

## IN PRAISE OF EVIL THOUGHTS\*

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*Abstract: Freedom of thought means freedom from social tyranny, the capacity to think for oneself, to encounter even shocking ideas without shrinking away from them. That aspiration is a core concern of the free speech tradition. It is not specifically concerned with law, but it explains some familiar aspects of the First Amendment law we actually have—aspects that the most prevalent theories of free speech fail to capture. It explains the prohibition of compelled speech, and can clarify the perennial puzzle of why freedom of speech extends to art and literature. It also tells us something about the limits of legal regulation, and about the ethical obligations of private actors.*

KEY WORDS: First Amendment, freedom of speech, freedom of thought, John Stuart Mill, John Milton

“The government ‘cannot constitutionally premise legislation on the desirability of controlling a person’s private thoughts.’”<sup>1</sup>

Freedom of thought is a familiar part of the canon of human rights.<sup>2</sup> The notion is, however, puzzling. How could thought *not* be free? Hobbes argued that citizens have an absolute obligation never to speak ill of the sovereign, but that private thoughts are different. “A private man has always the liberty, (because thought is free,) to beleeve, or not beleeve in his heart ... But when it comes to confession of that faith, the Private Reason must submit to the Publique ....”<sup>3</sup> One must follow church law, which is properly laid down by the state, but is “not bound to believe it: for men’s believe, and interiour cogitations, are not subject to the commands, but only to the operation of God, ordinary, or extraordinary.”<sup>4</sup> It is, he admits, impossible to control thoughts: “Beleef, and Unbelief never follow mens Commands.”<sup>5</sup> We can’t even control our own: “The secret thoughts of a

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<sup>1</sup> *Ashcroft v. Free Speech Coalition*, 535 U.S. 234, 253 (2002), quoting *Stanley v. Georgia*, 394 U.S. 557, 566 (1969).

<sup>2</sup> For example, it is enshrined in Article 18 of the 1948 Universal Declaration of Human Rights.

<sup>3</sup> Thomas Hobbes, *Leviathan*, ed. C. B. Macpherson (London: Pelican, 1968), chap. 37, 478.

<sup>4</sup> *Ibid.*, chap. 26, 332.

<sup>5</sup> *Ibid.*, chap. 42, 527.

man run over all things, holy, profane, clean, obscene, grave, and light, without shame, or blame.”<sup>6</sup> But “verball discourse cannot do” this, “farther than the Judgement shall approve of the Time, Place, and Persons.”<sup>7</sup> As the old German song puts it, “die Gedanken sind frei.” Thoughts are free. The song was defiantly quoted by prisoners in Nazi concentration camps: whatever they do to us, they can’t imprison that.

One response is that, if people think independently, it will be hard for them to keep their thoughts bottled up inside.<sup>8</sup> But what really matters is the converse: if people must keep their thoughts to themselves, they are less likely to think independently. That was John Stuart Mill’s concern.

Mill is best known to free speech theorists as an opponent of government censorship. But the state is not the only censor he worries about. He denounces “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.”<sup>9</sup> He fears a population “whose whole mental development is cramped and their reason cowed by the fear of heresy,” and “who dare not follow out any bold, vigorous, independent train of thought, lest it should land them in something which would admit of being considered irreligious or immoral.”<sup>10</sup>

For Mill, freedom of thought means freedom from social tyranny, the capacity to think for oneself, to encounter even shocking ideas without shrinking away from them. That aspiration is a core concern of the free speech tradition, one that theorists have curiously neglected. It is not specifically concerned with law, but it explains some familiar aspects of the First Amendment law we actually have—aspects that the most prevalent theories of free speech fail to capture. It explains the prohibition of compelled speech, and can clarify the perennial puzzle of why freedom of speech extends to art and literature. It also tells us something about the limits of legal regulation, and about the ethical obligations of private actors.

<sup>6</sup> *Ibid.*, chap. 8, 137.

<sup>7</sup> *Ibid.* On the reticence that Hobbes demands, see generally Theresa M. Bejan, *Mere Civility: Disagreement and the Limits of Toleration* (Cambridge and London: Harvard University Press, 2017), 82–111.

<sup>8</sup> Thus J. B. Bury (*A History of Freedom of Thought* [New York: Henry Holt, 1913], 7–8) says:

It is unsatisfactory and even painful to the thinker himself, if he is not permitted to communicate his thoughts to others, and it is obviously of no value to his neighbours. Moreover it is extremely difficult to hide thoughts that have any power over the mind. If a man’s thinking leads him to call in question ideas and customs which regulate the behaviour of those about him, to reject beliefs which they hold, to see better ways of life than those they follow, it is almost impossible for him, if he is convinced of the truth of his own reasoning, not to betray by silence, chance words, or general attitude that he is different from them and does not share their opinions.

<sup>9</sup> John Stuart Mill, *On Liberty*, ed. Gertrude Himmelfarb (London: Penguin, 1974 [1859]), 63.

<sup>10</sup> *Ibid.*, 95.

## I. NEITHER AUTONOMY NOR DEMOCRACY NOR TRUTH

The Supreme Court has declared that, under the First Amendment of the U.S. Constitution,<sup>11</sup> “government has no power to restrict expression because of its message, its ideas, its subject matter, or its content.”<sup>12</sup> Here are the standard justifications for that rule:

*Democracy:* The people can’t control the government if the government gets to control what the people think.<sup>13</sup>

*The pursuit of truth:* Discussion controlled by the state is less likely to discover truth than a free market in ideas.<sup>14</sup>

*Autonomy:* Human dignity depends on the freedom to pursue self-realization.<sup>15</sup>

These theories don’t capture Mill’s fear of social tyranny. In his nightmare scenario, a culture in which thoughts are pervasively constricted by the fear of heresy, those ends are generally achievable. They are indifferent to Mill’s idea of freedom of the mind.

Let’s consider them in turn.

Autonomy seems the most promising value for Mill to appeal to. But the fear of heresy is not necessarily opposed to autonomy. It might even instantiate it. The person who is thus constrained might *endorse* the constraint. She may internalize the fear of heresy to the point where she is unwilling to entertain the forbidden thoughts.

Freedom of thought might be understood —though not by Mill! —in the way that Harry Frankfurt has suggested we should understand freedom in general. What distinguishes humans from other species, Frankfurt claims, is that humans have desires about desires, what Frankfurt calls “desires of the second order.” Humans “are capable of wanting to be different, in their preferences and purposes, from what they are.”<sup>16</sup> A person has free will if “he is free to will what he wants to will, or to have the will he wants.”<sup>17</sup> If a

<sup>11</sup> U.S. Constitution, amendment 1, provides in pertinent part: “Congress shall make no law ... abridging the freedom of speech, or of the press ...”

<sup>12</sup> *Police Department of the City of Chicago v. Mosley*, 408 U.S. 92, 95 (1972).

<sup>13</sup> See Cass R. Sunstein, *Democracy and the Problem of Free Speech* (New York: Free Press, 1993); Harry Kalven, Jr., “The New York Times Case: A Note on ‘The Central Meaning of the First Amendment,’” *Supreme Court Review* 191 (1964): 191–221; Alexander Meiklejohn, *Political Freedom: The Constitutional Powers of the People* (New York: Harper, 1960).

