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# Free Speech and Liberal Community

GERALD LANG

## 1. Introduction

In a famous passage in *On Liberty*, John Stuart Mill expresses disquiet about his society's unreflective acceptance of 'dead dogmas':

However unwillingly a person who has a strong opinion may admit the possibility that his opinion may be false, he ought to be moved by the consideration that however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth. (II.21)<sup>1</sup>

For a long time, Mill's approach to free speech was taken for orthodox wisdom among those with broadly progressive tendencies. But then came along an important series of objections to free speech, variously focused on the demands of cultural identity, the harms of hate speech, the existence of implicit bias, epistemic injustice, and silencing. These objections imply that orthodox liberal free speech principles may do nothing to ameliorate the relevant problems, and may even further entrench them. A sign displayed at a recent protest organized by the Black Lives Matter movement at the College of William and Mary expressed one such charge in the bluntest possible terms: 'Liberalism is White Supremacy' (Truitt 2017). As a result of these concerns, the obviousness of Millian liberal principles now seems to be in retreat.

In one sense, perhaps this is no bad thing for liberals. Another round of reflection on Millian liberalism saves it from the irony of becoming the dead dogma risked by its unqualified acceptance in *bien pensant* circles. But it also presents liberals with the challenge of restating liberalism's power and purpose in a social world which is understood differently from the Victorian social world Mill was engaging with. In this essay, I want to make at least a start on that large project.

My focus here will be mainly on Mill, and on his vision of liberal community that emerges, in fits and starts, in *On Liberty*. The main outline of Mill's theory will be briefly sketched in Section 2. That account will then be challenged by a whole battery of objections, some of them familiar, others less so. Section 3 outlines some rather abstract problems for theories of free speech, including Mill's. More familiar first-order objections to Mill's

account are discussed in Section 4. In Sections 5 to 7, I will investigate what kinds of resources Mill has to reply to these various objections.

## 2. Mill's Building Blocks: the Doctrine of Liberty and the Harm Principle

In *On Liberty*, Mill outlines the 'Doctrine of Liberty' as follows:<sup>2</sup>

This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it. Secondly, the principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not harm them, even though they should think our conduct foolish, perverse, or wrong. Thirdly, from this liberty of each individual, follows the liberty, within the same limits, of combination among individuals; freedom to unite, for any purpose not involving harm to others: the persons combining being supposed to be of full age, and not forced or deceived. (I.12)

The Doctrine of Liberty takes its place as Mill's leading commitment alongside the famous 'Harm Principle':

The sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That 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. His own good, either physical or moral, is not a sufficient warrant. (I.9)

There are a number of subtleties of interpretation to negotiate here. Mill's confident and emphatic assertions paper over a number of potential fissures in his system. I want to flag up two points at this stage.

First, and unless it is maintained that free expression cannot be harmful—unless, that is, harm is implausibly restricted only to physical harm—then it appears to follow that the Doctrine of Liberty does not establish a protected zone of behaviour guaranteed to satisfy the Harm Principle. The acts encompassed by the Doctrine of Liberty cannot be understood as private acts, concerning no one but the agent herself. Free speech and other exercises in free

expression can disadvantage other people: they can be damaging, defamatory, insulting, malicious, wounding. But then it will appear to follow that these acts fall under the purview of the Harm Principle, and become candidates for regulation after all. Whether they are actually regulated will depend on further questions of utility and disutility; the Harm Principle states only a necessary but not sufficient condition for regulation. Even so, these contingencies should sound alarm bells for the Doctrine of Liberty. Mill boasts an enthusiastically inflexible level of commitment to the Doctrine of Liberty which appears to crumble upon the most cursory of examinations.

The second issue concerns the question of value of free speech. Why was freedom of speech so valuable, for Mill? He appeals to two dimensions of value. The first of them is concerned with intellectual inquiry, or the promotion of truth. Relatively unconstrained inquiry, according to Mill, has the best chance of eliciting truth: more opinions will be offered for consideration, and they will have the opportunity to be fearlessly tested. But Mill was not just interested in the prospects for intellectual inquiry. Mill also regarded free expression as the best way of providing for individuals' self-development and self-understanding. This is the second dimension of value. What mattered to him was the development of individuals' higher critical and emotional capacities, which permit them to realize distinctive human excellences and higher pleasures. The route to this destination will involve 'different experiments of living' (III.1).

Because these dimensions seem very different from each other, Mill needs a defence of the Doctrine of Liberty which can encompass both of them. Perhaps there are different things that need to be said about each dimension, but Mill still needs a consistent account, and would clearly benefit from some form of unified doctrine. My claim is that a broader characterization of the idea of liberal community may be able to achieve just this. It will either show the objections to come to be unfounded, or else demonstrate to us that, although the worries concerning harm are real, our resources for dealing with them are nonetheless constrained by the value of that liberal community.

### 3. Three Challenges in Free Speech Theory

Most of us acknowledge that free speech is a difficult issue. But we tend to think we know what the issues are about: we think we know when speech is free, and when it is restrained. But is that so obvious? In this section I outline three challenges of a more abstract or

conceptual nature to free speech theory. We will see later whether Mill's account can handle them.

