SHOUTING "FIRE!" IN A THEATER AND VILIFYING CORN DEALERS[1]

VINCENT BLASI[*]

I. INTRODUCTION

Five years ago, Fred Schauer published an article with the intriguing title: "Do Cases Make Bad Law?"[2] Playing off Holmes' observation that "[g]reat cases like hard cases make bad law,"[3] Schauer explored the possibility, as he put it, that "it is not just great cases and hard cases that make bad law, but simply the deciding of cases that makes bad law."[4] His concern, confirmed and deepened by his characteristically balanced inquiry, was that general principles forged in the resolution of specific legal disputes can suffer by virtue of that provenance.[5] Because such principles by definition are meant to carry some measure of authority in the resolution of future disputes, a principle invoked to justify a particular case outcome needs to be formulated with an accurate understanding of what kinds of cases, in what proportions, are likely to arise in the future that would be subject to the principle that is employed to decide the case at hand.[6] And that understanding, Schauer maintained, more often than not will be distorted by various cognitive biases that derive from the partial

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[*] Corliss Lamont Professor of Civil Liberties, Columbia Law School. This is a revised version of the John E. Sullivan Lecture, delivered at the Capital University Law School on April 8, 2010. Having met Professor Sullivan at the 2009 Sullivan Lecture and having heard in the tributes of his former students about his high standards and loving devotion to his craft, I was honored to be invited to give the Sullivan Lecture. I am indebted to Kent Greenawalt, Joseph Raz, and especially Frederick Schauer for their constructive criticisms and helpful suggestions, and to Brent Ferguson and Lisa Sokolowski for superb research assistance. I also want to thank my former student, Professor James Beattie of the Capital law faculty, for introducing me to the wonderfully vibrant intellectual community of which he is a part.

[1] See Frederick Schauer, *On the Relation Between Chapters One and Two of John Stuart Mill's* On Liberty, 39 CAP. U. L. REV. 571 (2011), for a response to this article.

[2] Frederick Schauer, *Do Cases Make Bad Law?*, 73 U. CHI. L. REV. 883, 883 (2006).

[3] N. Sec. Co. v. United States, 193 U.S. 197, 400 (1904).

[4] Schauer, *supra* note 2, at 885.

[5] *See id.* at 884–85.

[6] *Id.* at 893–94.

and often unrepresentative information generated by the instant litigation[7] and by the pull of equities specific to the case before the court.[8]

My topic in this lecture is not real cases, with their potential to distort the choice of principles, but rather hypothetical cases. Such figments of the human imagination no doubt spring from and perpetuate cognitive biases of their own,[9] biases that could lead to the adoption of principles that are less efficacious than others that might have been adopted but for the distortions introduced by thinking about the hypothetical case. On the other hand, as Professor Schauer has observed, hypothetical cases may exert a less powerful distorting influence than real cases precisely because their lack of flesh-and-blood, on-the-ground facts and parties gives them less salience, and on that account less gravitational pull in the process of principle selection.[10] One might even speculate that because hypothetical cases are invented for their heuristic efficacy, they can provide a countervailing salience that might diminish the distorting effects of the information and equities presented by the case at hand.

This problem of the distorting effect of the use of hypothetical cases in legal reasoning is potentially a rich subject. It is, however, a line of inquiry that I am neither inclined nor well equipped to pursue. My interest in hypothetical cases lies elsewhere. I will examine what are probably the two most famous hypothetical cases about free speech ever devised, not to assess their possible distorting influence but rather to determine what they are supposed to prove.

No one familiar with the history of Anglo-American thought about the freedom of speech will be surprised by my choice of examples. The first is John Stuart Mill's statement in *On Liberty* that the opinion that corn dealers are starvers of the poor "may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn dealer."[11] The second is Justice Oliver Wendell Holmes' dictum that the First Amendment "would not protect a man in falsely shouting fire in a theatre and causing a panic."[12] Mill and Holmes not only produced philosophical arguments that have figured prominently in modern analysis of the freedom of speech, they also devised limiting cases that have proved

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[7] *Id.* at 894–99.

