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Irene M. Ten Cate

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# Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses

Irene M. Ten Cate\*

*This Article is the first in-depth comparison of two classic defenses of free speech that have profoundly influenced First Amendment law: John Stuart Mill's On Liberty and Justice Holmes's dissenting opinion in Abrams v. United States. Both defenses argue that dissenting speech plays a critical role in a collective truth-seeking endeavor, and they are often grouped together as advocating for a "marketplace of ideas," a metaphor that has become a fixture in American constitutional law. However, this Article finds that, on closer examination, the two theories are grounded in fundamentally different views of the quest for truth and the role of speech in this undertaking. Mill envisions a process in which clashes between contrary opinions lead to progress in uncovering universal, unchangeable truths. Individuals who express unpopular views are indispensable, as their challenges to prevailing opinions keep the search for truth, and the meaning of already discovered truths, alive. The mentions of "truth" in the Abrams dissent, consistent with elaborations on the subject in Holmes's scholarly writings and correspondence, are best read as referring to choices made by majorities or dominant forces in response to internal and external challenges to the status quo. Holmes's commitment to free speech appears to be based primarily on its role in safeguarding a process by which decision-making factions can be formed. This Article argues that a key to understanding the differences between the two defenses lies in the ideas about freedom that are at the heart of Mill and Holmes's world views. Mill believes that individuals are free in the sense that they have the ability to choose their beliefs, even if they frequently opt for the easier alternative of uncritically following the mainstream. At the same time, he believes that a society can create conditions that are conducive to individual flourishing. Mill's free speech defense is based not only on the argument that individuals are more likely to pick true beliefs if presented with several alternatives, but also on the notion that a society that prizes dissent promotes the development of character traits in its citizens that will in turn allow that society to prosper. Holmes, on the other hand, views individuals as constrained by firmly rooted preferences shaped by accidental circumstances, but regards society as constantly evolving and adjusting and, to a large extent, free to determine its future course. His defense is staked on a constitutional commitment to safeguarding the conditions for collective self-determination in an uncertain and perpetually changing world.*

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## INTRODUCTION

Justice Holmes's dissenting opinion in *Abrams v. United States*<sup>1</sup> introduced into First Amendment jurisprudence the lasting notion that the expression of deviating opinions and ideas, no matter how objectionable they are believed to be, deserves protection because of the role of such speech in the pursuit of truth.

The *Abrams* decision is the last of four cases decided in 1919 by the Supreme Court concerning the constitutionality of the Espionage Act of 1917 and the Sedition Act of 1918 (which amended the Espionage Act).<sup>2</sup> These statutes, enacted during the First World War, criminalized certain acts taken while the United States was at war with Germany, including attempts to cause subordination in the military and obstruction of recruitment for the military.<sup>3</sup> Holmes had authored the first three opinions, which were issued in March 1919 and in which a unanimous Court upheld convictions under the Espionage Act. In the best-known of these three decisions, *Schenck v. United States*, Holmes articulated the "clear and present danger" test for determining whether speech is protected by the First Amendment.<sup>4</sup> The Court held that the speech at issue in *Schenck* (a circular positing that the draft violated the Thirteenth Amendment and calling on the reader to undertake peaceful action such as a petition for the repeal of the Conscription Act) was not protected by the First Amendment: "When a nation is at war many things that might be said in time of peace are such a hindrance to its effort that their utterance will not be endured so long as men fight and that no Court could regard them as protected by any constitutional right."<sup>5</sup>

Yet, in *Abrams*, decided in November 1919, Holmes—joined by Justice Brandeis—dissented from the majority's affirmation of the convictions of a socialist and four anarchists under the Sedition Act.<sup>6</sup> The defendants in

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1. *Abrams v. United States*, 250 U.S. 616, 624-31 (1919) (Holmes, J., dissenting).

2. See *Schenck v. United States*, 249 U.S. 47 (1919); *Frohwerk v. United States*, 249 U.S. 204 (1919); *Debs v. United States*, 249 U.S. 211 (1919).

3. Espionage Act of June 15, 1917, ch. 30, § 3, 40 Stat. 217, 219 (repealed 1948), amended by Act of May 16, 1918, ch. 75, 40 Stat. 553-54.

4. *Schenck*, 249 U.S. at 52.

5. *Id.*

6. Many Holmes scholars have tried to answer the question of whether the *Abrams* dissent can be reconciled with Holmes's position in the *Debs*, *Frohwerk* and *Schenck* decisions, or whether it represents a radical change in Holmes's thinking about the scope of the First Amendment's protection of free speech. For the argument that the *Abrams* dissent was consistent with Holmes's other opinions on freedom of expression, see David S. Bogen, *The Free Speech Metamorphosis of Mr. Justice Holmes*, 11 HOFSTRA L. REV. 97 (1982) (arguing that *Schenck* is a departure from earlier speech cases decided by Holmes, but that there was no change between *Schenck* and *Abrams*); and Sheldon M. Novick, *The Unrevised Holmes and Freedom of Expression*, 1991 SUP. CT. L. REV. 303, 358-61. For the argument that *Abrams* marks a change in Holmes's position on the First Amendment, see, e.g., Albert W. Alschuler, *LAW WITHOUT VALUES: THE LIFE, WORK AND LEGACY OF JUSTICE HOLMES* 75-76 (2000); Stephen M. Feldman, *Free Speech, World War I, and Republican Democracy: The Internal and External Holmes*, FIRST AMEND. L. REV. 192 (2008); and Gerald Gunther, *Learned Hand and the Origins of Modern First Amendment Doctrine: Some Fragments of History*, 27 STAN. L. REV. 719,

*Abrams* had been sentenced to twenty years for their role in distributing leaflets that condemned the United States' military intervention in Russia and called for a workers' strike in ammunition factories.<sup>7</sup> After stating his position that the convictions violated the First Amendment's mandate that "Congress shall make no law . . . abridging the freedom of speech," Holmes ended his dissenting opinion with a sweeping summation that instantly took its place in the canon of free speech defenses:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas – that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment. Every year if not every day we have to wager our salvation upon some prophecy based upon imperfect knowledge. While that experiment is part of our system I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.<sup>8</sup>

The paragraph's references to truth, the upsetting of fighting faiths, and an "ultimate good" to be served by free speech are reminiscent of John Stuart Mill's seminal free speech defense in *On Liberty*, which was first published in England in 1859, sixty years before the United States Supreme Court decided *Abrams*. Mill's stated goal in *On Liberty* is to identify the "nature and limits of the power which can be legitimately exercised by society over the individual."<sup>9</sup> In the middle section of the

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726, 732-35 (1975) (arguing that Learned Hand's discussion with Holmes in the summer of 1918, after *Debs*, *Frohwerk* and *Schenck* had been decided, and subsequent correspondence, contributed to Holmes's adoption of a more protective stance in *Abrams*).

7. *Abrams*, 250 U.S. at 625-26, 629 (Holmes, J., dissenting).

8. *Id.* at 630.

9. JOHN STUART MILL, *On Liberty*, reprinted in *ON LIBERTY AND OTHER ESSAYS* 5 (John Gray ed., 1998) (1859).

essay, Mill puts forward his arguments for freedom of expression, pleading that a society should not merely tolerate, but embrace speech that is considered objectionable, for four reasons. First, because nobody is infallible, one must be open to the possibility that an opinion that deviates from the mainstream is true. Second, an opinion that is generally erroneous may contain a portion of the truth that is missing from the prevailing opinion. Third, even if the prevailing opinion is the complete truth, those who hold the opinion do not fully understand or feel the rational grounds of the opinion unless it is frequently challenged. And fourth, in the absence of vigorous debate, “the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct.”<sup>10</sup>

The similarities between the two defenses are probably no coincidence, as Holmes had re-read *On Liberty* in early 1919.<sup>11</sup> The explicit claim in each defense that there is a connection between freedom of expression and collective truth-seeking has led many commentators to note that Mill’s rationale for freedom of expression found its way into American jurisprudence through the *Abrams* dissent,<sup>12</sup> and Mill and Holmes are routinely grouped together as representatives of the “marketplace of ideas” rationale for free speech.<sup>13</sup> Although some scholars have identified differences between the two defenses, observing that Holmes’s views on truth are more skeptical than those of Mill,<sup>14</sup> none have undertaken an in-depth comparison. This Article fills that void, and finds that an exploration of the similarities and differences between Mill’s and

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10. *Id.* at 59; see also *id.* at 21 (“[T]he peculiar evil of silencing the expression of an opinion, is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.”).

11. Letter from Oliver Wendell Holmes to Harold J. Laski (Feb. 28, 1919), in 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935, at 187 (Mark DeWolfe Howe ed., 1953) [hereinafter HOLMES-LASKI LETTERS]. Interestingly, Holmes’s re-reading of *On Liberty* took place very shortly before the three March opinions upholding convictions under the Espionage Act came out (the *Schenck* opinion was issued on March 3, 1919, and the *Debs* and *Frohwerk* opinions were issued on March 10, 1919).

12. See, e.g., Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, 1984 DUKE L.J. 3 (“Although this classic image of competing ideas and robust debate dates back to English philosophers John Milton and John Stuart Mill, Justice Holmes first introduced the concept into American jurisprudence in his 1919 dissent to *Abrams v. United States.*”); Max Lerner, THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS, AND JUDICIAL OPINIONS 306 (reprinted in 1989) (1943) (characterizing the *Abrams* dissent as “the greatest utterance on intellectual freedom by an American ranking in the English tongue with Milton and Mill”).

13. See, e.g., Joseph Blocher, *Institutions in the Marketplace of Ideas*, 57 DUKE L. J. 821, 871 (2008); Frederick Schauer, *Hohfeld’s First Amendment*, 76 GEO. WASH. L. REV. 914, 922-23 (2008).

14. See, e.g., Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J.L. & POL. 451, 455 (1988) (noting Mill’s influence on Holmes but stating that “while [Holmes’s] defense of freedom of expression clearly reflected the Enlightenment belief that the state has no monopoly over truth and that free speech is crucial for the process of discovering truth, he also wove into these justifications some themes of his own early twentieth century world view: the ideas of neutrality of the state, skepticism and social Darwinism”).

Holmes's free speech defenses helps to generate a better understanding of both theories, as it brings into relief some of the differing ideas about individual and societal development that underlie each defense, and the ultimate goals that each author believes to be served by freedom of speech.

The comparison shows the extent to which Mill's free speech theory is based on the idea that societal progress (indispensably fueled by a collective truth-seeking endeavor) is inextricably connected to individual development. In Mill's utilitarian framework, the discovery of truth is an important presumed societal goal. Independently-thinking individuals advance the search for truth by following their thoughts as far as they can even if doing so yields conclusions that make them, and their fellow citizens, uncomfortable. The expression of controversial opinions plays a critical role in this process. A second, and related, argument for free speech in *On Liberty* is its effect on individual character. Mill claims that a culture in which opinions are subject to challenge promotes the development of character traits in individuals that are particularly valuable to a society, including the ability to engage in critical inquiry, a willingness to challenge beliefs held firmly by oneself and others, and the courage to stand up for convictions that are not widely held. According to Mill, these traits will result in the selection of more and more truthful beliefs. Although Mill ultimately justifies a commitment to free speech on the basis of the perceived role of speech in collective truth-seeking, it is the more individual-centered aspects of his defense that have continued to inspire recent scholarship, including the development of free speech justifications based on conceptions of autonomy.

The project also sheds light on Holmes's defense, which, despite its powerful delivery, proves rather elusive upon further analysis and has given rise to extensive scholarship seeking to pin down its basis. For example, one puzzle posted by the *Abrams* dissent is how its reliance on truth-seeking can be reconciled with Holmes's skepticism. Scholars have looked for answers in Holmes's interest in Darwinism and the pragmatist movement in philosophy.<sup>15</sup> The comparison with Mill's theory makes clear that Holmes is concerned with neither individual development nor the discovery of some external truth. Rather, he values speech for its role in a dynamic process in which shifting interest groups are vying for dominance in a continually changing world. This Article concludes that a key aspect to understanding the difference between the two defenses lies in the different conceptions of freedom that are at the core of the defenses.

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15. See, e.g., Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1; Edward J. Bloustein, *Holmes: His First Amendment Theory and His Pragmatist Bent*, 40 RUTGERS L. REV. 283 (1988); Thomas C. Grey, *Holmes and Legal Pragmatism*, 41 STAN. L. REV. 787 (1989).

Mill believes that individuals are free in the sense that they have the ability to change their convictions, and he argues that free speech helps individuals adopt beliefs that are closer to the truth. The freedom with which Holmes is concerned is a society's ability to make pragmatic choices and determine the direction in which it is headed.

This Article proceeds in four parts. Part I examines the views of both authors on how individuals develop deeply held beliefs and opinions. This Part identifies the critical difference that Mill believes in the force of reason as a mechanism to identify the best ideas and ultimately uncover truths (even if he is pessimistic about the willingness of most individuals to develop and apply this capacity), while Holmes is more skeptical about the possibility, and desirability, of allowing reason to be the ultimate judge in the development of deeply held convictions by individuals.

Part II discusses the development of beliefs and opinions at a societal level. It concludes that Mill places great value on the contributions dissenting individuals can make to society, and wishes to establish safeguards that prevent tyrannical majorities from silencing such individuals. Holmes is primarily concerned with a process in which those who hold minority views are given a fighting chance to win over a critical mass and grow into a dominant force.

Part III examines the "ultimate good" that each author contends is served by the protection of speech. Mill and Holmes both view free speech as essential to the pursuit of truth, but they differ sharply on the nature of the truth-seeking enterprise. Mill's free speech defense is based on the position that societies are capable of making progress in uncovering truths, even if they can never know with complete certainty whether they have, in fact, found the truth. Holmes distinguishes between an external reality, which humans are unable to understand (although the aspiration to understand the universe is a quintessential human characteristic), and a much more pragmatic notion of truth in the context of societal decision-making. He values speech primarily for its role in facilitating decision-making by majorities or dominant forces, and the references to "truth" in the *Abrams* dissent are best understood as referring to the outcome of a battle for dominance between proponents of different ideas or solutions.

Part IV discusses the conceptions of freedom underlying the two theories. Mill's defense is based on the notion that individuals have the freedom to change their beliefs if they become persuaded of the superiority of alternatives. The role of free speech is not only to present many different viewpoints from which individuals may choose, but also to develop a culture that encourages the kind of rigorous, independent thinking through which individuals can contribute value to society. In contrast, Holmes is concerned with the freedom of a collective to determine its future course as its dominant forces see fit. In Holmes's theory, freedom of speech is critical because it helps protect the ability of

society to adapt to changing circumstances.

### I. THE ROLE OF REASON IN THE DEVELOPMENT OF INDIVIDUAL BELIEF

Mill and Holmes both accord a central place to the role of speech in the process of developing opinions. However, their views on how deeply held convictions or preferences are acquired and revised, and in particular the role of reason in that process, differ significantly.

