

## JOHN STUART MILL AND POLITICAL CORRECTNESS

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*“For a long time past, the chief mischief of the legal penalties is that they strengthen social stigma. It is that social stigma which is really effective, and so effective is it, that the profession of opinions which are under the ban of society is much less common in England, than is, in many other countries, the avowal of those which incur risk of judicial punishment.*

*...Our merely social intolerance kills no one, roots out no opinions, but induces men to disguise them, or to abstain from any active effort for their diffusion... [T]he price paid for this sort of intellectual pacification, is the sacrifice of the entire moral courage of the human mind.”<sup>1</sup>*

This is merely a small excerpt from John Stuart Mill’s argument that social stigmatization of unpopular speech does as much harm to the values of freedom of speech as legal prohibition. Although the term did not then exist in 1859, Mill was quite familiar with the notion of political correctness, or as he would have put it social intolerance, and was very concerned about its impact. As a philosopher writing in mid-nineteenth century England, Mill was not addressing the First Amendment of the United States Constitution. Rather he was concerned with speech as a philosophical or political concept. Was Mill correct? Does private or socially imposed censorship do as much if not more harm to the values underlying freedom of speech as government censorship? If so, what if anything should be done about it?

This article will examine Mill’s arguments in favor of unrestrained freedom of speech and his objection to the social censorship of speech. It will then discuss the origins and impact of what is now characterized as political correctness. The article will then define the concept of social censorship and attempt to distinguish pure social censorship from private tangible punishment of speech. Next, the article will examine the ways in

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<sup>1</sup> JOHN STUART MILL, ON LIBERTY 100–01 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

which social censorship serves important social goals and promotes free speech, as well as the ways in which it undermines free speech. It will especially focus on the damage to intellectual autonomy and development that so troubled Mill. The article will consider how the struggle between freedom of speech and social censorship/political correctness is ultimately a battle over the social norm defining the boundary between socially acceptable and unacceptable speech focusing on how social norms, especially in the area of speech, are created, maintained, and adjusted. Finally, the article will explain how Mill's norm of a robust culture of free speech can be defended and preserved against attempts at restriction.

Mill was a philosopher of legendary reputation as well as one of the patron saints of freedom of speech. As such, there is a voluminous literature on Mill and his theories.<sup>2</sup> This article will summarize Mill's views on the value of freedom of speech, as well as the harm to those values caused by social censorship, to a large extent in Mill's own words. It will then attempt to employ Mill's critique to issues that have arisen over a century and one half after Mill wrote. It will attempt to focus on what Mill plainly said and then apply Mill's words and thoughts to a context that is both similar and yet very different. In so doing, it hopes, to the extent possible, to avoid the never-ending and contentious debate over what Mill "really meant," as well as speculation as to what John Stuart Mill himself would think and say if transported to the twenty-first century. In other words, the assumption is that Mill's ideas as they appear on the page can be separated from Mill the man and his historical context.

## I. JOHN STUART MILL ON FREEDOM OF SPEECH AND SOCIAL CENSORSHIP

Chapter Two of Mill's classic *On Liberty* titled "Of Liberty of Thought and Discussion" provides a lengthy and vigorous defense of freedom of speech.<sup>3</sup> In a few important paragraphs midway through the essay, Mill argued that non-legal censorship does as much if not more harm to the underlying values of freedom of speech and thought as legal regulation.<sup>4</sup>

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<sup>2</sup> See, e.g., JOHN GRAY, *MILL ON LIBERTY: A DEFENCE* (1996); JOSEPH HAMBURGER, *JOHN STUART MILL ON LIBERTY AND CONTROL* (1999); GERTUDE HIMMELFARB, *ON LIBERTY AND LIBERALISM: THE CASE OF JOHN STUART MILL* (1974); RICHARD REEVES, *JOHN STUART MILL VICTORIAN FIREBRAND* (2007); JOHN RILEY, *MILL ON LIBERTY* (1998); *MILL'S ON LIBERTY: CRITICAL ESSAYS* (Gerald Dworkin ed., 1997); ALAN RYAN, *J.S. MILL* (1970); GEOFFREY SCARRE, *MILL'S ON LIBERTY* (2007); JOHN SKORUPSKI, *JOHN STUART MILL* (1989) [hereinafter JOHN SKORUPSKI, *MILL*]; JOHN SKORUPSKI, *WHY READ MILL TODAY?* (2006); C.L. TEN, *MILL ON LIBERTY* (1980).

<sup>3</sup> *MILL*, *supra* note 1, at 86–120.

<sup>4</sup> *Id.* at 141–47.

Mill defended vigorous and unrestrained freedom of speech from both a social and individual perspective. From the former perspective, he argued that free speech was essential to society's continual search for truth.<sup>5</sup> From the latter perspective, he argued that free speech was essential to the individual's ability to develop as an autonomous thinker.<sup>6</sup>

Throughout the essay, Mill emphasized the importance of free speech in the continual search for truth. He observed that history has shown that "many opinions, now general, will be rejected by future ages."<sup>7</sup> Suppression of purportedly false speech assumes unwarranted infallibility in the censor.<sup>8</sup> As such, banishing any matter whatsoever from the domain of free debate presumes an unwarranted certainty. Moreover, a "clearer perception and livelier impression of truth [is] produced by its collision with error."<sup>9</sup> Thus society benefits from even the dissemination of false speech.

Perhaps as, if not more important to Mill than the societal benefit from the discovery of truth, was the enriching of the intellect derived from the search itself. An individual can arrive at the truth only by continually "correcting and completing his own opinion."<sup>10</sup> Thus for Mill, it was impossible to know the truth in the absence of rigorous, critical, and constant examination and reexamination of premises.<sup>11</sup> Unexamined truth would eventually lapse into "dead dogma."<sup>12</sup> Consequently, the social benefit derived from the discovery of truth, as well as the individual benefit derived from the rigorous intellectual search, were both dependent on unfettered freedom of speech and thought.

Mill acknowledged that in the past, freedom of speech was most often restrained through the force of law.<sup>13</sup> However in more recent times (the mid-nineteenth century when Mill was writing), speech was more effectively and pervasively restrained through social intolerance. Indeed, the most pernicious effect of legal restraint of speech was to "strengthen the social stigma."<sup>14</sup> Mill recognized that private entities, especially through the use of economic power, could effectively stifle speech. He wrote that "men

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<sup>5</sup> *Id.* at 118.

<sup>6</sup> *Id.* at 102.

<sup>7</sup> *Id.* at 89.

<sup>8</sup> *Id.* at 88. C.L. Ten understands this to be Mill's most significant argument in favor of freedom of speech. See C.L. TEN, *supra* note 2, at 129–30.

<sup>9</sup> MILL, *supra* note 1, at 87.

<sup>10</sup> *Id.* at 90.

<sup>11</sup> See *id.* at 111.

<sup>12</sup> *Id.* at 103.

<sup>13</sup> *Id.* at 98.

<sup>14</sup> *Id.* at 100.

might well be imprisoned as excluded from earning their bread.”<sup>15</sup> However, Mill suggested that social intolerance divorced from economic sanction or the threat of retaliation was as harmful to freedom of speech and thought.<sup>16</sup> Without fear of suffering any material penalty, individuals are carefully guarded in their speech out of fear of social ostracism.<sup>17</sup> Mill explained why he saw this fear as a serious problem. Social intolerance of dissident speech preserves the status quo in matters of opinion. Mill noted that social intolerance results in “peace in the intellectual world . . . keeping all things going on therein very much as they do already.”<sup>18</sup> To use a modern idiom, people go along to get along. This undermines intellectual and moral courage. “A large portion of the most active and inquiring intellects” are encouraged to keep their opinions to themselves.<sup>19</sup> This stifles the mental development of not simply the average citizen but also of “the most active and inquiring intellects.”<sup>20</sup> As a result, people are either likely to set forth arguments that they do not really believe or avoid addressing controversial issues entirely.<sup>21</sup> This caused Mill to wonder “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 should land them in something which would admit of being considered irreligious or immoral?”<sup>22</sup> As such, over time, the loss to society is great. But the loss to the individual is equally great. “No one can be a great thinker who does not recognise, that as a thinker it is his first duty to follow his intellect to whatever conclusions it may lead.”<sup>23</sup> So from Mill’s standpoint, social intolerance of unconventional speech does significant harm both to society’s interest in exploring and discovering the truth as well as the individual’s interest in developing his or her faculties as an autonomous thinker.

It is worth pausing to ask exactly what type of social intolerance troubled Mill so greatly. The threat of social intolerance was a concern that permeated *On Liberty* as well as some of Mill’s other work.<sup>24</sup> However, he

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<sup>15</sup> *Id.*

<sup>16</sup> *Id.* at 100–01.

<sup>17</sup> *Id.* at 101.

<sup>18</sup> *Id.*

<sup>19</sup> *Id.*

<sup>20</sup> *Id.*

<sup>21</sup> *Id.*

<sup>22</sup> *Id.* at 101–02.

<sup>23</sup> *Id.* at 102.

<sup>24</sup> See *id.* at 78–79, 100–01. See also JOHN SKORUPSKI, MILL, *supra* note 2, at 366 (“[A] central object of the Liberty Principle is to protect the individual from enforced conformity to the ‘likings and

offered few examples of the type of social intolerance that concerned him. Mill was certainly troubled by religious intolerance which had always been a problem in England and certainly persisted during the Victorian Age in which he wrote.<sup>25</sup> Mill was by nature an iconoclast and instinctively rebelled against the dominant culture in which he lived. As such, he could readily expect a significant degree of social disapproval. Indeed, he invited it. At the time and to some extent even now, *On Liberty* was and is a radical book, and has always provoked counter-argument. Of all of the political and social causes that Mill promoted, he received the most ridicule and social ostracism for his consistent and heartfelt feminism.<sup>26</sup> But by definition, Mill was not the type to be chilled or silenced by social intolerance. He was perhaps the leading public intellectual of his day and relished the challenge. However, as *On Liberty* seems to indicate, he feared, perhaps based on personal experience, that others were not nearly so bold.

Still, one contemporary critique of Mill's social intolerance thesis was that it was grossly overstated.<sup>27</sup> As Thomas Babington Macaulay noted in his journal, "[h]e is really crying 'Fire!' in Noah's flood."<sup>28</sup> Mill's radical and provocative volume *On Liberty* was published in London in 1859.<sup>29</sup> In the very same year in the very same city, Charles Darwin published *The Origin of Species*, a book that was in the Victorian world even more radical than *On Liberty*.<sup>30</sup> Moreover, eleven years earlier in London, Karl Marx had published *The Communist Manifesto* and eight years after the publication of *On Liberty*, Marx published *Das Kapital*.<sup>31</sup> Thus it would seem that mid-nineteenth century London was in fact an extremely intellectually vibrant place, at least for major thinkers. Mill may have been aware that Darwin had delayed publication of *The Origin of Species* out of fear of being branded an atheist.<sup>32</sup> Even if the great thinkers were uninhibited, Mill was justifiably concerned that most people would not possess the moral courage of a Mill, Darwin, or Marx. Mill later suggested that he was largely concerned that social intolerance would become significantly more

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dislikings' of society.").