[8] *Id.* at 899–901.

[9] *See id.* at 894–96.

[10] *Id.* at 913.

[11] *See* JOHN STUART MILL, ON LIBERTY 121 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

[12] Schenck v. United States, 249 U.S. 47, 52 (1919).

through the years to have unexpected resonance. A critical comparison of these famous starting points for marking the limits of free speech is in order.[13]

II. VILIFYING THE CORN DEALER

Few political issues in Mill's time generated so much class warfare and political antipathy as the Corn Laws, protective tariffs that exerted upward pressure on the price of bread to the benefit of farmers and agricultural laborers and the dismay of the urban poor mired in their Malthusian demographics.[14] In Victorian England, to express an opinion regarding the character or intentions of corn dealers was to touch nerves.[15]

In *On Liberty*, Mill defends the principle that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[16] He asserts that this principle entails "absolute freedom of opinion and sentiment on all subjects."[17] He then observes, enigmatically:

> The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.[18]

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[13] Surprisingly, despite the dominant role that Mill and Holmes have played in the history of thought about the freedom of speech, until last year there existed in the scholarly literature no detailed comparison of their theories. That omission is corrected by Irene M. Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J.L. & HUMAN. 35 (2010).

[14] *See* MARK OVERTON, AGRICULTURAL REVOLUTION IN ENGLAND: THE TRANSFORMATION OF THE AGRARIAN ECONOMY 1500–1850, at 145–46 (1996); Cheryl Schonhardt-Bailey, *Introduction* to FREE TRADE: THE REPEAL OF THE CORN LAWS, at xviii–xxvii (1996); J. R. Wordie, *Perceptions and Reality: The Effects of the Corn Laws and Their Repeal in England, 1815–1906*, *in* AGRICULTURE AND POLITICS IN ENGLAND, 1815–1939, at 33, 33–35 (J. R. Wordie ed., 2000). For more information on the eighteenth century background to this chronic and often violent conflict over the price of bread, see E. P. Thompson, *The Moral Economy of the English Crowd in the Eighteenth Century*, 50 PAST & PRESENT 76, 94–107 (1971).

[15] *See* sources cited *supra* note 14.

[16] MILL, *supra* note 11, at 80.

[17] *Id.* at 82.

[18] *Id.* at 82–83.

This juxtaposition of propositions has puzzled interpreters ever since Mill's essay achieved almost instant canonical status.[19] Is he saying that a provocative or disgusting opinion can cause harm when expressed publicly but that such an act of expression cannot be regulated because it is "practically inseparable" from the act of silently holding the opinion? Why isn't the difference in the harm-causing potential that follows from the expression of the opinion enough to distinguish the two acts? Or is Mill's belief that although the expression of a disturbing opinion "concerns other people" who are outraged or threatened by it, that effect does not amount to the type of "harm to others" that limits his liberty principle? It is all very confusing.

Hence the profound expositional importance of his corn dealer example:

> No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. Acts of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of mankind.[20]

To understand the line that Mill has in mind, we need to appreciate why he thinks that the circulation through the press of an accusation vilifying corn dealers "ought to be unmolested," and also why he believes that the very same opinion can be the subject of punishment when

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[19] See JOHN SKORUPSKI, JOHN STUART MILL 369–75 (1989) [hereinafter SKORUPSKI, JOHN STUART MILL], for the best explanation of these tensions that I have discovered. *See also* JOHN SKORUPSKI, WHY READ MILL TODAY? 56–61 (2006); C. L. TEN, MILL ON LIBERTY 132–36 (1980); R. H. Hutton, *Mill on Liberty*, 8 NAT'L REV. 393 (1859), *reprinted in* LIBERTY: CONTEMPORARY RESPONSES TO JOHN STUART MILL 81, 106–09 (Andrew Pyle ed., 1994).