<sup>14</sup> “It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail.” *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969). Mill presses this argument in Chapter Two of *On Liberty*.

<sup>15</sup> See David A. Strauss, “Persuasion, Autonomy, and Freedom of Expression,” *Columbia Law Review* 91 (1991): 334–71; Martin Redish, *Freedom of Expression: A Critical Analysis* (Charlottesville, VA: Michie Publishing, 1984); C. Edwin Baker, “The Scope of the First Amendment Freedom of Speech,” *U.C.L.A. Law Review* 25 (1978): 964–1040; David A. J. Richards, “Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment,” *University of Pennsylvania Law Review* 123 (1974): 45–91; T. M. Scanlon, “A Theory of Freedom of Expression,” *Philosophy and Public Affairs* 1 (1972): 204–226.

<sup>16</sup> Harry G. Frankfurt, “Freedom of the Will and the Concept of a Person,” in *The Importance of What We Care About* (Cambridge: Cambridge University Press, 1988), 12.

<sup>17</sup> *Ibid.*, 20.

person “is performing an action that he wants to perform,” and if “his motive in performing this action is a motive by which he truly wants to be motivated,” then “the person is enjoying as much freedom as it is reasonable for us to desire.” The freedom thus exercised is “as close to freedom of the will as finite beings, who do not create themselves, can intelligibly hope to come.”<sup>18</sup> Moral responsibility, thus understood, can exist even in a deterministic world: “if someone does something because he wants to do it, and if he has no reservations about that desire but is wholeheartedly behind it, then—so far as his moral responsibility for doing it is concerned—it really does not matter how he got that way.”<sup>19</sup>

Over the course of Frankfurt’s career, T. M. Scanlon observes, there has been “a shift of emphasis . . . from concern with an agent’s ‘ownership’ of his or her desires as a precondition of moral appraisal to a concern with an ideal of psychic health.”<sup>20</sup> The object of the inquiry now is the good life. A person’s life is (at least in that respect) good if the person is “enjoying the inner harmony of an undivided will.”<sup>21</sup> One understanding of the value of democracy is as a remedy for political alienation: the people can embrace the law because they are its authors, and it represents their general will. It restricts their individual liberty (as all law does), but it does that in a way consistent with their second-order desires. If they have a second-order desire to live in an environment in which certain heresies are unthinkable, then a restriction that manifests that desire is an exercise of collective freedom.

One can freely and even cheerfully cramp one’s own moral development. Many do. That is one manifestation of freedom as Frankfurt understands it. If I am subject to social tyranny, and my reason is cowed by the fear of heresy, but I endorse these constraints, then in Frankfurt’s sense I am free.

What about democracy? It is thwarted if those in authority can prevent criticism of their performance in office.<sup>22</sup> But what if the people themselves are devoted to an orthodoxy that restricts what is said and thought? Suppose they *like* social tyranny, and want the state to enforce that orthodoxy?<sup>23</sup> It’s possible for the people to ratify what government does, free of manipulation by that government, and still be stultified in the way Mill feared.

<sup>18</sup> Harry G. Frankfurt, *The Reasons of Love* (Princeton, NJ: Princeton University Press, 2004), 20; see also Harry G. Frankfurt, *Taking Ourselves Seriously and Getting It Right*, ed. Debra Satz (Stanford, CA: Stanford University Press, 2006), 14–16.

<sup>19</sup> Harry Frankfurt, “Reply to John Martin Fischer,” in Sarah Buss and Lee Overton, eds., *Contours of Agency: Essays on Themes from Harry Frankfurt* (Cambridge, MA and London: MIT Press, 2002), 27.

<sup>20</sup> T. M. Scanlon, “Reasons and Passions,” in Buss and Overton, *Contours of Agency*, 167. See also Sarah Buss and Lee Overton, “Introduction,” in *Contours of Agency*, p. xii.

<sup>21</sup> Frankfurt, *Reasons of Love*, 97.

<sup>22</sup> James Madison, “The Virginia Report,” in Marvin Meyers, ed., *The Mind of the Founder: Sources of the Political Thought of James Madison*, rev. ed. (Hanover, NH: Brandeis University Press, 1981), 229.

<sup>23</sup> Frederick Schauer, *Free Speech: A Philosophical Enquiry* (Cambridge: Cambridge University Press, 1982), 40–44.

Whether the fear of heresy blocks the pursuit of truth will depend on how much truth we already have in our grasp. The condemnation of racism is a powerfully entrenched orthodoxy today. Yet it's also the case that racism is a delusion to which Americans are prone, and that its reflexive condemnation prevents some destructive errors.<sup>24</sup> The same point could be made about various other nasty beliefs. Sometimes social tyranny is good for us.<sup>25</sup>

But this misses Mill's concern. He values "the clearer perception and livelier impression of truth produced by its collision with error."<sup>26</sup> If the reasons for even a true opinion are held without understanding the arguments both for and against it, "it will be held as a dead dogma, not a living truth."<sup>27</sup> Truth held dogmatically "is but one superstition the more, accidentally clinging to the words which enunciate a truth."<sup>28</sup> The pursuit matters as much as the attainment: "Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think."<sup>29</sup> Mill's conception of truth evidently refers to more than holding accurate propositions.

The liberty that Mill wants to defend encompasses "liberty of expressing and publishing opinions," but also "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."<sup>30</sup> He thinks, as a general matter, that the state should interfere with liberty only to prevent harm to others, but he would give speech even more protection, allowing it even when it is harmful.<sup>31</sup>

Free speech, he claims, makes us into better people. "It is not by wearing down into uniformity all that is individual in themselves, but by cultivating

<sup>24</sup> Mari Matsuda writes that "racist speech is best treated as a sui generis category, presenting an idea so historically untenable, so dangerous, and so tied to perpetuation of violence and degradation of the very classes of human beings who are least equipped to respond that it is properly treated as outside the realm of protected discourse" (Mari J. Matsuda et al., *Words That Wound: Critical Race Theory, Assaultive Speech, and the First Amendment* [Boulder, CO: Westview, 1993], 35).

<sup>25</sup> Although the concepts of autonomy, democracy, or truth might be specified in ways that capture Mill's concern, without further argument they are too vague to do the job. They can easily be understood in ways that embrace the self-censorship that Mill hoped to prevent.

<sup>26</sup> Mill, *On Liberty*, 76; see also *ibid.*, 95.

<sup>27</sup> *Ibid.*, 97.

<sup>28</sup> *Ibid.*

<sup>29</sup> *Ibid.*, 95.

<sup>30</sup> *Ibid.*, 71.

<sup>31</sup> He offers two inconsistent articulations of the limit, at one point saying that he would censor opinions "when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act" (*ibid.*, 119), and at another saying that incitement may be punished "only if an overt act has followed, and at least a probable connection can be established between the act and the instigation" (*ibid.*, 76n). Mill does not appear to notice the large differences between these two formulations. Both, however, obviously would permit a great deal of harmful speech that falls short of either threshold.

it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation ..."<sup>32</sup> His anxieties grow out of this concern about character. "The greatest harm done is to those who are not heretics, and whose whole mental development is cramped, and their reason cowed, by the fear of heresy."<sup>33</sup> The consequence is "a low, abject, servile type of character,"<sup>34</sup> and Mill bombards it with unpleasant metaphors: automatons in human form, apes, cattle, sheep.<sup>35</sup> The rhetorical aim is to make the reader see the value of the kind of character that Mill prizes. Alan Ryan observes that *On Liberty* "does not so much lay out compelling arguments as depict a type of character to which one can react favourably or unfavourably."<sup>36</sup>

In short, Mill's concern about moral development is reducible neither to autonomy nor democracy nor the pursuit of truth.