<sup>25</sup> REEVES, *supra* note 2, at 294–95.

<sup>26</sup> *Id.* at 388–89.

<sup>27</sup> *Id.* at 296; see SCARRE, *supra* note 2, at 23 (quoting examples of such critiques).

<sup>28</sup> See Peter Nicolson, *The Reception and Early Reputation of Mill's Political Thought*, in *THE CAMBRIDGE COMPANION TO MILL* 464, 469 (John Skorupski ed., 1998) (quoting Macaulay). Nicolson argues that contrary to Mill, his critics significantly underestimated the existing social intolerance in contemporary England which became clearer as Mill propounded his feminist principles. See *id.* at 465–75.

<sup>29</sup> MILL, *supra* note 1, at ix.

<sup>30</sup> CHARLES DARWIN, *THE ORIGIN OF SPECIES* (Harvard Univ. Press 1964) (1859).

<sup>31</sup> KARL MARX AND FRIEDRICH ENGELS, *THE COMMUNIST MANIFESTO* (Washington Square Press 1968) (1848); KARL MARX, *DAS KAPITAL* (Pacific Publishing Studio 2010) (1867).

<sup>32</sup> REEVES, *supra* note 2 at 295.

powerful and inhibiting in the future.<sup>33</sup> Whether Mill intended this or not, Mill's fear of the power of social intolerance resonates in the era of political correctness.

The values promoted by, and the theoretical foundations of, freedom of speech have been the topic of intense debate ever since Mill wrote and before.<sup>34</sup> Mill captured several important values promoted by freedom of speech, most particularly the search for truth and the development of the intellect. Mill did not develop the theory that speech was essential to democratic self-government. The absence of this theory is not surprising given that Mill feared the "tyranny of the majority" and, as such, was quite skeptical of democracy.<sup>35</sup> There are other defenses of free speech that Mill did not raise. This article will focus exclusively on the arguments that Mill did make—the search for truth, and more significantly the development of the intellect, since Mill seemed to suggest that the latter was most deeply impacted by social intolerance.

## II. THE POLITICAL CORRECTNESS MOVEMENT

The phenomena that so disturbed Mill is a troubling aspect of contemporary culture. Just as there is almost certainly greater protection against government prohibition of speech than ever before, there also seems to be greater social intolerance toward many types of speech than there has ever been in the past. However, lest we assume that social intolerance of speech in the United States is a new phenomenon, we should remember that in the 1840s Alexis de Toqueville, who had a profound influence on Mill, wrote that "I know of no country in which there is so little independence of mind and real freedom of discussion as in America."<sup>36</sup> While there is much greater tolerance of speech that would have been subject to social as well as legal censure in the not too distant past including seditious and sexually oriented speech, there is far less tolerance of speech that might be deemed offensive or insensitive with respect to race, gender, sexual orientation, or speech that might be considered offensive to or by various cultural or social groups. This sensitivity to speech is commonly characterized as political correctness and seems to be largely a product of the last two or three

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<sup>33</sup> JOHN STUART MILL, AUTOBIOGRAPHY 162–63 (Columbia Univ. Press 1924) (1873).

<sup>34</sup> See, e.g., ERIC BARENDT, FREEDOM OF SPEECH 1–36 (2d ed. 2005); FREDERICK SCHAUER, FREEDOM OF SPEECH: A PHILOSOPHICAL INQUIRY 3–72 (1982); Kent Greenawalt, *Free Speech Justifications*, 89 COLUM. L. REV. 119 (1989).

<sup>35</sup> See REEVES, *supra* note 2, at 7, 114.

<sup>36</sup> ALEXIS DE TOCQUEVILLE, DEMOCRACY IN AMERICA 263 (Alfred A. Knopf, Inc. 1994) (1835). Mill borrowed the phrase "tyranny of the majority" from Tocqueville. *Id.* at 269.

decades.<sup>37</sup> Sometimes, it is manifested in the form of speech codes at universities or disciplinary policies or decisions in the private employment or business context. More commonly it is reflected through social stigma or intolerance. The application of social intolerance to scurrilous epithets and insults which tend to fall well outside of the pale of socially acceptable speech is not necessarily disturbing. However, the extension of social stigma to any discussion of controversial racial or sexual issues, such as the wisdom of race-based affirmative action, the moral legitimacy of abortion or same-sex marriage, or whether police officers unfairly target minorities, does appear to intrude deeply into the traditional and legitimate domain of free speech. Unfortunately, the latter seems to occur all too often.

There are many explanations for the rise of political correctness. It is a movement that tends to be connected with the political left.<sup>38</sup> It seems to owe a debt to certain strains of post-modernist thinking which equates the use of language with action and the structure of society.<sup>39</sup> Hence changing language changes behavior. Another source of political correctness is the contemporary emphasis on the concept of equality, especially with respect to groups which are viewed as the subjects of past discrimination.<sup>40</sup> Negative or seemingly negative speech about subordinated or previously subordinated groups is regarded as a manifestation of discrimination or domination itself.<sup>41</sup> Intolerance of certain types of speech may exemplify a

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<sup>37</sup> The literature on political correctness is enormous. See, e.g., DAVID E. BERNSTEIN, YOU CAN'T SAY THAT: THE GROWING THREAT TO CIVIL LIBERTIES FROM ANTIDISCRIMINATION LAWS 59–61 (2003); NAT HENTOFF, FREE SPEECH FOR ME BUT NOT FOR THEE: HOW THE AMERICAN LEFT AND RIGHT RELENTLESSLY CENSOR EACH OTHER 55–57 (1992); GREG LUKIANOFF, UNLEARNING LIBERTY: CAMPUS CENSORSHIP AND THE END OF AMERICAN DEBATE 48 (2014); KIRSTEN POWERS, THE SILENCING: HOW THE LEFT IS KILLING FREE SPEECH 1–18 (2015); ROGER L. SIMON, I KNOW BEST 119–21 (2016); MICHAEL SMERCONISH, MUZZLED 28 (2006); KIMBERLEY STRASSEL, THE INTIMIDATION GAME: HOW THE LEFT IS SILENCING FREE SPEECH 363–66 (2016). See generally Lackland H. Bloom, Jr., *Fighting Back: Offensive Speech and Cultural Conflict*, 46 SMU L. REV. 145 (1992) for extensive citation to the literature as it stood in 1992 during the first wave of furor over the political correctness movement.

<sup>38</sup> See, e.g., POWERS, *supra* note 37, at 4; Angelo Codevilla, *The Rise of Political Correctness*, XVI CLAREMONT REV. OF BOOKS, #4 (Fall 2016).

<sup>39</sup> See Stephen G. Gey, *The Case Against Postmodern Censorship Theory*, 145 U. PA. L. REV. 193, 198 (1996) (explaining how the postmodern censorship movement is at least partially derived from social construction theory); Kathleen Sullivan, *Free Speech Wars*, 48 SMU L. REV. 203, 210 (1995) (explaining how the proponents of hate speech regulation believe that “[i]f you want to change reality, you have to change the speech that constructs it”); Jillian Kay Melchior, *Censorship Is Free Speech? It Must be the Class of 1984*, WALL ST. J., Jan. 27, 2017, at A15; see also JUNG MIN CHOI & JOHN W. MURPHY, *THE POLITICS AND PHILOSOPHY OF POLITICAL CORRECTNESS* (1992) for a vigorous defense of the movement.

<sup>40</sup> See BERNSTEIN, *supra* note 37; Gey, *supra* note 39, at 281 (explicating how postmodern censorship is derived from egalitarian theory); Sullivan *supra* note 39, at 212–13.

<sup>41</sup> This approach was developed by legal scholars associated with the critical race theory

new hyper-sensitivity or politeness. Insulting or insensitive speech is seen as hurtful to feelings or, in the extreme case, as capable of inflicting severe emotional damage.<sup>42</sup> That in itself is considered worth preventing. Along with the contemporary concern with the value of equality is an emphasis on dignity and respect as foundational values.<sup>43</sup> Speech which undermines either is considered problematic. Social intolerance of speech may often be the product of an attempt to exercise power either to suppress opinions or ideas that are considered misguided, or simply to demonize political or cultural opponents.<sup>44</sup> Whatever the reasons for the rise of political correctness or increased social intolerance of speech, once it gains a certain degree of traction in society, it exerts significant control over the domain of free speech.<sup>45</sup>

### *A. Private Tangible Restraint and Social Censorship*

Under the United States Constitution, the First Amendment prohibits only state action that interferes with freedom of speech.<sup>46</sup> Non-governmental restraint of freedom of speech is beyond the scope of constitutional control. Hence, when non-governmental actors interfere with free speech there may be damage to free speech values but there will be no First Amendment violation. However, as Mill argued, non-governmental or

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movement. A collection of their seminal work is contained in MARI J. MATSUDA, ET. AL., *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT (NEW PERSPECTIVES ON LAW, CULTURE, & SOCIETY)* (1993) (containing essays by Richard Delgado, Mari J. Matsuda, Charles Lawrence III, and Kimberlee Crenshaw).

<sup>42</sup> See Richard Delgado, *Words That Wound: A Tort Action for Racial Insults, Epithets, and Name Calling*, in *WORDS THAT WOUND: CRITICAL RACE THEORY, ASSAULTIVE SPEECH, AND THE FIRST AMENDMENT* (1993).

<sup>43</sup> See, e.g., SAMUEL WALKER, *HATE SPEECH: THE HISTORY OF AN AMERICAN CONTROVERSY* 137 (1994).

<sup>44</sup> Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 246 (1992); see also Larry Alexander, *Banning Hate Speech and the Sticks and Stones Defense*, 13 CONST. COMMENT. 71, 98 (1996) ("I believe that [the hate speech movement] is motivated primarily by hatred of those with bigoted attitudes and a desire to exercise power over them."); Lawrence Lessig, *The Regulation of Social Meaning*, 62 U. CHI. L. REV. 943, 1016 (1995) ("What drives the passion of the anti-PCs is the idea that what is 'offensive' is being defined or determined by some particular group, and defined differently from what we happen now to find offensive.").

<sup>45</sup> James Gibson, *The Political Consequences of Intolerance: Cultural Conformity and Political Freedom*, 86 AM. POL. SCI. REV. 338, 339 (1992)

("Thus I hypothesize that people learn from the political culture that intolerance is widespread, that it is acceptable, and that there are tangible risks to asserting views that the intolerant culture finds objectionable.").