I call the first challenge the Location Challenge. Imagine that Tom expresses a view about some political matter, and that this is followed by the furious denunciation of it by Daisy. The main thought behind the Location Challenge is that it may be unclear whether Daisy's denunciation of Tom's speech act reflects hostility to free speech, because it can be unclear whether her denunciation merely continues the conversation or condemns Tom for having started it. Now anyone who is interested in free speech will be invested in some form of this distinction: we think we grasp the distinction between continuing a conversation, on the one hand, and attempting to shut it down, on the other hand. If Daisy's intervention merely continues the conversation, then it would seem that no challenge as such to free speech has been made. If her intervention seeks to condemn Tom for starting it, then it might appear, by contrast, that some form of challenge to free speech has been issued.

To illustrate the Location Challenge, it will be useful to have a specific case in mind. I focus on one extensively discussed case—the 'Christakis Affair'—which unfolded at Yale University towards the end of 2015.<sup>3</sup> The preamble to the Christakis Affair was an email, sent by the Intercultural Affairs Committee, to Yale students in late October 2015, exhorting them not to dress for Halloween parties in ways which other students were likely to consider offensive. Erika Christakis, who, together with her husband Nicholas Christakis, served as faculty in residence at Silliman College at Yale, then sent a further email to the Silliman students, suggesting that the administrators' exhortations had been objectionably heavy-handed. This is an excerpt:

Even if we could agree on how to avoid offense – and I'll note that no one around campus seems overly concerned about the offense taken by religiously conservative folks to skin-revealing costumes – I wonder, and I am not trying to be provocative: Is there no room anymore for a child or young person to be a little bit obnoxious... a little bit inappropriate or provocative or, yes, offensive? American universities were once a safe space not only for maturation but also for a certain regressive, or even transgressive, experience; increasingly, it seems, they have become places of censure and prohibition. And the censure and prohibition come from above, not from yourselves! Are we all okay with this transfer of power? Have we lost faith in young people's capacity – in your capacity – to exercise self-censure, through social norming, and also in your capacity to ignore or reject things that trouble you?

This triggered a protest from the students. They composed an open letter which collected hundreds of signatures. This is part of it:

To ask marginalized students to throw away their enjoyment of a holiday, in order to expend emotional, mental, and physical energy to explain why something is offensive, is—offensive. [...] We are not asking to be coddled. The real coddling is telling the privileged majority on campus that they do not have to engage with the brutal pasts that are a part of the costumes they seek to wear. We, however, simply ask that our existences not be invalidated on campus. This is us asking for basic respect of our cultures and our livelihoods.

The pressure intensified: there were scenes of angry confrontation between the students and Nicholas Christakis, and further meetings between the students and the Yale President, Peter Salovey, were held. Eventually the pressure prevailed. The Christakis were forced to resign from their positions at Silliman in 2016, though Nicholas Christakis retained his academic position.

The particular feature of the Christakis Affair which the Location Challenge fastens upon is how to understand, or where to locate, the students' protest against Erica Christakis's email. We can distinguish between two interpretations: the external interpretation, and the internal interpretation.

On the external interpretation, the students were objecting to Christakis's intervention, and thus objecting to the exercise of free speech. Christakis's right to express her views was always qualified, on this interpretation, by values other than free speech, to which the value of free speech should defer. It is these other values which explained the Intercultural Affairs Committee's mission, as the open letter puts it, to 'challenge bias and promote cultural awareness, respect, and appreciation on campus'. Put crudely, we might say that these other values are broadly concerned with equality, or social justice, whereas the value of free speech is concerned with liberty. The students were challenging Christakis's right to free speech by appealing to other values which outweigh the value of free speech.

The internal interpretation provides another way of locating the students' intervention. On this view, we need not discount the students' intervention as a contribution to the free speech exchange. Yes, their voices may have been louder and less measured than Christakis's contribution had been, but free speech does not require cool-headedness. We can learn something about these attitudes by the inflexions of the speech acts they produced. In responding—angrily—to Erica Christakis's intervention, the students were extending the speech exchange, not demanding the retraction of her intervention. So they were not 'shutting down' her speech, but simply responding to it by the production of another speech act.<sup>4</sup>

The main point here is that what looks like an ‘external’ intervention—an intervention which is hostile to free speech—may just as easily be classified as an ‘internal’ intervention, or as just another move in the free speech exchange.<sup>5</sup> The internal interpretation does not deny that words have consequences, and can provoke hostility or censure, but no one should deny that. If we are to take these encounters seriously, then we have to accept that what is said may be consequential. Words can harm, and can be resisted.