Mill describes the development of beliefs held by individuals as a dynamic interaction between reason, which enables individuals to critically assess opposing positions, and the emotional inclination to hold onto one's beliefs. It is clear to him that reason should be the ultimate guide in this process.<sup>16</sup> Mill's position that individuals have a choice to either hold onto their beliefs or revise them by applying reason implies that he believes humans are capable of using reason to overcome unfounded beliefs that are simply the result of accidental circumstances.<sup>17</sup> Confrontations with opposing views are instrumental in this process, as they present individuals with alternative beliefs and encourage re-examination of the bases for deeply held convictions. Mill argues that true knowledge can only be acquired by gaining a full understanding of both sides of the argument, because "[h]e who knows only his own side of the case, knows little of that."<sup>18</sup> Merely listening to contrary viewpoints is not enough; they must be put forward as persuasively as possible so that the listener can place himself "in the mental position of those who think differently."<sup>19</sup> Learning about the other side is so important for individual development that, if no real opponents can be found, a person should imagine them.<sup>20</sup>

Challenges to beliefs also keep them "alive" because they force a person to learn the grounds of his or her opinions.<sup>21</sup> Although Mill believes reason should have the last word in the selection of beliefs, he recognizes that holding a conviction is not just a rational affair; deeply held beliefs are *felt*, as well as known, and come to be part of one's identity, especially when those beliefs are under attack. In *On Liberty*, Mill appreciatively notes that those who adhere to a creed that has come under fire, "have realized its fundamental principles in all the forms of thought, have weighed and considered them in all their important bearings, and have

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16. Mill, *supra* note 9, at 10.

17. In the section, "Of Individuality, as One of the Elements of Well-Being," Mill envisions a similar role for conscience, which is to serve as a check on natural desires and impulses in individuals' decision-making concerning their living modes and actions. Mill, *supra* note 9, at 66-67.

18. *Id.* at 42.

19. *Id.* at 42-43.

20. *Id.* at 43.

21. *Id.* at 41-43.



experienced the full effect on the character, which belief in that creed ought to produce in a mind thoroughly imbued by it.”<sup>22</sup> By contrast, opinions that are never contested “will be held as a dead dogma, not a living truth.”<sup>23</sup> In the absence of confrontation—when a belief becomes commonplace and ceases to be the subject of heated debate—the meaning of a creed will eventually be lost.<sup>24</sup> This is because “the mind is no longer compelled, in the same degree as at first, to exercise its vital powers on the questions which its belief presents to it.”<sup>25</sup> Ultimately, the belief itself is forgotten “except the formularies,” or it is given “a dull and torpid assent, as if accepting it on trust dispensed with the necessity of realizing it in consciousness, or testing it by personal experience; until it almost ceases to connect itself at all with the inner life of the human being.”<sup>26</sup>

Mill became painfully aware of the importance of emotional development when he suffered a mental crisis at the age of twenty as a consequence of a rigorous education in which feelings were neglected.<sup>27</sup> In his *Autobiography*, Mill explains that after he recovered from the crisis, he came to realize the importance of “[t]he maintenance of a due balance among the faculties,” and that the cultivation of feelings takes a central place in his philosophy.<sup>28</sup> In *On Liberty*, Mill emphasizes that discussions with those who hold opposing views on important matters are crucial for the development of opinions that are both well-founded and deeply felt. Thus, Mill’s argument for freedom of speech integrates his views on the importance of reason with an acute awareness of the emotional aspects of our most deeply held convictions, which ultimately make life meaningful to us as individuals.

In his essay, *Natural Law*,<sup>29</sup> Holmes presents a much more skeptical view on an individual’s ability to develop and change preferences that are acquired early in life:

[P]roperty, friendship, and truth have a common root in time. One can not be wrenched from the rocky crevices into which one has grown for many years without feeling that one is attacked in one’s life. What we most love and revere generally is determined by early associations. I love granite rocks and barberry bushes, no doubt because with them were my earliest joys that reach back through the

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22. *Id.* at 46.

23. *Id.* at 41.

24. *Id.* at 45.

25. *Id.* at 46.

26. *Id.*

27. JOHN STUART MILL, *AUTOBIOGRAPHY* (1873), reprinted in *COLLECTED WORKS OF JOHN STUART MILL*, VOL. I, 137–45 (John M. Robson & Jack Stillinger eds., 1981) [hereinafter *MILL COLLECTED WORKS*].

28. *Id.* at 147.

29. Oliver Wendell Holmes, *Natural Law*, 32 *HARV. L. REV.* 40 (1918).

past eternity of my life.<sup>30</sup>

Similarly, in a letter to Pollock, Holmes wrote that he regarded moral and aesthetic preferences “as more or less arbitrary, although none the less dogmatic on that account. Do you like sugar in your coffee or don’t you?”<sup>31</sup> Thus, whereas Mill’s arguments are based on the premise that individuals develop their most deeply held convictions by a dynamic process in which their existing beliefs are regularly challenged and, as a result, bolstered or revised, Holmes believes that they are the accidental products of one’s upbringing. It should be noted, however, that Holmes does not state that such convictions are immutable.<sup>32</sup> In the statement from *Natural Law* quoted above, Holmes explicitly allows for the possibility that one may be “wrenched from the rocky crevices in which one has grown”<sup>34</sup>—that is, individuals may be *forced* to change strongly held beliefs about the truth, even if such a fundamental change can only happen after breaking through serious resistance.

Mill and Holmes differ in their perception of the role reason can and should play in the acquisition and revision of beliefs by individuals. As a descriptive matter, they agree that for most individuals, reason is a limited factor in the development of beliefs. In *On Liberty*, Mill notes that opinions are shaped by several aspects of a person’s make-up, including some deeply personal attributes: “Sometimes their reason—at other times their prejudices or superstitions: often their social affections, not seldom their antisocial ones, their envy or jealousy, their arrogance or contemptuousness: but most commonly, their desires or fears for themselves—their legitimate or illegitimate self-interest.”<sup>35</sup> Holmes similarly views reason as merely one element in the development of preferences, along with experience, consciousness, instinct, and temperament.<sup>36</sup>

30. *Id.* at 40-41.

31. Letter from Oliver Wendell Holmes to Lady Georgina Pollock (Sept. 6, 1902), in 1 HOLMES-POLLOCK LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND SIR FREDERICK POLLOCK, 1874-1932, at 104 (Mark DeWolfe Howe ed., 1961) [hereinafter 1 and 2 HOLMES-POLLOCK LETTERS].

32. Blasi points out that “Holmes was impressed by how seldom and slowly people yield to telling criticism, but never maintained that such resistance is for most persons absolute. When ideas cease to work, whether as guides to conduct or further inquiry, they tend to be abandoned by the individuals whose projects are frustrated as result. The process takes time and the admission of inefficacy does not come easily for most believers . . . . But changes of mind do occur, if only rarely, for all but the most refractory zealots.” Blasi, *supra* note 15, at 26-27.

34. *Natural Law*, *supra* note 29, at 40-41.

35. Mill, *supra* note 9, at 10.

36. Holmes disagreed with a behaviorist view that interprets human conduct purely as reflex responses. He criticized John B. Watson’s 1925 book, BEHAVIORISM, stating that it was “so preoccupied with resolving all our conduct into reflex reactions to stimuli, that he almost denies that consciousness means anything and that memory is more than a useless and misleading word. However much one may believe that men are automata one must recognize that what we call consciousness, memory &c. &c. are part of the phenomena—and we can’t say that the phenomena

However, Mill is more optimistic about the ability of individuals to strengthen reason and increase its role in the adoption of preferences. He recognizes that the development and maintenance of reason requires exercise, and that many, if not most, people lack the capacity or discipline to rigorously apply it.<sup>37</sup> At the same time, the very notion that reason is a faculty that can be improved by training implies that a society can create conditions, including an environment conducive to vigorous debate, that stimulate the development of reason. Conversely, a society can validate choices of individuals to neglect the faculty of reason, either by conscious decision or laziness. Mill believed that this was precisely what was happening in his era, and he lamented in *On Liberty* that many of his contemporaries advocated “that their feelings . . . are better than reasons, and render reasons unnecessary.”<sup>38</sup> Holmes seems to be more skeptical about the possibility of applying reason to overcome the arbitrary preferences that people develop early in life, and which they will struggle to hold onto no matter how many facts prove them wrong. He once wrote to Laski that, although he shared his friend’s “faith in reason”—which he said includes “the facts”—he realized “how limited a part reason has in the conduct of men,” who “believe what they want to” anyway.<sup>39</sup> In a later letter, Holmes wrote that “my conviction is only faith in the prevalence of reason in the long run . . . but I am well aware how long reason may be kept under what man wants to believe. I do despise the Will to Believe.”<sup>40</sup>

Importantly, Mill and Holmes make different *normative* claims about the desirability of the application of reason as a decisive factor. Mill has consistently fought the notion that intuition and feelings, standing alone, can be a source of knowledge. Mill’s treatise on epistemology, *A System of Logic*, posits that knowledge is acquired through inductive inferences from experience.<sup>41</sup> In his *Autobiography*, Mill explains that he was

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would have been the same if those supposedly epiphenomena were absent.” Letter from Holmes to Laski (Nov. 23, 1928), in HOLMES-LASKI LETTERS, *supra* note 11, at 1113.

37. Mill, *On Liberty*, *supra* note 9, at 53, 65. In *Utilitarianism*, published a few years after *On Liberty*, Mill argues that almost all humans who have had exposure to pleasures that employ their “higher faculties” are unwilling to give up such pleasures, even if they could achieve complete satisfaction in a “lower grade of existence.” *Utilitarianism*, reprinted in ON LIBERTY AND OTHER ESSAYS, at 139-40 (John Gray ed., 1998) (1863). As summarized by Mill: “It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied.” *Id.* at 140. Thus, it would seem unlikely that someone would voluntarily choose to relinquish the use of reason. However, Mill acknowledges that character weakness and lack of discipline may lead people to choose something that is easier to obtain even though they know it to be less valuable, and that ultimately, they may lose the capacity for more noble pleasures. *Id.* at 140-41.

38. Mill, *supra* note 9, at 10.

39. Letter from Holmes to Laski (Dec. 26, 1917), in HOLMES-LASKI LETTERS, *supra* note 11, at 122.

40. Letter from Holmes to Laski (Feb. 22, 1929), in HOLMES-LASKI LETTERS, *supra* note 11, at 1134.

41. See Book III (“Of Induction”) of John Stuart Mill, *A System of Logic Ratiocinative and Inductive: Being a Connected View of the Principles of Evidence and the Methods of Scientific Investigation* (1843), reprinted in VII MILL COLLECTED WORKS, *supra* note 27, at 283-638, in

motivated to attack the *a priori* or intuitionist theories of knowledge precisely because they seemed to legitimize prejudice:

The notion that truths external to the mind may be known by intuition or consciousness, independently of observation and experience, is, I am persuaded, in these times, the great intellectual support of false doctrines and bad institutions. By the aid of this theory, every inveterate belief and every intense feeling, of which the origin is not remembered, is enabled to dispense with the obligation of justifying itself by reason, and is erected into its own all-sufficient voucher and justification. There never was such an instrument devised for consecrating all deep seated prejudices.<sup>42</sup>

Holmes, notwithstanding his professed “faith in reason” in some of his correspondence, generally was more skeptical of the utility of reason. About a year before the *Abrams* dissent, he wrote to philosopher Morris Cohen: “I don’t see that . . . reason stands any differently from my preference of champagne to ditch water.”<sup>43</sup> And in a letter written after retiring from the Supreme Court, when he was in his nineties, he stated, “speaking only as a bettabilitarian and within the limits of our very finite experience I have no faith that reason is the last word of the universe.”<sup>44</sup> Interestingly, in a letter to Laski, Holmes noted the substantial place reason held in Mill’s thinking, and not entirely approvingly. Comparing Mill with Thomas Carlyle, a Scottish historian and essayist and a one-time friend of Mill, Holmes wrote: “Carlyle’s thoughts were rooted in his temperament, his prejudices, and his imagination—Mill’s were detached by reason.”<sup>45</sup>

Mill and Holmes’s differing views on the acquisition of preferences are reflected in the way they address the reader on the issue of freedom of expression. *On Liberty* appeals primarily to the reader’s reason. It reads as a model of the working method for truth-seeking Mill promotes. Typically, for each step in his argumentation, Mill first lays down his arguments, then proceeds to present what he considers to be the strongest arguments against his position, and finally seeks to refute these counter-arguments. Holmes, on the other hand, presents his views with

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particular Chapters III (“On the Ground of Induction”) *id.* at 306-15, VIII (“Of the Four Methods of Experimental Inquiry”), *id.* at 388-407, and XI (“Of the Deductive Method”), *id.* at 454-464.

42. Mill, *Autobiography*, in I MILL COLLECTED WORKS, *supra* note 27, at 233.

43. Letter from Oliver Wendell Holmes to Morris R. Cohen (Sept. 10, 1918), in Felix S. Cohen, *The Holmes-Cohen Correspondence*, 9 J. HIST. IDEAS 3, 12 (1948).

44. Letter from Holmes to Laski (Apr. 12, 1931), HOLMES-LASKI LETTERS, *supra* note 11, at 1314.

45. Letter from Holmes to Laski (Nov. 1, 1926), HOLMES-LASKI LETTERS, *supra* note 11, at 891. Holmes made this statement in reaction to Laski’s account of another person’s meeting with Carlyle in the 1860s, after Carlyle and Mill had fallen out, at which Carlyle had reportedly said about Mill: “He has nae roots in his mind.” See Letter from Laski to Holmes (Oct. 16, 1926), HOLMES-LASKI LETTERS, *supra* note 11, at 883.

peremptory rhetorical force, almost daring any challengers to come up with equally compelling rhetoric to make their case. As Vincent Blasi has pointed out, Holmes's case for the importance of free speech rests on experience, not logic or reason.<sup>46</sup> Note that Holmes points out that persecution for speech seems "perfectly *logical*."<sup>47</sup> However, the lessons of *experience*, rather than logic, should persuade us to adopt a position in favor of free speech: "But when men have *realized that time has upset many fighting faiths*, they may come to *believe even more than they believe* the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas . . ."<sup>48</sup> Thus, the realization that freedom of expression is beneficial becomes itself a deeply-held conviction that limits the actions a person can take to advance other preferences.<sup>49</sup>

Mill's and Holmes's theories about how human beings acquire preferences are critical for understanding their views about the role of speech in that process. For Mill, speech is an essential element of individual development: "[Man] is capable of rectifying his mistakes, by discussion and experience. Not by experience alone. There must be discussion, to show how experience is to be interpreted."<sup>50</sup> In other words, Mill values dissenting speech in part for its instrumental role in a selection process at the individual level in which the best opinions survive. Indeed, for Mill, the connection between freedom of speech and what he calls "liberty of conscience" or "liberty of thought" is so close that they are practically inseparable:

[The appropriate region of human liberty] comprises, first, the inward domain of consciousness; demanding liberty of conscience, in the most comprehensive sense; liberty of thought and feeling; absolute freedom of opinion and sentiment on all subjects, practical or speculative, scientific, moral, or theological. The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on

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46. Blasi, *supra* note 15, at 2-3.

47. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added).

48. *Id.* (emphasis added).

49. In a letter to Patrick Augustine Sheehan, an Irish priest, which pre-dates the *Abrams* dissent by more than 15 years, Holmes relayed a discussion with Justice Edward Douglas White, a Catholic, in which Holmes spoke of "the logic of persecution" and White agreed. But White added that "none of us live logically—you (Holmes) professing skepticism act on dogma; and those who profess dogma do not and could not carry it out dogmatically—the spirit of the times is too strong for us." Letter from Holmes to Sheehan (Feb. 1904), in *HOLMES-SHEEHAN CORRESPONDENCE: LETTERS OF JUSTICE OLIVER WENDELL HOLMES, JR. AND CANON PATRICK AUGUSTINE SHEEHAN* 23 (David H. Burton ed., Fordham University Press 1993).