<sup>46</sup> See generally, Julian N. Eule & Jonathon D. Varat, *Transporting First Amendment Norms to the Private Sector: With Every Wish There Comes a Curse*, 45 UCLA L. REV. 1537 (1998) (explaining the limits of free speech rights against state action, how those limits might expand into the private sector, and the serious constitutional pitfalls of expanding free speech rights to private parties).



private restraint of speech may be as, if not more, threatening to freedom of speech than legal restriction.<sup>47</sup> Arguably, non-governmental interference with free speech may be divided into two interrelated categories—1) the imposition of tangible harm to the individual as a result of his or her speech, such as loss of a job, a poor grade in a class, or suspension from school, or 2) pure social intolerance or stigmatization with no infliction of tangible harm. Either may have a debilitating impact on freedom of speech and its values. Mill was clearly concerned with the impact of both. He declared that “men might as well be imprisoned as excluded from the means of earning their bread.”<sup>48</sup> Economic retaliation by employers or others would quite obviously have a severe chilling effect on free speech. Persons or groups in positions of authority or control, whether governmental or private, are obviously in a position to chill or silence the speech of dependents or subordinates. Experience teaches that such authority is frequently employed in a biased, discriminatory, or self-serving manner. Consequently, private power often poses a serious threat to free speech values.

A society that respects freedom of speech should discourage private censorship at least in many instances. In settings such as the university, free speech and inquiry should be protected as essential to the very mission of the institution. As former President of Yale University Benno Schmidt declared, “a university is a place where people have to have the right to speak the unspeakable and think the unthinkable and challenge the unchallengeable.”<sup>49</sup> Although governmental protection of free speech in the private university is a possibility,<sup>50</sup> private internal protection would be preferable given that it is always dangerous for the government to become involved in the regulation of speech even to protect it.

In other areas of private enterprise and organization however, there are often valid reasons for restricting speech of employees or association members. A private entity should have the right to restrict the speech of its

<sup>47</sup> See MILL, *supra* note 1, at 101.

<sup>48</sup> *Id.* at 100.

<sup>49</sup> See HENTOFF, *supra* note 37, at 152 (quoting Benno Schmidt’s interview with Fred Friendly).

<sup>50</sup> California, Maine, and Massachusetts have passed legislation extending legal protection to speech at private universities. See Cal. Educ. Code § 48950 (West 2010) (the California Act is known as the Leonard Law); ME. REV. STAT. ANN. tit. 5, §§ 4681–82 (West 2001); MASS. GEN. LAWS ANN. ch. 12, §§ 11H–11I (West 2014). In the past year, several state legislatures have passed similar legislation: Colorado SB 17-062; Kentucky SB 117; North Carolina HB 527; Tennessee SB 723; Utah HB 54 and Virginia HB 1401. See S.B. 17-062, 71st Gen. Assemb., Reg. Sess. (Colo. 2017) (enacted); S.B. 117, 2017 Leg., Reg. Sess. (Ky. 2017) (enacted); H.B. 527, 2017 Gen. Assemb., Reg. Sess. (N.C. 2017) (enacted); S.B. 723, 110th Gen. Assemb., 1st Reg. Sess. (Tenn. 2017) (enacted); H.B. 54, 62d Leg., Gen. Sess. (Utah 2017) (enacted); H.B. 1401, 2017 Gen. Assemb., Reg. Sess. (Va. 2017) (enacted). This type of legislation is pending in other states as well. See, e.g., H.B. 363, 132d Gen. Assemb., Reg. Sess. (Ohio 2017).

members which undermines its enterprise or mission. A business ought to be able to prohibit speech by its employees that denigrates the products or goodwill of the business. Likewise, it should be able to restrict the speech of employees such as sexually harassing speech that makes it more difficult to achieve its legitimate ends. Some of this restriction will be legally imposed and some will be the result of contract. As Mill observed, restraints which exclude a person from “earning their bread” may have a significant impact on free speech, however in a free enterprise economy, such restraints are both inevitable and valuable.<sup>51</sup> At least to some extent, the individual whose speech is restrained has chosen to work for or associate with the entity imposing the restrictions. As a practical matter such choices may not be entirely voluntary in the broadest sense of the word, however there is usually still an element of choice involved. The primary focus of this article, however, will be censorship through social intolerance as opposed to censorship through the restriction of private tangible benefits.

### *B. Social Intolerance and Freedom of Speech*

#### 1. The Costs of Social Intolerance of Speech

It is certainly difficult to disentangle pure social censorship from the threat of, or at least the fear of, future economic reprisal. A primary reason why social censorship is so effective is because the individual whose speech may be chilled or silenced may fear that unpopular speech today may lead to tangible or economic harm in the future even if no present threat has been made. It is better to be safe than sorry. Even so, when there is no present threat of tangible harm, it is best considered as a case of social censorship. The question then arises whether Mill’s concern about the impact of social censorship on freedom of speech was warranted. What is so terrible about social intolerance of offensive, insensitive, or otherwise disagreeable speech?

As Mill so clearly recognized, social ostracism is powerful.<sup>52</sup> People are social animals. Few people are comfortable in the role of iconoclast or social outcast. In contemporary society, few would care to risk characterization as racists, sexists, or homophobes, however unfairly. Moreover, most people are not the “inquiring intellects” and “fearless characters” that Mill so admired but rather, as Mill well understood, simply

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<sup>51</sup> MILL, *supra* note 1, at 100.

<sup>52</sup> MILL, *supra* note 1, at 156

individuals who hope to live their lives in peace with as little controversy as possible. For most, conformity is a small price to pay for social peace.

Mill spoke to the harms inflicted by social intolerance.<sup>53</sup> A speaker who fears or is sensitive to social censure will often feel as though he or she is walking on eggshells, or, as Mill put it, whose “reason [is] cowed, by the fear of heresy.”<sup>54</sup> In any situation where such censure may arise, the potential speaker will feel the weight of inhibition. Navigating a conversation can become an unpleasant experience in which the speaker is constantly attempting to avoid saying the wrong thing. This is scarcely the frame of mind that a free speech culture should encourage. As one commentator noted, “[p]olitical courage should not be needed to live a life.”<sup>55</sup>

Apart from the feeling of inhibition, the speaker will be inhibited in fact. The speaker will not say what is truly on his or her mind. As Mill noted, social censorship creates “[a] state of things in which [many] find it advisable to keep the general principles and grounds of their convictions within their own breasts.”<sup>56</sup> This would seem to be the very opposite of the condition that a healthy free speech culture would hope to create. To return again to Mill: “where there is a tacit convention that principles are not to be disputed; where the discussion of the greatest questions which can occupy humanity is considered to be closed, we cannot hope to find that generally high scale of mental activity which has made some periods of history so remarkable.”<sup>57</sup>

This is perhaps Mill’s most important insight and concern. Mill clearly believed that freedom of speech was essential to freedom of thought and to the continual and progressive development of the intellect.<sup>58</sup> A person who is afraid to speak will inevitably be afraid to think. As comedian Chris Rock recently observed in explaining why he no longer performs on college

<sup>53</sup> *Id.*

<sup>54</sup> *Id.* at 101.

<sup>55</sup> George Kateb, *Freedom of Worthless and Harmful Speech*, in LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR 220, 237 (1996) (“Expressing and receiving expression by permission becomes the norm.”).

<sup>56</sup> MILL, *supra* note 1, at 101.

<sup>57</sup> *Id.* at 102. Jeremy Waldron points out that the same inhibition and consequent stagnation of thought can readily occur within cultural minority communities as well. Jeremy Waldron, *Mill and Multiculturalism*, in ON LIBERTY A CRITICAL GUIDE 165, 174 (C.L. Ten ed., 2008). He argues that Mill would presumably be comfortable with multiculturalism in that he valued social diversity, however he would be troubled by social conformity within cultural minority groups given that this would also suppress individuality. *Id.* at 165–66, 183–84.

<sup>58</sup> See Seana Valentine Shiffrin, *A Thinker-Based Approach to Freedom of Speech*, 27 CONST. COMMENT. 283 (2011) (presenting a contemporary exposition of the relationship between freedom of speech and freedom of thought).

campuses, “You can’t think the thoughts you want to think if you think you are being watched.”<sup>59</sup> The self-censored speaker will never achieve his or her true intellectual potential. This results in a loss of intellectual autonomy as well as the capacity for moral growth. The mind is constrained from becoming everything that it could be. Arguably this stifling of intellectual imagination and creativity is the most extreme cost of social intolerance or political correctness.

The loss from social censorship is not limited to the individual but affects society as well. When an individual engages in self-censorship out of fear of social intolerance, the public is deprived of whatever truths or contributions may have been revealed through less inhibited speech. The search for truth is restricted. Moreover, the overall intellectual atmosphere of society is inhibited by the self-censorship of its members. Mill clearly recognized each of these dangers. They remain serious costs of social censorship in our day as well.

Social intolerance strikes at the very heart of freedom of speech. Social stigmatization of particular opinions or subjects is intended to cleanse the public arena of unpleasantness and offensiveness; to effectively disapprove of certain points of view. If so, it is censorship pure and simple. The exclusion of particular opinions or viewpoints from the marketplace of ideas is certainly inconsistent with Mill’s powerful argument that it is only through consideration of all perspectives that either the individual or society can achieve at least some intellectual progress.<sup>60</sup> And although social disapproval will not entirely stifle the promulgation of dissenting views, they may be excluded from specific communities such as college campuses. If social intolerance becomes sufficiently widespread, it exercises a profound impact on the nature of speech. Still, in a diverse and heterogeneous society, it is likely that there will be a supply of iconoclasts who are willing to challenge social mores and engage in socially disapproved expression. Consequently, the chilling effect will hardly be complete. Indeed, if sufficient resentment of social intolerance or political correctness develops, a certain amount of speech challenging accepted social boundaries is likely to occur. Still, the impact of social intolerance on free speech will be significant. And perhaps the most serious harm will be that which most concerned Mill—the stifling of autonomous thought through the creation of a pall of orthodoxy.

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<sup>59</sup> POWERS, *supra* note 37, at 77.

<sup>60</sup> MILL, *supra* note 1, at 86–87.

The chilling effect on speech is notoriously difficult to prove empirically.<sup>61</sup> Consequently, the chilling effect thesis is largely based on anecdote and intuition. Mill assumed that if speech is penalized legally, economically, or socially, there will be less of it, especially with respect to matters of controversy.<sup>62</sup> There is a wealth of contemporary evidence to confirm that conclusion. The late Nat Hentoff, perhaps the most vigorous defender of freedom of speech in the nation over the past several decades, provides several explicit examples of the chilling effect in action in the chapter of his book *Free Speech for Me, But Not For Thee* entitled “The Pall of Orthodoxy on the Nation’s Campuses.”<sup>63</sup> In particular, Hentoff quotes one student as noting, “A lot of times I don’t want to speak up in class. Otherwise I’d have 40 percent of the class on me saying I’m a counterrevolutionary racist fascist. I’m normal. I don’t want everyone to hate me for my view.”<sup>64</sup>

Greg Lukianoff, the president of the Foundation for Individual Rights in Education (FIRE), details example after example of the chilling effect in action throughout his book *Unlearning Liberty*.<sup>65</sup> He concludes that “[i]f people believe there is any risk of punishment for stating an opinion, most will not bother opening their mouths; and in time, the rules that create this silence become molded into the culture.”<sup>66</sup> In support of this conclusion, he cites an American Association of Colleges and Universities 2010 survey of 24,000 students that revealed only 30 percent of students strongly agreed with the statement: “it [is] safe to have unpopular views on campus.”<sup>67</sup> Moreover, only 16.7 percent of faculty strongly agreed with the statement.<sup>68</sup> Likewise, a 1987 survey found “only 6% of the American people would

<sup>61</sup> See Brandice Canes-Wrone & Michael Dorf, *Measuring the Chilling Effect*, 90 N.Y.U. L. REV. 1095 (2015) for an attempt.