The second challenge—the Internal Norm Challenge—is somewhat related to the Location Challenge. This challenge arises from the obvious point that the internal norms governing assertion within speech are normative. They offer guidance and advice, praise and admonition. One fairly plausible assertion norm can be called the Truth Norm: speakers should say things which are true, or at least which can be reasonably believed to be true by being proportioned to the evidence. The Truth Norm may require some refinement, but it will do for our purposes. Appeal to the Truth Norm can then explain hostile reactions to a particular speech act. Imagine that Tom argues that *p*, and that Daisy argues that not-*p*. Daisy takes Tom’s statement to be deeply problematic: Tom should not have argued that *p*, maintains Daisy, because *p* cannot be reasonably believed to be true. Imagine we agree with Daisy. So, Tom’s contribution was a mistake. In that sense, it would have been better had Tom not uttered what he did. But if we agree with Daisy that Tom should not have argued in the way he did for *p*, then we seem to be saying that it would have been better had Tom withheld the contribution he made. And this is puzzling: wasn’t Tom within his rights to argue that *p*, even if his argument did not stand up to scrutiny? Isn’t Tom’s right to argue that *p*, whatever his argument actually amounts to, precisely one which is protected by a doctrine of free speech? From within the exchange, however, Tom’s right to argue that *p* seems exposed to dismissive criticism—criticism which comes from another participant within the same exchange. The protective function of the value of free speech appears to recede from within the perspective of fellow participants in the free speech exchange.

The third challenge is the Convention Challenge. This challenge arises from the thought that there can be no such thing as an entirely free exchange of ideas without any rules and conventions for organizing and structuring these interactions. Return to Daisy and Tom. Imagine further that each of them strongly prefers to hold the floor and for the other to listen intently. They cannot both have it their own way. If they are going to interact at all, then it looks as though the norms or rules for their interaction will in some sense have to be negotiated. Each of them will have to compromise in order to have an intelligible conversation, a fortiori a productive intellectual encounter, with the other. The point is all the

more obvious in relatively formal institutional settings, such as university classes and public debates. Not everyone can speak at once; participants will have to allow dissenting opinions from being heard, and may be required to adopt forms of moderate address when they do speak, in order to stop things from spiralling into a shouting match. For each participant, accommodation and forbearance will be required. But no one seriously thinks that these processes of accommodation and forbearance curtail free speech. Rather, they are necessary ingredients in practices which provide for free speech. Free speech has to amount to more than just a cacophony of voices, all of them talking past one another and straining only to be the loudest. Free speech practices need to be constructed; they can perhaps be regarded as a negotiated settlement among interlocutors.

The Convention Challenge is a challenge because the indispensable role of conventions makes it harder to see what defenders and critics of free speech are really arguing about. Defenders of free speech can hardly insist that there should be room for unconstrained self-expression in our various interpersonal encounters: no one is given insufficient accommodation by the value of free expression if we are all required to conform to these moderating norms. And yet unconstrained self-expression is sometimes what free speech's defenders appear to demand. Similarly, critics of free speech do not have an obvious critical target should it turn out that there is not a 'pure' free speech situation, embedding various inequalities in standing or in expected impact of utterance, the value of which the defenders of free speech were supposedly trying to uphold. And yet that is sometimes the characterization of free speech offered by its critics. Intuitively, defenders and critics of free speech are in dispute about something: but what is it? These challenges will be revisited in Section 7.

#### 4. Three Problems for Mill's Liberalism

These challenges may indicate that the ultimate focus of our concern over free speech is not obvious. But there are other, more first-order problems for Mill's liberal account. In this section, I outline three of them.

The first problem concerns a striking tension between two conditions which emerge early on in *On Liberty*. Call this the Invasiveness Problem. Mill's principal target, announced at the outset of *On Liberty*, is not so much state oppression as social oppression. His major preoccupation is not with the tyranny of the state—the traditional preoccupation of Western political thought—but the 'tyranny of the majority' (I.4), in a phrase he borrows from Alexis

de Tocqueville. Mill is concerned just as much with the ‘social stigma’ of non-conformity with conventional behaviour as with the ‘legal penalties’ (II.19) attaching to such non-conformity. He worries about the dangers of ‘social tyranny’ in the following passage:

Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own. (I.5)

As an antidote to this sort of social hostility, Mill wishes to create the conditions for the growth of genuine individuality. Part of what he wants the Doctrine of Liberty to achieve is a sort of social space where people can freely engage in inquiry and in self-expression. He urges us to take steps to self-discovery and self-creation, not to march in step with everyone else and settle for dull conformity to existing views and practices. This is a precondition to a higher sort of self-realization and the fullest development of our higher capacities for well-being. Call this the Individuality Condition.

The Individuality Condition requires, or appears to require, that we keep other people off our backs. We need room to breathe, to discover ourselves, surrounded by trusted people with whom we freely associate. But that is not all. Mill also wishes to provide for what we can call the Critical Friction Condition. He foresees that our various attempts at self-definition will elicit criticism from others, and he does not flinch from describing the reactions to which he anticipates we may then be subject. I may be judged ‘necessarily and properly a subject of distaste’ or even ‘contempt’; I may be regarded as a ‘fool’, or ‘a being of an inferior order’; I may be shunned (IV.5). My self-regarding views and actions may make me ‘an object of pity, and perhaps of dislike’; I risk a ‘loss of consideration’ (IV.7) in the eyes of others. These are the ‘inconveniences which are strictly inseparable from the unfavourable judgments of others’ (IV.6).