## II. OPEN, FEARLESS CHARACTERS

Mill's demand for "open, fearless characters" is not idiosyncratic. It is a persistent theme in the free speech tradition, of older provenance than democracy, truth, or autonomy. *Concern for character is the primitive origin of the idea of free speech.* It still operates silently. It is one of the idea's deepest attractions: the possibility of holding one's views on purpose, with full awareness of the alternatives.

The earliest articulation of the basis of free speech<sup>37</sup> is John Milton's 1644 pamphlet, *Areopagitica*. He was not concerned with democracy: he was Secretary of Foreign Tongues for the military dictator Oliver Cromwell. Nor with self-realization: he thought that prideful self-assertion was the core sin of Satan's rebellion against God. Nor with truth, understood as the holding of accurate propositions: he thought that such propositions were worthless if they were held on the basis of mere authority. "A man may be a heretic in the truth; and if he believe things only because his pastor says so, or the Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy."<sup>38</sup>

<sup>32</sup> *Ibid.*, 127.

<sup>33</sup> *Ibid.*, 95.

<sup>34</sup> *Ibid.*, 114.

<sup>35</sup> *Ibid.*, 129.

<sup>36</sup> Alan Ryan, *J. S. Mill* (London: Routledge, 1974), 141. For a similar reading of Mill, see Isaiah Berlin, "John Stuart Mill and the Ends of Life," in *Four Essays on Liberty* (Oxford: Oxford University Press, 1969), 173.

<sup>37</sup> I agree with John Durham Peters that the call to tolerate speech that articulates evil ideas for the sake of a greater good is already present much earlier, in Socratic dialogue, Jewish Torah study and Talmudic commentary, and the epistles of St. Paul. None of these, however, attempted anything like the creation of a legal doctrine that protects speech. John Durham Peters, *Courting the Abyss: Free Speech and the Liberal Tradition* (Chicago: University of Chicago Press, 2005), 29–67. Milton, on the other hand, is addressing state actors and calling for a reform of the law.

<sup>38</sup> John Milton, "Areopagitica," in *Complete Poems and Major Prose*, ed. Merritt Y. Hughes (New York: Odyssey Press, 1957 [1644]), 739.

He thought that free speech was necessary for the same reason that God was right to allow the serpent into the Garden of Eden. "He that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true warfaring Christian."<sup>39</sup> The way to be virtuous is "to ordain wisely as in this world of evil, in the midst whereof God hath placed us unavoidably."<sup>40</sup>

Religious salvation is to be achieved only by struggle against temptation. "Assuredly we bring not innocence into the world, we bring impurity much rather: that which purifies us is trial, and trial is by what is contrary."<sup>41</sup> Traditionally, the crucifixion was the central event in Christian history, but for Milton, the great moment was Christ's rejection, in the desert, of Satan's temptations.<sup>42</sup> It follows that "all opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest."<sup>43</sup> All that coercion can produce is "the forced and outward union of cold and neutral and inwardly divided minds."<sup>44</sup> Diversity of opinion is a sign of a deeper unity. "[T]here must be many schisms and many dissections made in the quarry and in the timber, ere the house of God can be built."<sup>45</sup>

One may wonder how Milton could be relevant today, since his defense of free speech is so dependent on his unusual Protestant theology.<sup>46</sup> But Milton displays a major theme of modern liberalism. Mill's argument has the same structure. At its center is the importance of freedom of the mind.<sup>47</sup> Milton

<sup>39</sup> *Ibid.*, 728.

<sup>40</sup> *Ibid.*, 733.

<sup>41</sup> *Ibid.*, 728.

<sup>42</sup> That episode is the subject of Milton, "Paradise Regained," in Hughes, *Complete Poems and Major Prose*, 470.

<sup>43</sup> Milton, "Areopagitica," 727. The importance of a free choice between good and evil is likewise emphasized in "Paradise Lost," Book III, lines 102ff, in Hughes, *Complete Poems and Major Prose*, 260. The speaker here is God the Father, explaining why it was right to allow the rebel angels and, later, Adam to transgress:

Freely they stood who stood, and fell who fell.  
Not free, what proof could they have giv'n sincere  
Of true allegiance, constant Faith or Love,  
Where only what they needs must do, appear'd,  
Not what they would? what praise could they receive?  
What pleasure I from such obedience paid,  
When Will and Reason (Reason also is choice)  
Useless and vain, of freedom both despoil'd,  
Made passive both, had serv'd necessity,  
Not mee.

<sup>44</sup> Milton, "Areopagitica," 742.

<sup>45</sup> *Ibid.*, 744.

<sup>46</sup> Vincent Blasi, *Milton's Areopagitica and the Modern First Amendment* (Yale Law School Occasional Papers, 1995), 2, <http://lsr.nellco.org/yale/ylsop/papers/6>.

<sup>47</sup> I elaborate on the parallels in "Waldron, Responsibility-Rights, and Hate Speech," *Arizona State Law Review* 43 (2012): 1201–21.



and Mill both believe that the moral distress of contemplating ways of life antithetical to your own is good for you.<sup>48</sup>

Alan Ryan argues that liberalism “is best understood as a theory of the good life for individuals that is linked to a theory of the social, economic and political arrangements within which they may lead that life.” The essence of that theory is “that individuals are self-creating, that no single good defines successful self-creation, and that taking responsibility for one’s own life and making of it what one can is itself part of the good life as understood by liberals.”<sup>49</sup>

Of course, liberalism isn’t just a theory. It’s a political practice.<sup>50</sup> Liberal political theories articulate ideals that are implicit in that practice and emerge from it.<sup>51</sup> Among these are the character ideal described by Milton and Mill.

The ideal has its dangers. God allowed the serpent to tempt Adam and Eve. That didn’t go well. Whenever people are treated as adults, with the power to make their own choices, they may make them badly. It is impossible for a censor to know what effect any text will have on its audience,

<sup>48</sup> See Jeremy Waldron, “Mill and the Value of Moral Distress,” in *Liberal Rights: Collected Papers 1981–1991* (Cambridge: Cambridge University Press, 1993), 115.

<sup>49</sup> Alan Ryan, “Liberalism,” in *The Making of Modern Liberalism* (Princeton, NJ: Princeton University Press, 2012), 35–36.

<sup>50</sup> Edmund Fawcett emphasizes this in *Liberalism: The Life of an Idea*, 2d ed. (Princeton: Princeton University Press, 2018).

<sup>51</sup> Here I follow Alasdair MacIntyre, who defines a “practice” as “any coherent and complex form of socially established cooperative human activity through which goods internal to that form of activity are realized in the course of trying to achieve those standards of excellence which are appropriate to, and partially definitive of, that form of activity, with the result that human powers to achieve excellence, and human conceptions of the ends and goods involved, are systematically extended.” Alasdair MacIntyre, *After Virtue: A Study in Moral Theory*, 2d ed. (Notre Dame, IN: University of Notre Dame Press, 1984), 187. Practices, as MacIntyre understands them, don’t have essences. They have histories.