<sup>62</sup> MILL, *supra* note 1, at 87–88.

<sup>63</sup> HENTOFF, *supra* note 37, at 146–92.

<sup>64</sup> *Id.* at 154; see Dennis Chong, *Free Speech and Multiculturalism In and Out of the Academy*, 27 POL. PSYCHOL. 29, 34 (2006) (“College students are making the transition from their teen years to adulthood and are highly susceptible to normative pressures because they have weak attitudes on many issues and desire social acceptance.”); see also Robert D. Cooter, *Three Effects of Social Norms on Law: Expression, Deterrence, and Internalization*, 79 OR. L. REV. 1, 8 (2000) (“People are notoriously susceptible to group pressures . . . .”); Cass Sunstein, *On the Expressive Function of Law*, 144 U. PA. L. REV. 2021, 2034 (1996) (“We might take the term ‘political correctness’ to connote a willingness to say or do something not because of its intrinsic value but because of reputational effects.”).

<sup>65</sup> LUKIANOFF, *supra* note 37.

<sup>66</sup> *Id.* at 9.

<sup>67</sup> *Id.*

<sup>68</sup> *Id.*; see also Suzanne Feigelson, *The Silent Classroom*, AMHERST MAG., Fall 2001; Mitchiko Kakutani, *Critic’s Notebook: Debate? Dissent? Discussion? Oh, Don’t Go There*, N.Y. TIMES, Mar. 23, 2002.

allow the group they most dislike to enjoy the same political rights and opportunities that the rest of the polity enjoy.”<sup>69</sup>

## 2. The Value of Social Censorship

Self-censorship induced by social intolerance can clearly undermine the values that freedom of speech is intended to serve. However, social intolerance is also an aspect of free speech, and is not without some value as well. In any culture or community, free speech has limits. For instance, the First Amendment, by its terms, seems to provide absolute protection to speech; but that has never been the case. For example, speech that threatens immediate physical danger to the individual or to the nation is and always has been prohibited.<sup>70</sup> Likewise, libelous speech published with knowledge of its falsity is unprotected.<sup>71</sup> Also, false or misleading commercial speech is unprotected.<sup>72</sup> The context matters as well. Speech that would be permissible at a sporting event might be prohibited in a classroom or courtroom.<sup>73</sup> Free speech inevitably has boundaries. With respect to legal regulation, the law itself sets the boundaries.

Boundaries exist in the social context as well. They are set by social convention and enforced by social intolerance. As developed above, speech has value in any community. But it is not entirely positive. Speech can also cause harm. Speech can insult and wound. Speech can render communication and social interaction difficult if not impossible. Speech can lead to fear, distrust, and isolation. If valuable communication is to flourish, not everything that can be said should be said. Much speech should be self-censored. Thus social intolerance provides a crucial means of enforcing the legitimate boundaries of a free speech community. As such, social intolerance is essential to the continuance of freedom of speech. Indeed, social intolerance is an aspect of free speech; it is a part, indeed an important part, of the marketplace of ideas. Social intolerance can serve several valuable functions. It can attempt to preserve some minimal level of

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<sup>69</sup> Gibson, *supra* note 45, at 340.

<sup>70</sup> Initially, the government could prohibit speech that had a tendency to cause violence or insurrection. In the Supreme Court's first significant First Amendment opinion, *Schenk v. United States*, 249 U.S. 47 (1917), Justice Holmes declared that speech must pose a "clear and present danger" before it can be prohibited. After one half century of legal dispute, the Court finally concluded that seditious or violence-inducing speech could be prohibited only if it incited immediate illegal action. *Brandenburg v. Ohio*, 394 U.S. 444, 447 (1969).

<sup>71</sup> See, e.g., *Gertz v. Welch*, 418 U.S. 323 (1974).

<sup>72</sup> See, e.g., *Cent. Hudson Gas & Elec. Corp. v. Pub. Serv. Comm.*, 447 U.S. 557, 563-64 (1980).

<sup>73</sup> See, e.g., *Heffron v. Int'l Soc'y of Krishna Consciousness, Inc.*, 452 U.S. 640, 647 (1981) (explicating the time, place, and manner doctrine).

civility in discourse, which in itself is essential to the continued flow of ideas. If a person is subject to personal vilification when venturing to offer an opinion, it is likely that most people, to avoid suffering such offense, will steer clear of the “marketplace.” Just as social intolerance can readily inhibit speech as Mill recognized, a complete absence of social intolerance can have the same effect.

Social intolerance can also be employed as a means of attempting to reject bad ideas, especially ideas or opinions that are demonstrably false. For instance, if a person denies the existence of the holocaust, one method of response is counter argument through voluminous factual recitation. Another response is social ostracization; that is, conveying the message socially that this opinion has been entirely debunked and has no place in civilized discourse. This is arguably a completely legitimate means of responding to a false and hurtful argument. Of course, Mill would disagree. He argued that as long as one person holds an opinion, however false, it must be met with counter-argument, not suppression even through social intolerance.<sup>74</sup> Mill argued that even false ideas help us better to appreciate the truth.<sup>75</sup> Does holocaust denial help us to better appreciate the horror of the event? Probably not. But Mill’s response was that the exclusion of any argument, however false or harmful, from the marketplace must proceed from an unwarranted assumption of infallibility.<sup>76</sup> Once we allow ourselves to assume that we are infallible enough to conclude that the holocaust did happen, and therefore holocaust deniers and their speech should be shunned, have we also concluded that we are infallible enough to exclude other speech as well, such as the denial of man-made global warming? For Mill, it was all or nothing. He explicitly rejected the argument that freedom of discussion should not be “pushed to an extreme.”<sup>77</sup> Rather, pushing speech to the extreme was the ultimate validation of the free speech principle.

However, as Mill well understood, there are boundaries in the real social world of freedom of speech. One legitimate function of social intolerance is to establish boundaries for free speech which discourage personal vilification and insult not simply to avoid offense but to promote the market by avoiding the silencing of the victims of such attacks. At least some of the campaign to penalize hate speech has proceeded on that theory. For the marketplace of ideas to function as it proponents assume,

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<sup>74</sup> See MILL, *supra* note 1, at 87.

<sup>75</sup> *Id.*

<sup>76</sup> *Id.* at 88.

<sup>77</sup> *Id.* at 91.

disagreements should be settled by civil discussion rather than name calling and demonization. Indeed, near the conclusion of Chapter Two, Mill maintained that freedom of speech assumes “temperate” debate that does not exceed “the bounds of fair discussion.”<sup>78</sup> However, he quickly recognized that temperance is very much in the eye of the beholder. A vigorously pressed argument is often characterized as intemperate.<sup>79</sup> He declared that the charge of intemperance was most often leveled against those who challenged the status quo.<sup>80</sup> Mill condemned those who “stigmatize those who hold the contrary opinion as bad and immoral men.”<sup>81</sup> Thus Mill clearly favored rational, moderate, and polite argument on the merits but understood that in the real marketplace of ideas, that was often not the case. And in any event “law and authority have no business restraining” the “employment of vituperative language” or “offensive attacks.”<sup>82</sup> Giving a fair and respectful hearing to all sides “is the real morality of public discussion.”<sup>83</sup> This was Mill’s conception of the way it should be with recognition that it is “often violated” sometimes by Mill himself who was inclined to employ “all the polemical tools at his disposal” to win a political argument.<sup>84</sup>

Ideally, the boundaries of legitimate speech ought to be set by rational discussion of that very question. In reality, they are set to some extent by such debate but perhaps even more so by social intolerance of speech that exceeds conventional boundaries without fair discussion of whether that is appropriate. From this perspective, social intolerance is simply one powerful way in which the market operates—not ideal but preferable to authoritarian regulation.

Another function of social intolerance is indeed to rule certain ideas and opinions out of bounds. But assuming that it is appropriate to employ social intolerance to exclude the incontestable from the marketplace of ideas, there will be serious debate over how we determine that any idea is indeed incontestable. And all of human history, especially our era of political correctness, teaches that the highly contestable will also be banned as well. Indeed, one of Mill’s primary arguments for freedom of speech proceeded from the recognition that so many beliefs now accepted as true had once

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<sup>78</sup> *Id.* at 118.

<sup>79</sup> *Id.*

<sup>80</sup> *Id.* at 119.

<sup>81</sup> *Id.*

<sup>82</sup> *Id.*

<sup>83</sup> *Id.* at 120.

<sup>84</sup> REEVES, *supra* note 2, at 4.



“been deemed not only false but absurd.”<sup>85</sup> Social intolerance has at least some positive value in setting the outer boundaries of acceptable speech. But at the same time it poses extreme hazards to the values of free speech as well.

### 3. Social Intolerance and the Boundaries of Free Speech

Mill valued freedom of speech because it would permit the gradual and progressive discovery of truth both by individual and by society. Perhaps, even more importantly he believed that unrestrained speech would encourage critical thinking and intellectual development. If free speech must continually reject bad ideas and advance through consistent reevaluation of accepted truth, critical counter-speech will play a significant role. Currently entrenched ideas will constantly be subject to challenge. Sometimes the challenge will be polite. Sometimes it will be caustic. For Mill, the debate was never over. It is a continuing process. Obviously, social intolerance leading to self-censorship presents a threat to this conception of free inquiry. On the other hand, completely unrestrained speech can undermine the conditions necessary to the realization of these goals by rendering the marketplace of ideas a war zone to be avoided by all but the most insensitive. Thus even under Mill’s conception of a fully liberated marketplace of ideas, some boundaries are needed if only to render free speech a desirable enterprise. One of the roles of social intolerance is to set and enforce the legitimate boundaries of freedom of speech. The response of free speech is to continually challenge the boundaries. Political correctness as we understand it is an attempt to adjust the boundaries moving them inward. The anti-political correctness movement is an attempt preserve the boundaries where they were or perhaps to even push them outward. As such, social intolerance or political correctness is freedom of speech in action, as is the counter movement. Determining the appropriate boundaries of the marketplace of ideas, at least in the private domain, is a debate over a significant political issue—what should be the limits of freedom of speech? Ideally, it is best resolved through the marketplace of ideas itself. However, there are complications.