Moreover, in one important sense these critical encounters are meant to be troubling.<sup>6</sup> That is how we achieve goodness in the plurality of experiments in living, and truth in the opinions we argue over. Experiments in living are not valuable simply because particular

individuals go in for them, any more than opinions are true because particular individuals espouse them: in order for our experiments in living to have value, and our opinions to have any chance of being true, critical testing is required. Mill is not content to say simply that we have a right to speak or express ourselves freely. He also wants the social environment to be shaped in a certain way, so that exercises of this right acquire value.

Now perhaps Mill may wish to distinguish between benign interactions with others, which help us to achieve self-realization and to arrive at the truth, and malign interactions with others, which impede those ends. But how can he know in advance which type of interaction will occur? Why do these permitted forms of censure fall short of the (metaphorical) ‘whips and scourges’ (IV.4) from which he is aiming to protect us? There seems, in short, to be the possibility of conflict between the Individuality Condition and the Critical Friction Condition. It is problematic that the critical friction Mill relies upon is potentially at loggerheads with the individuality he prizes. It is as though he thinks we are already rugged individuals, able to take social resentment in our stride. Mill appears to take comfort from the fact that, whatever is thrown at an individual, she is ‘the final judge’ (IV.4). But rugged individualism is as much a social creation as much as anything else in the social world. Why does Mill think that the conditions he outlines favour the creation of such a type of individual? The fact that she is the final judge of her own life is unlikely to be of much good to her if she lacks the social confidence to repose trust in her final judgment, or to advance a final judgment which risks critical derision.

The second problem with Mill’s theory concerns truth-promotion in particular. We can call it the Sub-Optimality Problem. The worry here is that unrestricted free speech may lead us towards error, rather than towards truth. It cannot be assumed that the free ‘marketplace of ideas’ clears at the point of truth-maximization. People can become enmeshed in bias and prejudice, thus obstructing the attainment of truth. True, these entrenchments of bias and prejudice can in turn be freely challenged by others, but satisfactory uptake from such critical interventions is not guaranteed. Critics and dissidents can be easily demonized, discredited, and dismissed. Inconvenient truths can be casually dismissed as ‘fake news’ by those who can rely upon the support of a constituency who already bear heavy grudges towards those who announced those truths. It is natural to suspect here that Mill is over-estimating most people’s appetite for intellectually serious, and critically fair critical dealings. Unrestricted free speech is unlikely to conform to the high-minded ‘seminar model’ which Mill may, naïvely, have had in mind.<sup>7</sup>

The third problem is the Vulnerability Problem. One of the inspiring and charismatic features of *On Liberty* is that Mill is cheering on the critics of the blinkered and hierarchical world views of the political establishment in Victorian Britain. But unrestricted speech in our world is not always aimed at the rich, the blinkered, the corrupt and the powerful. It has other targets as well. It is often directed at members of our social world who, by any reasonable measure, are already socially vulnerable and marginalized, thus risking an enlargement of their social vulnerability. As a result, we risk undermining their dignity and social self-respect, and inhibiting their contributions to free speech and ability to fashion their lives in ways that Mill envisaged.<sup>8</sup> To some, the recent flashpoints about free speech on North American campuses have suggested that ‘[w]hat is under severe attack, in the name of an absolute notion of free speech, are the rights, both legal and cultural, of minorities to participate in public discourse’ (Baer 2017). If Mill cared about free speech, then shouldn’t it have occurred to him that not everyone will be able to make herself heard in the ensuing critical din? A *laissez-faire* approach to who is waving and who is drowning in this social environment seems problematic.

The following model, which aims to describe the ‘logical space of free speech’ (Braddon-Mitchell and West 2004, p. 440), may help to shed further light on this collection of problems. According to David Braddon-Mitchell and Caroline West, free speech is organized around three distinct axes (Braddon-Mitchell and West 2004, West 2012). The first of these axes is a ‘production’ (or ‘distribution’) axis. This axis concerns the production of speech acts. The second axis is the ‘comprehension’ axis, where the speech acts produced in the production axis aim to be understood by other people. The third axis is the ‘consideration’ axis, where the speech acts produced by the production axis, and understood by the comprehension axis, aim further to be taken into deliberative consideration, not just summarily dismissed or overlooked. We need a free circulation of ideas going from the production axis, to the comprehension axis, to the consideration axis, if there is going to be, in the relevant sense, an adequate amount of free speech.

Now defenders of free speech tend to be focused on the first of these axes: the production axis. Their concerns are generally with attempts to shut down free speech. True, the circulation of ideas will indeed be reduced if operations from the production axis are curtailed. But the production axis is not the only thing we should be worried about, if we profess to be concerned with free-flowing contributions to the marketplace of ideas. If there are obstructions in the pathways between the production axis and the comprehension axis, or

between the comprehension axis and the consideration axis, there will also be reductions in free speech.

