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### Article

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# Speech, truth and liberty: Bentham to John Stuart Mill<sup>1</sup>

*Peter Niesen*

## Abstract

Bentham's Utilitarianism transforms earlier free speech doctrine in the service of the pursuit of truth and the control of government, preserving the distinction between statements of opinion and of fact and awarding the latter a lesser degree of protection. The work of James Mill and the early writings of John Stuart Mill retain this distinction, but their accounts are weighed down by the problems of a direct Utilitarian approach, in their consequentialist balancing of different values against each other, and in their dependence on a majoritarian epistemology and their commitment to a naive progressive optimism. Mill goes on in *On Liberty* to address and resolve these problems on the basis of a new justification for free speech as free deliberative thought. I argue that, contrary to most interpretations, his new justification leaves untouched the basic distinction between absolutely protected expressions of opinion and only functionally and contingently protected assertions of fact, leaving room for restrictions on factual statements, especially when untrue.

**Keywords:** Bentham; James Mill; John Stuart Mill; liberty; freedom of speech

In his account of John Stuart Mill's life as a public intellectual, Richard Reeves relates the history of a failed campaign that appears to have briefly landed the 16-year-old Mill in prison. With some companions, Mill had distributed controversial leaflets in a working-class neighbourhood, arguing for birth control and providing the necessary medical information:

All animal procreation is the result of seminal contact between the sexes. With mankind and healthy married people, sexual intercourse is as unavoidable, as it is wholesome and virtuous. But it is by no means desirable, it is, indeed, a continued torture, that a married woman should be incessantly breeding or bringing forth children, often unhealthy, and born with a certainty of death in infancy and nothing but the patients of pain [...]. What is done by other people is this. A piece of soft sponge is tied by a bobbin or penny ribbon, and inserted just before the sexual intercourse takes place, and is withdrawn again as soon as it has taken place. [...] If the sponge be large enough, that is; as large as a green walnut, or a small apple, it will prevent conception, and thus, without diminishing the pleasures of married life, or doing the least injury to the health of the most delicate woman, both the woman and her husband will be saved from all the miseries which having too many children produces.<sup>2</sup>

The leaflet assembles a number of Radical motives that would continue to shape Mill's life and work: an unflinching look at social miseries, a naturalistic understanding of human relations, a disregard of religious and bourgeois notions of decorum, and an unfeigned concern for universal hedonism, together with an irrepressible penchant for education and improvement. Yet the most immediate point of connection to Mill's own writing, and perhaps the reason for whatever slight fame the episode still commands, lies in the fact that it illustrates the limits of free public discussion in contemporary England. In prosecuting a publication that turns against the moral standards of its day and, at the same time, provides the necessary medical information for people to take their lives into their own hands, state and police reveal their despotic character. From Mill's earliest publications, he joins the fight against the repression of public criticism of politics, religion and morals.<sup>3</sup>

Almost forty years later, in the second chapter of one of his most influential works, *On Liberty*, Mill returns to the topic. The chapter is

distinctive both in its freestanding argument and in its complicated relations to the earlier and later chapters of *On Liberty*, as well as to Mill's other writings, among them his earlier works on free expression. Mill's position is attractive, but the justification for his claims appears opaque and overdetermined. Not only is it an open question what the premises of the argument are, it is also unclear what its scope and conclusion are meant to be. Is Mill trying to vindicate 'freedom of opinion', 'freedom of speech' or 'freedom of expression'?<sup>4</sup> How does his argument relate to older conceptions of the liberty of press, printing or publication? And how should we understand the fact that the title of Mill's famous chapter claims to defend none of the above, but 'the liberty of thought and discussion'?

In this paper, I want to argue that Mill's mature account is best seen as a reaction to the limitations of the Utilitarian tradition of freedom of publication itself, especially to its positions on false opinions, true and false statements of fact, and the limits of free speech. I discuss Mill's position against the backdrop of the doctrine that Jeremy Bentham, his father James Mill, and Mill himself in an earlier article had developed. John Stuart Mill's mature account will no longer be drawn into political reductionism, naive epistemology, optimistic assumptions about public debate, or unprincipled balancing. Yet I argue that, despite his declaration of independence from classical Utilitarian doctrine, he holds fast to a distinction between expressions of opinion and statements of fact.

## Classical Utilitarianism and Freedom of Speech

Mill introduces the second chapter of *On Liberty* by dissociating himself from an earlier understanding of free speech, which he believes to have lost almost all relevance. This is the liberty of the press as a security against arbitrary interferences, by autocratic governments, into the lives and beliefs of their citizens. Mill identifies press freedom with the liberty of 'political discussion', which he goes on to distinguish from a liberty of truly 'public discussion' that is yet to be established.<sup>5</sup> The fact that Mill believes press freedom has been completely vindicated intellectually (if not always institutionally) is mirrored in the title of his chapter. Where Jeremy Bentham, founder of the Utilitarian tradition of free speech, had argued for 'liberty of the press, and public discussion',<sup>6</sup> Mill demands 'liberty of thought and discussion'.

