⁶⁸

3. The Millian Boundaries to Free Expression

My focus is with *On Liberty*, where Mill wished to establish as far as possible unlimited freedom of speech, arguing as a general rule that it should not be subjected to state interference or control.⁶⁹ Nevertheless,

Volume I – Autobiography and Literary Essays, <http://oll.libertyfund.org/titles/mill-the-collected-works-of-john-stuart-mill-volume-i-autobiography-and-literary-essays>), Mill asserted that it is the duty of all people to seek to know the truth and that they should not be satisfied with accepting it on trust: 'Let each person be made to feel that in other things he may believe upon trust – if he find a trustworthy authority – but that in the line of his peculiar duty, and in the line of the duties common to all men, it is his business to *know*'. For further discussion, see J.B. Schneewind (ed.), *Mill's Essays on Literature and Society* (New York and London: Collier, 1965): 101.

⁶⁷ J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, 115.

⁶⁸ J.S. Mill, 'The Letters of J.S. Mill', in Francis E. Mineka (ed.), *The Earlier Letters of J.S. Mill, 1812–1848*, in *Collected Works XII* (Toronto: University of Toronto Press, 1963), <http://oll.libertyfund.org/titles/mill-the-collected-works-of-john-stuart-mill-volume-xii-the-earlier-letters-1812-1848-part-i>

⁶⁹ In various writings, Mill randomly proposed various limitations on freedom of expression. In 'Mr. O'Connell's Bill for the Liberty of the Press', in *The Collected Works of John Stuart Mill, VI – Essays on England, Ireland, and the Empire*, http://oll.libertyfund.org/titles/mill-the-collected-works-of-john-stuart-mill-volume-vi-essays-on-england-ireland-and-the-empire/simple#1f0223-06_head_045, Mill (1824) wrote that 'we would not permit the press to impute, even truly, acts, however discreditable, which are in their nature private. We would not allow the truth of

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Mill did not say that any form of expression ought to enjoy perfect immunity. Being aware of the fact that expressions are other-regarding, and that as such they might inflict evil, Mill did not deny that they may cause harm.

Mill explained that when thinking one's activity is directed inwards upon one's consciousness and operates solely in the spiritual level, so that there is no reason for interference in one's thought; whereas when one advocates ideas, one's activity is directed outwards, and no longer exists only in one's private domain, hence it may have a bearing on others. Though Mill insisted as a general rule that the harmfulness of utterances was not sufficient to warrant their restriction, he did not argue that utterances ought never to be restricted. In what he regarded as extreme circumstances, Mill explicitly admitted the importance of restraining them.

Mill opened *On Liberty* by stating that the struggle between liberty and authority is common.⁷⁰ Mill argued for the protection of all opinions, including the most unorthodox and false. Silencing such opinions might rob the entire human race because many scientific breakthroughs originated in singular minds. Similarly, the expression of false views would enhance our understanding of what is true and what is false.⁷¹ This is one of Mill's major contributions to the free speech literature. Mill emphasized the importance of speech (or discussion) as a matter of ethical conviction, and the freedom we are entitled to promote, to preach and to advocate our convictions.

such imputation to be even pleaded in mitigation'. In 'Law and Libel and Liberty of the Press', in Geraint L. Williams, (ed.) *John Stuart Mill on Politics and Society* (Glasgow: Fontana, 1976), 143–169, at 160–161, Mill wrote '[T]here is one case, and only one, in which there might appear to be some doubts of the propriety of permitting the truth to be told with reserve.' This case involves the situation 'when the truth, without being of any advantage to the public, is calculated to give annoyance to private individuals'. This statement cannot be easily reconciled with Mill's *On Liberty*. Annoyance in *On Liberty* cannot and should not serve as a yardstick for prohibiting speech. It is far too light justification for restricting speech. Mill reiterated time and again the Harm Principle which is much more weighty and severe yardstick than mere annoyance. For further discussion, see Joel Feinberg, *Freedom and Fulfillment: philosophical essays* (Princeton NJ: Princeton University Press, 1992).

⁷⁰ J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, 65.

⁷¹ *Ibid.*, 140.