Assuming that social intolerance does have a chilling effect on otherwise acceptable speech, is the self-censorship the result of actual social intolerance or at least to some extent is it the product of a perception of social intolerance, a perception that may in fact be exaggerated or perhaps have little basis at all? Perhaps one of the most devious aspects of social

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<sup>85</sup> MILL, *supra* note 1, at 88–89.

intolerance of speech is that once it becomes entrenched, it may create an atmosphere in which the fear of intolerance outstrips its very existence. In a sense, this is the chilling effect on steroids. The timid fear social consequences where perhaps none exist. As Mill recognized, speech is fragile and is easily chilled.<sup>86</sup> It is responsive to the social or cultural climate. From the standpoint of the search for truth or intellectual development, it shouldn't matter whether self-censorship is the result of displayed or merely perceived social intolerance—the harm to free speech values is the same. But this raises an important point.

The realization of freedom of speech is dependent on a culture that values it. The point, indeed the intent, of social intolerance of speech or political correctness, is to convey the message that no such culture exists; rather, that free speech is risky and may lead to trouble. It is best not to press it. Although social pressure has a legitimate role to play in defining the boundaries of speech and as a means of implicit counter-argument, like dynamite it must be handled with care. If social intolerance of speech becomes pervasive, it can be toxic. Mill was arguing for a spirit of free and unconstrained inquiry. That requires certain social or cultural understandings. These understandings are always contestable. Like the legitimate boundaries of speech, whether there is or should be an entrenched or privileged free speech culture is a matter on which individuals can and will differ. The value and limits of free speech are quite properly matters open for debate in the marketplace of ideas. As a society, we may have largely rejected legal restraint on speech, but as Mill recognized in 1859, and as is still the case today, the validity of social restraint remains and will continue to remain a contested issue.<sup>87</sup>

Self-censorship, the so-called chilling effect, is distinguishable from legal censorship or censorship by private authority (i.e. employers, schools, or associations) in that the potential speaker is generally exercising greater autonomy. This would be the case whether the self-censorship is attributable to fear of legal or economic sanctions, or simply social ostracism. Arguably, the speaker exercises greater autonomy when faced with social intolerance than with legal or economic sanction, though Mill might disagree.

Often when faced with the prospect of adverse social reaction, the speaker has made a rational calculation that it would be preferable to keep quiet. Is that problematic? Mill was something of a libertarian privileging individual liberty and autonomy above nearly all else. From the perspective

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<sup>86</sup> *Id.* at 77–78.

<sup>87</sup> *Id.*

of intellectual autonomy, shouldn't the individual's decision to self-censor in the face of social intolerance be entitled to respect? Would it not be unduly paternalistic to conclude otherwise? Mill seems to respond that such self-censorship in the face of social intolerance is inauthentic; that is "to fit as much as they can of their own conclusions to premises which they have internally rejected."<sup>88</sup> In other words, to dissemble. As Mill argued, from the perspective of intellectual growth, that can't be good.

Virtually all speech, perhaps with the exception of that of lunatics or edgy comedians, is self-censored or self-edited.<sup>89</sup> Even when speaking, an individual generally hopes to appear articulate and thoughtful and consequently almost automatically edits his or her own speech accordingly. Not only is some degree of self-censorship good, it is inevitable. The line between ordinary self-editing and socially induced self-censorship can be indistinct at times and may often be invisible to the speaker. Speech takes place within a culture and the understood norms of the culture necessarily affect what is said and not said. Sometimes those norms as expressed through social intolerance are clear and explicit. Perhaps more often they are implicit and internalized. Yet even the boldest and most provocative Millian intellectual almost certainly engages in some self-censorship while speaking. Separating that self-censorship attributable to social coercion from that attributable to autonomous good judgement is no easy task.

If the only loss through social intolerance of speech was to individualistic values of the autonomous thinker, then respecting the individual's decision to self-censor in response to social intolerance might be acceptable at least from a libertarian perspective. Acceding to social intolerance might certainly undermine the individual's intellectual development so prized by Mill, but that should probably be left to the particular individual. But there is a significant social loss as well. There is the potential loss of the progression towards truth in the marketplace of ideas recognized by Mill. That is a given. But beyond that, as Mill seemed to recognize, there is a loss as well to society as one less critical thinker emerges and engages. Mill hoped for a society in which at least the best and the brightest enter the intellectual arena and participate. That's how intellectual progress occurs. It is simply a less vibrant society when many are content to remain on the sidelines out of fear of social disapproval. The

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<sup>88</sup> *Id.* at 101.

<sup>89</sup> Lenny Bruce was one of the least self-censored individuals in recent memory, and he suffered significant persecution as a result. See LENNY BRUCE, *HOW TO TALK DIRTY AND INFLUENCE PEOPLE* (1964). The theme of Larry David's show *Curb Your Enthusiasm* is the travails of a person who is likely to say whatever pops into his head.

loss may not be concrete, but for Mill it was real and serious. And it is indeed a value threatened by contemporary notions of political correctness.

### *C. Social Norms and the Boundaries of Free Speech*

To a significant extent Mill was correct. Social intolerance does undermine the values of free speech and free thought. It keeps important ideas from entering the marketplace of ideas, depriving both the individual and society of the opportunity to consider them for what they may be worth. It inhibits the ability of the individual and society to persistently evaluate premises and beliefs, that is, to engage in critical thinking. It reinforces the status quo, whatever it may be at a given time, by rendering it more socially costly to challenge accepted opinion. This in turn inhibits the individual from both speaking and then thinking. It makes speaking hazardous and often unpleasantly risky. It deprives society of the benefit of at least some significant thinkers. So Mill argued and so experience, especially contemporary experience, confirms. Those who have studied the impact of political correctness, especially, though hardly exclusively, on college campuses, recognize the existence of the very harms that so troubled Mill.

But there is another side to it. Though Mill might disagree, unrestrained speech is not necessarily an unmitigated good.<sup>90</sup> Not all speech contributes to the individual or societal well-being. Some speech is primarily harmful. Some speech undermines the search for truth as well as individual intellectual development. To some extent social intolerance of speech is itself a form of counter-speech entitled to claim protection. To some extent, social intolerance is a legitimate attempt to define the boundaries of the acceptable. But not always. Frequently, it is an attempt to silence dissent and counter-argument and to exclude disapproved ideas from the realm of debate. That is, sometimes it is exactly what Mill believed it to be.

What if anything can or should be done about social intolerance of speech? Any prospect of government response or regulation should be rejected definitively. History and experience have shown that government is incapable of regulating freedom of speech in a fair and unbiased manner. Moreover, there is little if anything that the government could do to constrain social intolerance outside of a pervasive and intrusive police state, and even that might be ineffective.

Rather, the only hope of keeping social intolerance of speech within acceptable bounds is through continual maintenance of a vibrant free speech culture. To a significant extent freedom of speech, even against government

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<sup>90</sup> See MILL, *supra* note 1, at 83.

regulation, is protected less by the First Amendment than by cultural belief. The law and the culture are to be sure inextricably intertwined. Legal protection nourishes cultural belief and vice versa. Despite the emergence of political correctness, the culture of contemporary America is probably as, if not more, speech protective than any that has ever existed. So in maintaining a culture in which free speech is highly valued, the United States has a solid foundation on which to build. There is certainly a vibrant individualistic streak in American society that rebels against the restriction of speech whether by public or private authority. Moreover, there is at least some appreciation of why speech is especially valuable to both the individual and society. The very fact that instances of social intolerance of speech in the United States tend to attract public attention speaks to the vitality of freedom of speech.

At the very heart of the battle between freedom of speech and social intolerance is a struggle over the development and implementation of social norms. Cass Sunstein has quite correctly noted that “‘Political Correctness’ is no isolated phenomenon. It is ubiquitous. It occurs whenever reputational incentives impose high costs on deviant behavior.”<sup>91</sup> Virtually all social conduct is influenced if not governed by the existence of social norms (as opposed to laws or privately enforced rules). As Robert Ellickson has explained “[m]uch of the glue of a society comes not from law enforcement . . . but rather from the informal enforcement of social mores by acquaintances, bystanders, trading partners, and others.”<sup>92</sup> Despite extensive research, social scientists are in great disagreement as to how to define norms, where they come from, why they are honored, and why they sometimes disappear.<sup>93</sup> A serviceable working definition is “a social norm

<sup>91</sup> Cass Sunstein, *Social Norms and Social Roles*, 96 COLUM. L. REV. 903, 915 (1996).

<sup>92</sup> Robert C. Ellickson, *Law and Economics Discover Social Norms*, 27 J. LEGAL STUD. 537, 540 (1998).

<sup>93</sup> See, e.g., Elizabeth Anderson, *Beyond Homo Economicus: New Developments in Theories of Social Norms*, 29 PHIL. & PUB. AFF. 170, 170 (2000) (“These questions lead to one of the central puzzles of social theory: that of explaining why people comply with social norms.”); Ernest Fehr & Urs Fischbacher, *Social Norms and Human Cooperation*, 8 TRENDS IN COGNITIVE SCI., Apr. 2004, at 185 (“The existence of social norms is one of the great unsolved problems in social cognitive science . . . we still know little about how social norms are formed.”); Jack Gibbs, *Norms: The Problem of Definition and Classification*, 70 AM. J. SOC. 586, 586 (1965) (arguing there is no accepted definition of norms); Eric Posner, *Law, Economics and Inefficient Norms*, 144 U. PA. L. REV. 1697, 1699 (1996) (“The concept of a ‘norm’ is slippery, and scholars use it in different ways.”); Robert E. Scott, *The Limits of Behavioral Theories of Law and Social Norms*, 86 U. VA. L. REV. 1603, 1607 (2000) (“[W]e lack even a basic consensus on the proper definition of a social norm.”); *id.* at 1647 (“We currently lack a persuasive explanation of the mechanics by which norms evolve and are modified by law, or of the process by which values are internalized.”).

is an obligation backed by a social sanction.”<sup>94</sup> There is also disagreement over how social norms operate. One theory is that social norms are internalized by the individual resulting in feelings of guilt when the norms are violated.<sup>95</sup> Another theory emphasizes the external pressures to conform generated by the quest for the esteem of one’s peers.<sup>96</sup> Nevertheless, the social intolerance to which Mill objected and the political correctness at the center of contemporary debate are a struggle over the social norms which establish the appropriate boundaries of acceptable speech.

The struggle to establish the appropriate boundaries of socially acceptable speech has always existed and almost certainly always will. There seem to have been times in human history when speech has seemed more dangerous and threatening than at other times. Professor Blasi has characterized such times as “pathological periods.”<sup>97</sup> During such periods, there has traditionally been greater regulation of speech and certainly more social intolerance of disfavored speech. The era of political correctness may qualify as such a period even though solid judicial protection against content discrimination has stifled attempts to legally curb speech. Arguably, this has channeled efforts to discourage politically incorrect speech into the social context with greater vigor. What plays out then is a cultural struggle (often characterized as a “culture war”) over the limits of acceptable speech between those who would limit and those who would defend freedom of speech. Mill vigorously cast his lot with the latter.