From John Milton's *Areopagitica* to Immanuel Kant's 'An Answer to the Question: What is Enlightenment?', controversies over freedom

of speech had always focused on printed works, and on religious and political dissent.<sup>7</sup> Bentham and James Mill continue this tradition by assigning press freedom a functional task within an antagonistic political system. Newspapers are bulwarks and weapons in the permanent struggle between the 'ruling few' and the 'subject many', with the ruling few withholding from the subject many what they do not want them to know, and prescribing what they want them to believe.<sup>8</sup> Already in his first publication, *A Fragment on Government*, Bentham had introduced press freedom as a relation between citizen subjects and governmental power-holders. The motto of a good citizen was 'To obey punctually; to censure freely'.<sup>9</sup> In his mature 1822 account, Bentham is led to conclude that we can tell a system of free government from a despotic one by the fact that a citizen who publicly criticises it has no more to fear than a citizen who publicly praises it.<sup>10</sup>

The central function of the press, in Bentham's account, is to identify and censure abuse of government power. The value of free speech is accordingly instrumental, not intrinsic. Douglas Long, in what is still the standard account of the basic liberties in Bentham's political thought, has thus proposed a Utilitarian reductionist account of Bentham on free speech:

Bentham's espousal of liberty of the press and public discussion was no more profoundly liberal or libertarian than his endorsement of any other species of liberty. It was founded upon a purely utilitarian calculus of the good and evil consequences involved in the establishment and maintenance of those liberties.<sup>11</sup>

While it is of course true that Bentham's account of free speech is embedded in his Utilitarian outlook, this should not lead us to conclude that he was oblivious of the necessity of giving a principled defence of press freedom, or incapable of providing such a defence, or that he was too quick to sacrifice free speech for other interests in cases of collision. Bentham's account of a free press is based on his political psychology and on the value of true belief in politics rather than on direct calculations of aggregate happiness. This becomes manifest in his strategy for reform, first directed against William Blackstone's account of common law, and further developed in his later writings on domestic and foreign constitutional law. Blackstone sides with John Milton in considering 'previous restraint', i.e. the licensing and *ex ante* censorship of publication, incompatible with free government, and in combining this with a

plea for the post hoc prosecution of ‘blasphemous, immoral, treasonable, schismatical, seditious, or scandalous libels’, which he thinks fully compatible with stringent guarantees for the liberty of the press: ‘Neither is a restraint hereby laid upon freedom of thought or enquiry: liberty of private sentiment is still left; the disseminating, or making public, of bad sentiments, is the crime which society corrects.’<sup>12</sup>

Bentham’s first point of critique is that governments will exploit the intimidating effect that not only previous restraint, but also the prosecution of offences, will have.<sup>13</sup> His second argument concerns the potential truth value of allegations. While Blackstone holds that the public dissemination of ‘bad sentiments’ must be curtailed, Bentham rejects the ‘bad sentiments’ criterion since it forces us to assess a public statement irrespective of its truth or falsity. Also, using the ‘bad sentiments’ standard, common law punished public allegations against well-known government functionaries more severely than allegations against citizens, since government elites had more to lose and faced more extensive disadvantages if their reputation was damaged.<sup>14</sup> From a direct Utilitarian point of view, it is an open question whether the harms caused by aggressive speech are always borne out by the utility of disclosure, but Bentham’s reform programme ignores this possibility. He advocates impunity from prosecution for statements that are demonstrably true, and for most libellous speech targeting state functionaries.<sup>15</sup>

Bentham does not believe that all statements should be protected. For example, he argues that ‘exciting men to the commission of [an] offence’ should be prohibited.<sup>16</sup> With regard to offences against reputation, he distinguishes between specific imputations (*defamation*) and ‘vague and general’ criticism (*vituperation*). Vituperation, ‘how gross soever’, should always be tolerated, while more specific allegations ‘imputing an individual act legally punishable, or at least disreputable’ should not always be protected. We have seen that Bentham defends all true allegations, regardless of their consequences. But even for false and defamatory statements of fact he demands immunity, provided they have not been ‘groundless’ and made with ‘wilful mendacity, accompanied with the consciousness of its falsity, or else with culpable rashness’.<sup>17</sup> Bentham’s leniency towards factual errors asserted in good faith is not owed to any substantive contribution which false statements of fact could make to the information of the public, but to the dangers of an overly zealous prosecution and to the function of the press to act as a counter-power. The grounds for toleration of false and damaging

statements lie in their ‘check upon the conduct of the ruling few, ... indispensably necessary to the maintenance of good government’.<sup>18</sup>

The definitive early Utilitarian statement on press freedom we owe to James Mill, Bentham’s former secretary and the father of John Stuart. In his article on ‘Liberty of the Press’ in the supplementary volumes to *Encyclopaedia Britannica*, James Mill situates the relevance of free speech, just as Bentham did, entirely within the antagonistic relationship between rulers and the ruled. He puts his main emphasis on the service of free speech in the process of telling false from true opinions. James Mill argues

that there is no safety for the people in allowing any body to choose opinions for them; that there are no marks by which it can be decided beforehand, what opinions are true and what are false; that there must, therefore, be equal freedom of declaring all opinions, both true and false; and that, when all opinions, true and false, are equally declared, the assent of the greater number, when their interests are not opposed to them, may always be expected to be given to the true.<sup>19</sup>

The necessity of protecting false opinions, along with true ones, from prosecution and control, is here ascribed to our epistemic shortcomings. We have no way of grasping the truth and falsity of opinions in advance of their public dissemination. For James Mill, the decisive epistemic mechanism lies in the ‘declaring’ of opinions, as the prevailing of a majority opinion, ‘the assent of the greater number’, can under conditions of disinterestedness be trusted as a criterion of their truth.

