

## Mill on the Liberty of Thought and Discussion

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Chapter Two of John Stuart Mill's *On Liberty* – 'On the Liberty of Thought and Discussion' – is the best-known defense of free speech in the philosophical canon.<sup>1</sup> Familiarity has certainly not bred contempt: the chapter continues to be cited approvingly in both the academic literature and in judicial decisions, and the broad line of thought embodied in the text has been internalized as part of liberal society's self-understanding. Yet perhaps exactly because of its success, that text has itself in many ways become over-familiar. As a result, it has become easy to lose sight of the details of the arguments Mill offers, as well as their grounds and consequences. I wish, in this paper, to offer a reconstruction of Mill's case for 'Liberty of Thought and Discussion' which focuses on various aspects of that argument which may be easily forgotten; I hope that doing so will not only provide a useful refresher on the specifics of Mill's own argument, but will also serve implicitly to highlight some of the distance between Mill's argument and current accounts of free speech.

I begin, in Section 1, by suggesting that Mill's argument in Chapter Two of *On Liberty* is a distinctively *epistemic* argument, and one which relies on a specific conception of man's cognitive nature and the character of human knowledge. There is, I claim, a strong connection between what I term Mill's Freedom of Discussion Principle and the way in which human beings come to know the world. In Section 2, I attempt to identify quite what Mill means to *rule out* by his argument – what, in

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<sup>1</sup> JS Mill, 'On Liberty' in *The Collected Works of John Stuart Mill* (University of Toronto Press and Routledge 1963-91) (*Collected Works*) vol XVIII, 228-59.

short, freedom of discussion is freedom *from* – and quite what he means to *rule in*. I turn, finally, in Section 3, to consider the relation between the Freedom of Discussion Principle and its better known (though perhaps not much better understood) sibling, the Harm Principle, and the conditions under which these principles are applicable.

1. Man's Cognitive Nature and the Epistemic Case for Freedom of Discussion

Mill's argument for freedom of discussion draws on his conception of human beings and their place in the world. Human beings are, Mill claims, wholly part of the natural order – as such, the human mind, as well as body, is entirely governed according to the laws uncovered by scientific investigation. This vision of the mind as operating according to natural laws leads to a view under which our only means of interaction with the world is *causal* interaction. Insofar as we are able to come to know the world, Mill claims, we can do so only by being receptive to the world causally. As such, the possibility of substantive *a priori* knowledge is precluded, for all receptivity to the world takes place *via* the senses.<sup>2</sup>

Our engagement with the world, to put this another way, is *sensible*. We can perhaps imagine beings capable of knowing elements of the world by direct and unmediated insight. Such creatures would know how things are without *being affected*. But we are not them. We could know the world by acts of pure reflection only 'if we could know a priori that we must have been created capable of conceiving whatever is capable of existing: that the universe of thought and that of reality, the Microcosm and the Macrocosm (as they once were called) must have been framed in complete correspondence'. '[A]n assumption more destitute of evidence could scarcely be made', however.<sup>3</sup> There is, for us, 'no knowledge cognizable by the mind's inward light'.<sup>4</sup> As natural beings, our knowledge of how things are has at its foundation modes of interaction with the world which are themselves wholly natural.

As well as being *sensible*, our engagement with the world is also *discursive*.<sup>5</sup> Thinking is conducted, Mill is clear, through and by the application of concepts – or, in terminology he prefers, 'general names'.<sup>6</sup> Our knowledge takes the form of understanding that *things are in a certain way*. A manner of engaging with the world which did not enable us to think of objects as possessing qualities 'would not enable us to make a single assertion respecting them'.<sup>7</sup> The claim that an object has a quality,

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<sup>2</sup> See John Skorupski, *John Stuart Mill* (Routledge 1989) 5-43 for a useful overview of Mill's naturalistic approach to philosophy, and 376-83 for its connection to his account of free speech.

<sup>3</sup> Mill, 'An Examination of Sir William Hamilton's Philosophy' in *Collected Works*, vol IX, 68.

<sup>4</sup> JS Mill, 'Coleridge' in *Collected Works*, vol X, 125.

<sup>5</sup> I draw loosely on the terminology of Henry E Allison's *Kant's Transcendental Idealism: An Interpretation and Defense* (rev edn, Yale UP 2004) 77ff. There are of course clear and crucial differences in Mill and Kant's conception of the human intellect, though these should not be allowed to mask instructive parallels, which have often been overlooked.

<sup>6</sup> Mill (n 2) 315-19.

<sup>7</sup> JS Mill, 'Notes on Analysis' in *Collected Works*, vol XXXI, 142.

however, is a relational claim: that *this* object is similar in some way to *other objects*. ‘The only meaning of predicating a quality at all, is to affirm a resemblance’.<sup>8</sup> For us, such resemblances are not themselves *sensed* between objects, but involve thinking *about* what is delivered by sensation. Knowledge of the world, that is to say, involves sensation, but also interpretation.<sup>9</sup>

#### *Fallibility, Evidence and Judgment*

It is in this context that we must understand Mill’s claim that ‘[a]ll silencing of opinion is an assumption of infallibility’.<sup>10</sup> As Piers Turner has pointed out, Mill’s claim is not that one must explicitly represent oneself as infallible in order to *actually* silence opinion, but rather that the only conditions under which one would be *justified* in silencing opinion are those of infallibility.<sup>11</sup> This is, Mill claims, because ‘[c]omplete liberty of contradicting and disproving opinion, is the very condition which justifies us in assuming its truth ... on no other terms, can a being with human faculties have any rational assurance of being right’.<sup>12</sup>

That our engagement with the world is *sensible* means that human beings are fallible in the following sense: there is no evidence-base  $E_1$  that could be acquired to support conclusion  $c$  such that  $E_1$  could not in principle be extended into  $E_2$  such that  $E_2$  supports not- $c$ . For this reason, in order to achieve knowledge of how things are, we must consider the *whole* of our own evidence base in order to draw warranted conclusions – not merely part. Beings with faculties such as our own are subject to conflicting and countervailing evidence from the senses, and as such, ignoring part of the evidence can be misleading. Someone who concludes from the sound of tweeting that *there is a bird close by* while ignoring that they can also see a nearby radio with an active on-light is not warranted in their belief – though that person could have been warranted in their belief, had the *only* piece of evidence in their possession been the sound of a bird, or indeed had they *taken into account* the countervailing evidence but judged it on balance unpersuasive.