To give emphatic expression to these points, West imagines the existence of a Meaning Obliterator (West 2012, p. 226), which systematically scrambles the speech acts produced by speakers, so that they cannot be understood by others. The existence of a Meaning Obliterator, which systematically impedes the pathway between the production axis and the comprehension axis, would be just as perilous to free speech as prior restrictions on the production of speech. Similarly, West imagines the existence of an Input Buffer (West 2012, p. 229), which systematically impedes the pathway between comprehension and consideration. The Input Buffer ensures that, even if speech acts are produced and understood, they never get taken into consideration. Again, the existence of an Input Buffer would be just as injurious to free speech as prior restrictions on the production of speech.

For the value of free speech to be upheld, Braddon-Mitchell and West think that we require completed pathways between production, comprehension, and consideration.<sup>9</sup> No particular axis is privileged. The Invasiveness Problem is concerned with the production axis, whereas the Sub-Optimality Problem and the Vulnerability Problem seem potentially concerned with all three axes.

The accusations facing Mill, in summary, suggest that he has not fully provided for the conditions which may need to be in place for any of these free speech axes to be functioning as it should be, and to be in proper contact with the other axes. He is too concerned with the production axis, and not sufficiently concerned with the other axes. Moreover, even in respect of the production axis, Mill is exposed to the Invasiveness Problem.

## 5. Impact, Offence, and Free Association

These are grave problems. Does Mill have any chance of tackling them successfully? I tentatively favour an affirmative answer. I offer the following in a spirit of critical reconstruction rather than exegetical fidelity. Mill's commitments are complicated, and I am not convinced that there is a single path, suggested by his text, out of the difficulties facing him. Accordingly, I take the suggestions to come to be consistent only with the spirit, if not always the letter, of Mill's arguments.

Two immediate preliminary points need to be made. The first of them is that Mill should deny what I call the Equal Impact Claim, or the claim that there should be equal

prospects for impact in the opinions we voice. Imagine that Tom is a climate change sceptic, whereas Daisy holds that the evidence for climate change is overwhelming. If we are concerned with truth-promotion, we cannot intelligibly hope that these conflicting opinions have equally successful uptake. The point of free speech cannot be that we are always in a state of acute indecision between our epistemic or practical options, due to the fact that the reasons favouring them are so closely balanced. If Tom becomes a laughing stock, he has no complaint. His views do not have to be taken seriously; there is no particular level of adherence to them which he has the right to insist upon. The same goes for experiments in living. If my experiment in living is less popular than yours, and opens me to social censure or derision that yours does not, then I also lack a complaint. That is just the way things go in the social world. I may have hoped for greater esteem, influence, or popularity, but I cannot impugn other people for not granting me these social advantages. Ronald Dworkin seems quite correct to hold that my engagement with others in a free community does not bring with it the right to equal influence or popularity, or the right to get the social environment to conform to what I want it to be (Dworkin 1996a, p. 238). Mill should agree with Dworkin.

Now Tom does not have the right for his opinions to prevail. But can he at least reasonably expect them to be listened to, or to be taken into consideration? If Mill is going to all the trouble of insisting that people should have uninhibited opportunities to speak, then it may appear to follow that we also owe Tom the duty of hearing what he has to say. Won't our collective refusal to engage with his views have the same cumulative effect that West's Input Buffer would have? This is an important juncture in the argument. On the one hand, the existence of an Input Buffer would be undeniably harmful to the value of free speech. On the other hand, listening to Tom would also prevent us from pursuing the other things we want to do with our lives.

Mill should place the emphasis on the rights of free association. This is the key to Mill's most important commitments in the area. Tom's expectation that he be listened to must be tempered by our rights of free association. In addition to denying the Equal Impact Claim, Mill should uphold what we can call the Free Association Claim.

In illustration of the Free Association Claim, consider the following case:

#### Soul-Saving

Nick is an evangelical Christian. He lives to spread the word of God, and to save souls. He is stationed at his usual place, in the town centre, when the cheerfully agnostic Jordan walks past. 'Do you want to know how you can save your soul?', he

earnestly asks her. ‘Thanks, but no thanks’, is Jordan’s blasé reply, as she saunters on by.

In Soul-Saving, the Braddon-Mitchell-West view will judge Jordan to be turning in a weak performance along the axes of comprehension and consideration. Jordan’s failure to take any of Nick’s views into consideration potentially impedes the value of free speech every bit as much as the denial to Nick of the initial opportunity to try to sell his evangelical wares to her.

That verdict strikes me as incorrect, given a proper understanding of what the Millian system is aiming at. Jordan’s refusal to engage with Nick is permitted by the Free Association Claim. Though Nick has the right to make overtures to her, Jordan is within her rights to rebuff those overtures. Neither is she obliged to give any other religious proselytizer the time of day. It is up to her. These rights are simply opposite sides of the same coin. The complement of the value we place on the right to engage with others is the value we place on the right to disengage with them. The value of free expression, for Mill, is constrained by the value of freedom of association, or by what he calls the freedom of ‘combination among individuals’ (I.12).