James Mill introduced his *Encyclopaedia* entry with the provocative statement that unlimited press freedom could never be a proper goal of reform, since the press was capable of committing a large number of offences. Utilitarianism was in no way committed to free speech absolutism.<sup>20</sup> John Stuart Mill copies this introduction verbatim in his own early, sycophantic essay of 1825, ‘Law of Libel and Liberty of the Press’, and comments, ‘That the press may be so employed as to require punishment, we are very far from denying: it may be made the instrument of almost every imaginable crime.’<sup>21</sup> In contrast to Bentham, both Mills are eager to convey that the press does not deserve any general immunity. Offences committed by and through the press should be treated in the same way the law treats other offences. In the 1820s, neither Mill sees a need to distinguish between disutility resulting from speech and disutility

caused through other modes of action. Harm is harm; and offences or 'violations' may be of a linguistic or a non-linguistic character.<sup>22</sup> The Mills fight the use of the law of libel in politically motivated attempts to intimidate non-conformist critics of government, church or public morality, but they do not award expressive liberties any priority.

The younger Mill follows his father and Bentham in identifying the 'sinister' interest of those in power in suppressing 'great and important truths' and in upholding 'slavish opinions in politics [and] in religion'.<sup>23</sup> Press freedom is to guarantee the truth and utility of political beliefs: 'In the correctness of the estimate which the people form of the goodness of their government, their whole happiness is involved.'<sup>24</sup> In the long term, nothing but 'the balance of argument' will determine 'the decision of the majority'.<sup>25</sup> The young Mill sides with Milton's *Areopagitica* and James Mill's *Encyclopaedia* article in believing that 'truth, if it has fair play, always in the end triumphs over error, and becomes the opinion of the world'.<sup>26</sup>

As Filimon Peonidis has observed, Mill's early essay recognises that truth and falsity play out in different ways for expressions of opinion and for statements of fact. Mill advocates free speech for false opinions, but diverges from Bentham in accepting blanket restrictions on false statements of fact:<sup>27</sup>

It must be admitted that the case of facts, and the case of opinions, are not precisely similar. False opinions must be tolerated for the sake of the true: since it is impossible to draw any line by which true and false opinions can be separated from one another. There is no corresponding reason for permitting the publication of false statements of fact.<sup>28</sup>

Mill's distinction between opinions and facts has a forensic basis. Truth, in the case of facts, does not depend on opinion, but on 'evidence', and may therefore 'be safely left to be decided by those, on whom the business of deciding upon evidence in other cases devolves', i.e., the courts.<sup>29</sup> The distinction between facts and opinions immediately generates an argument for the freedom to express true statements of facts, since true opinions must be based on facts. Even for truthful statements, Mill grants that there will remain controversial cases in which an interest of the public seems to speak in favour of their publication, while the protection of the private sphere of an individual speaks against it. 'The truths which it most imports to the public to know,



are precisely those which give most annoyance to individuals, whose vices and follies they expose.’ In such cases, ‘there is no one who can be trusted to decide which are useful, which the unimportant truths’. But how to identify the cases in which ‘it would be desirable ... that truth should be suppressed’?<sup>30</sup> Unlike his father, who suggested a direct Utilitarian calculation of the advantages and disadvantages of indiscreet, but true, publications,<sup>31</sup> the younger Mill does not formulate a general answer.

In sum, the early Utilitarian conception of free speech is a clear and coherent political doctrine. The liberty of the press is grounded in the antagonistic constellation between rulers and ruled – a constellation that Mill will later see transformed, if not left behind, by the introduction of constitutional and representative government.<sup>32</sup> Free speech is a means for arriving at the truth, yet with different implications for expressions of opinions and of statements of fact. The expression of false opinions must be tolerated in the absence of a mechanism that could weed them out in advance, and true opinions will sooner or later be revealed by majoritarian approval. Factual truth is the basis of true opinion, and thus generally, but not universally, to be included in the protection of free communication. Sometimes, direct Utilitarian balancing is encouraged, as in the case of undesirable but true factual statements.<sup>33</sup> For James and the young John Stuart Mill, it is intuitively clear that ‘violations’ must be curtailed, and that false statements of fact enjoy no protection whatsoever. Bentham advocates a more extensive protection of libellous opinion and some false statements of fact, but bases his claims exclusively on the dangers of repression. Both Bentham’s and James Mill’s generalised distrust in government will become less plausible once popular constitutionalism is in place. When Mill, in *On Liberty*, defends the ‘liberty of thought and discussion’, he is aware that he must give a more substantive argument, one that is persuasive even under conditions of a responsive representative government.