“A practice,” MacIntyre observes, “involves standards of excellence and obedience to rules as well as the achievement of goods. To enter into a practice is to accept the authority of those standards and the inadequacy of my own performance as judged by them” (ibid., 190). Those standards of excellence can constitute virtues: “A virtue is an acquired human quality the possession and exercise of which tends to enable us to achieve those goods which are internal to practices and the lack of which effectively prevents us from achieving any such goods” (ibid., 191).

The practice of free speech as I describe it in this essay is historically situated within the liberal tradition. MacIntyre thinks that recognizing the historically situated character of any practice entails skepticism: “each tradition is unable to justify its claims over against those of its rivals except to those who already accept them” Alasdair MacIntyre, *Whose Justice? Which Rationality?* (Notre Dame, IN: University of Notre Dame Press, 1988), 348. Liberalism itself, MacIntyre thinks, is a tradition in precisely this predicament (ibid., 335). He also thinks that “no tradition can claim rational superiority to any other” (ibid., 348). One can regard his description of how traditions operate, and his characterization of liberalism as a tradition, without going this far. The fact that liberalism is a tradition does not entail that we cannot discuss its merits. Other historically situated practices, such as scientifically based medicine, have turned out to respond to universal aspirations, such as the desire to see one’s children survive to adulthood. Liberalism may have similar universal appeal. It is too soon to tell.



because readers are so diverse.<sup>52</sup> The value of free speech is that it enables us to be awake, conscious of what we are doing.

Some proponents of free speech have been forthright about the risks. Oliver Wendell Holmes wrote that free speech “is an experiment, as all of life is an experiment.”<sup>53</sup> Louis Brandeis thought that free speech was valuable because it would produce “courageous, self-reliant men, with confidence in the power of free and fearless reasoning.”<sup>54</sup> He thought it “hazardous to discourage thought, hope and imagination,” because “the greatest menace to freedom is an inert people.”<sup>55</sup> The same theme appears, in somewhat rarefied form, in contemporary theorists who try to reduce free speech to a single value, such as democracy, autonomy, or self-realization.<sup>56</sup>

We have some experience with an America in which these virtues are neglected. During our most repressive periods, during World War I, the Palmer raids, and the McCarthy period in the 1950s, the sense of being watched was pervasive. Government was empowered to decide which thoughts and ideas would be permitted and which were “disloyal.”<sup>57</sup> The consequence was a climate of fear. Everyone understood that severe punishment could be imposed for the mere holding of unpopular political positions.<sup>58</sup>

The Milton-Mill ideal shaped the controversy about whether those who advocate lawbreaking or reject democracy are entitled to free speech.<sup>59</sup> Alexander Meiklejohn offered the classic answer: “A government is maintained by the free consent of its citizens only so long as the choice whether or not it shall be maintained is recognized as an open choice, which the people

<sup>52</sup> That is why it’s nonsensical to talk about the moral effects of pornography. Both the pornography and the readership are too various. See Andrew Koppelman, “Does Obscenity Cause Moral Harm?” *Columbia Law Review* 105 (2005): 1635–79; Andrew Koppelman, “Eros, Civilization, and Harry Clor,” *New York University Review of Law and Social Change* 31 (2007): 855–64. This variety of responses also forecloses the kind of liberationism that supposes that the relaxation of sexual constraints is always good. See Andrew Koppelman, “Sex and the Civitas” (review of Geoffrey Stone, *Sex and the Constitution*), *New Rambler* (2017), <http://newramblerreview.com/book-reviews/law/sex-and-the-civitas>. It’s better to acknowledge that there is a lot of very bad speech (including sexual speech) out there, but that the law is incompetent to distinguish it from what’s valuable. Andrew Koppelman, “Reading Lolita at Guantanamo,” *Dissent* 64 (2006): 53–71.

<sup>53</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>54</sup> *Whitney v. California*, 274 U.S. 357, 377 (1927) (Brandeis, J., concurring). See Vincent Blasi, “The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in *Whitney v. California*,” *William and Mary Law Review* 29 (1988): 653–97.

<sup>55</sup> *Whitney*, 274 U.S. at 375.

<sup>56</sup> Many of these are discussed in Andrew Koppelman, “Veil of Ignorance: Tunnel Constructivism in Free Speech Theory,” *Northwestern University Law Review* 107 (2013): 647–730.

<sup>57</sup> Geoffrey R. Stone, *Perilous Times: Free Speech in Wartime from the Sedition Act of 1798 to the War on Terrorism* (New York: Norton, 2004), 352.

<sup>58</sup> See generally Martin H. Redish, *The Logic of Persecution: Free Expression and the McCarthy Era* (Stanford, CA: Stanford University Press, 2005).

<sup>59</sup> See Robert Bork, “Neutral Principles and Some First Amendment Problems,” *Indiana Law Journal* 47 (1971): 31; Carl A. Auerbach, “The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech,” *University of Chicago Law Review* 23 (1956): 186–89.

may debate and decide, with conflicting advocacies, whenever they may choose."<sup>60</sup> Meiklejohn's argument—which has prevailed—is essentially the same as Milton's: in order for the choice of good to be authentic, there must be a real option to choose evil.<sup>61</sup>

This complex aspiration holds its appeal, in large part, because it responds to certain inescapable tendencies of modernity. Individuals now typically live in a plurality of life-worlds, in which family life at home, one's tasks and identity at work, and political life involve vastly different, often discrepant meanings and experiences. Ideologies of pluralism function to legitimate this experience.<sup>62</sup> Given the extent to which the individual must continually refashion his social identity, the ability (and therefore the right) to freely plan and shape one's own life naturally becomes salient, because it is rooted in the fundamental structures of modern society.<sup>63</sup> Self-fashioning is a responsibility in this society because our economy and lifeworld depend on individuals engaging in it. People who live in modern societies have to develop these capacities. Eventually they become good at it.

Free speech aims to create a distinctive kind of human character, open to new ideas and ready to be challenged, and a social environment in which that kind of character can thrive.<sup>64</sup>

Vincent Blasi observes that this character is generated by the environment that free speech creates, in which "dissent is both an option and an inescapable reality."<sup>65</sup> People develop these traits in the course of having to cope with the experience of habitually encountering views with which they disagree, in an atmosphere in which it is safe to hold heretical views. The environment created by free speech generates the education of character that a liberal society needs.<sup>66</sup>

One cultivates that character by encountering ideas radically at odds with one's own. Mill observes that in order to do that, one

must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must

<sup>60</sup> Alexander Meiklejohn, "What Does the First Amendment Mean?" *University of Chicago Law Review* 20 (1953): 468.

<sup>61</sup> The Miltonic roots of Meiklejohn are elaborated in Andrew Koppelman, "You're All Individuals: Brettschneider on Free Speech," *Brooklyn Law Review* 79 (2014): 1023–1030.

<sup>62</sup> Peter Berger, Brigitte Berger, and Hansfried Kellner, *The Homeless Mind: Modernization and Consciousness* (New York: Vintage, 1974), 68.

<sup>63</sup> *Ibid.*, 79.

<sup>64</sup> Koppelman, "Veil of Ignorance," 707–15; Vincent Blasi, "Free Speech and Good Character: From Milton to Brandeis to the Present," in Lee Bollinger and Geoffrey Stone, eds., *Eternally Vigilant: Free Speech in the Modern Era* (Chicago: University of Chicago Press, 2002), 60.