Mill dreaded custom, convention, and mediocrity of opinion.⁷² As an elitist, he feared intellectual stagnation, that the people's mind will go to sleep and then society will not be able to attain happiness. Because public opinion usually reflects the accepted convention, Mill wished to enable scope for unconventional, original and antagonist views.⁷³ They will provoke further exchange and promote further probing, pushing people to think more carefully and more thoroughly about issues they take for granted without much deliberation. He wrote that people may hold strong beliefs, thinking they are true, but still they need to be ready to contest them.⁷⁴ Freedom of expression is 'practically inseparable' from freedom of thought but because it might affect other people, it falls under a separate principle.⁷⁵ Thus, unlike freedom of thought which is self-regarding, the Free Speech Principle is not immune to restriction. Individuals should be free to hear diversified opinions in order to make their own mind but they need not hear each and every opinion. Boundaries need to be outlined.

(i) *Instigating assassination of a tyrant*

Expression, according to Mill, is social or other-regarding conduct; thus society has legitimate authority to regulate it. Yet it is expedient for society to adopt a broad laissez-faire policy, with a limited number of exceptions to free expression. The expedient exceptions may vary as new social circumstances arise.⁷⁶ In Chapter 5 of *On Liberty*, Mill wrote that 'It is one of the undisputed functions of government to take precautions against crime before it has been committed, as well

⁷² Ibid., 68.

⁷³ Mill explained that there should be a great social support for opinions different from those of the mass. See 'M. de Tocqueville on Democracy in America', in *Dissertations and Discussions* (NY: Haskell House, 1973), II, 1–83, at 73. Mill further elucidated that whenever the multitude are alive to the necessity of 'superior intellect', they rarely fail to distinguish those who possess it. See 'Appendix', in *Dissertations and Discussions* (NY: Haskell House, 1973), I, 467–474, at 470.

⁷⁴ J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, 95. See also J.M. Robson, *The Improvement of Mankind* (Toronto: University of Toronto Press, 1968), 182–271; Kateb, 'The Freedom of Worthless and Harmful Speech', 233–35.

⁷⁵ J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, 75.

⁷⁶ Riley, 'J.S. Mill's Doctrine of Freedom of Expression', 149.

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as to detect and punish it afterwards.'⁷⁷ While warning against the potential abuse of power, nevertheless Mill argued that the government is duty-bound to prevent crimes before they are committed. In a footnote at the beginning of Chapter 2 of *On Liberty* Mill introduced the concept of incitement by saying:

It would... be irrelevant and out of place to examine here, whether the doctrine of tyrannicide deserves that title. I shall content myself with saying, that the subject has been at all times one of the open questions of morals, that the act of a private citizen in striking down a criminal, who, by raising himself above the law, has placed himself beyond the reach of legal punishment or control, has been accounted by whole nations, and by some of the best and wisest of men, not a crime, but an act of exalted virtue and that, right or wrong, it is not of the nature of assassination but of civil war. As such, I hold that the instigation to it, in a specific case, may be a proper subject of punishment, but only if an overt act has followed, and at least a probable connection can be established between the act and the instigation.⁷⁸

Mill's choosing to put this restriction on freedom of expression in a footnote is revealing. It was not material to the essential points he was making. After all, it does not matter whether people believe in Christ, in other religions or do not believe at all; it does not matter whether the opinion is immoral or not. Immorality also is not grounds for censorship. The important thing for him was to celebrate freedom of expression, not to circumscribe it. Precisely because of our awareness of Mill's intention, his exclusionary treatment of incitement is very important. The essential distinction between 'instigation' on the one hand, and 'advocacy', 'preaching' or 'teaching' on the other is that those to whom the instigation is addressed must be urged to do something now or in the immediate future, rather than merely being urged to believe in something. Advocacy attests to democratic deliberation when diverse interests openly compete for a period of time in order to reach a decision.⁷⁹ In instigation the time factor is limited. It is speech closely linked to harmful action.

⁷⁷ J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, 151.

⁷⁸ *Ibid.*, 78.

⁷⁹ Nadia Urbinati, *Mill on Democracy: From the Athenian Polis to Representative Government* (Chicago: University of Chicago Press, 2002), 81–82.

Mill insisted that instigation would warrant punishment 'only if an overt act has followed'.⁸⁰ I wish to offer several observations: first, Mill was studiously agnostic on the question of political assassinations. He did not elaborate and clarify when such assassinations are warranted. Indeed, on some occasions one may ask why *not* incite to the killing of a tyrant? Are the lives the tyrant is taking worthy less protection than the tyrant's life? If we follow the utilitarian doctrine that Mill had advocated, one would argue that if the taking of one life might save the lives of many others who will be put the death arbitrarily then possibly such instigation can be justified.