## Of the Liberty of Thought and Discussion

Mill’s new approach, in the second chapter of *On Liberty*, reflects the realities of popular representative government. In focusing on the threat of social conformity that comes with it, he implicitly rejects both Miltonian optimism and James Millian majoritarian epistemology. Mill distinguishes between true and false opinions, and within the latter set

between completely and partially false opinions. The suppression of opinions he rejects for all three cases, for the following reasons:

1. a suppressed opinion could be true;
2. a suppressed opinion could be false, but contain a true element;
3. a suppressed false opinion could lead to a state of affairs in which the opposite true opinion is held as dogma and loses its meaning and significance.<sup>34</sup>

The first case appears straightforward enough. If there is a chance that restrictions on free expression deprive the citizenry of a correct opinion, this is to be avoided quite independently of Mill's further claim that banning opinions always entails a claim to infallibility. If any further basis for admitting all potentially true opinion is deemed necessary, Mill can draw attention to the fact that the truth of an opinion is intimately connected with its utility.<sup>35</sup> Utility, Mill insists, remains the only standard for delineating the extension of all liberties, 'but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being'.<sup>36</sup> What is less plausible is that he should commit himself to the view that 'no belief which is contrary to truth can be really useful'.<sup>37</sup>

Before we can clear up the status of false beliefs, we need to turn to the very capacity of opinions to be true or false. Seen from the perspective of today's jurisprudence, Mill's cognitivism with regard to opinion is an outright provocation. In an oft-quoted definition by the German Federal Constitutional Court, 'expressions of opinion' are today understood as speech acts that display 'elements of commenting, opining, reckoning [*Stellungnahme, Dafürhalten, Meinen*]'.<sup>38</sup> This conception gives freedom of speech a subjectivist taint, as if all expression of opinion and public discussion were only concerned with personal holding-true, not with the correction of error and the pursuit of knowledge. In *On Liberty*, Mill would have found it easy to tap into the resources of the other chapters for a non-cognitivist defence of free expression, drawing on other practices of self-expression in which a person's individuality can manifest itself. But while, for example, in the third chapter, freedom of self-expression serves processes of authentic character-formation, the second chapter discusses free speech exclusively in the context of the truth or falsity of propositional attitudes. Free speech does not stand in the service of expressing *oneself*, but of expressing *that something is the case*. It is a misreading to see Mill as defending 'mere' expression in abstraction from the pursuit of truth.<sup>39</sup>

While Mill presupposes the cognitive character of opinions in order to justify the truth-oriented character of public debate, he does not identify expressions of opinion and statements of facts. He allows that in the struggle between opinions, facts can decide the issue.<sup>40</sup> Opinions build on facts, and will accommodate the presentation of facts in discussion, but true opinions themselves are not facts, and expressions of opinion are not statements of fact. Mill sees opinion and facts as complementing each other: just as opinion has to rely on a factual basis, facts are dependent on opinion. Independently of their embedding in discourse, interpretation and comment, facts can have hardly any influence on thought:

There must be discussion, to show how experience is to be interpreted. Wrong opinions and practices gradually yield to fact and argument: but facts and arguments, to produce any effect on the mind, must be brought before it. Very few facts are able to tell their own story, without comments to bring out their meaning.<sup>41</sup>

Without interpretation and comment, coming to a genuine understanding of the facts will be impossible. Hence Mill groups fact-interpreting statements with opinions and awards them full protection under freedom of speech. The same is true for ‘explanations’ of facts, which will be perennially controversial: ‘[T]here is always some other explanation possible of the same facts’, and as long as we do not grasp them ‘we do not understand the grounds of our opinion’.<sup>42</sup> But while interpretations of facts, and explanations of fact, should thus be protected along with expression of opinions under the liberty of thought and public discussion, this does not entail that pure statements of fact will profit from the same stringent protection.

Before we address the question of whether liberty of thought and discussion extends to all statements of fact, we need to face a second provocation. This provocation lies in Mill’s claim that expressions of true and false opinions should be granted the same degree of protection. Departing from his father’s doctrine, Mill no longer holds our epistemic deficit in telling truth from falsity in the absence of a public roll-call to be decisive. He grounds the liberty to express false opinions on two substantive arguments. The first is that false opinions can contain a correct aspect. The second, more important for our purposes, is that an engagement even with fully and irredeemably false opinions ensures that the full meaning of the corresponding true opinion will be contemplated in a clear and vivid way. Earlier, both James and John Stuart Mill had argued

for freedom of publication as a means of producing a reliable cognitive output: If only we feed the mechanism of press freedom with true and false statements, preponderantly true opinion will be produced. This view is vulnerable to the objection that if an alternative way for generating true beliefs were available, free speech would no longer be needed. Mill's alternative defence, in *On Liberty*, of expressions of false opinion shows that he is no longer exclusively relying on a truth-functional argument for freedom of expression. Serious and renewed confrontations with alternative views have a significance which is independent of the mere replacement of false with true opinion.<sup>43</sup>

The contemplation of false alternatives, and the defence of one's beliefs against them, is a key element in grasping the truth of our opinions. Only in confronting and rejecting contrary beliefs, as John Milton argued in *Areopagitica*, do we win the entitlement to call convictions 'our own'. Mill adds that we have no claim to judge our own opinions to be better than those of others if we have not put them to the test and faced objections.<sup>44</sup> The figure of Socrates in *On Liberty* is there to remind us that discussion is not teleologically geared to amassing true opinion, but rather to the understanding of problems.<sup>45</sup> Liberty of discussion is thus based on the value of mental engagement. If by 'deliberation' we mean the argumentative pursuit of well-understood convictions, we can say that the rationale of free speech in Mill is to make possible, next to gaining true beliefs, a free process of individual and collective deliberation.<sup>46</sup>