<sup>65</sup> Blasi, "Free Speech and Good Character," 84.

<sup>66</sup> There is a rich literature on the importance of education for democratic citizenship. See, e.g., Stephen Macedo, *Diversity and Distrust: Civic Education in a Multicultural Democracy* (Cambridge, MA: Harvard University Press, 2000); Amy Gutmann, *Democratic Education*, rev. ed. (Princeton, NJ: Princeton University Press, 1999); Eamonn Callan, *Creating Citizens: Political Education and Liberal Democracy* (Oxford: Clarendon Press, 1997).

know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty.<sup>67</sup>

Any citizen of a liberal society thus might have a legitimate reason to read dangerous things, such as the recruitment literature of ISIS.<sup>68</sup> No one has a moral right to say the things ISIS says,<sup>69</sup> but one nonetheless has a right to hear them when they have been said. No one can think intelligently about the challenge of Islamic radicalism, or of any other illiberal ideology, without spending at least a little time thinking about it from the inside. More generally, one can't think intelligently about evil without entertaining evil points of view. The fearless, open character that liberal society seeks to cultivate can't worry about whether one is permitted to look at this or that.<sup>70</sup>

William Galston observes that liberalism is characteristically committed to a divided conception of the self:

On the one side stands the individual's personal and social history, with all the aims and attachments it may imply. On the other side stands the possibility of critical reflection on—even revolt against—these very commitments. The self most at home in liberal society, as understood, contains the possibility for such critical distance from one's inheritance and accepts the possibility that the exercise of critical faculties may in important respects modify that inheritance.<sup>71</sup>

The capacity for such critical distance is among the core liberal virtues.<sup>72</sup>

A world of free speech encourages us, at least temporarily and provisionally, to divide ourselves, to imagine thoughts that no one should ever think. And the reason we should do that is because we should aspire to be the kind of people who are capable of that. The capacity to thus imaginatively project oneself into alien minds is a kind of liberal virtue. People with evil thoughts exist in the world, and each of us has the potentiality for evil within us. It is better to be awake than asleep, and it is better for us to know the world as it is than to walk around deluded. So evil ideas need to be expressed, and we need to entertain those ideas. In some contexts, evil thoughts are valuable

<sup>67</sup> Mill, *On Liberty*, 99.

<sup>68</sup> Andrew Koppelman, "Entertaining Satan: Why We Tolerate Terrorist Incitement," *Fordham Law Review* 86 (2017): 535–42.

<sup>69</sup> Jeffrey Howard, "Dangerous Speech," *Philosophy and Public Affairs* 47 (2019): 208–254.

<sup>70</sup> George Kateb, "The Freedom of Worthless and Harmful Speech," in Bernard Yack, ed., *Liberalism Without Illusions: Essays on Liberal Theory and the Political Vision of Judith N. Shklar* (Chicago: University of Chicago Press, 1996), 235.

<sup>71</sup> William Galston, *Liberal Purposes* (Cambridge: Cambridge University Press, 1991), 153.

<sup>72</sup> On the virtues associated with liberalism, see Galston, *Liberal Purposes*; Stephen Macedo, *Liberal Virtues* (Oxford: Clarendon Press, 1990); Peter Berkowitz, *Virtue and the Making of Modern Liberalism* (Princeton, NJ: Princeton University Press, 1999).

and even praiseworthy. The capacity to think them, without being overwhelmed by them, is a kind of skilled performance.<sup>73</sup>

As John Durham Peters observes, Mill's ideal of character is an unstable mix of Stoicism and romanticism. As listeners, citizens must be willing to subject their dearest beliefs to challenge and criticism, and learn to articulate views the opposite of their own. Yet as speakers, they must present their ideas powerfully and with conviction.<sup>74</sup> This is a demanding ideal.<sup>75</sup>

When I'm not being a professor, I sometimes work as an actor. Acting class taught me a lot about how to be a good liberal citizen. You have to learn how to see the world from your character's point of view, and genuinely identify with him. At the same time, you necessarily keep some distance, not only because of his defects (I have portrayed the mass murderer Rev. Jim Jones, and the despicable racist Bob Ewell from *To Kill a Mockingbird*) but also because you have to simultaneously worry about purely technical matters, such as whether the audience on the left side of the stage can see your face. We maintain our critical faculties as we play with fire.

You can't engage with evil unless you can see it for what it is. A society that won't tolerate this kind of engagement hamstring itself. The Dominican Cardinal Bartolome Carranza spent much of his life battling the Protestant Reformation. He was arrested by the Inquisition in 1559 on suspicion of heresy. Diarmaid MacCulloch reports: "They eagerly scanned his private files and found detailed notes on heretics in whom no decent Spaniard should take even a critical interest."<sup>76</sup> He was imprisoned for nearly seventeen years and died a few months after his release. This was good news for Catholicism's adversaries.

Of course, precisely because the capacity to entertain heretical thoughts is a skilled performance, there is no possible society in which everyone is capable of it. A liberal society is one in which a sufficient critical mass of people develop this capability, and can safely exercise it in public.

<sup>73</sup> Thus Nietzsche:

Something might be true while being harmful and dangerous in the highest degree. Indeed, it might be a basic characteristic of existence that those who would know it completely would perish, in which case the strength of a spirit should be measured according to how much of the "truth" one could still barely endure—or to put it more clearly, to what degree one would require it to be thinned down, shrouded, sweetened, blunted, falsified.

Friedrich Nietzsche, *Beyond Good and Evil*, trans. Walter Kaufmann (New York: Vintage, 1966), sec. 39, p. 49.

<sup>74</sup> Peters, *Courting the Abyss*, 130–36.

<sup>75</sup> Peters and Waldron are both skeptical of this ideal, and correctly point out that it can be carried to ridiculous lengths. See Jeremy Waldron, "Boutique Faith," *London Review of Books* 28, no. 14 (July 20, 2006): 22 (reviewing Peters, *Courting the Abyss*). Waldron dismisses "the boutique faith of a few liberals who take the resilience of their own voyeurism as a sign that speech is really harmless" ("Boutique Faith," 22). But Waldron's insistence on the value of moral distress involves similar paradoxes.

<sup>76</sup> Diarmaid MacCulloch, *The Reformation: A History* (New York: Viking, 2003), 292.

One consequence, when this capability is exercised with impunity, is that the understanding of what is evil will change over time. What at one time was heretical and unthinkable can become commonplace and acceptable. Today there are over a million Protestants in Spain.