Mill did not decide the question whether an act of tyrannicide is immoral and deserves punishment; therefore he was not saying that incitement to kill the tyrant is necessarily wrong. It might be the right thing to do. According to Mill, an attempt to kill a tyrant might be morally justified, in which case incitement to kill the tyrant may even deserve praise.

Let me illustrate. On 20 July 1944 Colonel von Stauffenberg attempted to assassinate Adolf Hitler. He placed a bomb in Hitler's headquarters which exploded while Hitler was in the room. Hitler was injured but escaped death. von Stauffenberg did not operate alone. He was part of a conspiracy to take over the government by killing Hitler and then embark on direct talks with Germany's enemies to end the war (Operation Valkyrie). It is estimated that 4,980 Germans were executed after the July Plot.⁸¹ To carry such a complicated operation, von Stauffenberg certainly talked to others and instigated the killing of the *Führer*. Was the incitement to murder, and the attempt on Hitler's life, justified? Weighing the pros against the cons of Valkyrie, I suggest that von Stauffenberg was justified in inciting Hitler's assassination and in carrying it through. Hitler's assassination could have brought WWII to an earlier close and saved a very significant number of lives, including the lives of hundreds of thousands of innocent civilians.⁸² It is

⁸⁰ Mill, *Utilitarianism, Liberty, and Representative Government*, 78. Henry Sidgwick (*The Methods of Ethics* (Indianapolis: Hackett, 1981: 478) questioned how from a utilitarian point of view it is possible to say broadly that secondary injury to others should be disregarded. For further discussion, see R. Wollheim, 'J.S. Mill and the Limits of State Action', *Social Research* 40 (1) (1973), 1–30; Nadia Urbinati, *Mill on Democracy*.

⁸¹ Jewish Virtual Library, Resistance in World War II: Operation Valkyrie – The 'July Plot' to Assassinate Hitler, *Jewish Virtual Library*, <http://www.jewishvirtuallibrary.org/jsource/Holocaust/julyplot.html>

⁸² During the summer of 1944, the estimated daily number of persons gassed and burned in Auschwitz-Birkenau was over 9,000. Holocaust

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noted that nothing in Mill's utilitarian thinking in general and his defense of freedom of speech in particular prevents him from holding that assassination is sometimes right. Mill's point is that incitement (or conspiracy) to murder can be legitimately prohibited and punished, consistent with his conception of freedom of *speech*. However, the phrasing of the footnote may open the way to diverse interpretations as to the legitimacy of very harmful *actions*, and under what circumstances they might be warranted.

Thus, it is not altogether clear what Mill meant by 'overt act'. Did he refer only to the overt act of assassination or also to overt acts in planning the assassination, notwithstanding whether they materialized to assassination? Mill did not elaborate. Consider two scenarios: in the first, suppose that a notable politician was calling to kill the tyrant but the tyrant had surrounded himself with many layers of security and consequently the co-conspirators backed down of their assassination plan. In the second scenario, the co-conspirators pursued the plan but the plan was foiled. In both scenarios, the overt act of assassination was not conducted but there were concrete plans to carry it out. In the first scenario, the plans did not reach the stage of attempt on the tyrant's life. In the second, the attempt failed. Do they both constitute overt acts to sufficiently categorize the speech leading to them as incitement? Is any consequential overt act sufficient to describe the motivating speech as incitement? The issue is unclear.

However we decide these questions, punishment for incitement or instigation is not legitimate if no 'overt act' has followed, or if no clear connection can be established between the speech/preaching and an attempted act of killing the tyrant. Why it was important for Mill to insist that punishment of the speech should take place only if action follows? Presumably because Mill wished to provide the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine however immoral it may be. If no act follows and/no probable connection can be established, then there is no punishment, which makes it clear that expression of opinion remains free. But then punishment comes always after the harm is already committed. It will serve only as a deterrence, not to prevent the translation of harmful speech into harmful act. Can't we evaluate the essence of speech and be able to discern between advocacy and incitement by considering its content, the speaker's intentions, and the circumstances in which the speech was uttered to make the distinction and categorize

Timeline, <http://www.historyplace.com/worldwar2/holocaust/timeline.html>

the given speech as incitement notwithstanding whether an overt act was followed? In other words, can we say that a given speech constitutes incitement because it might *potentially* bring about harmful consequences? Even if no violence resulted from the speech, there might be cases in which we can conclusively deduce that the speech was not merely advocating an idea but was inciting violence.