As regards one’s own evidence, this sensible fallibility rules out a certain kind of evidentiary *silencing* which might otherwise seem tempting. Where we have reached

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<sup>8</sup> *ibid* 143.

<sup>9</sup> That our knowledge is achieved *sensibly* and *discursively* perhaps admits of exception at the foundational level in Mill’s view. *That I am having a coloured sensation* might be known immediately, not causally by a sensation delivered *from* that sensation; similarly, of two red sensations, *that these sensations are similar*, might be known without the application of concepts, but directly. See JS Mill, ‘A System of Logic Ratiocinative and Inductive’ in *Collected Works*, vol VII, 6–9, 70–2. And, Mill indicates, some simple and unstable forms of thought (and therefore perhaps knowledge) may be possible without linguistic, ie conceptual, resources. See Mill, ‘A System of Logic Ratiocinative and Inductive’ in *Collected Works*, vol VII, 19; Mill (n 2) 311ff. Nevertheless, all knowledge more complex than this must be sensible and discursive, Mill holds – and I will confine my attention, for the purposes of a treatment of free speech concerning public claims, to such knowledge.

<sup>10</sup> Mill (n 1) 229.

<sup>11</sup> See Piers Noris Turner, ‘Authority, Progress, and the “Assumption of Infallibility” in *On Liberty*’ (2013) 51 *Journal of the History of Philosophy* 93.

<sup>12</sup> Mill (n 1) 231.

a conclusion and have confidence in our warrant for that conclusion, we might be tempted to simply think that the force of existing countervailing evidence is reduced to nil – and that, as such, going forward, we can ignore such evidence, on the grounds that it is misleading. This would be a mistake, however, as can be seen by noting that the same portion of the initial evidence which would be regarded as *misleading* when outweighed by a competing set of evidence supporting some conclusion *c*, could be considered *supportive* when complemented by further evidence of not-*c*. The same considerations, of course, apply equally to newly acquired evidence: to disregard or silence such evidence because it conflicts with conclusions already drawn ignores the fact that our reasoning from evidence is always defeasible. ‘There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation’.<sup>13</sup>

Taken at a social level, the link between consideration of the entirety of our evidence-base and robust norms of free discussion is clear. The features of the sensible intellect which make it necessary to consider all of one’s *own* evidence – not merely part – also make it necessary to listen to the evidence offered by *others*. For however much supporting evidence any person may possess for a given belief, others may possess countervailing evidence which, on balance, outweighs it. If we are to have confidence in our beliefs, it must be on the basis that we have not neglected any evidence possessed by others. As such, a society committed to truth must be prepared to hear evidence openly – ie to be governed by norms of free discussion.

An even more fundamental link between the need for norms of free discussion and our ability to have confidence in our beliefs, however, derives from the *discursivity* of our interaction with the world. Our sensible fallibility has its origins in the fact that evidence, when taken in part, can prove misleading. But we are also subject to discursive fallibility: even if, *per impossibile*, one could be confident that there was no more relevant experience to be had on a given matter, the question would still remain as to how to *interpret* the experience one *has* had in terms of claims about the world. Human beings learn about the world, Mill notes, by ‘discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted. ... Very few facts are able to tell their own story, without comments to bring out their meaning’.<sup>14</sup>

No interpretation of experience, Mill holds, is *self-validating*: there is a gap between the interpretation any individual *does* draw and the interpretation that would be *rational*, and as such we do not think that all interpretations are equally warranted. As beings that know the world only through the interpretation of experience, therefore, we are in need of a way of knowing whether the interpretation which we draw is a valid one. But such validation cannot itself be found purely *in* experience – as, for instance, the feeling of assurance, or the impression of correctness – for such an experience would itself simply amount to one more thing in need of interpretation and confirmation. To take any interpretation as confirmed *subjectively*, that is to say, amounts to ‘denying the existence of any outwards standard, the conformity of an

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<sup>13</sup> *ibid.*

<sup>14</sup> *ibid.*

opinion to which constitutes its truth' – of taking 'opinions [as] their own proof, and feelings [as] their own justification'.<sup>15</sup> The problem is a deep one: given that the authorisation of interpretation is not encountered in experience, from where can it come?

Mill claims that the only test on our *own* judgments about the validity of an interpretation can be the judgments of *others*.<sup>16</sup> For beings such as ourselves, no escape from human interpretation is possible – but comparison of one interpretation with another can provide a route to assurance that is not merely subjective. I can have confidence that my interpretation is objectively warranted only insofar as I believe other independent agents would also converge upon that same interpretation. That my interpretation finds confirmation in the judgment of others should increase my confidence that I am genuinely warranted in my belief – as should its endurance in the face of ongoing free consideration of emerging alternatives. Discussion, in which experience is shared and interpretations are freely compared and contrasted, then, is a condition of our coming to take any of our beliefs as justified. Norms of free discussion provide the only context in which we can gain critical distance upon our own interpretations – without such a context, we can have no rational assurance, but only psychological conviction. 'To refuse a hearing to an opinion, because they are sure that it is false, is to assume that their certainty is the same thing as absolute certainty'.<sup>17</sup>

Mill's repeated reference to how *human beings* can come to know the world should remind us that his argument advances from substantive commitments about the nature of our intellect and the forms of knowledge and objectivity *we* are capable of:

The beliefs which we have most warrant for, have no safeguard to rest on, but a standing invitation to the whole world to prove them unfounded. If the challenge is not accepted, or is accepted and the attempt fails, we are far enough from certainty still; but we have done the best that the existing state

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<sup>15</sup> JS Mill, 'A System of Logic Ratiocinative and Inductive' in *Collected Works*, vol VIII, 229; JS Mill, 'Letter to Gomperz' in *Collected Works*, vol XIV, 134.