Bentham and James Mill, in defending press freedom, had focused exclusively on the wide dissemination of true opinions, not on any active individual engagement with them. In recognising the independent value of one's own deliberative endeavours, the title of *On Liberty's* second chapter, 'Of the Liberty of Thought and Discussion', indicates where Mill goes beyond the older debate. 'Liberty of Thought' has a dual meaning here. For all practical purposes, a society that allows all opinions to be disseminated and publicly discussed allows, at the same time, free thought. In a first, weak sense, then, freedom of expression realises freedom of thought. Understood in a stronger sense, 'liberty of thought' figures as the *reason* why speech should be free. As we have seen, the unconditional protection of speech is grounded in our capacity for independent and self-determined deliberation in the search for truth. Liberty of thought, in the second and stronger sense, is an intrinsically valuable practical competence; it is part of what utility, for progressive beings, consists in.

With the substantive reasons for protecting true and false opinions in place, we can now revert to the issue of facts. Above, I suggested that Mill's argument, even though it is based on a cognitivist understanding of opinions, does not automatically extend to facts. It is compatible with neither true nor false statements of fact being protected under free speech. *On Liberty*, however, does not contradict the position he adopts in 'Law of Libel', that true opinions will have their basis in true factual convictions. If we are aiming at correctness and independence of thought, it is inconceivable that we should want to withhold facts from thinkers. We therefore have strong, perhaps compelling, reasons to protect the expression of true statements of fact for the sake of the formation of correct opinion. But already the young John Stuart Mill had drawn attention to one intuitive counterexample. Concerning the publication of information on individuals' private lives, it seems that less stringent protection of speech is called for. Can, according to the argument employed in *On Liberty*, the dissemination of true statements be prohibited? Jonathan Riley has discussed a case in which somebody passes nude photographs of a former lover to the press as a conflict between entitlements – on the one hand an 'act of expressing and publishing, without her consent, his sincere and undistorted opinions of their sex life', on the other, an act that damages her conflicting claims to self-determination, which should in this case be seen as trumping his entitlement to free speech.<sup>47</sup> For Riley, this is a hard case because there is a prima facie claim to freedom for all expressions of opinion. According to the present reading, the publication of private photos is more plausibly understood as making true statements of facts, not as expressing opinions. True statements of fact, as mere functional prerequisites of freedom of thought, not its instantiations, need not be seen as deserving unconditional protection under Mill's new justification for free speech. I conclude that there is a case for the protection of most, though not all, true statements of fact under Mill's mature theory.

What are the implications of this view for irredeemably false statements of facts? This question is today usually debated with regard to defamation; German and French law contribute the further example of the denial of historical facts, most prominently the denial of the genocide of the European Jews under National Socialism. While restrictions on defamation are usually accepted as exceptional within a comprehensive conception of freedom of speech,<sup>48</sup> bans on the denial of historical facts are highly controversial. Germany's penal code, for example, prohibits 'the denial, endorsement or trivialisation (*Leugnung, Billigung, Verharmlosung*)' of large-scale National Socialist crimes (§130). While

the Federal Constitutional Court believes the statute to be compatible with the free expression of opinion (as protected under Article 5 of the Basic Law),<sup>49</sup> Mill's *On Liberty* is usually understood as ruling out the legitimacy of such a statute.<sup>50</sup> The reading proposed here entails that the latter view is partially correct, partially false. Mill parts company with the Court in including interpretations of facts, such as *endorsement* and *trivialisation*, with the free expression of opinions. But he may well side with the Court as far as *denial* of the Holocaust, a false statement of fact, is concerned. This seems true even for the earlier Utilitarian position. We have seen that even the most extensive guarantee afforded to false statements of fact, in Bentham's writings, does not extend to statements that display 'rashness' and 'wilful mendacity'. The German Court takes a similar position in arguing that denials of the Holocaust are demonstrably and/or consciously false statements of fact and derive none of the protection accorded to the free expression of opinion.<sup>51</sup>

In *On Liberty*, Mill never revises the restrictive position on false statements of facts advanced in 'Law of Libel and Liberty of the Press'.<sup>52</sup> But should the new reasons adduced in *On Liberty* have swayed his position? Not, surely, with regard to the pursuit of truth. We cannot take seriously the possibility that the correct formation of opinion should be dependent on false statements of fact in the same way that it must rely on true ones. Gaining true beliefs regarding others, or regarding the past, is not supported by protecting false information. With regard to our initial example, the dissemination of true but not of false statements on contraception stands in the service of developing true beliefs. It would be absurd if somebody who knowingly made false statements about the quality of an unsafe bridge appealed to freedom of expression.<sup>53</sup> But could it be objected that Mill's argument for admitting irredeemably false opinions, their contribution to gaining and upholding a vivid and complete understanding of the opposite view, applies likewise to false statements of facts? Should the world of facts be subjected to an independent and self-determined quest, just as he recommends for the realm of opinion, that is, for religion, morals and politics?