Lastly, as for the law, Mill simply said that incitement to tyrannicide 'may be a proper subject of punishment', not that it always is. On purpose, Mill remained vague on the subject without providing us with guidelines when incitement should become subject of punishment. Mill either did not fully develop his thoughts on the matter, or did not wish to share his thoughts on the matter with the readers as this would lead him away from his agenda: making the strongest possible plea for freedom of expression. Either way, Mill's treatment of the question is disappointing. Mill the utilitarian was not an absolutist champion of freedom of speech and the question of boundaries is certainly material to the discussion. Thus we are left with one example in the entire book where Mill addressed the question of boundaries; the corn dealer example.

(ii) The corn dealer

Mill had shed more light on incitement when considering the example of the greedy corn dealer. Here he makes an important contribution in distilling the essence of incitement which distinguishes it from advocacy. Mill wrote:

No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of mankind.⁸³

⁸³ J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, 114.

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Mill considered as instigation any speech, which is intended (or if not intended then at least recklessly uttered) to lead to some mischievous action which is delivered under circumstances conducive to the taking of that action. In instances such as the one concerning the corn-dealer, it seems that Mill would regard harmful speech as incitement irrespective of whether overt harmful action follows.⁸⁴ Although he did not explicitly say that, Mill implied that the intention to lead people to take a harmful action – in circumstances likely to mobilize people to take that action – constitutes an incitement. This speech is not mere advocacy, discussion or debate voiced as a matter of ethical conviction which is protected under Mill's theory.

Mill in the corn-dealer example implicitly indicated that when an audience has no time for careful and rational reflection before it pursues the course of action urged upon it, this speech falls outside the protection of the Free Speech Principle, since the people are too excited to be responsible for their acts. Mill did not restrict the advocating of opinions *per se*. In the example of the corn-dealer, the harmful results of a breach of the peace, disorder, and harm to others were imminent and likely. These considerations outweigh the significance of free expression.⁸⁵

The Millian single paragraph on the corn dealer became a major guideline for liberal democracies for the proscription of incitement. But the corn dealer example is still opened for interpretations, especially in light of the advances in technology and the proliferation of many media outlets. What considerations should we weigh in

⁸⁴ My view is close to that of Riley, 'J.S. Mill's Doctrine of Freedom of Expression'. A different interpretation is offered by Morgan who argues that the Millian corn dealer example falls short of direct, unambiguous incitement to commit a violent crime; this is because an opinion that 'corn-dealers are starvers of the poor' is different from a direct call to murder the corn dealer. Notwithstanding the exact wording, the consequences might be similarly harmful. See Glyn Morgan, 'Mill's Liberalism, Security and Group Defamation', in Glen Newey (ed.), *Freedom of Expression: Counting the Costs*, 121–143, at 137. One may offer a contrary interpretation insisting that Mill thought that 'some mischievous act' must follow for expressed opinions to lose their immunity. Thus O'Rourke regards Mill as a free speech absolutist, arguing that the right to free expression is absolute according to Mill and that even speech which can be regarded as incitement should not be prohibited unless violence occur. See K.C. O'Rourke, *John Stuart Mill and Freedom of Expression: The genesis of a theory* (London: Routledge, 2001), 127.

⁸⁵ Raphael Cohen-Almagor, *The Boundaries of Liberty and Tolerance* (Gainesville, FL: The University Press of Florida, 1994).

deciding whether or not a given speech is protected? How should we evaluate the relationship and proximity between speech and action? These are difficult questions.

As for the first question, it is clear from the Millian example that the content of speech is of utmost importance. If people were to gather outside the corn dealer's house to thank him for his fair business and to celebrate his kindness, Mill would not have called them 'mob' and would not regard the celebratory praise as 'instigation' deserving punishment. Instigation, or incitement, always contains negative expression. It is an expression designed to yield harm. Plesantries are never at issue. Incitement is not about 'how beautiful you look today', 'it is a sunny day' or 'this cake is delicious'. The content of incitement speech is intended to be harmful, damaging, and conducive to violence. It is harmful speech-act, designed to evoke violence.