<sup>16</sup> Mill struggles with this issue at various points in his philosophy. See JS Mill, 'Utilitarianism' in *Collected Works*, vol X, 206–7, in which Mill suggests judgments can be disciplined by, and tested against, *principles*, and JS Mill, 'A System of Logic Ratiocinative and Inductive' in *Collected Works*, vol VII, 564, in which he notes that '[t]here is no appeal from the human faculties generally, but there is an appeal from one human faculty to another; from the judging faculty, to those which take cognizance of fact, the faculties of sense and consciousness'. Such mechanisms might be useful, but cannot provide an ultimately stable resting point – for of course the confidence that one is correctly *applying* principles, or correctly *judging* that the deliverances of independent faculties coincide, is itself merely delivered as the *experience* of confidence. Ultimately we must take the grounds that *warrant* such confidence to be grounded in something beyond the subject itself. See, in this connection, Ludwig Wittgenstein, *Philosophical Investigations* (GEM Anscombe tr, Basil Blackwell 1953) §202; Saul A Kripke, *Wittgenstein on Rules and Private Language* (Harvard UP 1982) 89ff.

<sup>17</sup> Mill (n 1) 232.

of human reason admits of ... This is the amount of certainty attainable by a fallible being, and this the sole way of attaining it.<sup>18</sup>

If our contact with the world was immediate and non-causal, countervailing evidence with regards to evidence might not be possible; if our experience was self-interpreting, there would be no distinction between subjective confidence and objective warrant. (Indeed, Mill claims, the intuitionist model of coming to know amounts to the claim that we have exactly such a form of knowledge. Intuiting *how things are* purportedly involves unmediated knowledge of the world which does not require interpretation and cannot be overturned by further evidence.) Freedom of discussion would, for such beings, be redundant – or, at least, redundant from a distinctively epistemic perspective. But for humans – creatures for whom evidence may always be misleading because it is partial, and for whom objectivity of interpretation is only possible in dialogue with others – maintaining conditions of free discussion is pivotal to achieving knowledge.

#### *Engagement with Falsehoods and Partial Truths*

The argument from human fallibility is self-standing, and suffices on its own to establish what we might term the Freedom of Discussion Principle: that there should be no interference with the discussion of any opinion. For without unrestricted discussion, we can be confident neither that we have considered all of the available evidence, nor that our interpretation of the evidence is sound – and hence, we cannot take our beliefs to be justified. This argument, however, is bolstered by two further arguments. Whereas the first division of Chapter Two attempts to show that an opinion should not be suppressed because it may be true, the second and third divisions attempt to show that even if an opinion *is* false, or even if it is merely *part* of the truth, it should still be heard.

Mill's argument that even beliefs which are false should be heard draws on a quite specific conception of knowledge, based on observations about 'the way in which truth ought to be held by human beings'.<sup>19</sup> Knowledge *that* something is the case, Mill claims, involves certain practical abilities – knowledge *how* to do certain things – which are hard to maintain except in a context in which true beliefs are forced to defend themselves against false beliefs.<sup>20</sup> Far from it being epistemically deleterious to have falsehoods aired and engaged with, then, it is epistemically *useful* to have falsehoods articulated 'in earnest' by those who 'do their very utmost for them'.<sup>21</sup>

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<sup>18</sup> *ibid* 232.

<sup>19</sup> *ibid* 244.

<sup>20</sup> Though the early essay *On Genius* differs from *On Liberty* in emphasis – most notably, in placing a model of autonomous, rather than dialectical, discovery at its knowledge – it is nevertheless telling that it endorses a model of knowledge which involves *ability*. Knowledge is a "something to do be done", rather than to be *had*; it is not passive, but a "power": see JS Mill, 'On Genius' in *Collected Works*, vol I, 336.

<sup>21</sup> Mill (n 1) 245.

Knowledge, Mill claims, involves the ability to account for one's belief in terms of reasons: *justification* of a proposition consists not in an extra piece of information to be acquired, but a capacity made explicit in the social process of giving account to others for one's belief. Without the ability to successfully articulate the 'grounds for one's own opinion', a belief is not properly considered knowledge, 'but one superstition the more, accidentally clinging to the words which enunciate a truth'.<sup>22</sup> As Mill conceives the process, however, being able to offer reasons for one's belief – to explain why one believes *this* rather than *that* – involves being able to 'refute the reasons on the opposite side'.<sup>23</sup> In order to qualify as knowing a proposition, that is to say, we must be able to show 'why that other theory cannot be the true one: and until this is shown, and until we know how it is shown, we do not understand the grounds of our opinion'.<sup>24</sup> As a result, 'he who knows only his own side of the case knows little of that'.<sup>25</sup> *Hearing, understanding, and arguing against*, false beliefs helps to maintain our ability to provide justification for our own true beliefs.

At an even more basic level, however, the discussion of false beliefs is also the primary mechanism for us to clarify the *meaning* of true beliefs.