50. Mill, *supra* note 9, at 24-25.

the same reasons, is practically inseparable from it.<sup>51</sup>

For Holmes, on the other hand, rational debate about preferences—which in his view are merely products of fortuitous circumstances—is meaningless as a method to convince others to revise them. Holmes would likely find that Mill asks for the impossible by advising the reader to try to feel the full force of the strongest arguments of opponents, in order to gain a profound understanding of his or her own opinions. However, within Holmes's framework, it is possible for a person to use the strength of his own convictions as a starting point, and consider that others are similarly attached to preferences grounded in different experiences:

But while one's experience thus makes certain preferences dogmatic for oneself, recognition of how they came to be so leaves one able to see that others, poor souls, may be equally dogmatic about something else. Not that one's belief or love does not remain. Not that we would not fight and die for it if important—we all, whether we know it or not, are fighting to make the kind of a world that we should like—but that we have learned to recognize that others will fight and die to make a different world, with equal sincerity or belief. Deep-seated preferences can not be argued about—you can not argue a man into liking a glass of beer—and therefore, when differences are sufficiently far reaching, we try to kill the other man rather than let him have his way. But that is perfectly consistent with admitting that, so far as appears, his grounds are just as good as ours.<sup>52</sup>

Essentially, Holmes invites the reader to think at two levels. At one level, a person is fully committed to his or her own deep-seated preferences. However, it is possible to analyze the source of one's convictions, and study them almost as an anthropologist would.<sup>53</sup> From this perspective, a person can imagine how different people have acquired convictions that are the outcome of the particular circumstances in which each person grew up. At this level, it is possible to see a multitude of individuals who are all willing to fight for their most strongly held convictions and who all seem equally justified in their willingness to do so.

Of course, even if one accepts that the grounds for others' preferences are just as good as one's own, the step to allow for freedom of expression does not necessarily follow. However, Holmes's observations are

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51. Mill, *supra* note 9, at 16-17; see also *id.* at 19 (noting that it is impossible to separate freedom of thought from freedom to speak and write).

52. Holmes, *Natural Law*, *supra* note 29, at 41.

53. Cf. Letter from Holmes to Lady Pollock (Sept. 6, 1902), 1 HOLMES-POLLOCK LETTERS, *supra* note 31, at 105 ("[T]o be civilized is to be potentially master of all possible ideas, and that means that one has got beyond being shocked, although one preserves one's own moral and aesthetic preferences . . . . You admit the possibility of difference and yet are categorical in your own way, and even instinctively condemn those who do not agree.").

consistent with a strong commitment to free speech for at least two reasons. First, with the exception of the extremely stubborn, people do not hold unchangeable beliefs on every subject. Someone may view religious beliefs as unalterable, akin to a like or dislike of beer in the example cited by Holmes, but be prepared to adjust political convictions, for example, because changing circumstances ask for a different approach to the role of government in society. Moreover, people vary with respect to the areas in which their convictions are unchangeable. Different persons attach differing degrees of importance to matters of politics, religion, art, ethics, and so forth, depending on their individual temperament and the circumstances under which the convictions were initially acquired. Some consider their religious convictions to be an unchangeable part of their identity; others shop around until they find a religion that suits their needs. The areas in which someone develops strong preferences are determined by natural inclination as well as cultivation during childhood and, in some instances, later in life. Some people develop strong likes and dislikes for certain composers or artists in early childhood, others only get serious exposure to music or visual art as adults, and many never develop any interest in the subject.

Second, if we accept Holmes's proposition that other people's preferences are based on grounds as good as ours, it is hard to justify why they would not have the same entitlement to express them. As has been noted by commentators, Holmes detested absolutism.<sup>54</sup> The awareness of the arbitrariness of one's own preferences leads to a certain degree of skepticism as to even those convictions for which we would give our lives—it permits one to hold strong beliefs, but to stop short of absolute certainty.<sup>55</sup> Holmes sometimes demonstrates this attitude when describing

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54. See Blasi, *supra* note 15, at 14 (“Throughout his adult life, in a variety of intellectual endeavours, [Holmes] displayed an instinctive aversion to assertions of ‘absolute’ truth”). In *The Path of the Law*, Holmes wrote: “The language of judicial decision is mainly the language of logic. And the logical method and form flatter that longing for certainty and for repose which is in every human mind. But certainty generally is illusion, and repose is not the destiny of man.” Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 466 (1897). In his correspondence, Holmes frequently criticized the attitude of contemporaries who seemed to him to be too certain. Presumably commenting on the defendants in the Espionage Act cases, Holmes wrote: “The greatest bores in the world are the come-outers who are cock-sure of a dozen nostrums.” Letter from Holmes to Pollock (Apr. 27, 1919), 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 11. Holmes critiqued William James' thoughts on the Will to Believe, saying that “[t]he alliance of philosophy with religion and the dogmatic foothold that it gets from a morality from which to bully *nous autres* seems to me to weaken its significance for us hard-headed ones.” Letter from Holmes to Pollock (Apr. 26, 1912), 1 HOLMES-POLLOCK LETTERS, *supra* note 31, at 191-92. And Holmes criticized Edmond Kelly's book *TWENTIETH CENTURY SOCIALISM* (1910) as follows: “It seems on the opening pages to be cocksure – and the introducers are also cocksure – a frame of mind that makes me puke[.]” Letter from Holmes to Pollock (Mar. 24, 1916), 1 HOLMES-POLLOCK LETTERS, *supra* note 31, at 235.

55. Addressing his fellow Harvard classmates fifty years after graduation, Holmes noted that “[o]ne learns from time an amiable latitude with regard to beliefs and tastes.” OLIVER WENDELL HOLMES, *The Class of '61: At the Fiftieth Anniversary* (June 28, 1911), in 3 *THE COLLECTED WORKS OF JUSTICE HOLMES: COMPLETE PUBLIC WRITINGS AND SELECTED JUDICIAL OPINIONS OF OLIVER WENDELL HOLMES*, at 504 (Sheldon M. Novick ed., 1995) [hereinafter 3 HOLMES COLLECTED

his own beliefs, for example, when elaborating on his statement that while he does not believe in hell, he is afraid of it:

Our early impressions shape our later emotional reactions and when one adds the experience of having been cocksure of things that weren't so, I can't help an occasional semi-shudder as I remember that millions of intelligent men think that I am barred from the face of God unless I change.<sup>56</sup>

The skepticism outlined by Holmes in his essay, *Natural Law*—which allows one to truly be convinced of something, while at the same time leaving room for the possibility that one may be wrong—is a premise for the argument for free speech in the *Abrams* dissent. For a person or group in power and not plagued by any doubt, the natural reaction is to silence opposing speech: “If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition.”<sup>57</sup> However, in a letter to Laski, a little over a year before the *Abrams* dissent came out, Holmes wrote that it is rare for all these circumstances to be present:

My thesis would be (1) if you are cocksure, and (2) if you want it very much, and (3) if you have no doubt of your power—you will do what you believe efficient to bring about what you want—by legislation or otherwise. In most matters of belief we are not cocksure—we don't care very much—and we are not certain of our power. But in the opposite case we should deal with the act of speech as we deal with any other overt act that we don't like.<sup>58</sup>

Although Holmes is aware of the existence of groups and individuals who would not even allow for the possibility of error,<sup>59</sup> he appears to believe that ultimately, most people and groups are not sufficiently secure to irrevocably dismiss the possibility of being proven wrong. By allowing for the expression of dissenting opinions, free speech safeguards an avenue for change, no matter how limited that possibility may be, given

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56. Letter from Holmes to Laski (May 8, 1918), HOLMES-LASKI LETTERS, *supra* note 11, at 153-54.

57. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

58. Letter from Holmes to Laski (July 7, 1918), HOLMES-LASKI LETTERS, *supra* note 11, at 160.

59. Letter from Holmes to Pollock (Aug. 30, 1929), 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 252-53 (“The abolitionists had a stock phrase that a man was either a knave or a fool who did not act as they (the abolitionists) *knew* to be right. So Calvin thought of the Catholics and the Catholics of Calvin. So I don't doubt do the more convinced prohibitionists think of their opponents today. When you know that you know persecution comes easy. It is as well that some of us don't know that we know anything.”); *see also* Letter from Holmes to Pollock (Oct. 12, 1917), 1 HOLMES-POLLOCK LETTERS, *supra* note 31, at 247 (“I was struck incidentally with the seeming sincerity of Virgil's worship of the national gods, and with the reflection that very likely it never occurs to him to question them, and then that the same is true of the run of men today *non obstant* modern skepticism in many matters. 'I have always heard so' is a sufficient reason for their beliefs.”).



the natural stubbornness of deeply held preferences. At the same time, Holmes states about free speech, “in the abstract, I have no very enthusiastic belief, though I hope I would die for it.”<sup>60</sup> This statement shows that, notwithstanding his personal commitment to free speech, it is not immune from his broader claims of skepticism.<sup>61</sup> This is a first indication of the limitations built into Holmes’s free speech theory. In particular, as we will see, Holmes offers no principled argument for protecting freedom of speech if forces that see no use for it obtain dominance.

## II. SOCIETY’S MOVING FORCES: INDIVIDUALS OR PERPETUALLY SHIFTING GROUPS?

One of the central themes in *On Liberty* is a paradox in the relationship between individuals and society: the most unconventional citizens are indispensable for progress, yet society exercises great pressure to coerce them into conformity, or at the very least silence them. *On Liberty* contains many warnings against the dangers of this pattern, and is in effect a plea for society to implement permanent limits on paternalist uses of its authority, no matter how well-intentioned. Holmes’s writings, on the other hand, show that he is not too concerned about the oppression of individuals who hold eccentric views. Rather, he views society as a collection of groups holding differing opinions, with each group vying to become dominant. His defense of free speech is not based on the value of individual contributions to a discourse, but rather on his conviction that opinions that are held by a minority faction at a given time should be given a fighting chance.

Mill’s appreciation for individuals who do not conform to societal norms forms the core of both his argument for free speech in the second chapter of *On Liberty*, and his plea for liberty in the realm of choices about how to live one’s life in the third chapter. In the third chapter of *On Liberty*, Mill emphasizes the value of the concept of “individuality,” which is expressed in actions that are the result of choice. Mill views the ability to choose as a unique human capacity, involving the exercise of “[t]he human faculties of perception, judgement, discriminative feeling,

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60. Letter from Holmes to Pollock (Nov. 6, 1919), 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 29.

61. Thomas Grey made some keen observations about how these types of statements, which Holmes made with some regularity, fit within his skepticism: “When Holmes said he would die or would kill for something, he was expressing, in the pragmatically strongest terms he could find, his *commitment* to it. When he said he didn’t believe in such a view ‘in the abstract,’ he meant that he couldn’t support his conviction philosophically, with rational grounds strong enough to match his level of emotional commitment . . . . What that meant, in pragmatic terms, was that he did not have evidence or rational arguments sufficient in practice to convince other sound people.” Thomas C. Grey, *Holmes, Pragmatism, and Democracy*, 71 OR. L. REV. 521, 536 (1992).

mental activity, and even moral preference.”<sup>62</sup> Mill argues that the benefits from allowing individuals to lead the lives that fit their natures best are not limited to individual flourishing. Just as contrarian thinkers are instrumental in a truth-seeking enterprise, choices made by individuals who lead unconventional lives may result in the discovery of new practices that end up improving the lives of many others, or in keeping existing practices alive by challenging them.<sup>63</sup>

In the second chapter of *On Liberty*, in the context of Mill’s free speech defense, Mill argues that individual freedom is essential to the development of humanity for at least two reasons. First, geniuses can only flourish in an atmosphere of freedom, making free speech particularly important in this respect.<sup>64</sup> Society as a whole will benefit from allowing its great thinkers to develop their views and speak out without having to fear persecution.<sup>65</sup> Second, freedom is needed in order “to enable average human beings to attain the mental stature which they are capable of.”<sup>66</sup> However, even though Mill values the role of freedom in developing strong character in its individual citizens,<sup>67</sup> he recognizes that few individuals possess the discipline to consistently use reason as a check on strong sentiments in order to achieve true knowledge at an individual level.<sup>68</sup> Thus, progress is achieved to a large extent as a result of the ability of “calmer and disinterested bystander[s]” to evaluate the merits of opposing opinions put forward by zealous proponents after observing the collision of these opinions.<sup>69</sup> Passionate believers in unconventional opinions are indispensable because of their role in stimulating the flow of energy and mental activity, which a society needs in order to make progress. But ironically, progress in uncovering truths is ultimately achieved by changing the minds of those who are either relatively indifferent to an issue or in doubt about their convictions.<sup>70</sup>

Mill notes that despite the gains society could derive from a diverse

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62. Mill, *supra* note 9, at 64.

63. See *id.* at 70-77. “[T]here are but few persons, in comparison with the whole of mankind, whose experiments, if adopted by others, would be likely to be any improvement on established practices. But these few are the salt of the earth; without them, human life would become a stagnant pool. Not only is it they who introduce good things which did not before exist; it is they who keep the life in those which already existed.” *Id.* at 71.

64. *Id.* at 38-39 (freedom of expression is an essential condition for the development of great thinkers); 71-73 (geniuses can only breathe freely in an atmosphere of freedom).

65. Cf. Vincent Blasi, *Free Speech and Good Character*, 46 UCLA L. REV. 1567, 1577 (1999) (“by tolerating unorthodox opinions and inquiries a community encourages creativity both by valuing it and by enabling creative persons to achieve visibility and interact.”).

66. Mill, *supra* note 9, at 39.

67. *Id.* at 38, 66-67; see also Blasi, *supra* note 65.

68. *Id.* at 54 (noting “few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness . . .”).

69. *Id.* at 58.

70. Mill, *supra* note 9, at 58-59.

body of strong citizens, its inclination is to do whatever is in its power to silence dissenting speech and coerce eccentrics into conformity. In fact, the pressures exercised by a majority may pose a greater threat to dissenting speech and originality than formalized oppression by the state:

Society can and does execute its own mandates: and if it issues wrong mandates instead of right, or any mandates at all in things with which it ought not to meddle, it practises a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself. Protection, therefore, against the tyranny of the magistrate is not enough: there needs protection also against the tyranny of the prevailing opinion and feeling; against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them; to fetter the development, and, if possible, prevent the formation, of any individuality not in harmony with its ways, and compel all characters to fashion themselves upon the model of its own.<sup>71</sup>

Society often engages in oppressive practices because a majority is so convinced it has the truth on its side, that it feels justified in silencing individuals who hold other opinions, or subjecting them to social sanctions.<sup>72</sup> As a result, individuals hide eccentric opinions, or at least refrain from publicly advocating for them.<sup>73</sup> Similarly, fewer people will openly live unconventional lives until, eventually, “individuals are lost in the crowd.”<sup>74</sup> Thus, a central argument for freedom of speech in *On Liberty* is that in order to maximize the benefits a society can gain from the energy and friction created by extraordinary opinions and conduct, it must permanently commit to restraining dominant groups from their natural inclination to demand conformity. Although freedom of expression cannot restrain all social forces that will encourage conformity, it will at least remove the threat of legal sanctions for those who wish to speak out in favor of unpopular opinions. A society’s irrevocable commitment to strict limits on interference with individual liberty may help foster a culture in which non-mainstream views are tolerated, even if not necessarily embraced.

Although Holmes does not directly address the relationship between individuals and society in the context of freedom of expression, his views on the subject appear to be radically different from Mill’s. Holmes believes that the development of agreements and conventions among majorities is a condition for the existence of society. As he states in

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71. *Id.* at 8-9.

72. *Id.* at 22-32.

73. *Id.* at 37-38.

74. *Id.* at 73.