The second important consideration is concerned with the circumstances that must be conducive to the pursuit of harmful action. In the corn dealer example, Mill highlighted that the circumstances constitute the expression 'a positive instigation to some mischievous act'.⁸⁶ The same utterance might be inciting to violence in a particular set of circumstances and therefore prohibited but it might be legitimate, regarded as mere advocacy, in other sets of circumstances. An opinion that corn-dealers are starvers of the poor constitutes an incitement when uttered to a mob in front of the corn-dealer's house but it might be considered as mere advocacy were it be uttered some 400 miles away from the corn-dealer's house or if the audience is composed of the ladies who populate the Windsor tea-rooms on a sunny afternoon. As Feinberg suggests, a mob is understood to be a collective person whose passions are easily manipulated and whose actions easily maneuvered.⁸⁷ Actions of an incited mob cannot be regarded as voluntary even though the component individuals in it, being free persons, are all acting voluntarily on their own responsibility.

It can also be inferred that Mill had in mind protection from violence. Mill wrote that the same opinion that 'corn-dealers are starvers of the poor, or that private property is robbery', can be freely published in the press although its consequences might be disastrous to

⁸⁶ J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, 114.

⁸⁷ Joel Feinberg, *Freedom and Fulfillment*, 144.

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the interests of the corn dealer.⁸⁸ Mill was a champion of freedom of the press in England and also in other parts of the world.⁸⁹ In the corn dealer example, the circumstances make the speech problematic. It should be clear that Mill was not there to protect capital interests and selfish gains. Mill wanted to protect the corn dealers from violence. He might have had other forms of incitement in mind⁹⁰ but Mill did not explicate other forms of incitement. Mill did suggest that 'the liberty of the individual must be thus far limited; he must not make himself a nuisance to other people'.⁹¹ That seems potentially to include more than violence, and may even extend further than non-violent crimes such as fraud. The issue is open to interpretation and as Mill did not elaborate on this matter in *On Liberty* I opt for a restrictive view of the Harm Principle when it relates to speech. This is because Mill's clear agenda was to champion freedom of expression and to protect it. What is clear is that Mill objects to mob activism.⁹²

Thus the content of the speech and the circumstances are, according to Mill, the most important considerations we need to weigh when we debate whether a speech should be excluded from the protection of the Free Speech Principle because it incites to violence. But are these the only considerations? I suggest that there are two further considerations we need to explore – the speaker's intention,

⁸⁸ For further discussion, see Marshall, *Constitutional Theory*, 156–157; Feinberg, *Freedom and Fulfillment*, 141–144; Gray, *Mill on Liberty*, 103–10; Daniel Jacobsen, 'Mill on Liberty, Speech and Free Society', *Philosophy and Public Affairs* 29 (3) (2000): 276–309, at 286; Eric Barendt, *Freedom of Speech*, 269–270; Brink, *Mill's Progressive Principles*, 156–172.

⁸⁹ In 'The French Law Against the Press', *Spectator* (19 August 1848), page 800, in *The Collected Works of John Stuart Mill* **XXV** – Newspaper Writings December 1847 – July 1873 Part IV [1847], <http://oll.libertyfund.org/titles/mill-the-collected-works-of-john-stuart-mill-volume-xxv-newspaper-writings-part-iv>, Mill protested against the decree against the press passed by the French National Assembly of France, saying it 'is one of the most monstrous outrages on the idea of freedom of discussion ever committed by the legislature of a country pretending to be free'. If only one set of opinions is to be permitted on any significant matter, Mill asked rhetorically, what is the essence of political discussion?

⁹⁰ Herb Morris suggests in his remarks on a draft of this paper that Mill 'surely would have believed that incitement to an act of fraud, where fraud was criminalized, could also be prohibited'.

⁹¹ Mill, *Utilitarianism, Liberty, and Representative Government*, 114.

⁹² For further discussion, see David Lloyd and Paul Thomas, *Culture and the State* (London: Routledge, 1998).

and the manner of expression. They might not be as crucial as the content of the speech and the circumstances, but they may strengthen our decision whether or not prohibit the speech under consideration.