[N]ot only the grounds of the opinion are forgotten in the absence of discussion, but too often the meaning of the opinion itself. ... Instead of a vivid conception and a living belief, there remain only a few phrases retained by rote; or, if any part, the shell and husk only of the meaning is retained, the finer essence being lost.<sup>26</sup>

In the context in which beliefs are accepted without resistance, there is no need for active *thinking* about those beliefs, and we ourselves can too easily pass over their semantic import. In the absence of discussion and defense, that is to say, we can lose sight of the commitments – theoretical and practical – that are involved in *having* any given belief. We lose the ability in those circumstances to connect our knowledge to its implications for further belief and action – the mirror image of losing the ability to connect our knowledge to its grounds. In such circumstances, beliefs are held only nominally, 'without being ever realized in the imagination, the feelings, or the understanding'.<sup>27</sup>

Lack of discussion of false beliefs, then, can lead to the loss of our ability to connect our true beliefs within a network of related beliefs and actions – in these circumstances a belief is 'held as a dead dogma, not a living truth'.<sup>28</sup> As such, open

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<sup>22</sup> *ibid* 244.

<sup>23</sup> *ibid* 245.

<sup>24</sup> *ibid* 244.

<sup>25</sup> *ibid* 245.

<sup>26</sup> *ibid* 247.

<sup>27</sup> *ibid*.

<sup>28</sup> *ibid* 243.

discussion and debate, in which falsehoods are ‘fully, frequently, and fearlessly discussed’, is epistemically useful.<sup>29</sup> It is also useful because it improves our chances of reaching the *whole*, rather than a merely *partial*, truth.

When two deeply held claims are in conflict, it is sometimes the case, Mill notes, that one claim is true and the other false. ‘But there is a commoner case than either of these; when the conflicting doctrines, instead of being one true and the other false, share the truth between them’.<sup>30</sup> Mill offers examples of partial truths which help us to better understand the thought. Admirers of the eighteenth century, Mill claims, observe that *civilization leads to an improvement in the lives of individuals*. That is true – but only part of the truth, and can be misleading unless combined with an acknowledgement of the Rousseauian insight that some aspects of civilization are ‘enervating and demoralizing’.<sup>31</sup> The conservative is quite correct that *stability is necessary for a functioning state* – but that point deceptive if not combined with the liberal observation that progress is a condition which enables stability.<sup>32</sup>

Individuals, Mill thinks, are constitutionally liable to fall into the trap of mistaking the portion of the truth that *they* possess for the *whole* of the truth about a given matter. The experience of any person is necessarily limited – ‘clever & intelligent men hardly ever err from [seeing what is not], but no powers of mind are any protection against the evils arising from imperfect and partial views of what is real’<sup>33</sup> – and we display a tendency towards epistemic conceit.

In general, man’s capacity of putting himself into the position of another man, and identifying himself with that man’s feelings and modes of thinking, when these are any way different from his own, is extremely limited. Most men, in consequence, regard the feelings and ideas excited in men of an opposite character to themselves, by objects which excite no such feelings in *them*, as monstrous and unnatural; or at least, radically wrong, and meriting no kind of consideration or allowance, either in reasoning or in conduct ... Hence we have hundreds of systems founded on the partial views of one-sided minds.<sup>34</sup>

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<sup>29</sup> *ibid.*

<sup>30</sup> *ibid.* 252.

<sup>31</sup> *ibid.* 253.

<sup>32</sup> *ibid.*; see also JS Mill, ‘Considerations’ in *Collected Works*, vol XIX, 383–89. Mill’s most telling example of someone who possessed only *part* of the truth, however, is Bentham. Bentham was correct, Mill observes, to note that *individuals are motivated by pursuit of utility* – but limited experience “furnished him with an unusually slender stock of premises” which resulted in his overlooking other truths about human beings. This, Mill claims, did not make Bentham’s premises false, but rather just incomplete – only “half of the truth”: see JS Mill, ‘Bentham’ in *Collected Works*, vol X, 93. See also Mill’s comments on Auguste Comte and James Mill: JS Mill, ‘Autobiography’ in *Collected Works*, vol I, 164–5; JS Mill, ‘Auguste Comte and Positivism’ in *Collected Works*, vol X, 313.

<sup>33</sup> JS Mill, ‘Letter to d’Eichthal’ in *Collected Works*, vol XII, 42.

<sup>34</sup> JS Mill, ‘Smart’s Outline of Sematology [I]’ in *Collected Works*, vol XXIII, 426.

The best correction for such tendencies, Mill suggests, is open discussion, for it is in discussion that we encounter alternative perspectives and beliefs, which though contrary are our own, are held just as deeply. ‘The long or extensive prevalence of any opinion as a presumption that it [is] not altogether a fallacy; that to its first authors at least, it was the result of a struggle to express in words something which had a reality to them’.<sup>35</sup> The fact that some claim is held by thoughtful individuals, stands as evidence that there is *something* to it: that it must be accommodated as *part* of the truth. Achieving the whole truth on important matters, therefore, ‘is so much a question of the reconciling and combining of opposites, that very few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners’. Unless two sides of the truth are ‘expressed with equal freedom, and enforced and defended with equal talent and energy, there is no chance of both elements obtaining their due’.<sup>36</sup>

### *Value of Truth*

The case for freedom of discussion of Chapter Two of *On Liberty*, then, has three parts, and takes the following structure.

For any opinion  $\varphi$ ,

[1, argument from fallibility]:  $\varphi$  might be true, and so should be not be suppressed,<sup>37</sup>

[2, argument from improved justification/understanding]:  $\varphi$  might be false, but should not be suppressed, for its airing can contribute to a better justification and understanding of the truth,<sup>38</sup>

[3, argument from whole truth]:  $\varphi$  might be partially-true, but should not be suppressed, for its airing can help us achieve the whole truth.<sup>39</sup>

Therefore: there should be no interference with the discussion of any opinion  $\varphi$ .  
[Freedom of Discussion Principle]

It is easy to overlook the fundamentally different character of argument deployed in sections 1, 2 and 3. As noted above, the argument from fallibility is itself sufficient to establish the conclusion, whereas the arguments from improved justification/understanding and whole truth merely bolster the overall case. The first identifies a *condition for the possibility of knowledge*, whereas the other two point out *conditions which better facilitate* the acquisition of knowledge. Mill is not always clear about this difference, and the combination of arguments in Chapter Two of *On Liberty* often causes him to oscillate between language which stresses the strict necessity of free discussion, and language which merely points out its edifying effects, for knowledge.