*Natural Law*, individuals simply need to accept certain rules if they want to live with others.<sup>75</sup> He has no doubt about the fate of an individual who holds opinions that are not accepted by anybody else: society will declare this person crazy and send him to a doctor or lock him up.<sup>76</sup> Nor does he have much sympathy for such a person; according to him, sensible men will recognize that if they are alone in their convictions, something is probably wrong with them.<sup>77</sup> Thus, Holmes appears unconcerned about the loss of eccentric individuals' contributions to societal dialogues.<sup>78</sup> Where Mill merely expresses his intention to "forgo any advantage" from a rights-based argument,<sup>79</sup> Holmes is more outright in his rejection of claims that individuals possess natural rights, stating that "[t]he most fundamental of the supposed preexisting rights—the right to life—is sacrificed without a scruple not only in war, but whenever the interest of society, that is, of the predominant power in the community, is thought to demand it."<sup>80</sup> In his book, *The Common Law*, Holmes had already observed that any society would sacrifice individual welfare if it concludes that doing so is necessary for its own existence.<sup>81</sup> And in a letter to Laski, Holmes states that a man who lives in society must expect to be treated as a means rather than as an end in itself at times.<sup>82</sup>

Mill and Holmes share the belief that individuals, by pursuing their own goals (or, as Holmes would call them, ideals), are instrumental to the achievement of broader societal ends. However, they seem to differ on what types of individual contributions are the most valuable. Mill emphatically argues that society should create an atmosphere of freedom in which geniuses (whom, he states, are often eccentric) can flourish, based on the premise that true individual originality is a driving force in achieving collective growth and development.<sup>83</sup> Holmes values individuals who appreciate that they are inseparable from the society in which they live and are willing to make sacrifices for a collective greater

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75. Holmes, *Natural Law*, *supra* note 29, at 42.

76. *See id.* at 40.

77. *Id.* ("[I]f I am alone probably something is wrong with my works."); *see also* Letter from Holmes to Pollock (Oct. 26, 1929), 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 255: "If we are sensible men and not crazy on-ists of any sort, we recognize that if we are in a minority of one we are likely to get locked up and then find a test or qualifications by reference to some kind of majority vote actual or imagined."

78. In a letter to Laski, Holmes wrote: "But I grow too detached with age. Perhaps I am too averse to any over-serious treatment of the personality as a definite indivisible unit, needing self-respect and striving for God's respect, instead of a shifting nebula of uncertain outline and content varying with the [aurora?]." Letter from Holmes to Laski (February 7, 1926), HOLMES-LASKI LETTERS, *supra* note 11, at 828.

79. Mill, *supra* note 9, at 15.

80. Holmes, *Natural Law*, *supra* note 29, at 42.

81. OLIVER WENDELL HOLMES, *THE COMMON LAW* 43-44 (Dover Publications 1991) (1881).

82. Letter from Holmes to Laski (May 20, 1920), HOLMES-LASKI LETTERS, *supra* note 11, at 264.

83. Mill, *supra* note 9, at 71-74.

good: "If our imagination is strong enough to accept the vision of ourselves as parts inseverable from the rest, and to extend our final interest beyond the boundary of our skins, it justifies the sacrifice even of our lives for ends outside of ourselves."<sup>84</sup> In his correspondence, Holmes often writes admiringly of individuals, including John Stuart Mill, who influenced the thinking in their era and possibly beyond.<sup>85</sup> However, he also notes that "probably the great body of insights that we have, touching life and the world, comes in large part from an unknown multitude, not mentioned in the histories of philosophy."<sup>86</sup> Tellingly, Holmes reserves his most lavish praise for soldiers—those who give up their individuality and are willing to sacrifice their lives.<sup>87</sup> The soldier figure also appears in Holmes's writings as a metaphor for human life: vis-à-vis the cosmos, we are but soldiers who "have not been told the plan of campaign, or even that there is one."<sup>88</sup> Thus, Holmes's perception of the limited importance of individuality seems related to his belief, frequently expressed in correspondence, that there are "no reasons for attributing cosmic importance to man" and that man is essentially on the same footing as other species,<sup>89</sup> or at least that there is no way of *knowing* the cosmic

84. Holmes, *Natural Law*, *supra* note 29, at 44. Note how Holmes invokes imagination rather than reason in order to get his point across.

85. Comparing Carlyle and Mill, Holmes wrote: "Carlyle's pictures may outlast Mill's thoughts but I doubt if Carlyle gave the world as great a shove as Mill." Letter from Holmes to Laski (Nov. 1, 1926), HOLMES-LASKI LETTERS, *supra* note 11, at 891. See also Letter from Holmes to Laski (Aug. 24, 1924), *id.* at 652 (writing about Herbert Spencer: "He was in fashion once, therefore he filled a need. Our fashion is no more respectable than any other. If a man has his time of being in fashion he has all that anyone has, and has proved his claim to be a force shaping the future."); letter from Holmes to Lady Pollock (July 2, 1895), 1 HOLMES-POLLOCK LETTERS, *supra* note 31, at 58 (also about Spencer: "I doubt if any writer of English except Darwin has done so much to affect our whole way of thinking about the universe.").

86. Letter from Holmes to Pollock (Mar. 1, 1918), 1 HOLMES-POLLOCK LETTERS, *supra* note 31, at 259.

87. For example, in his speech, *The Soldier's Faith*, Holmes states: "I do not know what is true. I do not know the meaning of the universe. But in the midst of doubt, in the collapse of creeds, there is one thing I do not doubt, that no man who lives in the same world with most of us can doubt, and that is that the faith is true and adorable which leads a soldier to throw away his life in obedience to a blindly accepted duty, in a cause which he little understands, in a plan of campaign of which he has little notion, under tactics of which he does not see the use." Oliver Wendell Holmes, *The Soldier's Faith: An Address Delivered on Memorial Day, May 30, 1895 at a Meeting Called by the Graduating Class of Harvard University*, in 3 HOLMES COLLECTED WORKS 486, *supra* note 55, at 487.

88. Holmes, *Natural Law*, *supra* note 29, at 43; see also Letter from Holmes to Pollock (June 18, 1925), 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 163 ("I take no stock in B. Russell's defiance of the sky. I think the proper attitude is that we know nothing of cosmic values and bow our heads—seeing reason enough for doing all we can and not demanding the plan of campaign of the General—or even asking whether there is any general or any plan.").

89. See Holmes, *Natural Law*, *supra* note 29, at 44 ("If we think of our existence not as that of a little god outside, but as that of a ganglion within, we have the infinite behind us. It gives us our only but our adequate significance. A grain of sand has the same, but what competent person supposes that he understands a grain of sand? That is as much beyond our grasp as man."); see also Letter from Holmes to Laski (Jan. 11, 1929), HOLMES-LASKI LETTERS, *supra* note 11, at 1125 ("I regard [man] as I do the other species (except that my private interests are with his) having for his main business to live and propagate, and for his main interest food and sex."); Letter from Holmes to Pollock (Aug. 30, 1929), 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 252 ("[W]hen one thinks coldly I see no reason for attributing to man a significance different in kind from that which belongs to a baboon or a

significance of mankind.<sup>90</sup>

From these statements, it appears that Holmes believes that the interests of society, or of its dominant forces, trump individual claims. Although he does not affirmatively state that a society is morally justified in sacrificing individuals in its own interest, Holmes appears to accept this state of affairs as a matter of fact, and he praises those who are willing to fight and die for the greater good without asking questions. In his dissenting opinion in *Gitlow v. New York*,<sup>91</sup> written a few years after the *Abrams* dissent, Holmes expresses the chilling view that the dominant forces are to be respected even if, ultimately, they would end the very freedom that permitted them to obtain a majority position: “If in the long run the beliefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way.”<sup>92</sup> This statement is hard to reconcile with Holmes’s commitment to free speech in *Abrams*. One way to explain Holmes’s position in *Gitlow* is that it describes a consistent majority position formed *in the long run* and that, in such a situation, the dominant forces should not be denied the opportunity to subject their overarching ideas regarding governance to the tests of experience and time. As explored more fully below, Holmes makes no claim that the extent of free speech guaranteed by the United States Constitution is a principle of universal validity. Possibly, Holmes considers it to be the responsibility of the people themselves to protect their liberties over time by making sensible choices, whereas the role of the courts is limited to fending off attacks that would abruptly end such liberties. In a letter to his friend, Pollock, written a few months before the *Abrams* dissent was published, Holmes criticized the “collectivist tendency . . . toward underrating or forgetting the safeguards in bills of rights that had to be fought for in their day and that still are worth fighting for” and quoted Thomas Jefferson’s statement that “eternal vigilance is the price of freedom.”<sup>93</sup>

Mill, in contrast, would not permit a society to give up the right to freedom of expression. The central point of *On Liberty* is that tyrannical

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grain of sand.”).

90. See, e.g., Letter from Holmes to Laski (Jan. 31, 1918), HOLMES-LASKI LETTERS, *supra* note 11, at 131 “[T]he universe may be contemplated in two ways—one our usual one, at the point of contact where it is finite, measurable, predictable—the other as a whole, as an inexplicable mystery which one can help oneself to realize by thinking that a roomful of men would take us back to the unknown.”); Letter from Holmes to Pollock (Feb. 10, 1925), 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 152 (noting that his view of the cosmos “is an I know not what, beyond my capacity to predicate . . .”).

91. *Gitlow v. New York*, 268 U.S. 652, 672-73 (1925) (Holmes, J., dissenting).

92. *Id.* at 673.

93. Letter from Holmes to Pollock (Sept. 19, 1919), in 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 25.

majorities must be prevented from silencing dissenting individuals. For Mill, individual liberty is so inextricably connected to the utilitarian goal of promoting general welfare that it should be protected even against voluntary renunciation. Mill addresses a similar issue when he explains why individual liberty should not include the freedom to sell oneself into slavery.<sup>94</sup> The reason is that the justification for granting the freedom in the first place is taken away by the act of giving it up for once and for all.<sup>95</sup> Mill concludes: "The principle of freedom cannot require that [an individual] should be free not to be free. It is not freedom, to be allowed to alienate . . . freedom."<sup>96</sup> By analogy, under Mill's reasoning a society should not have the freedom to relinquish its liberties once and for all in favor of a dictatorship.

So how can Holmes's deference to dominant forces be squared with his position that there are strict limits on a society's ability to restrict and punish speech? One answer could be that it is almost never in the long-term interest of a society to suppress speech from minority groups. First, human beings are complex and so is the collection of opinions and preferences held by them. Many individuals who are considered to fit into the mainstream do hold deviating opinions on some issues. Thus, suppression of speech will not only affect those whose opinions place them on the fringes of society; it is likely to silence many of those who for all practical purposes are within the "dominant group" as well. In addition, today's minorities may be the dominant forces of tomorrow. Even the strictest suppression of unwelcome opinions has only limited effect and is unlikely to prevent at least some dissidents from trying to bring about changes. If these attempts end up being successful (quite possibly after a violent upset), the previously dominant forces of society will likely find themselves in as poor a position as those they tried to silence when they were in power.<sup>97</sup> Perhaps most importantly, even if suppression of minority views could succeed, the question remains whether dominant forces really want to foreclose avenues for change and, in effect, sign up for stagnation. As we have seen in Part I, Holmes believes that changing circumstances may lead individuals to give up preferences, or at least make them willing to experiment. Group dynamics can become an independent force, and position shifts from high-profile individuals, or from a sufficiently large portion of a dominant group (possibly in response to a dramatic external change), may corrode the

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94. Mill, *supra* note 9, at 113-14.

95. *Id.* at 114.

96. *Id.*

97. This suggests that in a Rawlsian thought-experiment, people might opt for a strong commitment to free speech, not just because they might end up as dissidents, but rather because it is quite likely that almost everyone will be outside of the mainstream during certain periods of his or her life.

strength of dominant opinions from within. Also, if we accept that our world is in a constant state of change, a logical consequence of Holmes's viewpoint is that just as each individual develops deeply personal attachments due to circumstances, each generation is shaped by the unique circumstances in which it comes of age. Of course this does not mean that there is uniformity within each generation, but the accidents of time and place determine the largest commonalities within a generation. Thus, over time demographic changes can lead to major shifts in prevailing opinion. No matter how strongly people feel about their preferences, the question is to what extent they want to force these opinions on their offspring. In the abstract, some may even accept that younger generations could be better equipped to address problems posed by the times in which they came of age.<sup>98</sup>

Another quite powerful explanation for Holmes's commitment to free speech can be found in his view that it is natural for individuals and groups to fight for causes in which they strongly believe. Notwithstanding his views on the relative insignificance of humankind, Holmes recognizes in himself, and in others, a highly personal desire to "touch the superlative" in our lives.<sup>99</sup> Although he believes ideals to be arbitrary, Holmes argues that it is their pursuit that makes life worth living. In *Law in Science and Science in Law*, an article published in 1899, Holmes writes:

[W]ithout ideals what is life worth? They furnish us our perspectives and open glimpses of the infinite. It often is a merit of an ideal to be unattainable. Its being so keeps forever before us something more to be done, and saves us from the ennui of a monotonous perfection.<sup>100</sup>

Holmes views the willingness to fight—and eventually, to die or kill—for our ideals as the essence of human nature. In *Natural Law*, Holmes observes that our cosmic insignificance "has no bearing upon our conduct. We still shall fight—all of us because we want to live, some, at least,

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98. Blasi suggests that, from Holmes's perspective, the Darwinist principle that creatures with the most adaptive traits survive can be applied to ideas, and thus generational shifts and immigration result in a natural selection of newcomers with the most suitable ideas. Blasi, *supra* note 15, at 26.

99. In a letter to Pollock, Holmes commented about Chief Justice Howard William Taft's statement that he had always had the ambition to be Chief Justice, stating that he could not understand the ambition for an office, and that the only one he felt was "when the end comes, for till then it is always in doubt, that one has touched the superlative." Letter from Holmes to Pollock (July 11, 1921), in 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 72. In *Natural Law*, Holmes posits that this desire is universal: "There is in all men a demand for the superlative, so much so that the poor devil who has no other way of reaching it attains it by getting drunk." Holmes, *Natural Law*, *supra* note 29, at 40. See also Letter from Holmes to Pollock (Feb. 26, 1911), 1 HOLMES-POLLOCK LETTERS, *supra* note 31, at 175 ("[W]as not Plato the first to make articulate the high idealizing that we recognize as the best thing in man?").

100. Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443 (1899), in 3 HOLMES COLLECTED WORKS 406, *supra* note 55, at 420.



because we want to realize our spontaneity and prove our powers, for the joy of it.”<sup>101</sup> In *Law in Science and Science in Law*, Holmes states that “the place for a man who is complete in all his powers is in the fight.”<sup>102</sup> These types of statements led Alexander Meiklejohn to criticize Holmes’s philosophy as being “one of excessive individualism.”<sup>103</sup> Meiklejohn stated that a combination of Darwinism, Puritanism, and Holmes’s personal experiences had led Holmes to adopt a worldview that left no room for the existence of a “community of purpose,” instead viewing society “as a multitude of individuals, each struggling for his own existence . . . in the social forms of a competitive independence.”<sup>104</sup> However, this description is at odds with Holmes’s worldview in which there is little consideration for individuals. Indeed, for Holmes, any fight of consequence is between competing *groups*, as suggested in a letter to Pollock: “I believe that force, mitigated so far as may be by good manners, is the *ultima ratio*, and between two groups that want to make inconsistent kinds of world I see no remedy except force.”<sup>105</sup>

Holmes’s appreciation of battle is reflected in the reference to the “competition of the market” in the *Abrams* dissent. The image of a continuous struggle between clashing ideas evoked by the metaphor is one that was used by Holmes in earlier writings.<sup>106</sup> As Albert Alschuler points out in his recent biography of Holmes, disarming one side by silencing it ends the struggle and kills ideas.<sup>107</sup> Perhaps, in Holmes’s view, the best law can do is create the parameters for a fair battle. Holmes’s opinions in cases involving injunctions against organized labor from the Massachusetts Supreme Court in the 1890s support this explanation for Holmes’s commitment to free speech. In *Vegeahn v. Guntner*, Holmes dissented from the majority opinion, which reinstated an injunction prohibiting strikers from maintaining a patrol of two men who urged patrons not to enter the picketed business.<sup>108</sup> He reasoned that application

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101. Holmes, *Natural Law*, *supra* note 29, at 41.