In *On Liberty*, Mill presents one case to which his reasons for deliberative freedom do not straightforwardly apply. In mathematics, it is unclear what a protection of false statements could achieve. 'The peculiarity of the evidence of mathematical truths is that all the argument is on one side. There are no objections, and no answers to objections.'<sup>54</sup> In his critique of Auguste Comte, six years after the publication of *On Liberty*, Mill takes a different approach. He objects to Comte's provocative

denial of an “absolute right of free examination, or the dogma of unlimited freedom of conscience”. Comte thought such an entitlement existed neither in “astronomy, physics, chemistry, [nor] physiology”.<sup>55</sup> Mill duly registers that even stating that ‘two and two make ten’ should be protected as a matter of law,<sup>56</sup> but it is not clear that the argument of *On Liberty* would bolster his claim. Although freedom of conscience guarantees ‘absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological’,<sup>57</sup> mathematics is no matter for opinion and sentiment. Even in his essay on ‘Comte and Positivism’, Mill never asserts what Comte denies, that the claim to a universal entitlement to free speech extends to matters of scientific and academic expertise. Arguably, the self-determined working-through of false factual beliefs in the areas of arithmetic, astronomy and historiography does not contribute to leading a self-determined life within the evolution of a ‘progressive’ species in the same sense as does deliberation over opinions and interpretations – at least as long as we can securely assume that inner-academic and inner-scientific controversies will continue, and that their public dissemination will be safeguarded. Contemporary, functionally differentiated societies seem to employ a division of labour and delegate the questioning of a world of facts, and its permanent critique, to science and the universities, protecting them not under freedom of speech, but under academic freedom, another branch of the same stem of the liberty of thought.<sup>58</sup>

I conclude that the type of communicative freedom that Mill defends in ‘Of the Liberty of Thought and Discussion’ is neither an unqualified freedom of expression encompassing all utterances regardless of their capacity to be true or false, nor an unqualified freedom of speech that encompasses all utterances regardless of their character as statements of fact or expressions of opinion, but the freedom to express one’s opinion, regardless of its truth or falsity. Only once the protective perimeter of free speech has been drawn can we ask what limits on the expression of opinion Mill is prepared to tolerate, and, in closing, I would like to offer a brief sketch.

Mill’s early account of the limits of free speech in ‘Law of Libel’ followed James Mill’s in insisting that speakers could be made legally responsible for ‘offences’ and ‘violations’. In *On Liberty*, Mill at first glance reaffirms this view when he argues that utterances of ‘Corn-dealers are starvers of the poor’ or ‘Tyrannicide is lawful’ could, under specific circumstances, be lawfully prosecuted.<sup>59</sup> On the surface, a notion of harm does the work in resolving the conflict between claims to free expression of

opinion, on the one hand, and claims to security and inviolability, on the other: 'Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavourable sentiments, and, when needful, by the active interference of mankind.'<sup>60</sup> If the expression of opinions causes harm, James Mill and the young John Stuart had argued, it cannot claim stringent protection. Some leading interpreters have read *On Liberty* as limiting free speech along the lines of the causation of harm,<sup>61</sup> and have specified important balancing interests.

Assuming that Mill's fresh start in *On Liberty* was partly motivated by the unsatisfactory balancing of conflicting claims in early Utilitarianism, we can support a simpler, and at the same time more radical, reading that does not directly appeal to the notion of harm.<sup>62</sup> When Mill claims that 'even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act',<sup>63</sup> he is referring not to the intended or probable harms caused by the incriminated speech act, but to the deficits of the situation when viewed as a forum for deliberation. If freedom of expression stands in the service of making up one's own mind in an independent manner, the objective features of situations that disallow contributing to this goal will at the same time speak against the protection of expression. The first step towards the identification of incitement does not therefore lie in identifying the perpetrators' harmful intention and the objective probability of harm, or in distinguishing between 'actions' and 'opinions',<sup>64</sup> but in diagnosing a communicative constellation as unfit to support the liberty of thought in the strong sense. From this, it does not follow that only calm, deliberative styles of conversation will deserve protection.<sup>65</sup> Under Mill's mature conception, non-deliberative challenges may be apt to revive dogmatic beliefs if they are uttered in situations amenable to deliberation. Independence of thought, in discourses turned scholastic or clichéd, may be best served by disruptions or even by a curse.<sup>66</sup>

The nuanced character of Mill's mature account, then, can be briefly summed up with reference to the problem of hate speech. As we have seen, his account allows the prosecution of hate speech in the form of defamation, that is, where the expression in question contains false allegations of fact. False statements of fact enjoy no protection in the first place, and can therefore be restricted in the absence of any balancing of conflicting claims. Also, regulating non-factual hate speech in situations that obstruct the potential for deliberation is unproblematic. In contrast,



identifying non-factual hate speech by the content of the message involved and restricting it on the basis of probable harm alone<sup>67</sup> should be considered illegitimate. It reads into *On Liberty* a position that James and the young John Stuart held, and from which Mill's later account sought to emancipate.