### III. COMPELLED SPEECH AND ART

The ideal can help us make sense of some familiar puzzles in free speech theory. One of these is the prohibition of compelled speech. This rule was announced in a 1943 Supreme Court decision overturning the punishment of Jehovah's Witness children for refusing to say the Pledge of Allegiance. The opinion is eloquent: "If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein."<sup>77</sup> But its scope is decidedly uncertain: schools constantly impose unpleasant consequences on students for giving unorthodox answers to questions of mathematical calculation or historical fact.<sup>78</sup> And how does such compulsion impair democracy, or the search for truth, or autonomy?<sup>79</sup>

Justice Robert Jackson's opinion depends for its power on an image rather than an argument—a vision of a free society. His core claim is that Mill's ideal can be realized without unleashing the chaos that Hobbes fears:

we apply the limitations of the Constitution with no fear that freedom to be intellectually and spiritually diverse or even contrary will disintegrate the social organization. To believe that patriotism will not flourish if patriotic ceremonies are voluntary and spontaneous instead of a compulsory routine is to make an unflattering estimate of the appeal of our institutions to free minds.<sup>80</sup>

The vision of "freedom of the mind" is accompanied by an ugly picture of the alternative, made more vivid by the mention of America's "present totalitarian enemies."<sup>81</sup> It offers a lesson: "Those who begin coercive

<sup>77</sup> *West Virginia State Board of Education v. Barnette*, 319 U.S. 624, 642 (1943).

<sup>78</sup> Steven D. Smith, "Barnette's Big Blunder," *Chicago-Kent Law Review* 78 (2003): 625–68. The complaint can, however, be overstated. See Andrew Koppelman, "No Expressly Religious Orthodoxy: A Response to Steven D. Smith," *Chicago-Kent Law Review* 78 (2003): 729–38.

<sup>79</sup> Justice Felix Frankfurter wrote in dissent:

Children and their parents may believe what they please, avow their belief and practice it. It is not even remotely suggested that the requirement for saluting the flag involves the slightest restriction against the fullest opportunity on the part both of the children and of their parents to disavow as publicly as they choose to do so the meaning that others attach to the gesture of salute.

*Barnette*, 319 U.S. at 664.

<sup>80</sup> *Ibid.*, 641.

<sup>81</sup> *Ibid.*

elimination of dissent soon find themselves exterminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard."<sup>82</sup> The same image of dynamism against stasis we saw in Milton and Mill appears again.

If one's core goal is to avoid a citizenry cowed by the fear of heresy, then the compelled pledge presents an easy case. The whole point of the pledge law is to train children in blind conformity and to demoralize dissenters.<sup>83</sup> Freedom of thought means that government is forbidden from attempting to engage in thought control.

A second puzzle in free speech theory is the protection of art and literature. These are manifestations of free thought, but they are hard to fit into the conventional justifications for free speech. How is democracy, or the pursuit of truth, advanced by the arts that do not contain definite propositions, such as visual art, instrumental music, and nonsense poetry?<sup>84</sup>

Our thoughts are not confined to propositions about the world. When the Supreme Court announced the present constitutional test for unprotected obscenity, it declared that "[p]reventing unlimited display or distribution of obscene material, which by definition lacks any serious literary, artistic, political, or scientific value as communication, is distinct from a control of reason and the intellect."<sup>85</sup> But thought is more than reason and the intellect.

Seana Shiffrin argues that, "given that our minds are not directly accessible to one another, speech and expression are the only precise avenues by which one can be known *as the individual one is* by others."<sup>86</sup> Censorship enacts "a sort of solitary confinement outside of prison but within one's mind."<sup>87</sup> Because free communication is essential to avoid this pathology, it is a fundamental human right.<sup>88</sup>

Communication of the contents of one's mind, primarily through linguistic means, but also through pictorial or even musical representation, uniquely furthers the interest in being known by others. . . . it helps to develop some of the capacities prerequisite to moral agency, because successful communication demands having a sense of what others are

<sup>82</sup> *Ibid.*

<sup>83</sup> The demoralizing effects of compelled speech are catalogued in Martin H. Redish and Kirk J. Kaludis, "The Right of Expressive Access in First Amendment Theory: Redistributive Values and the Democratic Dilemma," *Northwestern University Law Review* 93 (1999): 1114–17.

<sup>84</sup> This difficulty is explored in detail in Mark V. Tushnet et al., *Free Speech Beyond Words: The Surprising Reach of the First Amendment* (New York: New York University Press, 2017). The authors offer a variety of answers, but admit that they are unsatisfactory. Here I offer a different take on the same problem.

<sup>85</sup> *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 67 (1973), citing John M. Finnis, "Reason and Passion": The Constitutional Dialectic of Free Speech and Obscenity," *University of Pennsylvania Law Review* 116 (1967): 222–43; see also *Miller v. California*, 413 U.S. 15, 34–35 (1973); *Roth v. United States*, 354 U.S. 476, 484 (1957).

<sup>86</sup> Seana Valentine Shiffrin, *Speech Matters: On Lying, Morality, and the Law* (Princeton, NJ: Princeton University Press, 2014), 88–89.

<sup>87</sup> *Ibid.*, 91.

<sup>88</sup> *Ibid.*, 117.

in a position to know and understand. Practicing communication initiates the process of taking others' perspective to understand what others know and are in a position to grasp.<sup>89</sup>

Nonverbal art is a communication from mind to mind, a revelation of mental contents. Freedom of the mind means the right to imagine other worlds, and to tell one another what we have imagined. Under that description, the reason/emotion dichotomy, which bears so much weight in justifying the prohibition of obscenity, collapses.<sup>90</sup> Freedom of the mind should be understood to forbid the government from trying to regulate those uses of the mind and communications that it regards as insufficiently dignified.<sup>91</sup>

The nonprotection of obscenity aims precisely at promoting the fear of heresy, by elevating a certain kind of sexual ethic to unquestionable sacred status: "a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex."<sup>92</sup>

The fear of heresy thus engendered is particularly manifest in the once-unthinkable status of homosexual desire. Gay pornography has played an important role in many young gay men's development of their own self-understanding. "[A] gay adolescent male's encounter with gay pornography ... explodes negative stereotypes that the young man has internalized and offers him models of exuberant, affirming, unashamed sexual interactions between desirable men."<sup>93</sup> Explicit pornography, or even photographs of naked men that suggest sexual availability, can and do lead gay teenagers to "realize that there were others out there with sexual feelings for men: indeed, enough of them to create a market for such photographs."<sup>94</sup>

This suggests a corollary to Shiffrin's account of free speech. The transparency she aims at demands certain traits of character: one must be willing to be known as the person one is by others. That demands a certain courage in introspection. The fear of heresy not only keeps people from being transparent to others. They are not transparent to themselves.

<sup>89</sup> *Ibid.*, 89.

<sup>90</sup> Andrew Koppelman, "Is Pornography 'Speech'?" *Legal Theory* 14 (2008): 71–89.

<sup>91</sup> The Court has held that one factor in determining whether nonverbal conduct is protected by the First Amendment is whether "the governmental interest [in regulation] is unrelated to the suppression of free expression." *United States v. O'Brien*, 391 U.S. 367, 377 (1968). Alan Chen claims that "under *O'Brien*, musical expression is conduct that is protected only when the government's interest in regulating it is to address its speech or cognitive component." "Instrumental Music and the First Amendment," in Tushnet et al., *Free Speech Beyond Words*, 49. But *O'Brien* refers to expression, not to the cognitive component of expression. Any attempt to regulate the content of music will involve thought control.

<sup>92</sup> *Paris Adult Theatre*, 413 U.S. at 63 (citations omitted).

<sup>93</sup> Jeffrey G. Sherman, "Love Speech: The Social Utility of Pornography," *Stanford Law Review* 47 (1995): 682.

<sup>94</sup> *Ibid.*, 685 n. 130. The implications of Sherman's claims are further elaborated in Andrew Koppelman, "Madisonian Pornography or, The Importance of Jeffrey Sherman," *Chicago-Kent Law Review* 84 (2009): 597–613.