102. Holmes, *Law in Science and Science in Law*, *supra* note 55, at 420.

103. ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 61 (Oxford University Press 1965) (1960).

104. *Id.* at 62.

105. Letter from Holmes to Pollock (Feb. 1, 1920), 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 36. See also Sheldon M. Novick, *Introduction*, in 1 HOLMES COLLECTED WORKS, *supra* note 55, at 41 (noting that Holmes views the world as a struggle between competing groups).

106. In an article published in 1899, Holmes referred to “the struggle for life among competing ideas, and of the ultimate victory and survival of the strongest.” Holmes, *Law in Science and Science in Law*, in 3 HOLMES COLLECTED WORKS 406, *supra* note 55, at 410. And in 1909, Holmes mentioned “the struggle for life carried on among ideas; to the result that some perish and others put on the livery of the conqueror.” Oliver Wendell Holmes, *Holdsworth’s English Law*, 25 L. QUART. REV. 412 (1909), in 3 HOLMES COLLECTED WORKS 434, *supra* note 55, at 435. See also Alschuler, *supra* note 6, at 79 (discussing these quotes).

107. Alschuler, *supra* note 6, at 79.

108. *Vegeahn v. Guntner*, 167 Mass. 92, 104, 44 N.E. 1077, 1079 (Mass. 1896) (Holmes, J., dissenting).

of the principle of free competition is not limited to competitors who are within the same social class, but that it also required that the strikers, whose efforts he viewed as a “free struggle for life,” were entitled to a fair battle against their employers.<sup>109</sup> Holmes concluded:

One of the eternal conflicts out of which life is made up is that between the effort of every man to get the most he can for his services, and that of society, disguised under the name of capital, to get his services for the least possible return. Combination on the one side is patent and powerful. Combination on the other is the necessary and desirable counterpart, if the battle is to be carried on in a fair and equal way.<sup>110</sup>

Holmes offers another reason for not giving a majority a license to persecute the opinions of minorities (consisting of more than one person) merely because they are different. In the *Abrams* dissent, he writes that “Congress certainly cannot forbid all effort to change the mind of the country.”<sup>111</sup> In other words, minority factions must be permitted an attempt to gain support for their positions, and become dominant.<sup>112</sup> One argument for tolerating dissenting speech by minority factions would be that it increases transparency, because absent a strong commitment of free speech, it will never be clear whether the dominant forces’ power is based on the fact that they represent a majority or on their ability to effectively silence others. Thus, free speech facilitates the implementation of the ideas held by shifting majorities at any given time.<sup>113</sup> This explanation is consistent with Holmes’s deference to legislative majorities. Although a

109. 167 Mass. at 107, 44 N.E. at 1081.

110. 167 Mass. at 108, 44 N.E. at 1081; *see also* *Plant v. Woods*, 176 Mass. 492, 505, 57 N.E. 1011, 1015 (Mass. 1900) (Holmes, C.J., dissenting) (noting that “unity of organization is necessary to make the contest of labor effectual,” but adding that “I cherish no illusions as to the meaning and effect of strikes. While I think the strike a lawful instrument in the universal struggle of life, I think it pure phantasy [sic] to suppose that there is a body of capital of which labor, as a whole, secures a larger share by that means . . . . Organization and strikes may get a larger share for the members of an organization, but, if they do, they get it at the expense of the less organized and less powerful portion of the laboring mass. They do not create something out of nothing.”). Sheldon Novick, in one of the introductory chapters to Holmes’ *Collected Works*, informs us that, when preparing for the labor union cases, Holmes met with labor leader Frank Foster to discuss upcoming labor cases. According to Novick, “Foster . . . shared Holmes’s Darwinist philosophy but hoped for the victory of labor in the struggle for existence; he argued simply for fair terms in the fight. Holmes, despite unswerving loyalty to his own class, heard Foster’s plea with sympathy. . . . [Holmes’s] studies had persuaded him that law itself had evolved into a system of fair, peaceful competition.” 1 *HOLMES COLLECTED WORKS*, *supra* note 55, at 50.

111. *Abrams*, 250 U.S. at 628 (Holmes, J., dissenting).

112. *Cf.* Blasi, *supra* note 15, at 19, 24-33 (arguing, based on Holmes’s Darwinist perspective and his emphasis on fallibilism, that Holmes rejects absolutism which insulates certain ideas and practices from criticism and change).

113. *Cf.* David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 *DUKE L. J.* 449, 501-02 (1994) (“Precisely because dominant social forces ought to get their way, Holmes believed that a good society must determine which social force is actually dominant. This requires a contest between contenders that is fair, that is, in which legal rules and institutions of yesteryear do not distort the outcome of the struggle.”).

strong commitment to freedom of expression takes away some power from groups that are currently dominant, it protects potential future majorities and thereby the process of majoritarian decision-making.<sup>114</sup>

However, there are some problems with this reasoning. A first issue is that dominance does not always correspond with the position that is actually held by a majority. This issue is alluded to by Mill in *On Liberty*, when he states that “[t]he will of the people . . . practically means the will of the most numerous or the most active *part* of the people; the majority, or those who succeed in making themselves accepted as the majority.”<sup>115</sup> Moreover, important choices are often bundled together in packages and not put to a vote individually, so it is impossible to find out if there is majority support for each decision that must be made. Lastly, in a representative democracy, many citizens vote for a person or a party on the basis of qualities that have nothing to do with their substantive positions. For example, Steven Shiffrin points out that many voted for President Reagan because of his perceived leadership qualities, even though they disagreed with many, or even most, of his policies.<sup>116</sup> However, it is possible that Holmes would consider none of these objections very problematic, so long as it is possible for decision-making majorities to be formed as to issues that are of overriding importance to a significant part of the population. Imperfections in the decision-making process, in this reasoning, are simply the price paid for the ability of a society to re-group to respond to challenges, something with which Holmes seems to be concerned. Moreover, any flawed outcomes, if they sufficiently bother a significant part of the population, can be corrected at the next opportunity, so long as avenues for correction are left open.

To some extent, Mill’s and Holmes’s theories of societal development mirror their thinking about how individuals acquire and revise convictions. Mill believes that one only truly knows one’s opinions after a thorough examination of their bases. While he recognizes that few individuals are inclined to undertake such a rigorous examination unless circumstances force them to do so, Mill does believe that at the individual level, convictions are most deeply held, indeed most alive, after surviving a strong challenge. Similarly, a society challenged by the dissenters in its midst is constantly in the process of evaluating its truths, often re-affirming them, sometimes revising them. The dispassionate “bystanders”

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114. See Yosaf Rogat, *The Judge as Spectator*, 31 U. CHI. L. REV. 213, 250 (1964) (“Holmes could fail to apply constitutional limitations; . . . he thought of the Supreme Court as more of an instrument for implementing the ‘irresistible demands of the dominant forces in society’ than as a potential check on those desires.” (quoting Mark DeWolfe Howe, JUSTICE OLIVER WENDELL HOLMES: THE PROVING YEARS, 1870-1882, at 57 (1963))); see also Blasi, *supra* note 15, at 30-31; Gunther, *supra* note 6, at 735; Vetter, *The Evolution of Holmes, Holmes and Evolution*, 72 CAL. L. REV. 343, 344 (1984).

115. Mill, *supra* note 9, at 8 (emphases added).

116. STEVEN H. SHIFFRIN, *THE FIRST AMENDMENT, DEMOCRACY, AND ROMANCE* 63 (1990).

in this scenario play a role similar to that of reason at the individual level. Protection of speech is thus necessary because it places limits on society's ability to silence contrary opinions, and creates the conditions for facilitating the process of societal deliberation. Holmes, as we have seen, views individual preferences as the result of fortuitous circumstances of nature. In a similar way, society develops as the result of a natural power struggle between different forces. Rather than a deliberative process of evaluation, changes in prevailing opinions reflect the formation of majorities in response to changing circumstances. Holmes's defense of freedom of expression is not based on the role of speech in a process of debate and reflection, but seems to be grounded primarily in an almost Darwinist belief that it is best not to mess with the forces of nature.

### III. THE ROLE OF DISSENTING SPEECH IN THE PURSUIT OF TRUTH

At first blush, the most obvious shared aspect of Mill's and Holmes's free speech defenses is the connection between speech and truth. However, upon examination, the conception of truth that underlies each defense is radically different. Mill views the truth-seeking enterprise as a search for objective, universal truths, whereas the conception of truth that underlies Holmes's free speech defense appears to be more pragmatic, consisting of choices made by sufficiently interested majorities or dominant groups.

Mill and Holmes have in common that they do not, at least not expressly, value freedom of expression because of some intrinsic benefit; rather, they identify societal goals that they believe are served by free speech, and truth is an essential part of those goals. *On Liberty*, as a utilitarian treatise, is expressly devoted to collective well-being, even though Mill argues that humanity is served best by granting individuals the maximum amount of freedom that is consistent with the prevention of harm to others. In the section on free speech, Mill indicates that he is concerned with "the necessity to the mental well-being of mankind (on which all their other well-being depends) of freedom of opinion, and freedom of the expression of opinion."<sup>117</sup> In a similar vein, Holmes writes in the *Abrams* dissent that "men . . . may come to believe . . . that the *ultimate good* desired is better reached by free trade in ideas" and he connects this "ultimate good" to the premises "that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out."<sup>118</sup>

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117. Mill, *supra* note 9, at 59.

118. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added).

Mill's commitment to *utility* as "the ultimate appeal on all ethical questions"<sup>119</sup> could be read to allow for the possibility that other utilitarian values may trump truth under appropriate circumstances. However, for Mill, truth is an essential, and perhaps even a necessary part of utility, as evidenced by his suggestion that "no belief which is contrary to truth can be really useful."<sup>120</sup> Mill believes that the expression of dissenting opinions, regardless of whether they are true, partially true, or false, aids in the discovery of truth:

[T]he peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it. If the opinion is right, they are deprived of the opportunity of exchanging error for truth: if wrong, they lose, what is almost as great a benefit, the clearer perception and livelier impression of truth, produced by its collision with error.<sup>121</sup>

Although Mill never clarifies his beliefs regarding the nature of truth, he seems to assume that truths are objective and unchangeable. *On Liberty* states that opinions can be "right"<sup>122</sup> or "true,"<sup>123</sup> as opposed to "wrong"<sup>124</sup> or "false,"<sup>125</sup> and juxtaposes "truth" and "error" in several places.<sup>126</sup> Mill's use of the word "discovery" in connection with truth also strongly suggests an assumption that truth is objective, as does his description of progress as the achievement of consensus on a growing number of doctrines: "As mankind improve, the number of doctrines which are no longer disputed or doubted will be constantly on the increase: and the well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested."<sup>127</sup> Mill further states that "it is useful that while mankind are imperfect there should be different opinions," suggesting that once a perfect state is achieved, disagreement will no longer exist.<sup>128</sup>

119. Mill, *supra* note 9, at 15.

120. *Id.* at 27. The *Autobiography* recounts an instance where Mill perceived a potential conflict between truth and utility. He writes that during his mental crisis, he was deeply troubled by the notion, which he believed to be true, that our characters are shaped entirely by circumstances that we cannot control. As discussed in Part IV, Mill came to think that individuals can exert some control in shaping the circumstances that in turn shape their characters. Mill wrote that once he reached that conclusion, he "no longer suffered under the burthen, so heavy to one who aims at being a reformer in opinions, of thinking one doctrine true, and the contrary doctrine morally beneficial." Mill, *Autobiography*, in 1 MILL COLLECTED WORKS, *supra* note 27, at 177.

121. Mill, *supra* note 9, at 21.

122. *Id.*

123. *Id.* at 22, 34, 39, 40, 42, 44, 49, 52, 59.

124. *Id.* at 21, 25.

125. *Id.* at 22, 33, 52.

126. *Id.* at 21, 34, 39, 49, 52, 58, 59.

127. *Id.* at 49.

128. *Id.* at 63. Mill acknowledges that one of the functions of dissenting speech, namely to keep beliefs alive, will get lost as progress is made and greater unanimity of opinion on matters of

Mill's belief in progress in the sense of getting closer to an objective truth may appear to be inconsistent with his claim that human beings are fallible.<sup>129</sup> However, in Mill's view, there is a relationship between our understanding that we are fallible and our ability to achieve progress. Both Mill and Holmes are aware of an ironic aspect of human nature: in their eagerness to discover absolute truths, human beings frequently allow themselves to be fooled by a lack of understanding of their own limitations.<sup>130</sup> As a result, they conflate certitude and certainty.<sup>131</sup> On the other hand, someone who acts in accordance with an awareness of the fact that he may be mistaken may feel less certain about his convictions, but has a stronger basis to believe that they are true:

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 . . . [W]e may hope that if there be a better truth, it will be found when the human mind is capable of receiving it; and in the meantime we may rely on having attained such approach to truth, as is possible in our own day. This is the amount of certainty attainable by a fallible being, and this is the sole way of attaining it.<sup>132</sup>

As discussed in Part I, Mill rejects the notion that knowledge can exist independent of experience. Mill posits that humans can acquire knowledge and overcome wrong prejudices only by continuing to check the conclusions of our minds against experience and by being open to the possibility that we may be wrong.<sup>133</sup> Moreover, the way we use reason itself can be examined, and such examination allows us to gain knowledge about normative questions concerning what we should believe and how we

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importance is achieved. He states, "[t]he loss of so important an aid to the intelligent and living apprehension of a truth, as is afforded by the necessity of explaining it to, or defending it against, opponents, though not sufficient to outweigh, is no trifling drawback from, the benefit of its universal recognition. Where this advantage can no longer be had, I confess I should like to see the teachers of mankind endeavouring to provide a substitute for it[.]" *Id.* at 50. Mill does not address how progress can be measured—that is, how one can distinguish between unanimity that is the result of the discovery of truth and unanimity that is the result of, for example, intellectual apathy.

129. A related criticism is that Mill's liberalism depends on a concept of progress based on Western values, which is not sustainable. JOHN GRAY, *MILL ON LIBERTY: A DEFENSE* 130-58 (2d ed. 1996).

130. In *A System of Logic*, Mill discusses the inclination of individuals to think that whatever they have not experienced themselves cannot be true, even if there is no reason to distrust the source of information. He provides the example of the King of Siam who did not believe Dutch travelers who advised him of the existence of ice. Mill, *A System of Logic*, in VII *MILL COLLECTED WORKS*, *supra* note 27, at 630. Mill concludes, "an ignorant person is as obstinate in his contemptuous incredulity as he is unreasonably credulous. Anything unlike his own narrow experience he disbelieves, if it flatters no propensity; any nursery tale is swallowed implicitly by him if it does." *Id.*

131. *Cf.* Holmes, *Natural Law*, *supra* note 29, at 40 ("Certitude is not the test of certainty.").