[20] MILL, *supra* note 11, at 121.

delivered orally or via a placard "to an excited mob assembled before the house of a corn dealer." Is the difference simply the presumed higher probability of an attack on the corn dealer when members of the excited mob receive the opinion in person at a place where action can be commenced immediately? That assessment of comparative probabilities is highly plausible, but in distinguishing the two cases, Mill argues as if he perceives a difference in principle, not just in degree of probabilities. Furthermore, depending on the extent of circulation, power of the prose, and reputation of the writer in the relevant quarters, an opinion published in the press could have considerable harm-causing potential by virtue of its capacity to appeal to large numbers of persons who may harbor grievances against different corn dealers. That being the case, why doesn't Mill qualify his assertion that the act of circulating such an incendiary opinion through the press is never punishable? And why, if all that is involved is an empirical estimate of probabilities, does Mill employ the concept of a "positive instigation to some mischievous act"? Why not "causal connection to some mischievous act" or some other formulation less focused on the moral agency of the speaker? "Positive instigation" appears to bring into play the character of the speech, the intentions of the speaker, perhaps the manner by which the communication induces listeners to act, and possibly the vulnerabilities of audience members. In other words, Mill seems to distinguish the two situations qualitatively, not just by means of a quantitative difference in the probability of harm.

One might challenge this reading by pointing to Mill's use of the term "instigation" at an earlier point in *On Liberty* when he is discussing the advocacy of tyrannicide. There he says: "I hold that the instigation to [tyrannicide], in a specific case, may be a proper subject of punishment, but only if an overt act has followed, and at least a probable connection can be established between the act and the instigation."[21] It is true that in this passage Mill takes probability into account, but he does so not to determine what counts as an "instigation," much less a "positive instigation," but rather to establish what he considers to be the requisite connection, if punishment of the speaker is to be justified, between an instigation and the harmful event that it may be thought to have caused. He thus treats instigation and causation as independent variables, both necessary, such that causation cannot define instigation. It is unlikely that Mill thinks that an overt act of tyrannicide that has some "probable connection" to *any* kind of prior speech advocating or justifying tyrannicide is a sufficient ground,

[21] *Id.* at 87.

without more, for punishing the speaker. That would hardly comport with his call three sentences earlier for "the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, no matter how immoral it may be considered."[22] The correct interpretation of the tyrannicide passage, I believe, is that proposed by Geoffrey Marshall:

> What he presumably ought to be saying is that if an act is mischievous or damaging to others or to society, society may properly make it criminal and suppress such speech acts as are so closely connected with the commission of the act as to be part of it or be counted as attempts to do the act; but that something to be called discussion, advocacy, debate, or expression of opinion about its desirability, can never be deemed to be part of a mischievous action in this sense.[23]

Mill's key distinction is between, as Marshall puts it, "discussion, advocacy, debate, or expression of opinion" and "positive instigation." That is a conceptual or qualitative distinction that goes to the nature and social value of the speaker's activity, which is exactly and exclusively what Mill talks about in the long, justly renowned chapter that is bracketed by the tyrannicide and corn dealer examples.[24]

Another qualitative difference that might lie at the heart of Mill's distinction is the difference between the total prohibition of an idea and a regulation that is partial in the sense that its application is contingent on the particular circumstances of the act of dissemination—the timing, the place, the means and manner of expression, the audience addressed—such that other opportunities are left open for the idea to be circulated. The right to express opinions is valuable to Mill primarily because it serves the freedom of thought. The freedom to express an opinion can be happiness generating in other ways related to self-assertion and the exercise of influence over others, and those satisfactions count in his utilitarian calculus. But the extraordinary protection Mill accords the freedom to express opinions gains it special priority, its power to trump the predictable and occasionally severe harms that flow from many ideas, from the transcendent importance he attaches to the human capacity to exercise independent judgment. That capacity is compromised far more by a

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[22] *Id*. at 86.

[23] GEOFFREY MARSHALL, CONSTITUTIONAL THEORY 157 (1971).