The Millian ideal demands what Mill called “an atmosphere of freedom.”<sup>95</sup> It demands the unquestioned assumption of one’s right to speak and to play with ideas. Courage is not quite the right term, because it implies that one is aware of danger and has the fortitude to proceed nonetheless. The state of mind one seeks is rather the confidence characteristic of young people who have never suffered serious injury, and who perform impressive and dangerous feats because they unconsciously, irrationally feel sure that they can’t really be hurt. Speakers should have the kind of confidence that doesn’t even imagine that their opinions could get them into trouble with the police. That confidence is vulnerable.<sup>96</sup>

#### IV. MICROAGGRESSIONS AND SELF-CENSORSHIP

The Millian ideal needs some qualification. A liberal society depends on an ethic of mutual respect, and that ethic will entail some constraints on speech—and social sanctions brought upon those who fail to respect those constraints.

Consider the racism taboo. It was not always the case that “racist” was one of the worst things one could call a person. That ethic was deliberately constructed. It has done a lot of good. Pervasive prejudice has to be combated with equally strong cultural forces.

Liberal theorists are uncomfortable with the invocation of such primitive impulses, but they appear to be an ineradicable part of humanity’s moral vocabulary.<sup>97</sup> Ideas of purity had been powerfully deployed on behalf of racism. The left captured purity and turned it against the enemy. Racism itself has come to be stigmatized as contaminating. A similar cultural reversal has been directed at “homophobia.”<sup>98</sup> As with racism, the stigmatization of gays is so deeply rooted in American culture that it is probably necessary to rely on this kind of countertaboo in order to respond to it. In each case, the aim is to induce citizens to regard the relevant prejudice as itself ritually unclean.

<sup>95</sup> Mill, *On Liberty*, 129.

<sup>96</sup> The persistent effect of repression is nicely illustrated by this story told by Clancy Sigal, a writer whose parents were arrested and jailed during the Palmer raids of 1920. Decades later, when FBI agents arrived to question Sigal about his politics during the cold war,

my mother politely met them at the door, invited them in for coffee and charmed them out of their intended purpose. But she was pale and terrified when I got home. In an understandable slip of the tongue she said: “The Palmers have been here. What have you done?”

Clancy Sigal, “John Ashcroft’s Palmer Raids,” *New York Times*, March 13, 2002.

<sup>97</sup> See Jonathan Haidt, *The Righteous Mind: Why Good People are Divided by Politics and Religion* (New York: Vintage, 2012), 170–77.

<sup>98</sup> The term was originally coined by George Weinberg in an effort to invert the then-conventional notion that homosexuality was a mental illness, by arguing that the aversion to homosexuality was itself pathological. George Weinberg, *Society and the Healthy Homosexual* (New York: St. Martin’s, 1972).

The rejection of racism—and sexism, and homophobia, and other ascriptive rejections of equal dignity—are indispensable preconditions of a free society that delivers basic security to all its citizens. Even libertarians ought to endorse the project of transforming culture to eradicate the notion that some classes of persons are beings of an inferior order who have no rights. Such prejudices have typically meant that the law couldn't even be relied upon to protect their minimal rights of person and property. African-Americans were lynched; violence against women was casually tolerated; police regarded assaults on gay people with indifference and sometimes perpetrated them themselves. A guarantee of liberal rights demands a culture that respects those rights.<sup>99</sup>

Law alone can't deliver this.

Given the power of these taboos, this strong medicine is necessary if there is to be any hope of having a society of genuine opportunity. Yet there are obvious Millian concerns.<sup>100</sup> The concerns become more intense when the taboos are used to empower the authorities.

Consider the debate over “microaggressions,” which have been defined by a leading proponent as “brief and commonplace daily verbal, behavioral, and environmental indignities, whether intentional or unintentional, that communicate hostile, derogatory, or negative racial slights and insults to the target person or group.”<sup>101</sup> There's no doubt that these exist, and that constantly encountering them is a dispiriting and exhausting part of minority experience in the United States. Familiar illustrations: Asian-Americans, born in the United States, who are complimented for their perfect English; black men who see whites flinch and clutch their bags when they walk past them on the street; women constantly interrupted by male colleagues.

If the ultimate aim of free speech is a culture in which people know what they are doing (the term “woke” connotes something real), then the move to highlight microaggressions is terrific news. (It's particularly important to the practice of teaching, because it calls attention to subtle ways that teachers alienate students. A teacher must earn his students' trust.)

The movement becomes toxic, however, when it is coupled with administrative sanctions. University administrators sometimes punish mere allegations of bias, with little substantiation.<sup>102</sup> Many schools have created

<sup>99</sup> Andrew Koppelman, *Antidiscrimination Law and Social Equality* (New Haven, CT: Yale University Press, 1996), 181–90.

<sup>100</sup> One danger that we have recently seen is the attribution of nearly magical power to specific types of speech, such as the claim that pornography silences women and that its suppression would ameliorate this silencing. See Andrew Koppelman, “Another Solipsism: Rae Langton on Sexual Fantasy,” *Washington University Jurisprudence Review* 5 (2013): 163–87.

<sup>101</sup> Derald Wing Sue et al., “Racial Microaggressions in Everyday Life: Implications for Clinical Practice,” *American Psychologist* 62 (2007): 273.

<sup>102</sup> Heather Mac Donald, “The Microaggression Farce,” *City Journal*, Autumn 2014, <https://www.city-journal.org/html/microaggression-farce-13679.html>. Mac Donald doesn't appear to perceive any real harms from microaggressions. For a more nuanced picture, see Keith E. Whittington, *Speak Freely: Why Universities Must Defend Free Speech* (Princeton, NJ: Princeton University Press, 2018).

“bias response teams,” whose function is less to improve the environment for minorities than to preserve their school’s reputation.<sup>103</sup> Microaggression is a poor candidate for adjudication. Hostile environment harassment already presents a free speech problem, manageable but with characteristic dangers.<sup>104</sup> Extending its definition from intentional denigration to inadvertent slights is a recipe for exactly the kind of intimidation that Mill described.<sup>105</sup> Precisely because microaggressions are common and often reasonably contestable, they should never elicit a punitive response.

If microaggressions are to be significantly reduced, it will probably be by the means that Mill feared: the dominance of “prevailing opinion and feeling;” “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.”<sup>106</sup> It will be because people are socialized into an anti-racist ethic as a consequence of the prevailing stigmatization of racism. That ethic can and sometimes does degenerate into crude virtue signaling and censorship by the mob.<sup>107</sup> This is even worse than administrative sanctions, because it is decentralized, the censorship of all against all. Another part of the liberal ethic is unwillingness to participate in this kind of gang activity.

There is a painful tension in Mill’s thought:

We have a right ... to act upon our unfavourable opinion of anyone, not to the oppression of his individuality, but in the exercise of ours. We are not bound, for example, to seek his society; we have a right to avoid it (though not to parade the avoidance), for we have a right to choose the society most acceptable to us. We have a right, and it may be our duty, to caution others against him if we think his example or conversation likely to have a pernicious effect on those with whom he associates.<sup>108</sup>

His distinction between avoiding and parading the avoidance isn’t sustainable. If we exercise our own free speech rights, that will put pressure on

<sup>103</sup> Jeffrey Aaron Snyder and Amna Khalid, “The Rise of ‘Bias Response Teams’ on Campus,” *New Republic*, March 30, 2016.