132. Mill, *supra* note 9, at 26.

133. JOHN SKORUPSKI, *WHY READ MILL TODAY?* 8 (2006).

should act.<sup>134</sup> Renowned Mill scholar John Skorupski characterizes Mill as a “constructive empiricist,” referring to an epistemology that, among other things, views humans as being part of the world that we scientifically study and assumes that anything we believe to know could turn out to be wrong upon further inquiry.

Although Mill’s argument for free speech is based on the presumption that objective truths exist and on the role of discussion in uncovering them, he implies that only a limited universe of ideas and convictions are capable of being true or false.<sup>135</sup> For example, it is clear from the third chapter of *On Liberty* that decisions about how to live are not susceptible to being universally true. Mill strongly believes that each person should search for practices that fit his or her unique character.<sup>136</sup> Indeed, Mill emphatically insists on the inherent value of autonomy in this sphere: “If a person possesses any tolerable amount of common sense and experience, his own mode of laying out his existence is the best, not because it is the best in itself, but because it is his own mode.”<sup>137</sup> To Mill, the ability of individuals to live their lives in accordance with the possibilities and needs of their own natures, at least in areas where others are not directly concerned, is a key to human happiness and to individual and societal progress.<sup>138</sup> In this area, he believes that plurality should be embraced:

It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to.<sup>139</sup>

Some scholars, most notably Isaiah Berlin in *John Stuart Mill and the Ends of Life*, interpret *On Liberty* as a celebration of individual autonomy for its own sake.<sup>140</sup> This interpretation is compelling with respect to the

134. *Id.* at 9 (“Principles of Evidence and Theories of Method are not to be constructed *a priori*. The laws of our rational faculty, like those of every other natural agency, are only learnt by seeing the agent at work . . . [W]e should never have known by what process truth is to be ascertained, if we had not previously ascertained many truths”). (quoting Mill, *A System of Logic*, in 7 MILL COLLECTED WORKS, *supra* note 27, at 833)).

135. Cf. Richard Vernon, *John Stuart Mill and Pornography: Beyond the Harm Principle*, 106 ETHICS 621 (1996) (arguing that the free speech defense in *On Liberty* is narrower than commonly understood, and that Mill’s argument only covers protection of opinions and discussions that could result in knowledge).

136. Mill, *supra* note 9, at 65.

137. *Id.* at 75.

138. *See id.* at 63.

139. *Id.* at 70.

140. *See* ISAIAH BERLIN, *John Stuart Mill and the Ends of Life*, in FOUR ESSAYS ON LIBERTY

subject of the third chapter, which argues for liberty for each individual to pursue his or her own way of flourishing. Indeed, Mill himself described *On Liberty* as a “philosophic text-book of a single truth . . . : the importance, to man and society, of a large variety in types of character, and of giving full freedom to human nature to expand itself in innumerable and conflicting directions.”<sup>141</sup> However, such a reading is unconvincing with respect to the chapter about freedom of speech. There, Mill argues quite consistently that the ultimate justification for freedom of expression lies in the gains a society can derive from exposure to dissonant speech.<sup>142</sup> In societies that have achieved a certain stage of development, utilitarian goals are achieved by creating conditions for individual flourishing, so that utilitarianism and liberalism are not in conflict. But when a conflict arises, utilitarianism remains the guiding moral principle. For example, Mill believes that benevolent despotism is an appropriate form of government for societies that have not yet reached the stage where progress can be achieved by free discussion.<sup>143</sup>

On its face, Holmes’s free speech defense is also based on the role of speech in a truth-seeking endeavor. Holmes’s references to “truth” in the *Abrams* dissent are puzzling because Holmes has consistently professed skepticism and demonstrated an aversion to any claims regarding absolute truth. His skepticism is directed both at the existence of an external, absolute truth, and at the knowability of such a truth to humans even if one

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(1969). Berlin’s claim is challenged by Richard Wollheim. See Richard Wollheim, *John Stuart Mill and Isaiah Berlin: The Ends of Life and the Preliminaries of Morality*, in *THE IDEA OF FREEDOM: ESSAYS IN HONOUR OF ISAIAH BERLIN* 253 (Alan Ryan ed., 1979). Wollheim argues that Mill proposes a three-tiered ethic. The first tier is “complex utilitarianism” which holds when people pursue utility in accordance with fully formed conceptions of happiness of themselves and others. The second tier is “simple utilitarianism,” a stage in which people pursue pleasure rather than happiness because they have not formed conceptions of their own happiness. The third tier, which Wollheim considers one of Mill’s greatest innovations, is “preliminary utilitarianism.” This is “whatever is necessary for people either to form, or, having formed, to maintain, conceptions of their own happiness, or . . . envisagements of other people’s conceptions of their own happiness.” See *id.* at 267.

141. Mill, *Autobiography*, in *I MILL COLLECTED WORKS*, *supra* note 27, at 259.

142. A question arises as to whether Mill argues that speech is immune from government under the “harm principle” pursuant to which “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,” Mill, *supra* note 9, at 630, or whether the argument for free speech is separate and exempts government interference with speech even in situations in which it causes harm to others. Frederick Schauer, for example, takes the position that Mill treats speech as other-regarding and thus not within the coverage of the harm principle. FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL INQUIRY* 11 (1982). He interprets the chapter of *On Liberty* that advocates for free speech as either “an attempt to demonstrate why speech is a special class of other-regarding acts immune, for other reasons, from state control.” *Id.* Alternatively, the chapter can be read as “arguing that free and open discussion is the defined ultimate good in advanced societies, so that any adverse effect caused by discussion must be, *ex hypothesi*, smaller than the adverse of suppression.” *Id.*; see also Skorupski, *supra* note 133, at 56 (noting that, notwithstanding Mill’s own characterization of free speech as a single branch of his general thesis, “in practice, he seems to think that liberty of discussion merits stronger safeguards than liberty of action in general, and he argues for it on separate grounds.”).

143. Mill, *supra* note 9, at 14-15.



assumes its existence.<sup>144</sup> Holmes frequently defines truth as “the system of my (intellectual) limitations,” and refers to what he believes to be truths as “can’t helps.”<sup>145</sup> He emphasizes that there is no reason to believe that his “can’t helps” are cosmic “can’t helps,”<sup>146</sup> or that his limitations correspond to cosmic limitations.<sup>147</sup> In other words, there is no way of knowing whether our beliefs about truth are true as an abstract matter.

The notion of societal progress, which underlies Mill’s free speech defense, seems utterly foreign to Holmes. In a letter written to his friend Laski a few years after the *Abrams* dissent, Holmes states: “People talk of [progress] in general terms—who knows what he means when he speaks of it? I understand and agree when it is said that there has been progress in philosophy—or mathematics—but when they speak of the world I’m blowed if I know.”<sup>148</sup> Holmes sometimes calls himself a “bettabilitarian,” meaning that he can bet on what the truth might be but has no way of knowing it.<sup>149</sup> One of his “bets” is that others exist in the same sense that he does.<sup>150</sup> From this belief, he extrapolates that there is an external world in which he exists.<sup>151</sup> It should be noted that Holmes’s skepticism does not lead to the conclusion that any search for truth is an exercise in futility. Holmes regards the drive both to search for truth and to fight for our

144. For example, Holmes wrote to Lady Pollock: “All I mean by truth is the road I can’t help traveling. What the worth of that *can’t help* may be I have no means of knowing. Perhaps the universe, if there is one, has no truth outside of the finiteness of man.” Letter from Holmes to Lady Pollock (Oct. 27, 1901), 1 HOLMES-POLLOCK LETTERS, *supra* note 31, at 100. Late in his life, Holmes wrote to Laski: “I don’t believe that we have any warrant for believing that we know cosmic ultimates and think therefore we had much better content ourselves with recognizing in good faith that we are finite creatures and can’t formulate the infinite.” Letter from Holmes to Laski (Aug. 4, 1929), HOLMES-LASKI LETTERS, *supra* note 11, at 1169.

145. Holmes, *Natural Law*, *supra* note 29, at 66.

146. See, e.g., Letter from Holmes to Laski (Jan. 11, 1929), HOLMES-LASKI LETTERS, *supra* note 11, at 1124.

147. See, e.g., Letter from Holmes to Pollock (Nov. 23, 1905), 1 HOLMES-POLLOCK LETTERS, *supra* note 31, at 122.

149. Letter from Holmes to Laski (Aug. 12, 1923), HOLMES-LASKI LETTERS, *supra* note 11, at 522.

149. Letter from Holmes to Laski (Aug. 12, 1923), HOLMES-LASKI LETTERS, *supra* note 11, at 522.

150. Letter from Holmes to Laski (Jan. 11, 1929), HOLMES-LASKI LETTERS, *supra* note 11, at 1124.

151. *Id.* (“I assume that I am dreaming, although I can’t prove it—that you exist in the same sense that I do—and that gives me an outside world of some sort (and I think the *ding an sich*)—so I assume that I am in the world not it in me.”); see also Letter from Holmes to Pollock (Nov. 23, 1905), 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 122 (“[W]hen we decide that our brother is not our dream it is his agreement with us as to chair, table, etc., that makes us surmise that they also are not only our dream—and I add that if I admit my brother I don’t see why I should not admit the world. Yet as I can’t get outside my dream I admit something I don’t know. I put it as a mere bet.”); Letter from Holmes to Pollock (June 23, 1906), 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 126 (“I accept the existence of a universe, in some unpredictable sense, just as I accept yours—by an act of faith—or by another can’t help, perhaps.”); Letter from Holmes to Pollock (July 22, 1919), 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 19-20 (“I think when you give up solipsism (odious word) and admit the existence of other people you admit the *ding an sich*. Of course, however, I agree that the cosmic importance of man we know nothing about . . . P.S. All that I mean by the *ding an sich* is a somewhat, independent of my thought, presumably amounting to more than I know.”).

beliefs as an essential aspect of human existence. Nor does his skepticism lead to a state of paralysis; he strongly believes that human life derives meaning and worth from our abilities to function and act.<sup>152</sup>

Holmes sometimes describes truth as “a present or imagined future majority in favor of our view.”<sup>153</sup> In *Natural Law*, he defines truth as “the majority vote of that nation that could lick all others.”<sup>154</sup> Although such pronouncements could be read as a definition of truth that is devoid of any normative value (“truth is whatever the majority says it is”), it appears that Holmes believes that the circumstance that a belief is shared—or may in the future be shared—by a significant number of people lends some legitimacy to it, even if there is no way of knowing whether it is objectively true. Regarding his characterization of truth as the system of one’s intellectual limitations, he states in *Natural Law*, “what gives it objectivity is the fact that I find my fellow man to a greater or less extent (never wholly) subject to the same *Can’t Helps*.”<sup>155</sup> And in a letter to Laski, Holmes writes that his definition of truth implies “a tacit reference to what I bet is or will be the prevailing can’t help of the majority of that part of the world that I count.”<sup>156</sup> A certain level of agreement on most of the “can’t helps” is what makes society possible, according to Holmes.<sup>157</sup> However, he believes that unanimous agreement will never be reached, because irreducible differences between human beings will always ensure that “one man’s truth [is] another man’s falsehood.”<sup>158</sup> Holmes questions whether unanimous consent is even desirable:

We talk about the truth and yet another man will say that he can see nothing in reasoning that seems to you conclusive. Truth is the unanimous consent of mankind to a system of propositions. It is an ideal and as such postulates itself as a thing to be attained, but like other good ideals it is unattainable and therefore may be called absurd. Some ideals, like morality, a system of specific conduct for every situation, would be detestable if attained and therefore the

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152. See, e.g., Holmes, *supra* note 55, at 387 (“Man is born a predestined idealist, for he is born to act. To act is to affirm the worth of an end, and to persist in affirming the worth of an end is to make an ideal.”); Holmes, *The Soldier’s Faith*, in 3 HOLMES COLLECTED WORKS 486, *supra* note 55, at 490 (“[T]he joy of life is living, is to put out all of one’s powers as far as they will go; . . . the measure of powers is obstacles overcome . . . .”); Letter from Holmes to Pollock (Aug. 21, 1919), 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 22 (“Functioning is all there is—only our keenest pleasure is in what we call the higher sort. I wonder if cosmically an idea is any more important than the bowels.”).

153. Holmes, *supra* note 29, at 40.

154. *Id.*

155. *Id.*

156. Letter from Holmes to Laski (Jan. 11, 1929), HOLMES-LASKI LETTERS, *supra* note 11, at 1124.

157. Letter from Holmes to Pollock (Oct. 26, 1929), 2 HOLMES-POLLOCK LETTERS, *supra* note 31, at 256.

158. Letter from Holmes to Pollock (July 6, 1908), 1 HOLMES-POLLOCK LETTERS, *supra* note 31, at 140.

postulate must be conditioned—that it is a thing to be striven for on the tacit understanding that it will not be reached.<sup>159</sup>

Holmes's statement in *Abrams* that “the best test of truth is the power of the thought to get itself accepted in the competition of the market” could be read as referring to a competition in which the thought that is, for whatever reason, the “strongest,” wins out by being accepted by a majority. Free speech, in this interpretation, is needed primarily to safeguard the functioning of the process of democracy, in which majorities are formed.<sup>160</sup> In *Holmes, Pragmatism, and Democracy*, Thomas Grey identifies Holmes's statement in the *Lochner* dissent that the Constitution was “made for people of fundamentally differing views” as central for an understanding of Holmes's stance toward American constitutional democracy.<sup>161</sup> Holmes justifies the right of majorities to “embody their opinions in law” on the grounds that citizens disagree on fundamentals and that we cannot know what is true.<sup>162</sup> At the same time, democratic and legal traditions warrant the enforcement of certain fundamentals against the majority.<sup>163</sup> As Grey points out, the logical weakness with Holmes's position is that generalized skepticism has no implications for conduct and supports neither “majority over elite rule, nor freedom of debate over the right of the majority to suppress dissident opinion.”<sup>164</sup> He views Holmes's commitment to democracy and free speech as a strong emotional attachment, rather than one rooted in evidence or rational arguments.<sup>165</sup>

The interpretation of Holmes's free speech defense as a commitment to the continued safeguarding of the right of shifting majorities to make decisions is supported by an examination of the limits Holmes places on the protection of speech. As noted by Alschuler, throughout the *Abrams*

159. Letter from Holmes to Laski (Apr. 6, 1920), HOLMES-LASKI LETTERS, *supra* note 11, at 258-59. Mill, despite defining progress as the increase of unanimous positions, regrets a state of universal agreement on matters that are true but for a different reason—namely that the beneficial effects of vigorous disagreement will diminish. Mill, *supra* note 9, at 50 (“The loss of so important an aid to the intelligent and living apprehension of a truth, as is afforded by the necessity of explaining it to, or defending it against, opponents, though not sufficient to outweigh, is no trifling drawback from, the benefit of its universal recognition”).

160. This justification is markedly different from Alexander Meiklejohn's argument from the American practice of democratic self-governance, which emphasizes the role of speech in ensuring that citizens are able to make well-informed decisions. Cf. Blasi, *supra* note 15, at 39-40 (noting that Holmes was not concerned with quality of decisions or opportunities for participation but rather in facilitating political struggle). Using the “traditional American town meeting” as a model, Meiklejohn states that the “final aim of the meeting is the voting of wise decisions. The voters, therefore, must be made as wise as possible . . . . The First Amendment, then, is not the guardian of unregulated talkativeness . . . . What is essential is not that everyone shall speak, but that everything worth saying shall be said.” Meiklejohn, *supra* note 103, at 26.

161. Grey, *supra* note 61, at 528.

162. *Lochner v. New York*, 198 U.S. 45, 75 (1905) (Holmes, J., dissenting).