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<sup>35</sup> Mill (n 3) 120.

<sup>36</sup> Mill (n 1) 254.

<sup>37</sup> *ibid* 229-43.

<sup>38</sup> *ibid* 243-52.

<sup>39</sup> *ibid* 252-57.

Despite this distinction, it bears emphasis that the arguments share something important. They are *epistemic* arguments, appealing only to *the value of knowledge* – and not to any ‘abstract right’<sup>40</sup> – in mounting the case for free discussion of opinion. The value of knowledge is itself all but taken for granted throughout the argument, however, receiving almost no defense as part of the argument. *Almost* no defense, but not *entirely* no defense – for Mill does advert to an argument for the value of truth when considering the suggestion that one might insulate an opinion from criticism not on the grounds of its truth, but on the grounds that it is too socially useful to dispense with.

Mill rejects that suggestion. To insulate an opinion of the grounds of its usefulness, he claims, one would at least need to be in a position to claim that the opinion in question is useful. To be in a position to make *this* claim, however, would involve opening the issue up for debate, for ‘[t]here is the same need of an infallible judge of opinions to decide an opinion to be noxious, as to decide it to be false, unless the opinion condemned has full opportunity of defending itself’.<sup>41</sup> And having this debate about a view’s usefulness without entering into a substantive debate about the truth of the opinion itself would be impossible, because ‘[t]he truth of an opinion is part of its utility’.<sup>42</sup>

The details of that argument need not concern us here, for what is primarily of interest for our purposes is the link Mill draws between *truth* and *utility*. As is well known, Mill claims in his moral philosophy ‘that happiness is desirable, and the only thing desirable, as an end’.<sup>43</sup> The status of utility as the ‘ultimate principle of teleology’, does not mean that human beings do not have other ends – but only that those ends are themselves justified by their place in securing human happiness. ‘I do not mean to assert that the promotion of happiness should be itself the end of all actions, or even of all rules of action. It is the justification, and ought to be the controller, of all ends, but is not itself the sole end’.<sup>44</sup> That Mill holds that the truth of an opinion is *part of its utility* shows how the orientation towards truth of Mill’s argument in Chapter Two of *On Liberty* fits within his broader axiological commitments. Truth, in the form of *knowledge*, is the proximate end of enquiry and discussion – the end assumed valuable by that practice and regulating its norms. This end is in turn justified by its relation to the overarching end of human life: happiness.<sup>45</sup>

## 2. The Scope of Freedom of Discussion

Mill claims, then, that there should be no interference with the discussion of any opinion. So stated, however, the injunction is hard to interpret – for how demanding it will turn out to be depends greatly on how widely or narrowly *interference* and

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<sup>40</sup> *ibid* 224.

<sup>41</sup> *ibid* 223.

<sup>42</sup> *ibid* 223; JS Mill, ‘Utility of Religion’ in *Collected Works*, vol X, 405.

<sup>43</sup> Mill, ‘Utilitarianism’ (n 15) 234.

<sup>44</sup> Mill, ‘A System of Logic Ratiocinative and Inductive’ in *Collected Works*, vol VIII, 951–52.

<sup>45</sup> See Christopher Macleod, ‘Mill on the Primary of Practical Reason’ (2018) 78 *Analysis* 630.

*discussion of opinion* are to be understood. I wish in this section, therefore, to clarify the scope of Mill's claim: put simply, what he means to limit by his Freedom of Discussion Principle, and what he means to protect.

As is generally well known, Mill's concern is not merely with interference by the *state*, but also by *society at large*. While Mill certainly takes seriously the possibility of governmental intrusion into individuals' lives, his primary focus in *On Liberty* is the newly emerging threat to liberty which arises as a result of democratic mass society – the social pressures made possible by egalitarian social structures and *mores*. Informal mechanisms of control possible in such societies are, he argues, just as insidious as legislative or executive action – and, indeed, can often be more so, given that they are capable of 'penetrating much more deeply into the details of life, and enslaving the soul itself'.<sup>46</sup>

Society can and does execute its own mandates ... 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.<sup>47</sup>

Mill's prohibition on interference with discussion applies as equally to social as to state interference – it applies to individuals attempting to censor by the use of stigma, as well as by the use of law.<sup>48</sup> '[T]o control the expression of opinion ... I deny the right of the people to exercise such coercion, either by themselves or by their government. The power itself is illegitimate'.<sup>49</sup> We might reasonably, ask, however: what *counts* as an instance of the people exercising such interference? Mill does not offer an explicit answer to this question. The outer-boundaries of such interference are usefully marked by those reactions Mill *does not* count as interference, however.

Mill is clear that we are entitled to form opinions about others on the basis of their conduct and views, and to act on those opinions – this is not interference with *their* liberty, but merely a legitimate exercise of *our own* liberty. 'Though doing no wrong to any one, a person may so act as to compel us to judge him, and feel to him, as a fool, or as a being of an inferior order ... We have a right, also, in various ways, to act upon our unfavourable opinion of any one, not to the oppression of his individuality, but in the exercise of ours'.<sup>50</sup> Indeed, we are entitled to attempt to persuade a person, ie not to express certain views – 'remonstrating with him, or reasoning with him, or persuading him, or entreating him'<sup>51</sup> – or simply to avoid someone if we see fit. 'We are not bound, for example, to seek his society; we have a right to avoid it ... for we have a right to choose the society most acceptable to us. We have a right, and

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<sup>46</sup> Mill (n 1) 220.