Although there is no consensus as to why social norms develop or change, there certainly are factors that seem to exert significant influence. To some extent, social norms are heavily influenced by the speech and

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<sup>94</sup> Cooter, *supra* note 64, at 5; see also Richard H. McAdams, *The Origin, Development and Regulation of Norms*, 96 MICH. L. REV. 338, 340 (1997) (“Roughly speaking, by norms this literature refers to informal social regularities that individuals feel obligated to follow because of an internalized sense of duty, because of a fear of external sanctions, or both.”).

<sup>95</sup> See Robert D. Cooter, *Decentralized Law for a Complex Economy: The Structural Approach to Adjudicating the New Law Merchant*, 144 U. PA. L. REV. 1643 (1996); see also Anderson, *supra* note 93, at 172 (“I shall argue that the normativity of norms plays an indispensable role in accounting for the motive to comply with them.”)

<sup>96</sup> McAdams, *supra* note 94, at 342, 355 (“My thesis is that norms arise because people seek the esteem of others.”). McAdams argues that a norm is created when: 1) there is a consensus with respect to the esteem worthiness of the conduct; 2) there is a risk of detection of engaging in the conduct; and 3) the consensus and risk of detection is well known. *Id.* at 358. McAdams attempts to fuse internalization and externalization theories of norms by arguing that norms initially sanctioned externally by shame may later be internally sanctioned by guilt in addition. *Id.* at 381. See Scott, *supra* note 93, at 1637–38, for a description of different norm theorists and their approaches.

<sup>97</sup> Vincent Blasi, *The Pathological Perspective and the First Amendment*, 85 COLUM. L. REV. 449, 450 (1985).

actions of elite opinion makers.<sup>98</sup> Whether society adopts a speech tolerant or speech restrictive norm depends to some extent on whether political, business, and educational leaders tend to publically favor one approach or the other.<sup>99</sup> At universities and colleges where the struggle over speech norms has been most engaged, the opinions of faculty and administrators will tend to make a difference.<sup>100</sup>

Social norms are also developed through education both formal and informal. As Mill well understood, speech is an essential human activity. To a large, though not exclusive, extent, education, including with respect to social norms, is conveyed and discussed through speech. The attitudes expressed toward the limitations of free speech in homes, schools, churches, jobs, and other associations consciously and subconsciously influence attitudes with respect to the legitimate boundaries of speech.<sup>101</sup> When as today, the limits of free speech become issues of public controversy, educators can play a role in the development of norms. Unfortunately, from a free speech perspective, the political correctness movement and its negative impact on free speech has been most aggressive and successful on college campuses. If in fact education plays a significant role in developing social norms, then speech protective norms may be at risk.

Another factor in the development of social norms is the existence of organized groups affirmatively supporting the development of, or change

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<sup>98</sup> Daron Acemoglu & Matthew O. Jackson, *History, Expectations, and Leadership in the Evolution of Social Norms*, 82 REV. ECON. STUD. 423, 423–35 (2015) (citing examples of Nelson Mandela, George Washington, and Mahatma Gandhi, the authors “show that prominent agents can counter the power of history by exploiting their visibility to change the prevailing social norm from *Low* to *High*”).

<sup>99</sup> Chong, *supra* note 64, at 30–31 (“The best of the cross-sectional studies has shown that, across civil liberties issues, the degree of elite consensus about the applicable democratic value on a particular issue affects the clarity of the norm in the eyes of the public and therefore the likelihood that the norm will shape public opinion.”).

<sup>100</sup> See TIMOTHY C. SHIELL, *CAMPUS HATE SPEECH ON TRIAL* 53 (1998) (discussing how the intervention of Nat Hentoff, Professor C. Van Woodward, Law School Dean Guido Calabresi, and University President Benno Schmidt made a significant difference in protecting free speech at Yale University when it was under assault). However, the university elites can sway the norm in either direction. See Chong, *supra* note 64, at 33 (“When respected legal scholars, academics, and other political elites argue that hate speech is not protected by the First Amendment, they weaken the elite consensus around the democratic value and potentially affect how people comprehend and apply the norm of free speech.”).

<sup>101</sup> See Allison Harell, *Political Tolerance, Racist Speech, and the Influence of Social Networks*, 91 SOC. SCI. Q. 724, 724 (2010) (“The analysis suggests that exposure to racial and ethnic diversity in one’s social networks decreases political tolerance of racist speech while simultaneously having a positive effect on political tolerance of other types of objectionable speech.”); Diana C. Mutz, *Cross-Cutting Social Networks: Testing Democratic Theory in Practice*, 96 AM. POL. SCI. REV. 111, 123 (2002) (suggesting that exposure in social networks to persons with differing political views has a modest impact on the increase in political tolerance).

to, a social norm.<sup>102</sup> Norms do not necessarily develop in a random or haphazard manner. Sometimes, a group with the purpose of changing social attitudes or behavior can be quite successful both with respect to legal rules and social norms. Obvious examples would be the labor, civil rights, environmental, feminist, and gay rights movements. In each case, these movements changed legal and social norms, often radically, but usually through deliberate and co-ordinated action. Apart from organized groups, aggressive individuals, “heroes,” to use Richard McAdams terminology, or “norm entrepreneurs,” to use Cass Sunstein’s phrase, can also play a significant role in the creation or destruction of social norms.<sup>103</sup>

Since our free speech tradition has to a large extent developed through judicial interpretation of the First Amendment, it is likely that social norms will be heavily influenced by legal norms even though the latter do not control the former.<sup>104</sup> To a large but ultimately unknowable extent, our vigorous free speech culture is attributable to judicial protection of freedom of speech during the Twentieth Century. The average citizen is unaware of the state action doctrine and often assumes incorrectly that the First Amendment protects free speech against private as well as public restraint.<sup>105</sup> And even if people recognize that the First Amendment does not curb private restriction, and certainly not social intolerance, of speech, nevertheless the free speech values and principles articulated by the courts to some extent permeate the culture and are internalized by citizens. If, as seems to be the case, elite opinion influences social norms, it is likely that the elite opinion that has been most influential with respect to speech norms is that of the judges. If the courts have created a legal culture that favors unrestrained free speech, the social culture has been influenced as well.

History and tradition also influence the development of social norms.<sup>106</sup> To an extent, people continue to do what they have always done absent a reason to change. The United States has not always maintained a tradition of relatively unrestrained speech, but there has been such a tradition over

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<sup>102</sup> See WALKER, *supra* note 43, at 15 (“The principle of free speech has triumphed in large part because it has had a vigorous and effective advocate.”).

<sup>103</sup> McAdams, *supra* note 94, at 366–70; Sunstein, *supra* note 91, at 909. Sunstein cites Martin Luther King, William Bennett, Louis Farrakhan, Catherine MacKinnon, Ronald Reagan, and Jerry Falwell as examples of norm entrepreneurs. *Id.* at 929.

<sup>104</sup> See McAdams, *supra* note 94, at 349 (citing anti-dueling laws as an example of how “the law can influence the norm”). See ROBERT L. TSAI, *ELOQUENCE AND REASON* (Yale Univ. Press 2008), for examples of the impact of law in the free speech culture.

<sup>105</sup> See Eule & Varat, *supra* note 46, at 1540.

<sup>106</sup> Acemoglu & Jackson, *supra* note 98, at 448 (“[B]ehaviour today can be uniquely determined by distant history that is irrelevant to current payoffs. This is because past events provide information about how other agents will interpret their information.”).



the past fifty years and that is the period with which most people alive today would identify. As such, a social norm of relatively unrestrained free speech represents the status quo.

Art and literature have always had an impact on social norms. Indeed, one of the points of art and literature is to challenge existing social norms. If art and literature are broadly defined to include mass entertainment through movies, television, music, and social media, then the penetration of art and literature has never been more pervasive. As a matter of common sense, these elements of pop culture must have some influence, perhaps a large influence, on social norms. Indeed, the producers of pop culture often deliberately set out to change or redirect social norms, including norms with respect to speech. There can be little question that an increasingly permissive approach to sex, violence, and language in television, motion pictures, music, and literature over the past sixty years has had a significant impact on social norms. Indeed, the process of declining social norms, especially with respect to sexual matters, was cleverly satirized by Cole Porter in 1934 in the immortal lyrics of *Anything Goes*.<sup>107</sup>

Much of the development of norms is sub-conscious or reflexive, however some of it is deliberate and rational. Indeed, norms of tolerance permit the reasoned re-evaluation of existing norms.<sup>108</sup> With respect to the boundaries of free speech, there has been significant reasoned debate. Defenders of free speech have been able to rely on cogent arguments developed by the likes of Milton, Mill, Holmes, Brandeis, Meiklejohn, and others, bolstered by the inspiring rhetoric of such First Amendment classics as the Holmes dissent in *United State v. Abrams*,<sup>109</sup> the Brandeis concurrence in *Whitney v. California*,<sup>110</sup> the Jackson opinion in *West Virginia Board of Education v. Barnette*,<sup>111</sup> and the Brennan opinion in *New York Times v. Sullivan*.<sup>112</sup> The reasoning is powerful, and even more so the

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<sup>107</sup> “In olden days a glimpse of stocking  
Was looked on as something shocking  
But heaven knows  
Anything goes  
Good authors who too once knew better words  
Now only use four letter words  
Writing prose  
Anything goes”

COLE PORTER, *ANYTHING GOES* (1934).

<sup>108</sup> McAdams, *supra* note 94, at 397.

<sup>109</sup> 250 U.S. 616, 624 (1919) (Holmes, J., dissenting).

<sup>110</sup> 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

<sup>111</sup> 319 U.S. 624, 625 (1943).

<sup>112</sup> 376 U.S. 254, 256 (1964).

rhetoric. Those arguing for some restriction on free speech, especially with respect to racist or sexist speech, have their rational arguments as well. In response to the First Amendment, they raise constitutional counter-arguments based on equality, as well as consideration of the victim's perspective.<sup>113</sup> It is difficult to determine how much of a role rational deliberation plays in the development and maintenance of social norms but with respect to the boundaries of free speech, rational debate is not irrelevant.

Perhaps more than anything, actual experience shapes social norms. Most people internalize and conform to the norms of the societies or cultures in which they live. Friends and family have a significant impact in establishing or maintaining social norms that tend to govern a person's speech and behavior.<sup>114</sup> Those norms obviously come from somewhere. They are developed over time based on the interaction of many of the factors discussed above. However once in place, they exert a powerful influence on members of the group. As a matter of everyday experience, and as Mill recognized, people generally conform to the norms of society as a means of achieving social acceptance.<sup>115</sup> Thus entrenched social norms exert a powerful gravitational force. Mill recognized this and throughout his career it continued to upset him.