163. *Id.*

164. Grey, *supra* note 61, at 534.

165. *Id.* at 533-34, 536.

dissent, Holmes emphasizes that suppression of speech is only warranted if danger is *imminent*:

I do not doubt for a moment that by the same reasoning that would justify punishing persuasion to murder, the United States constitutionally may punish speech that produces or is intended to produce a clear and *imminent* danger that it will bring about *forthwith* certain substantive evils that the United States constitutionally may seek to prevent . . . .

It is only the *present* danger of *immediate* evil or an intent to bring it about that warrants Congress in setting a limit to the expression of opinion where private rights are not concerned . . . .

[W]e should be eternally vigilant against attempts to check the expression of opinions that we loathe and believe to be fraught with death, unless they so *imminently* threaten *immediate* interference with the lawful and pressing purposes of the law that an *immediate* check is required to save the country . . . .

Only the *emergency* that makes it *immediately* dangerous to leave the correction of evil counsels to time warrants making any exception to the sweeping command, “Congress shall make no law . . . abridging the freedom of speech.”<sup>166</sup>

Thus, Holmes appears concerned not with the level of danger of speech, but with the immediacy with which the danger is posed and the instability that can be caused by sudden danger. Speech that results in immediate and irrevocable change distorts the functioning of a democracy that is based on the ability of interest groups to try to obtain majority status for their position. In the chaos ensuing after the onset of a revolution, it cannot be ensured that the group that seizes power represents a majority, and that it is the majority’s true intent to submit irrevocably to a dictatorship. On the other hand, speech that poses the same danger but over a longer term, must be allowed and given the chance to survive battles with counter-movements, including the status quo which has an advantage due to the natural resistance of people to changing their inner beliefs.<sup>167</sup> In other words, the limits that can be imposed on speech are

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166. *Abrams v. United States*, 250 U.S. 616, 627-31 (Holmes, J., dissenting) (emphasis added).

167. The natural resistance to changes in preferences thus serves as a safeguard against movements that would abruptly do away with democracy or free speech. Stanley Ingber criticized the “marketplace of ideas” as a myth that legitimizes an entrenched power structure, because it provides an image of autonomy and openness to change but in reality is heavily skewed in favor of the status quo. Ingber, *supra* note 12, at 16-49. Holmes would not disagree with Ingber’s observation that dominant groups are at an advantage, but he might say that there are advantages to facilitating fundamental changes that evolve over a period of time as opposed to sudden, radical changes. *Cf.* Blasi, *supra* note 15, at 30 (“Markets move quickly; evolution takes forever.”). Ironically, Holmes’s liberal position on freedom of speech may have been motivated partly by a relatively conservative

strictly those necessary to ensure a democratic decision-making process, regardless of whether the outcome of such a process might be undemocratic.<sup>168</sup> Holmes's position that absent imminent danger, "the correction of evil counsels" is best "le[ft] to time" suggests that he trusts that, once enough time has passed for the most heated emotions to cool down, a sensible majority will prevail.

This interpretation of the word "truth" in the *Abrams* dissent should be understood in the context of Holmes's belief, stated in *Natural Law*, that deep-seated preferences come into existence at an early stage and are not given up easily.<sup>169</sup> Even if not suppressed by law, there will always be strong natural resistance to new ideas.<sup>170</sup> Conversely, the nature of preferences suggests that people will revise their preferences only if one or both of the following two circumstances is present. The first is that the new idea is so powerful that it leads them to overcome their initial distrust. This is perhaps why Holmes writes about the "power of the thought to get itself accepted in the competition of the market."<sup>171</sup> The second situation in which people are willing to give up their preferences is if their circumstances have changed in such a way that they have grown dissatisfied with their preferences, or at least open to revising them. Changing circumstances may result in a decrease—or increase—of someone's level of commitment to a particular preference, or cause a person to adopt different preferences. In either case, it may seem unwise to allow a group that has become a majority to permanently impose its convictions on the remaining part of society and on future generations, just because it happened to be the dominant force at some fixed point in time.

Holmes has been criticized for offering a conception of truth that is defined entirely as the outcome of a process. The critique is that, as a result, "truth" is essentially meaningless as a basis for defending free speech because it fails to explain the superiority of whatever emerges from the "competition of the market" over the outcome of another process. As

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view about the desirable pace of societal change.

168. Of course, this theory is difficult to implement in practice. At the time an idea is posed, it is not always possible to tell whether it presents immediate danger, nor can such determinations fairly be made in hindsight when speech has already been suppressed or punished. Moreover, the distinction between speech that has an immediate effect and speech that leads to more gradual change may be simplified and artificial. More commonly, speech has limited impact for some time and then a tipping point is reached. Setting aside the difficulties in determining when that point is reached, it is not clear under Holmes's theory whether this tipping point presents a "clear and present danger" or whether it should be viewed as a legitimate outcome of a democratic process.

169. See *supra* notes 29-52 and accompanying text.

170. Cf. Blasi, *supra* note 65, at 1573.

171. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) (emphasis added). The notion that an idea can have power in and of itself is reminiscent of Mill's idea that the truth will always attract people to defend it. See Mill, *supra* note 9, at 34 ("The real advantage which truth has, consists in this, that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when from favourable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it.").

Frederick Schauer puts it: “If free speech is justified because it defines the process that produces knowledge, and if that knowledge is in turn defined by the very process, we are saying nothing at all.”<sup>172</sup> However, Holmes might defend the process itself by arguing that free speech enables sufficiently interested groups in society to come up with solutions to challenges, and that such groups are most qualified to identify the best solution under the circumstances. The *Abrams* dissent could thus be read as referring to a pragmatist conception of truth that is certainly open to attack, but not without meaning.<sup>173</sup> Holmes’s skepticism as to the possibility (and perhaps the rejection of the desirability) of universal truths is not necessarily inconsistent with the notion that there are preferable courses of action given a particular set of facts. We have no way of knowing what is best in an objective sense, but we can choose to make a leap of faith that an interested majority will select the best means to adjust to changing realities. In a letter to Laski, Holmes wrote that he thought it “unlikely that we know anything ultimate about the universe or have faculties that fit us to do more than to adjust ourselves to it and live.”<sup>174</sup> Speech may be one of the tools that help people make these adjustments, as it allows them to re-group, undertake actions, and make legislative changes in response to changing circumstances.<sup>175</sup>

The interpretation of “truth” as the outcome of democratic decision-making explains the next two sentences in the *Abrams* dissent: “That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.”<sup>176</sup> Holmes’s use of the word “experiment”—a test or trial under controlled circumstances, but with an uncertain outcome—is telling. A scientist conducting an experiment must always be open to the possibility that hypotheses will turn out to be incorrect, or that the experiment will result in a discovery of something completely unrelated to what the scientist sought to examine. Moreover, the results of experiments are never set in stone, and may be proven doubtful or even

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172. Schauer, *supra* note 142, at 22.

173. Cf. Holmes, *The Path of the Law*, *supra* note 54, at 466 (stating that a large part of the law is open to reconsideration upon change in the public mind, and that judgments of relative importance may vary in different times and places).

174. Letter from Holmes to Laski (Feb. 22, 1929), HOLMES-LASKI LETTERS, *supra* note 11, at 1134.

175. See Yosai Rogat & James M. O’Fallon, *Mr. Justice Holmes: A Dissenting Opinion—the Free Speech Cases*, 36 STAN. L. REV. 1349, 1367-68 (arguing that Holmes’s view of the law as a mechanism to implement the beliefs that have won out in a battle of ideas and his view that judges should not close off avenues of social change led him to adopt a liberal position on speech); cf. Blasi, *supra* note 65, at 1575-77 (discussing how free speech helps persons and institutions adapt to a changing world). One of the free speech theories identified by Kent Greenawalt that is related to this view is the notion that in a liberal democracy where citizens must make choices, free speech “enhance[s] identification and accommodation of interests.” Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119, 145 (1989).

176. *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

invalid by other research.<sup>177</sup> In the year before the Supreme Court decided the Espionage Act cases, Learned Hand wrote to Holmes:

Opinions are at best provisional hypotheses, incompletely tested. The more they are tested, after the tests are well scrutinized, the more assurance we may assume, but they are never absolutes. So we must be tolerant of opposite opinions or varying opinions by the very fact of our incredulity of our own.<sup>178</sup>

Holmes responded that he agreed with Learned Hand's letter, subject to one qualification:

[F]ree speech stands no differently than freedom from vaccination. The occasions would be rarer when you cared enough to stop it but if for any reason you did care enough you wouldn't care a damn for the suggestion that you were acting on a provisional hypothesis and might be wrong. That is the condition of every act.<sup>179</sup>

Notwithstanding Holmes's initial response to Learned Hand's description of opinions as hypotheses subject to testing, Learned Hand's words seem to be reflected in Holmes's reference to free speech, and life itself, as an "experiment."<sup>180</sup> However, Holmes's approach to free speech carries with it the possibility of its own demise. This marks an important difference from Mill, who claims that his arguments for protecting speech have universal validity to all developed societies.<sup>181</sup> The limits on freedom of speech identified by Holmes in the *Abrams* dissent would exclude from protection speech that results in immediate loss of control, but protect speech that, over time, would fundamentally change the nature of the experiment or even terminate it and replace it with a new experiment. If anything postulated as truth is up for challenge, America's constitutional commitment to freedom of expression should not be insulated. As Holmes acknowledges in the *Gilow* dissent, a consistent application of this principle must lead to the conclusion that a majority

177. Meiklejohn wrote approvingly of Holmes's description of the Constitution as an "experiment," noting that "[o]ur plan of government, being based on imperfect knowledge, must be forever open to amendment, forever on trial. It will change as social conditions change, and as human insight changes." Meiklejohn, *supra* note 103, at 72.

178. Letter from Learned Hand to Holmes (June 22, 1918), *reprinted in* Gunther, *supra* note 6, at 755.

179. Letter from Holmes to Learned Hand (June 24, 1918), *reprinted in* Gunther, *supra* note 6, at 756-57.

180. Grey points out that Holmes's perception of democracy as an "experiment" was shared by pragmatist philosopher John Dewey. However, Grey notes that the two men had different ideas about the nature of the participation of humans in the experiment. In Holmes's view, the experiment is run by "some impersonal force, History, Chance, or Fate," and human beings are merely experimental subjects. Grey, *supra* note 61, at 540. Dewey, on the other hand, views the experiment of democracy as one in which the citizens aspire to run the experiment. *Id.* Furthermore, although Holmes and Dewey both view the experiment as an experiential one, for Holmes the experience is one of "faith and loyalty" whereas Dewey finds a basis in a "sound philosophical account of human nature." *Id.* at 525.

181. Mill explicitly states that the arguments in favor of freedom of expression do not apply to societies in early stages of development. Mill, *supra* note 9, at 14-15.

should be allowed to turn the country into a dictatorship, if it sees fit to do so.<sup>182</sup> And if a dictator's first order of business is to abolish freedom of expression, the courts can do nothing to invalidate such a decision.<sup>183</sup> However, if free speech is preferable over other alternatives to a sufficiently large group of citizens—for example, because deep down, they share Holmes's skepticism and are reluctant to have their preferences set in stone—it should be able to survive attacks in the “competition of the market” provided there is enough time for free speech advocates to make their case.

#### IV. FREE SPEECH AND FREEDOM

Mill's and Holmes's differing views on freedom emerge as a key aspect to understanding some of the differences between their free speech theories. Mill's defense of free speech is ultimately grounded in an individual conception of freedom. Its goal is to protect and nurture freedom of thought on the ground that society will benefit from uncensored and rigorous application of reason by individuals. The notion of freedom that underlies Holmes's free speech defense is more collective, and his free speech defense primarily seeks to protect a society's ability to make decisions and adjust to changing conditions by facilitating the formation of interest groups.

A central conception of freedom that underlies Mill's free speech defense is his view that individuals have some choice in deciding whether to hold onto their beliefs or revise them if they become persuaded of the merits of other positions. Put differently, humans have the ability to select and develop their inner beliefs, even if they may not be able to determine the point from which they start.<sup>184</sup> Skorupski argues that Mill's “comprehensive liberalism”—which includes a moral doctrine placing limits on the authority of government and society over individuals and a vision of what constitutes a good life—can be traced back to the philosophical notion of “free thought.”<sup>185</sup> Skorupski describes free thought as “thought ruled by its own principles and by nothing else; in

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182. See *supra* notes 91-92 and accompanying text.

183. On the other hand, under Holmes's test in the *Abrams* dissent, suppression might be justified if the dictatorship ideology is about to become dominant since the expression would then “so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.” *Abrams v. United States*, 250 U.S. 616, 630 (1918) (Holmes, J., dissenting). For Mill, free speech is essential for the discovery of (external) truth. This may be another reason why Mill's theory would not allow for the right to freedom of expression to be relinquished, even voluntarily. See *supra* notes 94-96 and accompanying text.

184. In the section, “Of Individuality, as One of the Elements of Well-Being,” Mill envisions a similar role for conscience, which is to serve as a check on natural desires and impulses in individuals' decision-making concerning their actions and living modes. Mill, *supra* note 9, at 66-67.

185. John Skorupski, *supra* note 133, at 5-6.



other words, by principles of thinking that it discovers by reflecting on its own activity.”<sup>186</sup> In *On Liberty*, Mill emphatically stresses the importance of rigorous and independent thinking:

No one can be a great thinker who does not recognize, that as a thinker it is his first duty to follow his intellect to whatever conclusions it may lead. Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think.<sup>187</sup>

For Mill, reason, checked by experience, allows humans to rise above the arbitrary circumstances that resulted in their initial convictions, and provides the key to overcoming prejudices and achieving progress. Although other persons play a role in the development of convictions, most importantly when they oppose our views, it is ultimately up to each individual to decide what to believe, and Mill criticizes those who slavishly follow the prevailing opinions. Holmes, by contrast, describes deeply-held convictions as “can’t help,” expressing the relative powerlessness of individuals when it comes to the beliefs they hold.<sup>188</sup> For him, moral judgments are both arbitrary and deeply ingrained.<sup>189</sup> And because of his skepticism both as to the ability to use reason and its utility, Holmes, in contrast to Mill, finds comfort in the fact that one’s opinions are shared by others.

This distinction flows from their views regarding the extent to which individuals, including their character and beliefs, are subject to the laws of cause and effect. Although Mill and Holmes share a world view that could be characterized as determinist, their versions of determinism differ significantly. For Holmes, there is no room for individual choice.<sup>190</sup> We are willing to fight and die for our ideals, but they are nonetheless predetermined and arbitrary.<sup>191</sup> Mill, on the other hand, tries to reconcile his determinist views with the existence of free will.

In principle, Mill believes that human will and action are “necessary and

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186. *Id.* at 6.

187. Mill, *supra* note 9, at 39.

188. *See supra* notes 145-147, 155-157 and accompanying texts.

189. *See Luban, supra* note 113, at 475.

190. In the context of criminal law, Holmes incorporates this view into his notion that the predictability and severity of punishment are part of the circumstances that determine the likelihood of criminal behavior. In a letter to Laski, Holmes discussed the notion of determinism in criminal law, stating: “If I were having a philosophical talk with a man I was going to have hanged (or electrocuted) I should say, I don’t doubt that your act was inevitable to you but to make it more avoidable by others we propose to sacrifice you to the common good. You may regard yourself as a soldier dying for your country if you like. But the law must keep its promises.” Letter from Holmes to Laski (Dec. 17, 1925), HOLMES-LASKI LETTERS, *supra* note 11, at 1314.