If we take seriously the deliberative *telos* of free speech in *On Liberty*, we can bypass the notion of harm in identifying situations in which expression can be regulated. In embracing the value of deliberation, Mill transcends the early Utilitarians' politically antagonistic vision and adds to his own early truth-functional understanding of free speech. Cognitive progress, in *On Liberty*, results from individual engagement and public discussion, not from majoritarian verdicts. The continuing struggle between true, partially true and irredeemably false opinions is a necessary feature of the independence and self-determination of individual and collective thought. In seeking to avoid objections to his mature account that arise from its near-absolute protection of expression of opinion, Mill does well to continue to discriminate between statements of opinion and statements of fact.

## Notes

- 1 This paper first appeared as 'Parole, vérité et liberté de Jeremy Bentham à John Stuart Mill', *Archives de Philosophie*, vol. 78 (2015), pp. 291–308 (translated into French by Professor Emmanuelle de Champs).
- 2 Handbill IV, now in the Francis Place Collection of the British Library, quoted in N. Himes, 'The Birth Control Handbills of 1823', *The Lancet*, 6 August 1927, p. 315; cf. R. Reeves, *John Stuart Mill: Victorian Firebrand*, Atlantic, London, 2007, pp. 1–2. Reeves ascribes authorship of the pamphlet to Richard Carlile, which Himes denies. For the larger historical context see F. E. Minenka, 'John Stuart Mill and Neo-Malthusianism, 1873', *John Stuart Mill Newsletter*, vol. 8 (1972), pp. 3–10.
- 3 Four of the younger Mill's first seven publications (in letters to the *Morning Chronicle*) treat questions of the freedom of religion and of the press: see J. S. Mill, Letters 3–7 (1823) in *The Collected Works of John Stuart Mill. Volume XXII: Newspaper Writings, December 1822–July 1831, Part I*, ed. A. P. Robson and J. M. Robson, University of Toronto Press, Toronto, 1981, pp. 6–18.
- 4 P. Rinderle, *John Stuart Mill*, Beck, Munich, 2000, p. 93; D. Jacobson, 'Mill on Liberty, Speech, and the Free Society', *Philosophy and Public Affairs*, Vol. 29, No. 3, 2000, pp. 276–309; J. Riley, 'Mill's Doctrine of Freedom of Expression', *Utilitas*, Vol. 17, No. 2, 2005, pp. 147–79.
- 5 J. S. Mill, 'On Liberty (1859)', in *The Collected Works of John Stuart Mill. Volume XVIII: Essays on Politics and Society, Part I*, ed. J. M. Robson, University of Toronto Press, Toronto, 1977, p. 228 & n.
- 6 J. Bentham, *On the Liberty of the Press, and Public Discussion, and Other Legal and Political Writings for Spain and Portugal* (1822), ed. C. Pease-Watkin and P. Schofield (*Collected Works of Jeremy Bentham*, hereafter *CW*), Oxford University Press, Oxford, 2012.
- 7 J. Milton, 'Areopagitica: A Speech for the Liberty of Unlicensed Printing to the Parliament of England (1644)', in *John Milton: The Major Works*, ed. S. Orgel and J. Goldberg, Oxford University