<sup>47</sup> *ibid.*

<sup>48</sup> As Vincent Blasi notes in this volume, this is one key way in which Mill's argument differs from that of his most famous predecessors.

<sup>49</sup> *ibid* 229.

<sup>50</sup> *ibid* 278.

<sup>51</sup> *ibid* 224.

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>52</sup>

Such responses – [a]dvice, instruction, persuasion, and avoidance by other people<sup>53</sup> – do not amount to coercive interference with an agent, as they do not attempt to change their action by 'compelling' or 'visiting him with an evil'.<sup>54</sup> We can stray into the terrain of interference, however, if such acts constitute a threat of censure. And when we react with feelings of 'anger or resentment', we *do* visit the agent with an evil. As such, we coercively interfere in the permissible expression of ideas. We are not entitled to react with 'moral reprobation' to those who express ideas with whom we disagree, and we are not entitled to treat them as 'an enemy of society'. Indeed, though we are permitted to avoid those who engage in what we regard as distasteful expression, we are not entitled to 'parade our avoidance'.<sup>55</sup>

The distinction is a difficult one to draw precisely. It permits one to form an estimate of another's expressed opinion, but not to be judgmental – to withdraw from an individual personally if one sees fit, but not to withdraw our recognition of that person as a member with full standing in our moral community. Wherever the line lies between these categories of reaction, though, the resulting prohibition on interference will clearly be an exacting one. For Mill's claim is that we should not react to an agent's expressed opinion by public-facing reproach – that we should remain, in a word, *civil* – and this involves taking an open attitude towards those whose opinions we think false, distasteful or even immoral. As he himself puts it, individuals are 'to be allowed to say what they have got to say, & not be abused for their opinions so long as they *do* nothing wrong'.<sup>56</sup> They are 'to be judged by their actions ... & not by their speculative opinions'.<sup>57</sup>

Mill's notion of 'interference', then, is expansive – and, as such, much is ruled out as impermissible in response to discussion. What constitutes 'discussion', though, is perhaps surprisingly narrow. Recall that Mill's case for free discussion is *epistemic*, and argues from the claim that an opinion  $\varphi$  might be *true*, *false*, or *partially-true* to the claim that  $\varphi$  should be freely discussed. Because the argument is explicitly premised on contributions to discussion being either true, false, or partially-true, it is important to note that it is applicable only to statements which are *truth-apt*: capable of being evaluated in terms of truth. Moral and political claims, of course, are capable of truth or falsity – even when we do not know whether a proposition about *what we ought to do* is true or false, we know that it is the sort of claim which *admits* of being true or false – and are therefore protected by Mill's Freedom of Discussion Principle. Scientific claims are also truth-apt, as are broader claims about how things *are*, *were* or *will be*, and so are similarly protected. All such propositions are capable of being affirmed, as well as being denied or merely entertained, and as such can form part of discussion.

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<sup>52</sup> *ibid* 278.

<sup>53</sup> *ibid*.

<sup>54</sup> *ibid* 224.

<sup>55</sup> *ibid* 278-79.

<sup>56</sup> JS Mill, 'Letter to Lambert' in *Collected Works*, vol XVI, 1492 (my emphasis).

<sup>57</sup> JS Mill, 'Letter to Marshall' in *Collected Works*, vol XVI, 1479.

Because the argument in Chapter Two of *On Liberty* only offers a case for protecting the assertion of truth-apt propositions as a contribution to discussion, however, the conclusion it establishes is significantly more restricted than that which those who advocate for ‘freedom of speech’ in the twenty-first century usually intend. We might note, for instance, that *satire* is not truth-apt. It makes little sense to ask whether a satirical joke is *true* or *false*. It can, to be sure, be witty or unamusing – penetrating or wide-of-the-mark – but it cannot be evaluated in terms of *truth*. The case Mill offers for the Freedom of Discussion, appealing to the truth-aptitude of opinions, simply cannot speak to the case. Similarly, insofar as we hold that they cannot be persuasively characterised as capable of truth or falsity in anything other than a metaphorical sense, it cannot speak to the case of poetry or literature, painting or music.<sup>58</sup> Neither can one evaluate acts of protest or support – the burning of a flag, or the wearing of a religious symbol – in terms of its truth or falsity.

Discussion, then, has a technical meaning in Mill’s work: freedom of discussion does not amount to freedom of expression. As such, many cases which are often argued in First Amendment terms to be covered by the *right to free speech* simply fall outside the scope of Mill’s argument. Of course, this does not mean that Mill intends that such acts should receive no protection. Rather, it only means that Mill’s arguments for the *freedom of discussion* does not offer them protection. Telling jokes, painting, and wearing religious symbols may well receive protection in Mill’s work, but we have to look beyond the free speech arguments of Chapter Two of *On Liberty* – to the arguments of Chapters Three, Four and Five – to find its source. Such protections will have little to do with the epistemic case Mill makes for free discussion, but rather the utility of allowing people to develop their personality as they see fit, and pursue without interference any action which does not directly harm others.

Are *all* assertions of truth-apt claims protected by the Freedom of Discussion Principle? Mill’s answer is complicated, but provides for clear cases in which the assertion of truth-apt claims is not permitted, and can be legitimately subject to interference.

[O]pinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered

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<sup>58</sup> Of course, this is not to deny that some artworks, religious symbols, jokes, etc, can be used to persuade or to convey a message. But this is a feature that belongs only to some expressive acts and objects – it is clear that, ie, an average landscape painting does not communicate any meaning – and such usage does not imply that works themselves *make a claim*. (It is little use to note that an artwork can be *taken* by individuals to make a claim about the world – or indeed that an individual author can *intend* to make a claim *via* any expressive act – for such criteria threaten to trivialise the notion of meaningfulness by implying that *anything* can possess *any* meaning.) In the absence of tightly disciplined norms governing interpretation, commitment, and disagreement, expressive acts and objects cannot constitute moves in a discussion – and we cannot evaluate them as true or false.

orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.<sup>59</sup>

The opinion that corn dealers are starvers of the poor is not, in virtue of its *content*, proscribed. Assertion of the belief does not *itself* warrant interference – but interference can be warranted in certain contexts, when, for instance the assertion amounts to an *instigation to violence*. So, too, Mill notes that *the invasion of privacy* warrants interference, even when it takes place merely by the expression of truth-apt propositions.