191. *See also* Luban, *supra* note 113, at 477 (stating that in Holmes’s view, “[w]e may, as a matter of individual, natural, or evolutionary happenstance, be so constituted that we necessarily hold certain beliefs as to the intrinsic worth of many things.”).

inevitable,” and rejects the view that the will is free and determines itself.<sup>192</sup> Mill embraces some of the consequences of this position, as it opens up the possibility of improving individual character by changing the environment. The idea that a society can stimulate personal growth by improving the conditions of individuals is a central aspect of Mill’s philosophy, and motivated his involvement in reform initiatives, including the women’s rights movement. In the *Autobiography*, Mill explains that he was driven to write *Examination of Sir William Hamilton’s Philosophy*, a direct attack on the philosophy of one of the main proponents of intuitionism, because he believed such a philosophy did not leave room for the possibility of improving the conditions for personal growth:

There is . . . a natural hostility between [the practical reformer] and a philosophy which discourages the explanation of feelings and moral facts by circumstances and association, and prefers to treat them as ultimate elements of human nature; a philosophy which is addicted to holding up favourite doctrines as intuitive truths, and deems intuition to be the voice of Nature and of God, speaking with an authority higher than that of our reason. In particular, I have long felt that the prevailing tendency to regard all the marked distinctions of human character as innate, and in the main indelible, and to ignore the irresistible proofs that by far the greater part of those differences, whether between individuals, races, or sexes, are such as not only might but naturally would be produced by differences in circumstances, is one of the chief hindrances to the rational treatment of great social questions and one of the greatest stumbling blocks to human improvement.<sup>193</sup>

When Mill learned about Bentham’s utilitarianism as a young man, he was attracted to its potential to offer “the most inspiring prospects of practical improvement in human affairs.”<sup>194</sup> Utilitarianism, to Mill, was “a creed, a doctrine, a philosophy; in one among the best senses of the word, a religion,” and it presented him with “a grand conception . . . of changes to be effected in the condition of mankind through that doctrine.”<sup>195</sup>

Although Mill embraced the potential for improvement provided by the position that individual character is subject to the laws of cause and effect, he was disturbed by the notion that individuals could be reduced to products of their circumstances. In the *Autobiography*, Mill describes how personal this problem was to him: “I felt as if I was scientifically proved to be the helpless slave of antecedent circumstances; as if my character and that of all others had been formed for us by agencies beyond our control,

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192. Mill, *A System of Logic*, in VIII MILL COLLECTED WORKS, *supra* note 27, at 836.

193. Mill, *Autobiography*, in I MILL COLLECTED WORKS, *supra* note 27, at 269-70.

194. *Id.* at 69.

195. *Id.*

and was wholly out of our own power.”<sup>196</sup> Mill believes he resolved the problem in his analysis entitled, “Of Liberty and Necessity,” in the last book of *A System of Logic*. In that chapter, he argues that even if one’s character is formed by circumstances, including one’s constitution, one’s “own desire to mould it in a particular way, is one of those circumstances, and by no means one of the least influential.”<sup>197</sup> Our will can influence, to some extent, our circumstances, and thus affect the development of our character.<sup>198</sup> Mill concedes that external factors may drive someone’s desire to alter his or her character.<sup>199</sup> But he is not interested in the question of whether free will is ultimately illusory; for him, the real sense of freedom that comes from the ability to change our characters is what matters: “[T]his feeling, of our being able to modify our own character *if we wish*, is itself the feeling of moral freedom which we are conscious of.”<sup>200</sup>

*On Liberty* demonstrates the interaction between those two aspects of Mill’s psychology: the possibility of individual determination, and the notion that individuals are to a large extent products of their environment. In part, Mill values free speech because we have the best chance of arriving at truths if alternatives that challenge the prevailing views are presented in the most persuasive fashion. This aspect of Mill’s defense relies on the premise that individuals are free to choose their beliefs and, to some extent, decide whether or not to try to apply reason to evaluate our opinions. But *On Liberty* also argues explicitly that a culture in which dissent is prized, or at the very least not suppressed, helps sharpen the minds and develop the character of its citizens. Mill believes that “free and daring speculation on the highest subjects” serves to “strengthen and enlarge men’s minds.”<sup>201</sup>

Critically, in addition to advancing intellectual abilities, according to Mill, a free speech culture also promotes other traits one needs in order to develop into a truly independent thinker. One such trait is courage, which is implicated not only in voicing unconventional opinions, but also in allowing oneself to follow one’s reason to conclusions that may be unwelcome not only to others but to oneself. Discussing the prohibition of heresy, Mill asks rhetorically, “Who can compute what the world loses in the multitude of promising intellects combined with timid characters, who dare not follow out any bold, vigorous, independent train of thought, lest it

196. *Id.* at 175-77.

197. Mill, *A System of Logic*, in VIII MILL COLLECTED WORKS, *supra* note 27, at 840.

198. *Id.*

199. *Id.* at 840-41.

200. *Id.* at 841; *see also* Mill, *Autobiography*, in I MILL COLLECTED WORKS, *supra* note 27, at 177 (“[W]hat is really inspiring and ennobling in the doctrine of freewill, is the conviction that we have real power over the formation of our own character; that our will, by influencing some of our circumstances, can modify our future habits or capabilities of willing.”).

201. Mill, *supra* note 9, at 38.

should land them in something which would admit of being considered irreligious or immoral?”<sup>202</sup> The suppression of heretical opinions, according to Mill, achieves “intellectual pacification” at the expense of “the entire moral courage of the human mind.”<sup>203</sup> He fears that a society that prevents the most intellectually active individuals from publicly expressing their thoughts “cannot send forth the open, fearless characters, and logical, consistent intellects who once adorned the thinking world.”<sup>204</sup> Even more harmful, such a society precludes all individuals from fulfilling their potential: “There have been, and may again be, great individual thinkers, in a general atmosphere of mental slavery. But there never has been, nor ever will be, in that atmosphere, an intellectually active people.”<sup>205</sup> Thus, Mill goes beyond pointing out the harms that could result from suppression of ideas and asserts that a free speech culture has positive effects on the intellectual and character development of individuals.

The importance of individual growth as a means for achieving societal well-being arises from Mill’s atomistic view of society. In this view, individuals, by interacting and clashing with each other, strengthen their intellects, and contribute to societal progress by the resulting discovery of more truthful ideas.<sup>206</sup> In *A System of Logic*, Mill states that society can only be understood through the lens of psychology, because “[t]he laws of the phenomena of society are, and can be, nothing but the actions and passions of human beings united together in the social state.”<sup>207</sup> The idea that for a society to flourish, it should nurture traits like independence and a critical attitude in its citizens is also expressed in *On Liberty*:

The worth of a State, in the long run, is the worth of the individuals composing it; and a State which postpones the interests of their mental expansion and elevation, to a little more of administrative skill or that semblance of it which practice gives, in the details of business; a State, which dwarfs its men, in order that they may be

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202. *Id.* at 39.

203. *Id.* at 38.

204. *Id.*

205. *Id.* at 39.

206. See, e.g., Wendy Donner, *Utilitarianism*, in *THE CAMBRIDGE COMPANION TO MILL* 277 (John Skorupski ed., 1998) (“Mill’s concept of individualism is centered around the value he places on the individual as the generator, focus and evaluator of value. Value is located in each and every individual, and whatever value groups or communities have flows only from the value of its members.”).

207. Mill, *A System of Logic*, in *VIII MILL COLLECTED WORKS*, *supra* note 27, at 879; see also ALAN RYAN, *THE PHILOSOPHY OF JOHN STUART MILL* 103 (2d ed. 1987) (“Mill’s picture of social science was that the science of society should be constructed from the science of the individual member of society; the laws which govern the behavior of men in the aggregate must be the result of inference from the laws which govern the behavior of individual men, just as the laws governing the behavior of a complete physical system can be inferred from those which govern the behavior of its components.”).

more docile instruments in its hands even for beneficial purposes, will find that with small men no great thing can really be accomplished; and that the perfection of machinery to which it has sacrificed everything, will in the end avail it nothing, for want of the vital power which, in order that the machine might work more smoothly, it has preferred to banish.<sup>208</sup>

The idea that society as a whole benefits from the effects of exposure to opposing opinions on individual character has been developed further in more recent American scholarship on freedom of speech.<sup>209</sup>

Holmes, as we have seen in Part II, does not view society as the aggregate of its individuals, but seems to regard it as an organism consisting of constantly shifting groups that are involved in a dynamic struggle for power. Holmes does not indicate whether his determinist views regarding individuals also apply to society as a whole. However, it may be sufficient for him that for groups involved in a battle for power there is a very real sense that the outcome is undetermined and hinges on the fight that is being fought. In other words, Holmes's position about *groups* would be similar to Mill's view that for *individuals*: even if their actions and thoughts may be nothing more than a manifestation of the laws of cause and effect, this does not matter so long as they do not perceive them as such. Groups that challenge the status quo are usually very much aware of the chain of cause and effect, in that they tend to be concerned with the consequences that are believed to follow from the available choices. But when a society at a crossroads has to choose one of several alternatives, that decision itself is not experienced as pre-determined. Rather, we experience such a moment as one in which we can determine our collective future, until a dominant force—because of a change in circumstance, or dissatisfaction with the perceived results of the decision made earlier, or for any other reason—decides to change course again.

In this respect, it is relevant that Holmes seems to view battle, and even war, as a necessary and natural condition. In *The Soldier's Faith*, Holmes suggests that a society always needs to be prepared for war:

War, when you are at it, is horrible and dull. It is only when time has passed that you see that its message was divine. I hope it may be long before we are called again to sit at that master's feet, but some

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208. Mill, *supra* note 9, at 128.

209. See Blasi, *supra* note 65; Stanley Ingber, *Rediscovering the Communal Worth of Individual Rights: The First Amendment in Institutional Contexts*, 69 TEX. L. REV. 1 (1990). This justification for free speech is closely related to some theories based on autonomy, namely those that argue that "when all ideas can be expressed, people will be less subject in their decisions to the dictates of others and will be encouraged to exercise this independence in a considerate manner that reflects their fullest selves." Greenawalt, *supra* note 175, at 143-44. However, a critical distinction is that Mill's argument for free speech is ultimately not concerned with individual self-realization but with the collective benefits that result from providing individuals with the freedom to engage in an exploration of truth.

teacher of the kind we all need. In this snug, over-safe corner of the world we need it, that we may realize that our comfortable routine is no eternal necessity of things, but merely a little space of calm in the midst of the tempestuous untamed streaming of the world, and in order that we may be ready for danger.<sup>210</sup>

Thus, it appears that Holmes values free speech because it regulates the internal struggles between interest groups in a society that is constantly evolving and adjusting. Not surprisingly, Holmes does not share Mill's position that all societal value is derived from individuals' contributions. Holmes's ideas about this subject are almost the opposite: In his view, it is the sense of being part of a larger whole that ultimately gives our individual existence meaning, even if we experience ourselves as the center of the universe. The notion that our individual significance is limited and that our value lies in the role we play in a larger plan of which we can see no more than glimpses seems almost comforting to Holmes; the notion is a recurring theme in his speeches. A typical—and particularly beautifully expressed—example is the closing of Holmes's speech to his former Harvard classmates at the fiftieth anniversary of their graduation:

Life is a roar of bargain and battle, but in the very heart of it there rises a mystic spiritual tone that gives meaning to the whole. It transmutes the dull parts into romance. It reminds us that our only but wholly adequate significance is as part of the unimaginable whole. It suggests that even while we think that we are egotists we are living to ends outside ourselves.<sup>211</sup>

In sum, Mill's and Holmes's free speech defenses are rooted in views of human nature and conceptions of freedom that are markedly different. Mill and Holmes both justify free speech on the basis of perceived collective benefits, but their visions of the role of speech differ significantly, and these differences can be better understood by the choices that each author believes are at stake. Mill views freedom of speech as enabling the presentation of different positions to individuals in the most

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210. Holmes, *The Soldier's Faith*, in 3 HOLMES COLLECTED WORKS 486, *supra* note 55, at 489.

211. Oliver Wendell Holmes, *The Class of '61*, in 3 HOLMES COLLECTED WORKS 504, *supra* note 55, at 505. Another example is Holmes's address during proceedings at a Bar meeting held in Boston upon the passing of trial lawyer Sidney Bartlett, at which Holmes remarked: "It seems to me that the rule for serving our fellow men, and, so far as we may speculate our hope upon that awful theme, the rule for fulfilling the mysterious ends of the universe—that beginning of self-sacrifice and of holiness—is to do one's task with one's might. If we do that, I think we find that our motives take care of themselves. We find that what may have been begun as a means becomes an end in itself; that self-seeking is forgotten in labors which are the best contribution that we can make to mankind; that our personality is swallowed up in working to ends outside ourselves." Oliver Wendell Holmes, *Sidney Bartlett: Answer to Resolutions of the Bar, Boston, March 23, 1889*, in THE ESSENTIAL HOLMES: SELECTION FROM THE LETTERS, SPEECHES, JUDICIAL OPINIONS, AND OTHER WRITINGS OF OLIVER WENDELL HOLMES, JR. 220-21 (Richard Posner ed., 1997).

convincing manner, and stimulating the development of those character traits that increase individuals' ability to choose freely among beliefs. Holmes's defense is concerned with collective choices. Free speech, in his view, helps create the conditions for a fair fight that will encourage the formation of decision-making factions, which have some basis in the interests of a majority or at least a dominant group of persons who are sufficiently interested in the matter to be decided.

That Mill's and Holmes's conceptions of freedom differ is perhaps evidenced most starkly by how each author approaches the question of whether freedom can be relinquished. Mill uses an individual example, namely whether one can sell oneself into slavery. Holmes views the issue as one of collective determination, namely whether a society can opt for a dictatorship.<sup>212</sup> Equally significant is the fact that Mill answers this question with an unqualified no, and that Holmes's response is that the ultimate meaning of democracy is that the dominant forces of society are free to give it up in favor of a different governance model.

#### CONCLUSION

Although Mill and Holmes both defend freedom of speech for its importance in a collective pursuit of truth, a comparison of their premises shows that their views on the meaning of truth, the nature of the search for it, and the role of speech in the endeavor are markedly different. The reasons Mill offers for the desirability of freedom of expression are closely connected to his belief that people acquire preferences in a continuing dialogue between reason and natural inclinations. Holmes, on the other hand, thinks that deeply held preferences are to a great extent arbitrary and generally will not be changed as a result of vigorous debate and rational deliberation. Mill places a high value on the contributions eccentric individuals may offer to society. Holmes views society as a composition of shifting forces, which are continuously engaged in a dynamic struggle for dominance and he is not troubled by the possibility of "tyranny of the majority." And while Mill appears to believe that objective truths exist and that we are capable of uncovering more and more truths over time, Holmes is skeptical about our ability to know any external truth, and the word "truth" in the *Abrams* dissent is best interpreted as referring to the views that are held by a present or future majority as a result of a process in which different factions have had a chance to fight for dominance.

This Article attempts to explain these differences by identifying different notions of freedom that underlie the two free speech defenses. For Mill, freedom is quintessentially individual. He believes that

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212. See *supra* notes 91-96 and accompanying text.

individuals are free to accept, abandon, or modify their opinions. Dissenting speech helps maximize the benefits of this faculty both by presenting individuals with alternatives to their beliefs and by promoting certain character traits that increase the level and independence of thought. It appears that Holmes's free speech theory is based on a more collective notion of freedom. He is concerned with choices at a societal level, and his defense is based on the role of speech in facilitating the formation of interest groups that are sufficiently large or influential to be able to make decisions. The characterization of Mill and Holmes as proponents of a "marketplace of ideas" rationale for free speech ignores significant differences between their free speech theories, and does not do justice to the complexity of either defense.