The Free Association Claim implies that our lives need not be organized around the collective search for truth; we need not pursue earnest conversations with others with advice to give, or at least deliberate carefully about their views. That is not the community Mill should be taken to be after. He should not regard life as one big seminar. It also follows that we cannot reasonably expect certain forms of recognition, if those forms of recognition require active engagement with others.

Mill does think that the arrangements he outlines offer the best way of alighting on truth, and of achieving self-realization. But his aim in the first instance should be to secure constrained forms of truth-maximization and self-realization, not maximal forms of these values. The reason for thinking that the remedy for ‘bad speech’ is further speech is not that it offers us a sure-fire way of truth-maximization and a reduction of prejudice—it may or may not eliminate prejudice and blind alleys—but that this may be the only permissible remedy for inquiry-slumps respecting the Free Association Claim. This remedy may function, not purely as a means to an end, but as a constrained means to that end. This should form the substance of Mill’s preliminary reply to the Sub-Optimality Problem. (He can supplement this reply, as we shall see in Section 6.)

Mill can also make some quick headway with the Invasiveness Problem and the Vulnerability Problem. First, he is entitled to rely on the Equal Impact Claim. He should

supplement this claim with the point that we cannot take wounded or hurt feelings, or feelings of offensiveness, as the criterion which triggers a presumptive case for regulation. In other words, Mill should deny what I shall call the Offensiveness Claim, which would make the bare presence of hurt, offended, or wounded feelings a sufficient condition for making speech acts a candidate for regulation.<sup>10</sup> There are certain things that Mill can insist upon, as we shall see, for preserving a decent social environment for hearers and bystanders. But he should not countenance an appeal to individuals' offended feelings as a criterion for the rightness of regulation. We are entitled to insist upon some degree of critical robustness, and to be able to look for something beyond offended feelings as a workable ground of regulation.

To take stock of the points made so far, let us return to the Yale students' open letter of protest about Erika Christakis's intervention. They wrote: 'To ask marginalized students to throw away their enjoyment of a holiday, in order to expend emotional, mental, and physical energy to explain why something is offensive, is—offensive.' Mill should simply disagree with these points. Even if he would have been sympathetic to them as marginalized individuals, his account offers no compelling reason to keep tabs on individuals' expenditures of emotional and mental energy in getting their points across. It does not matter that some individuals should have to expend more emotional or intellectual effort than others in the interactions they have, and nor does it matter that some individuals experience higher levels of frustration or offensiveness than others. Mill's aim cannot be to minimize feelings of offensiveness, or to manage the incidence of frustration or offensiveness so that they impact on everyone in roughly equal quantities.<sup>11</sup>

As far as they go, these points strike me as compelling. Mill should deny the Equal Impact Claim and the Offensiveness Claim, and throw his weight squarely behind the Free Association Claim. But this collection of commitments does not by itself inspire much optimism that a social environment consisting of happy, fulfilled, critically supple individuals can be created. The broad tension between the Individuality Condition and the Critical Friction Condition remains in place. Some individuals, faced with a hostile critical environment, are still likely to wilt under the pressure. Many individuals in our society will be miserable, and the distribution of this misery will look frankly suspicious; as evidence of a bullying and insensitive culture that keeps marginalized individuals down and knows how to keep them down. Even if we had to put up with this sort of society, it would not warrant celebration. More pointedly, this is surely not a vision of the society which Mill is trying to commend to us in *On Liberty*. What else does Mill have to offer?

## 6. Further Millian Remedies

Mill has other remedies for the Invasiveness Problem and the Vulnerability Problem. The first of these concerns economic vulnerability. Mill regards economic vulnerability as a profound source of personal and social inhibition. Those who are already economically secure ‘have nothing to fear from the open avowal of any opinions, but to be ill-thought of and ill-spoken of, and this it ought not to require a very heroic mould to enable them to bear’ (II.19). The implied contrast here is with those whose economic dependence on others will rob them of any inducement to express themselves in a confident way.

A second potential remedy concerns the ‘positive instigation to some mischievous act’ (III.1) which Mill discusses in the context of an imagined denunciation of corn-dealers addressed to an inflamed mob, gathered in proximity to a corn-dealer’s house. Every theory of free speech has to deal with cases of incitement and ‘fighting words’. The corn-dealer case allows Mill to retain the view that utterances made in certain contexts may be regulated, though the content of the opinion stated by these utterances is not necessarily restricted; there will be other contexts in which they can be safely promulgated. What the proscribed contexts may have in common is that they are likely to be rationality-suppressing; when utterances are made in such contexts, the opinions they express cannot be properly grasped or tested, and thus do not contribute to rational exchange (Scanlon 1972). Members of an excitable mob have little chance of responding rationally to the ideas presented to them.