A speaker who explicitly declares that his aim is to stir violence against his target group strengthens our conclusion that the speech constitutes incitement and that it should be prohibited. The clear intention to do harm should not be facilitated by society's permission to attack his victim. Jonathan Riley interprets Mill to suggest that threatening innocent people with death, severe physical harm or financial ruin can rightfully be suppressed by criminal sanctions as well as social stigma. And in assessing the speaker's intention we should consider the speaker's past conduct towards his target group, his connections with organizations that have a history of prejudice and violence, and the likelihood that the speech will encourage others to do harm.⁹³

As for the manner of expression, a charismatic speaker (A) has better chances to motivate people into action than someone (B) who is stripped of any charismatic qualities and who is likely to be ignored. Both speakers might utter exactly the same damaging expression but while the audience might be swayed to act on the utterance of (A), they might silence (B) because he lacks the motivating powers.

At the same time, while the content of the speech and the circumstances are essential for describing speech as incitement, the speaker's intention and the manner of expression are secondary. Even in their absence we might still prohibit a certain speech because it incites violence. This is because not always speakers openly declare their harmful expressions, and because the manner of speech might be immaterial to our decision. Let me explain.

Astute politicians who wish to do harm might disguise their intentions and motives. This is especially true in democracies that have developed mechanisms of self-defense against anti-democratic movements. Thus racist and exclusionary parties in contemporary Germany would not describe themselves as Nazi because Nazism is outlawed in Germany. Racist organizations would not openly declare that they aim is to throw out minorities from the country and to persecute them. Instead they would emphasize the need for clearer immigration laws, and speak of the dangers of multiculturalism that, so they claim, facilitate terrorism. The utterances might be very harmful and damaging but the intentions of the speaker might remain obscure. In

⁹³ Jonathan Riley, 'Mill, Liberalism, and Exceptions to Free Speech', in Glen Newey (ed.), *Freedom of Expression: Counting the Costs* (Newcastle: Cambridge Scholars Publishing, 2007), 205.

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certain circumstances, when the speech is dangerous and vile, we may decide to prohibit the harmful expression notwithstanding whether or not the intention of the speaker was made clear.

Charisma is of vital importance in motivating people into action. But leaders may enjoy different forms of charisma, not necessarily verbal. No less important is religious charisma. A speaker might lack any oratory qualities and still enjoy powerful ability to sway people into action. Ayatollah Khomeini might have whispered the fatwa he uttered against Salman Rushdie but the manner of expression was absolutely immaterial to its impact and did not detract from its seriousness. Sheikh Yassin, the spiritual leader of Hamas, was not known for a strong voice yet he was able to persuade dozens of young Moslems to become *shaheeds* (holy martyrs) in launching suicide terror attacks in public places in Israel.

Sometimes, the manner of expression encapsulates content. This is the case of symbolic expressions. Thus, when a person arrives in a Jewish neighborhood while he dresses as a Nazi, with the symbol of swastika on his arm band, long black boots and black clothes he need not say anything. It is clear that his message is one of hate and that his intentions are harmful. When a person burns a cross at the lawn of an African-American family it is clear that his intention is to inflict harm, harass and intimidate the family. He need not say anything further. When a person puts a pork head at the entrance of a mosque he need not utter a word. His message is one of hatred and contempt. Symbolic speeches can be as damaging as other forms of expression. They might be morally on a par with physical harm.

Symbolic expressions can be highly offensive to the target group, and they can also incite others to violent actions. Mill was not cognizant of the former, not explicitly at any rate. Explicitly Mill was committed to the view that, however offensive an opinion may be, this cannot constitute a legitimate ground for its suppression for he wrote: 'there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no more than between the desire of a thief to take a purse, and the desire of the right owner to keep it'.⁹⁴

⁹⁴ J.S. Mill, *Utilitarianism, Liberty, and Representative Government*, 140. Eric Barendt noted in his comments on a draft of this paper the distinction between insulting speech and offensive speech, arguing that it would be wrong to penalize offensive speech, and that freedom of speech must include the freedom to publish offensive material. The law has to strike a balance between the tolerance of offensive speech on the one hand and on the