Mr. O’Connell goes farther than we are able to follow him, when he proposes that in all cases of private libel, truth should be a justification. ... But we would not permit the press to impute, even truly, acts, however discreditable, which are in their nature private. ... The proper tribunal for the cognizance of private immoralities, in so far as any censorship can be advantageously exercised over them by opinion at all, is the opinion of a person’s friends and connexions.<sup>60</sup>

There is good reason to think that interference is also warranted in other cases of the assertion of truth-apt claims – for instance, in the case of *violation of copyright*.<sup>61</sup>

What is often missed, however, is that the range of cases in which interference with the assertion of a truth-apt proposition is permissible is far wider than such *legally actionable* instances of speech. Given that Mill’s notion of interference is a broad one – broad enough to include *moral reproach* as interference – he must, for instance, endorse interference in cases of *lying*. While he would not advocate *legal* intervention as an expedient sanction in cases of individual lying – unless, presumably, that lie takes place in a context in which it qualifies as perjury – informal mechanisms of interference such as anger and resentment are entirely appropriate, because, as he repeatedly notes, lying is morally wrong.<sup>62</sup> That a lie takes the form of the assertion of a truth-apt proposition does not make it permissible, and does not oblige us to tolerate it as simply a contribution to discussion which permits its refutation.

The Freedom of Discussion Principle, we might note, is most plausible where discussion is portrayed as taking place solely within the space of reasons. Where volunteering a proposition is imagined to give rise only to disembodied reflection upon a claim, little can seem objectionable about the Freedom of Discussion Principle – for its consequences are seen only as moves of reason occasioned by acts of free thought. For human beings, however, discussion cannot take place solely in the space of reasons. (Though discussion in the seminar room can often seem to offer that ideal.) Because speech must take place within the causal order, it cannot only be the

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<sup>59</sup> Mill (n 1) 260.

<sup>60</sup> JS Mill, ‘Mr O’Connell’s Bill for the Liberty of the Press’ in *Collected Works*, vol VI, 165.

<sup>61</sup> See, for instance, Mill’s comments on Appleton’s proposals for international copyright: JS Mill, ‘Letter to Rae’ in *Collected Works*, vol XVII, 1853.

<sup>62</sup> See, ie, Mill, ‘Utilitarianism’ (n 15) 223, and Mill, ‘Bentham’ (n 31) 112.

volunteering of a proposition, but must take on other aspects also, depending on its causal antecedents and consequences.

What may be accurately described as *asserting a proposition* might also, because one speaks too loudly, be described as *bursting one's interlocutor's eardrums* – and under the latter description might clearly be subject to interference. (It can seem tempting to distance the effects of the assertion by saying that bursting one's interlocutor's eardrums is merely the *effect* of the action – but in an important sense, it simply *is* the action, under an alternative description.<sup>63</sup>) Similarly, what might be *the assertion of a proposition* might also be *an instigation to violence, an invasion of privacy, a lie*, etc. Because *all* actions in the causal world are subject to multiple descriptions, no action can be *only* a contribution to discussion. If the Freedom of Discussion Principle protects assertions in one of their aspects, but all assertions must also take on an additional aspect which may render them unprotected, how are we to know whether any *given* assertion is liable for warranted interference? To answer this, we must turn to Mill's discussion of the Harm Principle.

### 3. The Harm Principle and the Freedom of Discussion Principle

In Chapter One of *On Liberty*, Mill articulates the central purpose of his essay as a whole:

The object of this Essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties, or the moral coercion of public opinion. That principle is, that 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 civilized community, against his will, is to prevent harm to others.<sup>64</sup>

The principle he specifies here has become known as the Harm Principle. A central question, therefore, for the purpose of our discussion is how that principle relates to the one outlined in this chapter: how the Harm Principle, articulated in Chapter One of *On Liberty*, is connected to the Freedom of Discussion of Principle, defended in Chapter Two.

There are three apparent options. Firstly, the Freedom of Discussion Principle might simply be *an instance* of the Harm Principle. That there should be no interference with the discussion of any opinion might be strictly implied by the fact that the only reason for interference *tout court* is harm to others. Secondly, the principles could be entirely independent of one another, offering guidance in different areas of life. Each might be a valid principle with self-standing normative force confined to its

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<sup>63</sup> See Donald Davidson 'Actions, Reasons and Causes' in *Essays on Actions and Events* (OUP 1980) 4-5.

<sup>64</sup> Mill (n 1) 223.

own domain. Thirdly, the principles could be independent, and speak to some of the same areas of life. Both could have force, but the principles might be in need of reconciliation in some way.

There is some support for each option. That the Freedom of Discussion Principle should be taken simply as *an instance* of the Harm Principle is certainly suggested by the fact that Mill seems to give the Harm Principle priority in *On Liberty* as the ‘one very simple principle’ which the work seeks to assert.<sup>65</sup> Indeed, Mill seems to confirm in his *Autobiography* that *On Liberty* is dedicated to defending a *single* principle, rather than *multiple* principles, describing the work as ‘a kind of philosophic text-book of a single truth’.<sup>66</sup> Viewing the principle defended in Chapter Two as a corollary to the Harm Principle would, additionally, make sense of Mill’s claim that that chapter is ‘a single branch’ of his ‘general thesis’.<sup>67</sup>

Nevertheless, there is a serious obstacle to interpreting the Freedom of Discussion Principle as merely an application of the Harm Principle. For nowhere in his defense of the Freedom of Discussion Principle does Mill even *mention* the Harm Principle – the notion of harm plays no role whatsoever in the argument of Chapter Two. As the materials were certainly at hand, we might have expected Mill to offer the following derivation in Chapter Two:

[1, Harm Principle]: the only reason we are warranted in interfering in an action is to prevent harm to others.