There may be more to be recovered from this range of cases. The idea of broader group defamation, for example, does not seem incoherent on the face of it, and if that is so, then hate speech can be regulated as well (Waldron 2012).<sup>12</sup> But we must tread carefully here. Jeremy Waldron thinks that hate speech can be regulated in order to avoid harm to the ‘dignitary order of society’ (Waldron 2012, p. 92). By restricting hate speech, individuals from vulnerable social groups can be given ‘assurance ... that they can count on being treated justly’ (2012, p. 85) in their everyday lives. But such assurance should not proceed through the absence of feelings of offence or hurt feelings. Despite his assurances to the contrary, Waldron’s ideas risk being difficult to implement without capitulating to the Offensiveness Claim which Mill should reject.<sup>13</sup> We need to enlarge the circle of critical ideas if Waldron’s proposals stand any chance of being honoured.

A more valuable set of materials for Mill to build on comes from a source which may seem on initial inspection to be unpromising. Mill points to possible restrictions arising out of nuisance behaviour (III.1), and in response to ‘violations of good manners’ and ‘offences against decency’ (V.7). These may look at first like concessions to Victorian primness, from

whose orbit perhaps even Mill was unable to escape. But I think they enjoy a much deeper significance than that. They confirm Mill's awareness of the importance of conventions in shaping free speech environments.

The need to abide by good manners and to avoid indecency arises from the fact that our activity unfolds in public social space. I do not own public social space, and this means that I may have to conform to certain restrictions on the behaviour I am entitled to produce in it. I cannot claim the right to walk around naked in a public space, or engage in sexual acts with consenting others, if other people also have the right to inhabit those spaces. I am not at liberty to play loud music in a residential area at 3:00 in the morning. If I were free to engage in such activity, then others would not be free to inhabit an environment in which they were not exposed to it. Moreover, the reasons for these restrictions need not reflect any direct capitulation to the Offensiveness Claim.

So what concerns do they reflect? Mill sees the need to construct a public space where we feel able to relate to each other as fellow members of our moral and political community. These conditions partly consist in conditions that structure our expectations, giving us fair warning of what we can and what we cannot do in public. But they go beyond 'fair warning' conditions. As Skorupski (2006, p. 45) correctly notes, the relevant conditions on behaviour in public social spaces are ineluctably normative. There is a difference between designating some carriages on trains as quiet carriages and designating other carriages as 'Whites only': quiet carriages do not infringe the rights of noisy people, whereas 'Whites only' carriages would infringe the rights of non-white people.

What Mill should be looking to create are conditions where people can feel comfortable in interacting with each other in ways that realize the value of the Critical Friction Condition. This will mean, *inter alia*, that people are not acutely uncomfortable with each other in common social space, and that they do not experience fear or distress, or drastic inconvenience. Now the source of these feelings may seem too intolerably subjectivist to give Mill what he is seeking. After all, fear and distress might be engendered by the awareness that one is sharing the public environment with people of a distrusted ethnicity or background. Such feelings must be dismissed. Or some people may simply have eccentric demands on appropriate standards for social cohabitation: perhaps I think that no one should appear in public wearing a threadbare three-piece suit.<sup>14</sup>

How do we avoid capitulating to such preferences? As a rough guide to regulation, I propose the following: people's feelings of discomfort and distress may be a relevant source to possible restrictions on behaviour as long as those feelings are not best explained by the

thought that other people are not fit to share the social environment with them, or the thought that other people are somehow unworthy of presenting themselves in a minimally expressive way. The suggestion is admittedly very coarse-grained, and leaves us with much work left to do—for one thing, people are often blind to their prejudices—but I believe that Mill can do something with it. It provides us with a rough test for the relevance of feelings of discomfort and distress that admits of further refinement.

Finally, we can note that it is consistent with the Free Association Claim that there are more specialized sectors of our society, access to which is voluntary, which operate with more refined or demanding rules for respectful address and engagement: universities, for example. Campus speech codes do not, merely as such, impugn free association, and the rules for interacting in such environments may be much denser and more demanding than they would be in ordinary public spaces. Proxies for sensible regulation may—and, I think, should<sup>15</sup>—still largely be provided by an institutional repudiation of the Equal Impact Claim and the Offensiveness Claim, but there will inevitably be less emphasis on the Free Association Claim. After all, these individuals are already gathered in a place where they freely chose to be, which then allows the institutional environment to be carefully shaped in ways that are expected to promote the aims of that institution.

The structure of such environments can also do something to compensate for the inefficiencies and slackness in truth-promotion which we risk having to settle for in ordinary public environments. The rules for conducting inquiry in universities, and for interacting in them, have a steeper price of entry, and are more demanding. None of this needs to be condemned by a broadly Millian approach.

## 7. Revisiting the Three Challenges

In this final section I shall briefly revisit the three conceptual challenges from Section 3, to outline how a Millian account can handle them.

I shall take the Location Challenge and the Internal Norm Challenge together. What these challenges primarily demand is that we get clearer on what kind of value the value of free speech is. On my view, free speech is a value possessed by a practice, or an institution. It describes the rules applying to conduct and expression in public or social spaces, and it recovers a value for them. This value is scalar; it falls on a sliding scale. One central measure of this value, as I see it, is provided by the sanctions which are thought to be properly applicable to those whose contributions to a free speech exchange are regarded as defective.