But if symbolic expressions might lead to a violent action here or in the immediate future, as was the case in Israel in 1995, when a calculated incitement campaign was launched by the extreme right against the Oslo Peace Accords and its driving force, Prime Minister Rabin, then there can be grounds for some limitations on speech. I think Mill would not protect the depiction of the prime minister in Nazi SS uniform, as Rabin was depicted. When the prime minister of Israel was depicted as a Nazi, that meant he was the prime enemy of Israel with whom one could not make any reconciliation. The Nazi agenda dictated annihilation of all Jews, thus the only option left was to kill the prime minister before he will destroy 'us', the 'true' Jewish-Zionists. The incitement campaign led to Rabin's assassination on 4 November 1995.⁹⁵ It seems to me that Mill would not have tolerated such speech because it facilitated and promoted harm and wrong-doing against a specific target. An overt act of assassination immediately followed upon this campaign and so the campaign of speech satisfies Mill's necessary condition for regarding it as instigation deserving of punishment. But Mill would condone cases like Skokie, where a group of American Nazis wished to march in this suburb of Chicago which was populated mainly by Jews, many of whom were Holocaust survivors, notwithstanding the offensiveness of the speech as this kind of speech does not provoke people to harm others.⁹⁶ In *On Liberty*, there is no strong evidence that Mill would not have allowed expressions because of their offensive nature and their power to inflict significant psychological distress.

Thus there is a hierarchy between the four criteria for incitement; we need to probe all of them but we might reach the conclusion that a certain speech constitutes an incitement also when the speaker's

other the proscription of speech which is insulting and intended or likely to lead to violence, disorder and so on.

⁹⁵ Michael Karpin and Ira Friedman, *Murder in the Name of God* (London: Granta Books, 2000); R. Cohen-Almagor, *The Boundaries of Liberty and Tolerance*.

⁹⁶ Aryeh Neier, *Defending My Enemy* (New York: Dutton, 1979); Joel Feinberg, *Offence to Others* (New York: Oxford University Press, 1985); D.A. Downs, *Nazis in Skokie* (Notre Dame, Indiana: University of Notre Dame Press, 1985); R. Cohen-Almagor, 'Harm Principle, Offence Principle, and the Skokie Affair', *Political Studies* **XLI** (3) (1993): 453–470; Ivan Hare and James Weinstein (eds), *Extreme Speech and Democracy*; Jeremy Waldron, *The Harm in Hate Speech* (Cambridge, Mass.: Harvard University Press, 2012).

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intention is unknown, and when the manner of expression is calm and seems lacking the power to motivate power into action. But now another question arises: Are there utterances that would be considered inflammatory notwithstanding the particular circumstances in which they are uttered? This question becomes very important in our age of mass media.

In 1859, when John Stuart published *On Liberty*, the press was the main vehicle for circulating news. Today, the press is only one of many means to circulate news. The media are far more invasive and diffuse. Incitement can be uttered many miles away from the target group and the media will transmit it to the audience who might act upon it. Further, the media might create an atmosphere of incitement against the designated target. The media amplify the violent expression, multiply its strength tenfold, and inspire more people to adopt violent language. The combination of the press, radio, television and Internet (including ample platforms of social media) is extremely powerful in conveying messages, positive and negative. The media can mobilize people into action. We have seen it time and again in organizing events, demonstrations, petitions, charity campaigns, marches, customer initiatives and political campaigns. With such a powerful influence, it can be argued that the mob need not be outside the victim's house. The media have the ability to transmit incitement and deliver the violent message to many people in many places. Again, prime example is the successful incitement campaign against Prime Minister Yitzhak Rabin. The campaign was orchestrated via the mass media, effectively delivering the message that Rabin should be killed for his betrayal of Israel, in conceding to give up precious parts of the Holy Land in return for an obscure peace that, according to the inciters, was not worth of the paper on which it was written.⁹⁷ The combination of the content of the dangerous expressions, its manner, the intentions of the speakers that clearly said 'Rabin Should Be Killed', and the circumstances in Israel at large necessitated the restriction of incitement. Unfortunately, not enough was done to curtail the well-orchestrated incitement campaign which led to Prime Minister Rabin's assassination.