<sup>104</sup> Andrew Koppelman, “A Free Speech Response to the Gay Rights/Religious Liberty Conflict,” *Northwestern University Law Review* 110 (2016): 1125–67.

<sup>105</sup> The intense monitoring of unconscious facial signals was already imagined by Orwell:

It was terribly dangerous to let your thoughts wander when you were in any public place or within range of a telescreen. The smallest thing could give you away. A nervous tic, an unconscious look of anxiety, a habit of muttering to yourself—anything that carried with it the suggestion of abnormality, of having something to hide. In any case, to wear an improper expression on your face (incredulity when a victory was announced, for instance) was itself a punishable offense. There was even a word for it in Newspeak: *face-crime*, it was called.

George Orwell, 1984 (London: Secker and Warburg, 1949), 1.5.62.

<sup>106</sup> Mill, *On Liberty*, 63.

<sup>107</sup> For a catalogue of examples, see Robby Soave, *Panic Attack: Young Radicals in the Age of Trump* (New York: All Points Books, 2019).

<sup>108</sup> Mill, *On Liberty*, 144.

those who disagree with us. The tension however is not a mistake on Mill's part. It captures a real dilemma. We need to freely express our thoughts, but those who disagree mustn't be intimidated into silence. An ethic of free speech must live with that tension.

So there's an orthodoxy after all. Liberalism depends on the consistent presence of certain traits of character—one might call them virtues—and the persistence of those traits. Liberalism is a distinctive ideal that can be consciously held, and it is most itself when it is consciously held.

In a free society, then, there will be a distinctive kind of self-censorship. It will not be primarily the result of the kind of intimidation that worries Mill. It will rather be based on each individual's own understanding of what it is appropriate to express.<sup>109</sup> Civilized people don't say everything they think.

You may dismiss this as "political correctness." But it's nothing new. George Orwell reported in 1941 that in vulgar comic English postcards, which trafficked in all sorts of stereotypes, jokes about Jews "disappeared abruptly soon after the rise of Hitler."<sup>110</sup> This did not bespeak Millian intimidation, nor an inability to appreciate a joke. Orwell observes that the whole point of these postcards' low humor is to register protest against society's demanding aspirations, to be the voice of Sancho Panza. Yet even they reflected a line that people of the time would not cross.

Some wounding speech is of course inevitable in a free society. Some people will regard others' life choices as worthless and contemptible, and they will say so, and sometimes they will be right. Liberal respect for persons can't be conflated with respect for the ends that they pursue.<sup>111</sup> Yet, as John Rawls observed, "our self-respect normally depends upon the respect of others. Unless we feel that our endeavors are honored by them, it is difficult if not impossible for us to maintain our conviction that our ends are worth advancing."<sup>112</sup> It is hard for us to develop our autonomous thoughts in complete isolation, with no sympathetic hearers.

The answer liberalism can offer is the very cultural fragmentation that free speech engenders. Even if most people think my values are ridiculous—they avoid me and parade the avoidance—I can (try to) find islands of safe space where they are given the recognition that (I believe) they deserve.

<sup>109</sup> Philip Cook and Conrad Heilmann, "Two Types of Self-Censorship: Public and Private," *Political Studies* 61 (2013): 178–96.

<sup>110</sup> George Orwell, "The Art of Donald McGill," in *My Country Right or Left: Collected Essays, Journalism and Letters 1940–1943*, vol. 2, ed. Sonia Orwell (Harmondsworth: Penguin, 1970), 158.

<sup>111</sup> Richard C. Sinopoli, "Thick-Skinned Liberalism: Redefining Civility," *American Political Science Review* 89, no. 3 (1995), 612–20.

<sup>112</sup> John Rawls, *A Theory of Justice* (Cambridge, MA: Harvard University Press, 1971), 178. Revealingly, in the revised edition, Rawls changed "honored" to "respected." John Rawls, *A Theory of Justice*, rev. ed. (Cambridge, MA: Harvard University Press, 1993), 155–56. The revision grasps the problem, but one may doubt whether the revised sentence is true. The fact that others respect our right to pursue our endeavors, but regard them as silly, does not give us any reason to think them worthwhile.

## V. LIBERAL SELF-CENSORSHIP

Let's return to Hobbes, whose conception of freedom of thought seemed impossibly constraining. He began with a valid point: "the Actions of men proceed from their Opinions; and in the well governing of Opinions, consisteth the well governing of mens Actions, in order to their Peace, and Concord."<sup>113</sup> Any society, in order to sustain itself, must sustain certain traits of character that it must regard as virtues: the traits necessary to induce citizens to preserve the institutions of that society.

Hobbes thought we could be trained to censor ourselves.<sup>114</sup> "It is therefore the duty of those who have the chief authority, to root those [ideas such as regicide] out of the minds of men, not by commanding, but by teaching; not by the terror of penalties, but by the perspicuity of reasons."<sup>115</sup> Thus the people "ought to be informed, how great a fault it is, to speak evill of the Sovereign Representative, (whether One man, or an Assembly of men;) or to argue and dispute his Power, or any way to use his Name irreverently, whereby he may be brought into Contempt with his People, and their Obedience (in which the safety of the Common-wealth consisteth) slackened."<sup>116</sup> In his own way, he aspired to censorship by Frankfurtian wholeheartedness. His vision, Teresa Bejan observes, was "difference without disagreement, in which the price of pluralism was the civil silence necessary for men to differ in religion without disagreeing about it."<sup>117</sup> If you understand the importance and fragility of civil order, then you will never be inclined to endanger it by speaking ill of the sovereign or by denouncing your fellow citizens' beliefs.<sup>118</sup>

Modern liberalism does not demand the deference to government authority that Hobbes demands. Nor is it terrified of all argument about fundamental disagreement. But it does ask that we know when to shut up.

Hobbes wants us to be constrained in what we say by our understanding of the truth and of the needs of social life. We *should* be constrained by our understanding of the truth and of the needs of social life. Real freedom of thought is having one's thoughts constrained in the right way.

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<sup>113</sup> Hobbes, *Leviathan*, chap. 18, 233.

<sup>114</sup> David Van Mill, "Hobbes and Free Speech," in *Hobbesian Applied Ethics and Public Policy*, ed. Shane D. Courtland (New York: Routledge, 2018); David Van Mill, "Civil Liberty in Hobbes's Commonwealth," *Australian Journal of Political Science* 37 (2002): 23–27.

<sup>115</sup> Thomas Hobbes, *Man and Citizen*, ed. Bernard Gert (Garden City, NY: Doubleday, 1972), 262–63.

<sup>116</sup> Hobbes, *Leviathan*, chap. 30, 381.

<sup>117</sup> Bejan, *Mere Civility*, 110. Bejan observes that Hobbes anticipated the modern sensitivity to microaggressions (ibid., 87).

<sup>118</sup> Jonathan Parkin, "Thomas Hobbes and the Problem of Self-Censorship," in Han Baltussen and Peter J. Davis eds., *The Art of Veiled Speech: Self-Censorship from Aristophanes to Hobbes* (Philadelphia: University of Pennsylvania Press, 2015).