More punitive sanctions imply that the practice or institution offers a lesser degree of accommodation of the value of free speech, and less punitive sanctions imply that the practice or institution offers a higher degree of accommodation of the value of free speech. When the sanctions are particularly steep—when contributions that are judged to be defective are met, for example, with the demand for criminal prosecution, or for speakers to lose their jobs, or to be denied any admissible platform for the promulgation of their views—then free speech has been accorded a lower degree of value.

This characterization of free speech allows ‘internal’ interventions to be forceful, and indeed perhaps aggressive: individual contributors to an exchange are not tasked with the job of defending free speech as such. They are not treated as the last-gasp guardians of the value of free speech every time they open their mouths. Their contributions do not therefore have to be pitched at the level of gently encouraging or non-judgmental. It will all depend. They are participants in free speech, whereas the value of free speech is the value of a practice, or institution. It is only if these participants reach for certain sanctions going beyond the normal institutional standards of dissent and criticism that they risk offending against the value of free speech.<sup>16</sup>

Mill’s acknowledgement of the need to avoid ‘violations of good manners’, ‘offences against decency’ and anti-nuisance behaviour indicates his awareness of the irreducible role of conventions in the construction of free speech environments. Free speech has to be constructed; it is not realized simply when inhibitions against speech and expression are lifted. Free speech is not simply unregulated speech, any more than free action is whatever action unfolds in entirely unregulated social environments. Free speech also aims to get certain results. It is freedom directed to the attainment of certain ends. But it is an important—and valuable—part of Mill’s theory that some of the values he expects will be realized through free speech may be thwarted, temporarily or otherwise, by the fact that other people, associating in ways that suit them, may simply prove to be a disappointment to us, and perhaps to themselves.<sup>17</sup>

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## NOTES

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<sup>1</sup> The in-text references will be to the chapter and paragraph number of *On Liberty* (which has been published in innumerable editions).

<sup>2</sup> I take the term 'Doctrine of Liberty' from the useful discussion in Jacobson (2000).

<sup>3</sup> The Christakis Affair was much discussed in the news media and in opinion pieces: see, for example, Nelson (2015), Friedersdorf (2015), Stack (2015), and Manne and Stanley (2015).

<sup>4</sup> There are strong hints of this interpretation of the Christakis Affair in Manne and Stanley (2015).

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<sup>5</sup> Similar issues may arise in certain regions of metaethics: in particular, the quasi-realist's distinction between the 'internal reading' and the 'external reading' of claims in moral discourse. For more details, see Blackburn (1993), and Dworkin (1996b).

<sup>6</sup> Waldron (1987), (1993) provides a particularly uncompromising interpretation of this idea.

<sup>7</sup> The phrase 'seminar model' is taken from Haworth (1998).

<sup>8</sup> These ideas are pursued by Waldron (2012). I revisit Waldron's views in Section 6.

<sup>9</sup> These considerations, for Braddon-Mitchell and West, further serve to determine what free speech is. Free speech, for them, is a distinct normative kind of speech; it consists of speech that is valuable, because it increases the probability that truth will be attained. I won't directly challenge their methodology, but rather the substantive conclusions about free speech that Braddon-Mitchell and West recover from it.

<sup>10</sup> I do not deny that such feelings may be a source of harm. Following Jacobson (2000), I am exploring the grounds for upholding the Doctrine of Liberty which may require us to abandon the assumption that it is a corollary of the Harm Principle.

<sup>11</sup> Should Millians adopt this line in our world, though? Even if the distribution of offence and frustration in the ideal world would not be problematic, its distribution in our non-ideal world may seem more problematic, given background conditions of injustice. But in my view the line needs to be held: I think it would be unwise for Millians to make free speech situations absorb the burdens of wider types of injustice. These need separate remedies. The fact that this issue arose in an academic institution, however, may possibly make some difference: see section 6. Thanks to Carl Fox and Léa Salje for flagging up this point.

<sup>12</sup> Some significant alteration in stance appears to have taken place between Waldron (2012) and Waldron (1987), (1993).

<sup>13</sup> See Leiter (2012) for a powerful critical discussion of Waldron's main arguments.

<sup>14</sup> Thanks to Aaron Meskin for this example.

<sup>15</sup> As I suggested in Section 5, in connection to the Christakis Affair.

<sup>16</sup> And it is in this more specialized context that we should largely understand the phenomenon of 'no-platforming': see Simpson and Srinivasan (2017) for a helpful discussion.

<sup>17</sup> Earlier and slightly different versions of this material were presented at workshops in Leeds and Southampton, respectively. Thanks to everyone who commented, and in particular to Carl Fox and Joe Saunders, and to Brian McElwee, for the invitations to these respective workshops. I'm also grateful to the participants of a Work in Progress Seminar at Leeds for their very helpful comments on an advanced draft, including Ed Elliott, Matthew Kieran, and

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