The context of the time is also important. Today the expression 'John Doe (the Finance Minister) is starving the poor' would most probably be tolerated anywhere, also in front of the finance minister's home. But the statement 'John Doe is starving the poor and therefore

⁹⁷ R. Cohen-Almagor, 'Political Extremism and Incitement in Israel 1993–1995, 2003–2005: A Study of Dangerous Expressions', *Democracy and Security* 3 (1) (2007), 21–43.

should be killed' is beyond the scope of tolerance anywhere, whether in front of his house or many miles away. This is because we take into consideration the power of the mass media in facilitating incitement. Indeed, the Internet is awash with inciting calls for violence and terrorism whose significance and impact cannot be underestimated.⁹⁸

The statement 'Jews should be gassed' would have probably been tolerated by many American liberals during the 1920s. They would have said: What does it mean 'should be gassed'? It is meaningless. Surely it is impossible to gas all Jews. This is a message of hate but it has no consequence. It is like saying 'Jews should fly.' But many liberals won't tolerate such a statement today, after the Holocaust. Reality sometimes exceeds imagination.

The peculiarity of cases of instigation is that the likelihood of an immediate danger is high, and we have little or no opportunity to conduct a discussion in the open and to submit conflicting considerations into play, which may reduce the effects of the speech. Justice Oliver W. Holmes argued that in some circumstances, when speech is closely related to action and might induce harmful consequences, it should be curtailed. In a way similar to the Millian corn-dealer example, Holmes asserted in a renowned opinion that we cannot allow falsely shouting 'Fire!' in a crowded theater.⁹⁹ Here, too, a restriction on speech is justified on the grounds that the content of the speech (that is, its effects, not its intrinsic value), the manner of the speech, and the intentions of the agent are aimed to bring about harm, while the audience dwells under conditions which diminish its ability to deliberate in a rational manner. Therefore such a shout might lead it to act in a harmful manner (harmful to themselves as well as to others). Hence, to the extent that speech entails an immediate effect, the arguments which assign special status to freedom of speech are less compelling. Boundaries have to be introduced in accordance with the context of the speech, otherwise the results could be too risky. As Zechariah Chafee stated: 'Smoking is all right, but not in a powder magazine.'¹⁰⁰

⁹⁸ Alexander Tsesis, 'Terrorist Speech on Social Media', *Vanderbilt Law Review* 70 (2) (2017), 651–708; R. Cohen-Almagor, *Confronting the Internet's Dark Side: Moral and Social Responsibility on the Free Highway* (NY and Washington DC.: Cambridge University Press and Woodrow Wilson Center Press, 2015).

⁹⁹ *Schenck v. U.S.* 249 U.S. 47 (1919).

¹⁰⁰ Zechariah Chafee, *Free Speech in the United States* (Cambridge, Mass.: Harvard University Press, 1946), 397.

Conclusion

Mill's arguments are utilitarian and consequentialist. He was interested in promoting liberty because of the social benefits that can be derived from a policy of freedom and unlimited access to the discovery of truth. For Mill, the ideas of happiness and progress were infused with his concept of individual autonomy.¹⁰¹ His writings should be analyzed in light of the spirit of the time, when freedom of speech was privilege, not necessarily a right, especially not for the poor strata of society, even more so when people raised criticisms against the church. In a society that had limited expressions that were deemed blasphemous or offensive to the elite, Mill felt the need to endorse the widest possible scope to freedom of expression and of the press. This was his clear agenda.

Rather than Mill's protection of free speech being boundless, it is argued that different considerations must apply in different contexts. In the context of Nazi Germany, instigating the assassination of Hitler is not just justified but morally praiseworthy. By contrast, in Israel, instigating the assassination of the Prime Minister, even using implicit and indirect symbolic means, is not justified and legitimately subject to prohibition.

Because Mill wished to be a champion for free expression, his treatment of the exceptions to free speech is unsystematic and incomplete. It opens a scope for interpretations. In this essay I offered one more interpretation, and critique, of the Millian principles. While admiring Mill's achievement in influencing many scholars and courts in different corners of the globe, at the same time I find it regrettable that Mill did not elaborate in his writings on the issue of appropriate boundaries to freedom of expression in *On Liberty* or in his later writings. But maybe this is what Mill wanted: to open an ongoing debate in which many stakeholders express an opinion, in the fashion that Mill promoted with the formulation of the Truth Principle, aiming to reach some truth, only to be contested and challenged until another consensus is reached, and yet again until the next challenge. In this respect, we follow the Millian tradition and implement what Mill had preached. Mill should be pleased.

¹⁰¹ Alan Ryan, *The Philosophy of John Stuart Mill* (London: Macmillan, 1970), xi–xx; J.C. Rees, *John Stuart Mill's On Liberty* (Oxford: Clarendon Press, 1985), 77.

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