[2, No Harm in Discussion Claim]: discussion never causes harm,

Therefore: there should be no interference with discussion. [Freedom of Discussion Principle]

Mill pointedly does *not* make this argument, however. He appeals, instead, to the epistemic argument outlined above. It is hard to believe, given its obviousness, that Mill’s eschewal of the argument is accidental, or a matter of oversight – all the more so, because it would have lent greater unity to *On Liberty* as a whole. As such, it is impossible to resist the conclusion that Mill rejected the argument – either because he thought it unsound on the grounds of the No Harm in Discussion Claim, or because he thought it missed something important.<sup>68</sup>

Treating the Harm Principle and Freedom of Discussion Principle as independent of one another, but each restricted to their own domain, leads to other problems. As we have seen, as casual creatures, it is not possible to identify actions which are *only* ‘discussion’ – all actions are capable of being described in multiple ways. If the principles are to be treated as applicable to different domains, then, a detailed account is needed of to which acts of discussion the Freedom of Discussion Principle applies,

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<sup>65</sup> *ibid* (my emphasis).

<sup>66</sup> Mill, ‘Autobiography’ (n 31) 259.

<sup>67</sup> Mill (n 1) 227.

<sup>68</sup> See, however, Daniel Jacobson, ‘Mill on Freedom of Speech’ in Christopher Macleod and Dale E. Miller, *A Companion to Mill* (Wiley Blackwell 2017) 440–53 for a recent defence of this view.

and to which the Harm Principle applies.<sup>69</sup> (We can, no doubt, *define* discussion as that to which only the Freedom of Discussion Principle applies by fiat – but the task of determining the extension of the Freedom of Discussion Principle will remain. What is needed is a *non-circular* account.)

We are unlikely to be able to derive such an account *a priori*. While appealing to participants' intention to contribute to debate might seem to promise a way to isolate actions as accountable only to the Freedom of Discussion Principle, it would be absurd to claim that an action can escape appeal to the Harm Principle simply because it was intended, *however unreasonably*, as a contribution to debate. And while we might be able to offer a socio-historical account of domains in which free speech *has* been privileged as absolute – contexts in which it has been taken for granted that the causing of harm is either impossible, or is an unacceptable ground for interfering in discussion – what is needed is a *justification* for cordoning off such areas for treatment solely by the Freedom of Discussion Principle. Mill never offers such an account, and it is hard to imagine what one which does justice to the conditions of public entry we think appropriate for discursive areas in the modern world would look like. Entry into spaces for discussion, we might say, should not depend on a willingness to suffer whatever harms occur therein without any call for redress.

We are left, therefore, with an account according to which the authority of the Freedom of Speech Principle and Harm Principle each possess independent force, but in which their jurisdiction overlaps. How, then, are we to understand their interaction? Given Mill's clear preparedness to appeal to the Harm Principle for cases in which discussion amounts to, ie incitement, it would be implausible to claim that Mill thinks that the Freedom of Discussion Principle trumps the Harm Principle in any case in which both apply – that where an action is describable *in merely one way* as discussion, the question of interference is settled ultimately by appeal to the Freedom of Discussion Principle rather than the Harm Principle. Rather, Mill's preparedness to countenance interference in some actions describable as discussion when those actions are harmful suggests that the application of the Harm Principle constrains the application of the Freedom of Discussion Principle.

The nature of that constraint, however, should be carefully understood. The Harm Principle, of course, offers a *necessary*, and not a *sufficient*, condition for interference. That an action harms another does not imply that we *should* interfere with that action, but rather opens up the possibility of *considering* interference which would otherwise be ruled out. '[I]t must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference'.<sup>70</sup> Where it is not ruled out by the Harm Principle, judgments about interference must be made on the basis of prudential considerations: whether interference will, on balance and taking into account long term effects, be positive, and what form of interference (formal or informal) will lead to the *best* results. This applies as much to actions which can be

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<sup>69</sup> As Vincent Blasi puts it in ch. 2 of this volume, this strategy will involve making sure "the operative category "thought and discussion" is carefully delineated". As will be seen, I am less optimistic about achieving such a delineation than he is.

<sup>70</sup> *ibid* 292.

described as discussion as to other forms of action.

Where the assertion of a proposition is also an action which causes harm – as we might think of assertions which amount to invasions of privacy, incitement, etc – interference, therefore, is an option. Nonetheless, the Freedom of Discussion Principle retains force, providing independent considerations that count, albeit non-decisively, against such interference. The Freedom of Discussion Principle, to put this another way, provides extra reasons which must be taken into account in calculating whether interference is warranted *all things considered* – and as such the bar for interference in such cases is raised. That norms of free discussion are a necessary condition for the possibility of knowledge and facilitate the discovery of truth means that the cost of interference in discussion is non-trivial, and indeed can be extremely high. But that does not mean that interference cannot be warranted in any case whatsoever.<sup>71</sup> As Mill is clear, ‘rules of conduct cannot be so framed as to require no exceptions’.<sup>72</sup> This applies as much to the Freedom of Discussion Principle as to any other rule.

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<sup>71</sup> See Jonathan Riley, ‘J.S. Mill’s Doctrine of Freedom of Expression,’ (2005) 17 *Utilitas* 147–79 for a quite different interpretation of Mill’s argument, which nevertheless, I think, reaches the same conclusion.

<sup>72</sup> Mill, ‘Utilitarianism’ (n 15) 225.