Mill believed that existing social norms favored the status quo in most matters, especially speech.<sup>116</sup> That is true almost as a matter of definition. Existing social norms don't simply favor the status quo, rather, they are the status quo. They represent a bulwark against the type of intellectual eccentricity that Mill believed essential to the full development of critical thinking.

Mill argued for a revision of what he perceived to be unduly censorial social norms in order to promote greater freedom of speech and thought. He was writing in a society that had struggled for greater tolerance of dissident speech over the centuries. Milton's *Areopagitica*, published a full two centuries prior to *On Liberty*, had struck a blow for toleration of speech (at least that of Protestants).<sup>117</sup> And over the next two centuries, as Mill acknowledges, England had progressed toward greater tolerance of speech, at least as a legal matter.<sup>118</sup> Even so, when Mill wrote England had no First

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<sup>113</sup> See Delgado, *supra* note 42, at 107.

<sup>114</sup> Gibson, *supra* note 45, at 341.

<sup>115</sup> See MILL, *supra* note 1, at 126.

<sup>116</sup> *Id.*

<sup>117</sup> JOHN MILTON, *AREOPAGITICA* (Okitoks Press 2017) (1644).

<sup>118</sup> MILL, *supra* note 1, at 86.

Amendment nor an entrenched tradition of support for free speech. Indeed, Mill was attempting to create just such a culture with *On Liberty*.

The United States, in the early twenty-first century finds itself in quite a different position. Despite, a checkered history of intolerance of dissident speech, the latter part of the twentieth century witnessed the development of the most speech tolerant culture that the world has ever known.<sup>119</sup> As has often been recognized, the United States is a true outlier in the world with respect to the protection of offensive speech.<sup>120</sup> This in turn presents something of a paradox. Although social norms ordinarily favor the status quo, perhaps in this unusual instance the status quo supports tolerance of marginal and unconventional speech as opposed to its suppression. In other words, in twenty-first century America, perhaps John Stuart Mill has succeeded beyond his wildest dreams. The social norm is one of tolerance.

Perhaps the political correctness movement that started in the 1980s and seems to have gathered steam more recently is best understood as a reaction against the norm of tolerance. If so, the defenders of the free speech norm find themselves in a different position than Mill did 150 years earlier. Mill hoped to move the social norm with respect to the tolerance of unconventional speech quite beyond where it had previously existed. Current defenders of a vigorous free speech norm are attempting to preserve what has already been achieved against a more restrictive counter movement. This provides an advantage that Mill lacked in that it is generally easier to defend the citadel than to attack it.

However, there is a further layer of complexity. To the extent that the proponents of political correctness or social intolerance of speech have made significant inroads in certain domains, such as academia, the champions of free speech may quickly find that instead of defending an established norm of tolerance, they are now challenging a recently enshrined norm of restriction.<sup>121</sup> Even so, the speech defenders still possess an advantage that Mill lacked—a well-established legal and social tradition of free speech tolerance including over a century of celebration of the wisdom of John Stuart Mill.

Assuming that the defenders of relatively unrestricted speech and the proponents of limiting hurtful speech, whether because it is racist, sexist, homophobic, or simply insulting or insensitive, are currently locked in a

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<sup>119</sup> See Chong, *supra* note 64, at 29 (“Since the 1950s, the overall trend in American politics and law has been toward strengthening the norm of free speech.”).

<sup>120</sup> See WALKER, *supra* note 43, at 4–5.

<sup>121</sup> Cf. Chong, *supra* note 64, at 34 (“[O]utside the academy, there has been extensive criticism of the new college culture, thus diluting and compromising the strength of the ideas emanating from that source.”).

struggle over the legitimate boundaries of free speech, how should the battle be fought?

Should the defenders of free speech culture necessarily object to any social intolerance of speech? Of course not. As explained above, at least to some extent, social intolerance is an acceptable form of counter-speech and as such is deserving of respect and protection. Suppose that a speaker makes a racist remark. One method of counter speech is to argue that the very premise of the remark is wrong or misguided. Another response is to declare: "That is an outrageous statement. It has no place in civilized discourse and I will not tolerate it." Yet another is to simply turn one's back on the speaker, walk away, and avoid further interaction with him or her. The latter two responses would be examples of social intolerance. All three responses would seem to fall within the ambit of freedom of speech. All are intended to convey extreme disagreement with the speaker. The latter two examples of social intolerance may be intended to silence the speaker. That in itself seems inconsistent with a flourishing free speech culture. However, the first example, arguing the merits of the speaker's premise, though solidly within the legitimate domain of free speech, would also seem to have the purpose and effect of silencing, at least in terms of convincing the speaker that either his message or his manner of expressing it was profoundly wrong and should not be repeated. A point of free speech, as Mill argued, is to change minds, resulting in the rejection of previously held opinions. If done effectively, it may ultimately result in silencing.

Still there would seem to be a difference between meeting disagreeable speech squarely on the merits in an attempt to discredit it through open debate as opposed to simply responding with outrage or social shunning apparently designed to silence absent intellectual engagement. Although either approach may legitimately claim to fall within the domain of free speech, the former seems closer to its core while the latter straddles the margins. The ideal marketplace of ideas, the market to which Mill was devoted, assumes rational debate on the merits. The real marketplace as Mill understood is far more vicious. Mill's hope as expressed at the conclusion of his essay on free speech and thought was to move society, however gradually, from the real toward the ideal.<sup>122</sup> Likewise, if Mill was correct that unrestrained speech is a pre-condition of free thought and intellectual development, silencing through social intolerance seriously undermines the value of critical thinking. Serious criticism or counter-argument arguably forces the individual to reconsider his or her position.

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<sup>122</sup> See MILL, *supra* note 1, at 117.

Mere social intolerance through shunning, marginalizing, or excluding the speaker, however, could cause the speaker to reevaluate but certainly would not provide an articulated reason for doing so. And as Mill believed, social intolerance is more likely to result in unthinking social conformity, the very antithesis of the vibrant thinker that Mill cherished.<sup>123</sup> General social intolerance of disagreeable speech may claim to qualify as a legitimate method of counter-speech, but just barely. It certainly is not the best means of engaging the speaker.

Socially shunning offensive or disagreeable speech may be an acceptable though unattractive alternative. Shouting down or disrupting the speaker is not. It is entirely inconsistent with free speech values.<sup>124</sup> The shunned speaker has at least had his say. If he is silenced, it is as an exercise of his autonomy, though perhaps coerced by social pressure. The speaker who is prevented from speaking by the so-called heckler's veto has never been given the opportunity to speak. His ideas have not found their way into the marketplace. He has not been allowed the opportunity to articulate his views. And though it is at least possible that angry shouts of disapproval may cause the speaker to re-evaluate his own views, the likelihood is small and the cost to free speech values is simply too great.

Although the heckler's veto should be beyond the pale of acceptable speech, heckling alone should not be. Heckling, that is aggressive verbal disagreement during the course of a speech, is a part of our free speech tradition. Heckling after all is counter-speech; outside of the Robert's Rules of Order to be sure, yet still very effective. One need only watch a debate in the House of Commons to appreciate the power and value of heckling. Mill emphasized that a core function of free speech is to promote constant re-evaluation of ideas and opinions. Critical counter-speech serves the function of illuminating error in argument. Skillful heckling of a superficial or illogical speech can be an effective method of illuminating the flaws in an argument. Of course not all heckling is skillful. Much of it is boorish and vulgar. But not all speech is enlightening either. Most isn't. But the legitimacy of speech or counter-speech does not depend on its cogency. A distinction should be drawn between heckling that shuts down a speaker

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<sup>123</sup> See *id.* at 101–02.

<sup>124</sup> See *Updated Statement on Violent Protest at University of California, Berkeley*, FOUND. FOR INDIVIDUAL RTS. IN EDUC. (Feb. 2, 2017), <https://www.thefire.org/updated-statement-on-violent-protest-at-university-of-california-berkeley/> (condemning the riot at the University of California, Berkeley that forced cancellation of a speech by Milo Yiannopoulos). See also David Bromwich, *The New Campus Censors*, CHRON. OF HIGHER EDUC., Nov. 17, 2017, for a discussion of disruption of speakers on campus.

and that which does not. The former is beyond the pale while the latter is not.

In confronting the real marketplace of ideas, should social intolerance designed primarily if not exclusively to silence speech be accepted as a legitimate part of the debate, or should it be condemned as antithetical to the values of free speech? The answer may to some extent depend on perspective.

From the perspective of the socially intolerant, such behavior may be characterized as aggressive counter-speech, a means of decisive reply to an arguably offensive message. The socially intolerant are still competing in the marketplace, they are simply competing hard and playing to win. Silencing the opposition is simply one method of winning the debate. From the perspective of society, it may appear different. One dominant social value protected by the marketplace of ideas is to make progress towards discovering the truth through the clash of ideas both socially and individually. Mill argued that most ideas are but half-truths and it is only through consideration of all perspectives that the whole truth emerges.<sup>125</sup> By silencing speech, social intolerance inevitably suppresses some truth, or as Mill would have it at least some half-truth. This necessarily undermines the proper functioning of the marketplace of ideas.

From the perspective of the potential speaker, the harm would appear to be even greater. As Mill explained, social intolerance of speech inhibits the speaker both with respect to speech and thought.<sup>126</sup> A pall is cast over the entire intellectual enterprise. The speaker ceases to speak and the thinker ceases to think. There is no intellectual growth. From Mill's perspective, this was clearly the most serious consequence of social intolerance. This is why Mill suggested that social intolerance is as, if not more, destructive than legal prohibition.<sup>127</sup>

So assuming that at least sometimes social intolerance of speech is socially beneficial, both by silencing at least some speech that probably should be silenced and as a somewhat legitimate means of responding to disagreeable speech, can it be contained in such a way that it does not undermine the important values of free speech by casting a pall of orthodoxy over the marketplace of ideas? Perhaps the greatest difficulties with any regulation of speech, legal or social, are the inter-related concepts of over breadth and the chilling effect. Assuming that some speech ought to be silenced, there is a legitimate fear that any regulatory system will cover

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<sup>125</sup> See MILL, *supra* note 1, at 121–22.

<sup>126</sup> *Id.* at 100–01.

<sup>127</sup> See *id.* at 101–02.

speech that should not be silenced. That is the over breadth problem.<sup>128</sup> In addition, even if regulation is not intended to reach protected speech, the concept of the chilling effect assumes that potential speakers will be fearful of prohibitions (legal or social) and through self-censorship relinquish the right to engage in non-prohibited speech.<sup>129</sup> In the context of legal prohibition of speech, courts can tailor permissible regulation to avoid the pitfalls of over breadth and the chilling effect. In the case of social regulation however, social and cultural norms must replace judicial protection. Obviously, this is a rather extreme challenge.