- Press, Oxford, 2003, pp. 236–72; I. Kant, ‘Beantwortung der Frage: Was ist Aufklärung?’ (1783), in *Gesammelte Werke. Volume VIII: Abhandlungen nach 1781*, ed. H. Maier, M. Frischeisen-Köhler and P. Menzer, Akademie Verlag, Berlin, 1900, pp. 33–42.
- 8 J. Bentham, *Securities against Misrule and Other Constitutional Writings for Tripoli and Greece* (1822–3), ed. P. Schofield (CW), Oxford University Press, Oxford, 1990, pp. 44–60.
  - 9 J. Bentham, *A Fragment on Government*, (1776), ed. H. L. A. Hart and J. Burns, Cambridge University Press, Cambridge, 1988, p. 10.
  - 10 Bentham, *Securities against Misrule* (CW), p. 33, cf. Bentham, *A Fragment on Government*, p. 97.
  - 11 D. Long, *Bentham on Liberty: Jeremy Bentham’s Idea of Liberty in Relation to his Utilitarianism*, University of Toronto Press, Toronto, 1977, pp. 205–6.
  - 12 W. Blackstone, *Commentaries on the Laws of England*, 4 vols, [1765–9], Chicago University Press: Chicago, 1975, iv, pp. 151–2, cf. Milton, ‘*Areopagitica*’, p. 270.
  - 13 J. Bentham, ‘The Elements of the Art of Packing’ (1821), in *The Works of Jeremy Bentham*, published under the superintendence of John Bowring, 11 vols, William Tait, Edinburgh, 1843, v, p. 112.
  - 14 Bentham, *On the Liberty of the Press* (CW), p. 12.
  - 15 Bentham, *On the Liberty of the Press* (CW), p. 12; Bentham, *Securities against Misrule* (CW), p. 81.
  - 16 Bentham, *Securities against Misrule* (CW), p. 80.
  - 17 Bentham, *On the Liberty of the Press* (CW), p. 12.
  - 18 *Ibid.*, pp. 12–13.
  - 19 James Mill, ‘Liberty of the Press’, (1822) in *James Mill: Political Writings*, ed. T. Ball, Cambridge University Press, Cambridge, 1992, p. 122.
  - 20 James Mill, ‘Liberty of the Press’, pp. 97–110.
  - 21 J. S. Mill, ‘Law of Libel and Liberty of the Press’, (1825) in *The Collected Works of John Stuart Mill. Volume XXI: Essays on Equality, Law, and Education*, ed. J. M. Robson, University of Toronto Press, Toronto, 1984, p. 4.
  - 22 *Ibid.*, pp. 4, 34.
  - 23 *Ibid.*, p. 6.
  - 24 *Ibid.*, p. 8; cf. James Mill, ‘Liberty of the Press’, p. 117.
  - 25 J. S. Mill, ‘Law of Libel and Liberty of the Press’, p. 15.
  - 26 *Ibid.*, p. 8; cf. James Mill, ‘Liberty of the Press’, p. 122, and Milton, ‘*Areopagitica*’, p. 269, who states: ‘Let [truth] and falsehood grapple; who ever knew truth put to the worse in a free and open encounter?’
  - 27 Filimon Peonidis, ‘A Note on Mill’s Early Theory of Free Speech’, *Australian Journal of Legal Philosophy* vol. 33, pp. 60–65, 2008.
  - 28 J. S. Mill, ‘Law of Libel and Liberty of the Press’, p. 14.
  - 29 *Ibid.*
  - 30 *Ibid.*, p. 11.
  - 31 James Mill, ‘Liberty of the Press’, pp. 108–9.
  - 32 J. S. Mill, ‘On Liberty’, p. 229.
  - 33 James Mill, ‘Liberty of the Press’, pp. 108–9.
  - 34 J. S. Mill, ‘On Liberty’, p. 258.
  - 35 *Ibid.*, p. 233.
  - 36 *Ibid.*, p. 224.
  - 37 *Ibid.*, p. 234.
  - 38 Federal Constitutional Court, *Entscheidungen* (‘Decisions’), vol. 61, Mohr Siebeck, Tübingen, 1983, p. 15.
  - 39 O. O’Neill, *Rethinking Freedom of the Press*, Royal Irish Academy, Dublin, 2004.
  - 40 J. S. Mill, ‘On Liberty’, p. 231.
  - 41 *Ibid.*, p. 234.
  - 42 *Ibid.*, p. 244.
  - 43 *Ibid.*
  - 44 *Ibid.*, p. 232; cf. Milton, ‘*Areopagitica*’, p. 269.
  - 45 J. S. Mill, ‘On Liberty’; cf. F. Rosen, *Mill*, Oxford University Press, Oxford (Founders of Modern Social and Political Thought Series), 2013, p. 39 n.
  - 46 D. O. Brink, ‘Mill’s liberal principles and freedom of expression’, in C. L. Ten (ed.), *Mill’s ‘On Liberty’: A Critical Guide*, Cambridge University Press, Cambridge, 2008, pp. 46–9.
  - 47 Riley, ‘Mill’s Doctrine of Freedom of Expression’, p. 167.
  - 48 For a dissenting position, see R. Amdur, ‘Scanlon on Freedom of Expression’, *Philosophy and Public Affairs*, Vol. 9, No. 3, 1980, pp. 287–300.
  - 49 D. Grimm, ‘The Holocaust Denial Decision of the Federal Constitutional Court’, in *Extreme Speech and Democracy*, ed. I. Hare

- and J. Weinstein, Oxford University Press, Oxford, 2009, pp. 557–61.
- 50 S. Dietz, ‘Die Lüge von der “Auschwitzlüge”’, *Kritische Justiz*, Vol. 28, No. 2, 1995, p. 217.
- 51 Grimm, ‘Holocaust Denial Decision of the Federal Constitutional Court’, p. 559.
- 52 Peonidis, ‘A Note on Mill’s Early Theory of Free Speech’, p. 64.
- 53 See J. S. Mill, ‘On Liberty’, p. 294.
- 54 *Ibid.*, p. 244.
- 55 J. S. Mill, ‘Auguste Comte and Positivism’ (1865), in *The Collected Works of John Stuart Mill. Volume X: Essays on Ethics, Religion and Society*, ed. J. M. Robson, University of Toronto Press, Toronto, 1969, p. 301.
- 56 *Ibid.*, 302.
- 57 J. S. Mill, ‘On Liberty’, p. 225.
- 58 *Ibid.*, p. 225.
- 59 *Ibid.*, pp. 260, 228.
- 60 *Ibid.*, p. 260; cf. p. 223.
- 61 Riley, ‘Mill’s Doctrine of Freedom of Expression’; Brink, ‘Mill’s liberal principles and freedom of expression’.
- 62 See J. Skorupski, *John Stuart Mill*, Routledge, London, 1991, p. 376.
- 63 J. S. Mill, ‘On Liberty’, p. 260.
- 64 *Ibid.*
- 65 Brink, ‘Mill’s liberal principles and freedom of expression’, p. 56.
- 66 C. M. Fairman, ‘Fuck’, *Cardozo Law Review*, Vol. 28, No. 4, 2007, pp. 1711–72.
- 67 Brink, ‘Mill’s liberal principles and freedom of expression’, p. 50.

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