If a society is to avoid the detrimental impact of self-censorship induced by social intolerance, it must develop and nurture a vigorous free speech culture. That does not mean that there are no boundaries. Of course there are. Personally insulting or demeaning speech, though not legally prohibited, can legitimately be met with vigorous social intolerance. In a particular context, there may be other examples as well. However, there should be clear recognition of the tendency to continually expand the domain of socially prohibited speech to include that speech which is simply inconsistent with the values, beliefs, and opinions of the majority or of some influential segment of the population. A social norm excluding racial epithets from the domain of acceptable speech could unfortunately expand to prohibit criticism of race-based affirmative action. A norm to exclude sexist insults might expand to prohibit criticism of progressive abortion policies or women's aptitude for STEM subjects. A norm excluding insults based on sexual orientation might readily be applied to criticism of same-sex marriage. Indeed, an examination of the enforcement of speech codes on college campuses reveals that all this and much more has occurred.<sup>130</sup> As such, there should be automatic suspicion of any attempt to exercise social intolerance against harmful speech out of legitimate fear that it has either the purpose or effect of suppressing that which should be spoken. That is not to say that social intolerance is always improper, but rather that it always carries the burden of justification.

Yet another lesson learned from the legal domain is that intolerance of specific viewpoints, however loathsome they may be, is simply inconsistent with a free speech culture. Viewpoint discrimination is a prohibited manner of legal regulation.<sup>131</sup> If the value of free speech as expounded by Mill is to

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<sup>128</sup> See, e.g., *Bd. of Airport Comm'rs. v. Jews for Jesus*, 482 U.S. 569, 574 (1987).

<sup>129</sup> See Frederick Schauer, *Fear Risk and the First Amendment: Unraveling the Chilling Effect*, 58 B.U. L. REV. 685, 689 (1978).

<sup>130</sup> See HENTOFF, *supra* note 37, at 146–92; LUKIANOFF, *supra* note 37, at 40–52.

<sup>131</sup> See, e.g., *Matal v. Tam*, 137 S. Ct. 1744, 1757 (2017) (emphasizing the prominence of the anti-viewpoint discrimination principle under the First Amendment); *R.A.V. v. City of St. Paul*, 505 U.S.

be realized, no opinion, including racist and sexist opinions, should be banned. As Mill argued, wrong-headed opinions contribute to “the clearer perception and livelier impression of truth, produced by its collision with error.”<sup>132</sup> In addition, however true an opinion or idea may be, “if it is not fully, fearlessly and frequently discussed, it will be held as dead dogma, not a living truth.”<sup>133</sup>

Assuming that freedom of speech is extremely valuable both to the individual and to society, and that social intolerance, though sometimes a legitimate part of the domain of freedom of speech, nevertheless often undermines free speech and its values by casting a pall of orthodoxy, can free speech and its values be vindicated? That is, can the defenders of free speech hold their own or even gain ground in the struggle over what is acceptable speech? The answer is yes, but if and only if the defenders of free speech have the courage and persistence to continually defend the value of free speech against constant challenge. As discussed above, there is a struggle over the location of the boundaries of social norms regarding acceptable speech. Those who would restrict free speech raise arguments of equality, decency, inclusion, and freedom from offense, degradation, and emotional distress. These are sympathetic values worthy of protection. However, throughout history, attempts to restrict freedom of speech have been based on the preservation of admirable social and cultural values. As always, the case for relatively unrestricted speech must emphasize that it is worth preserving even at the cost of the infliction of some social harm. Free speech is not costless, however the cost is worth the value. If a free speech norm is to be successfully defended, it must have prominent, outspoken, aggressive, and well organized advocates. In recent decades people such as Nat Hentoff, Alan Dershowitz, Lee Bollinger, Ahveh Neir, Ira Glasser, Jay Sekulow, Floyd Abrams, Greg Lukianoff, and many others have answered the call time and again. Organizations such as the American Civil Liberties Union, the Foundation for Individual Rights in Education (FIRE), the Alliance Defense Fund, the American Center for Law and Justice (ACLJ), the Rutherford Institute, and the First Amendment Center at Vanderbilt University continue to fight for freedom of speech. As noted above, leadership plays a significant role in the development and maintenance of social norms. But so does education and, unfortunately, educational institutions and their leaders have often been responsible for creating a culture in which freedom of speech is unduly restricted. But that is not always the case. The examples of Benno Schmidt, C. Van Woodward, and

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377, 391 (1992).

<sup>132</sup> See MILL, *supra* note 1, at 87.

<sup>133</sup> *Id.* at 103.



Donald Kagan at Yale,<sup>134</sup> Lee Bollinger at Columbia,<sup>135</sup> Alan Dershowitz at Harvard,<sup>136</sup> and Geoffrey Stone and Robert Zimmer at the University of Chicago,<sup>137</sup> to mention a few of the most prominent, have provided a significant boost for freedom of speech in academia.

The advocates of freedom of speech enjoy the benefit of a remarkable tradition of free speech theory, rhetoric, and judicial triumph. As important as this tradition is in laying the foundation for speech protective social norms, it is not a part of the atmosphere. Rather, it must be taught and re-taught. Noted free speech advocate Nat Hentoff was fond of quoting Ronald Reagan's statement that "if we forget what we did, we won't know who we are . . . ."<sup>138</sup> It is all too easy to take free speech for granted. Many don't. The stories of the great free speech struggles and victories such as *West Virginia Board of Education v. Barnette*,<sup>139</sup> *New York Times v. Sullivan*,<sup>140</sup> *Cohen v. California*,<sup>141</sup> and *Texas v. Johnson*,<sup>142</sup> just to name a few, must be told and retold if they are to continue to resonate and influence.

In many areas, reasoned argument plays little role in the adjustment of social norms. However, freedom of speech is an area in which cogent argument can make a difference. Speech theorists have been devising and debating arguments as to why free speech matters for centuries. Arguably, John Stuart Mill stands atop the pyramid with Holmes, Brandeis, Hand, and Meiklejohn not far behind. In the latter half of the twentieth century, free

<sup>134</sup> See HENTOFF, *supra* note 37, at 99–145 (detailing the defense of free speech at Yale by noted academics).

<sup>135</sup> President Bollinger permitted Iranian President Mahmoud Ahmadinejad to speak at the World Leaders Forum at Columbia University in 2007 despite vigorous protest. Anthony Faiola & Robin Wright, *Ahmadinejad's Day One in New York: A Hostile Reception, a Rambling Talk*, WASH. POST (Sept. 25, 2007), <http://www.washingtonpost.com/wp-dyn/content/article/2007/09/24/AR2007092400168.html>.

<sup>136</sup> Law Professor Alan Dershowitz defended free speech at Harvard for decades. He recounts many of the struggles in his autobiography. ALAN DESHOWITZ, *TAKING THE STAND: MY LIFE IN THE LAW* (2013).

<sup>137</sup> Professor Stone, the Edward R. Levi, Professor of Law and former Provost of the University of Chicago, published a short defense of free speech at the University of Chicago. Geoffrey Stone, *Statement of Principles of Free Inquiry*, UCHICAGO NEWS (July 2012) <https://news.uchicago.edu/behind-the-news/free-expression/statement-principles-free-inquiry>. President of the University of Chicago Robert Zimmer has consistently defended freedom of speech on campus. See, e.g., Robert J. Zimmer, President, Univ. of Chi., Address at Colgate University, Free Expression on University Campuses: The Chicago Principles (Mar. 30, 2017), <http://president.uchicago.edu/page/address-colgate-university>.

<sup>138</sup> HENTOFF, *supra* note 37, at 387.

<sup>139</sup> 319 U.S. 624 (1943) (invalidating expulsion of Jehovah's Witness children for failure to salute the flag).

<sup>140</sup> 376 U.S. 254 (1964) (extending First Amendment protection to libel actions brought by public officials).

<sup>141</sup> 403 U.S. 15 (1971) (invalidating a conviction for carrying a jacket with an offensive word on it in public).

<sup>142</sup> 491 U.S. 397 (1989) (invalidating a conviction for burning the American flag).

speech theory has been eloquently propounded by Harry Kalven,<sup>143</sup> Thomas Emerson,<sup>144</sup> Vince Blasi,<sup>145</sup> Lee Bollinger,<sup>146</sup> Fred Schauer,<sup>147</sup> Geoffrey Stone,<sup>148</sup> Ed Baker,<sup>149</sup> Steve Shiffren,<sup>150</sup> and Kent Greenawalt,<sup>151</sup> simply to mention a few. The arguments that these scholars have produced are cogent and powerful. They should be circulated more widely, although often in a more simplified and accessible form. If reasoned argument can influence the establishment and defense of social norms, and in this instance it certainly can, the foundation has been carefully laid.

### III. CONCLUSION

As Nat Hentoff has proclaimed, “censorship . . . remains the strongest drive in human nature, with sex a weak second.”<sup>152</sup> Attempts to restrict freedom of speech both legally and socially are constant and pervasive. The relatively liberal norms of free speech which took hold in the United States in the latter half of the twentieth century can be maintained only through vigorous action by the defenders of speech.

It may seem idealistic if not downright foolish to attempt to influence the boundaries of a domain that by definition is impervious to regulation. However, freedom of speech is a social and cultural institution (using the term very loosely) that is not immune to social and cultural norms. The creation and defense of those norms, and the definition of the boundaries, is a process that occurs to a large degree within the domain of free speech itself. As long as there are those who agree with Mill that freedom of speech is extraordinarily valuable and that social intolerance presents a serious threat to its health and existence, there will be efforts to push back against intolerance of controversial speech and to make the case vigorously and often for a largely unrestrained marketplace of ideas. Mill was one man (though an unusually articulate and intelligent man). Yet as history’s preeminent defender of free speech, the impact that he has had is

<sup>143</sup> See, e.g., HARRY KALVEN, JR., *A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA* (Jamic Kalven ed., 1988).

<sup>144</sup> See, e.g., *THE SYSTEM OF FREE EXPRESSION* (1970).

<sup>145</sup> See, e.g., *IDEAS OF THE FIRST AMENDMENT* (2d ed. 2012).

<sup>146</sup> See, e.g., *THE TOLERANT SOCIETY* (1988).

<sup>147</sup> See, e.g., *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* (1982).

<sup>148</sup> See, e.g., *PERILOUS TIMES: FREE SPEECH IN WARTIME* (2004).

<sup>149</sup> See, e.g., *HUMAN LIBERTY AND FREEDOM OF SPEECH* (1989).

<sup>150</sup> See, e.g., *THE FIRST AMENDMENT, DEMOCRACY AND ROMANCE* (Princeton Univ. Press, photo. reprint 1993) (1990).

<sup>151</sup> See, e.g., *FIGHTING WORDS* (1995).

<sup>152</sup> HENTOFF, *supra* note 37, at 17.

incalculable. Close to one hundred and fifty years after its publication, *On Liberty* remains required reading. As long as Mill has disciples with the courage, and it often takes courage, to defend the value of free speech, social intolerance of speech can be held at bay.