[24] MILL, *supra* note 11, at 86–120.

comprehensive ban on circulating an idea than by a partial regulation limited to particular circumstances. And in the mass society of Mill's day, to prohibit the dissemination of an opinion through the press was, practically speaking, entirely to prohibit its general circulation.[25]

In explaining the premises on which he builds his argument, Mill says: "I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being."[26] Those permanent interests related to progress depend, Mill firmly believes, on widespread free thought and on the presence throughout the society of persons with the strength of character to be bold in their inquiries, unshackled by custom and convention.[27] Were majorities, "or those who succeed in making themselves accepted as the majority,"[28] to possess the authority to banish ideas they detest or fear, the freedom of thought and strength of character that Mill considers to be the keys to progressive well-being would be imperiled. However, the "permanent interests of man as a progressive being" do not require that speakers have an unqualified right to convey their opinions at the times, in the places, by the methods, and to the audiences of their choice. Thus, the speaker who addresses the excited mob before the corn dealer's home can be punished.

A close reader of Mill might object to this explanation for his corn dealer example by calling attention to the following passage in *On Liberty*:

> It would be a great misunderstanding of this doctrine, to suppose that it is one of selfish indifference, which pretends that human beings have no business with each other's conduct in life, and that they should not concern themselves about the well-doing or well-being of one another, unless their own interest is involved. Instead of any diminution, there is need of a great increase of disinterested exertion to promote the good of others. . . . Human beings owe to each other help to distinguish the better from the worse, and encouragement to choose the former and avoid the latter. . . . Considerations to aid [a

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[25] *See* HANNAH BARKER, NEWSPAPERS, POLITICS AND ENGLISH SOCIETY 1695–1855, at 4–5, 26–28, 225 (2000); 1 STEPHEN KOSS, THE RISE AND FALL OF THE POLITICAL PRESS IN BRITAIN 24 (1981).

[26] MILL, *supra* note 11, at 81.

[27] *Id*. at 122–25; *see* Ten Cate, *supra* note 13, at 50–52.

[28] MILL, *supra* note 11, at 75.

> person's] judgment, exhortations to strengthen his will, may be offered to him, even obtruded on him, by others; [even though] he himself is the final judge.[29]

Mill clearly believes that social interaction, especially morally and intellectually contentious interaction, is crucial to the freedom of thought. Thus, he can hardly be indifferent to any regulation of speech that reduces the incidence, or even the intensity, of exchanges of opinions. "[A] high general average of energy" is Mill's prescription for maximizing progressive utility.[30] Regulations of speech that are contingent on circumstances may not banish ideas entirely, but they certainly can diminish disputational energy. Consistent with Mill's prioritization of the freedom of thought, such "partial" regulations of speech cannot be considered to be inconsequential or only moderately threatening to his conception of social well-being.

Surely this point is well taken. It only proves, however, that Mill's argument in *On Liberty* calls for additional protection for the liberty to communicate beyond what is entailed by granting speakers absolute immunity from context-independent general prohibitions of disfavored ideas. I read Mill to favor both an absolute freedom from such context-independent general prohibitions of ideas and also a robust, albeit qualified, freedom from regulations of speech that turn on the particular circumstances of dissemination. This latter, qualified freedom is subject, in Mill's scheme, to his Harm Principle: a sufficient showing of predicted harm can justify regulations of speech that do not, because they turn on context, amount to the total prohibition of the circulation of an opinion or observation. Even when his Harm Principle is activated, however, for the regulation of speech to be legitimate the predicted harm to society of the speech in question must outweigh its predicted or posited social benefit.[31]

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[29] *Id.* at 140.

[30] *Id.* at 125.

[31] *See infra* text accompanying note 40. It is instructive to contrast the fairly robust implications of Mill's argument for the liberty of thought and discussion regarding partial, context-specific regulations of speech with the weaker implications of a different kind of argument, grounded in personal autonomy rather than progressive utilitarianism, developed by one of his most important successors as a theorist of liberalism. *See* Joseph Raz, *Free Expression and Personal Identification*, 11 OXFORD J. LEGAL STUD. 305, 313–14 (1991), *reprinted in* ETHICS IN THE PUBLIC DOMAIN 131, 141–42 (1994).

> This argument [that free speech enables autonomy by publicly validating diverse ways of life] shows freedom of expression to be a

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Some knowledgeable commentators on Mill assume that he means his Harm Principle to govern all restrictions on the dissemination of ideas, not just partial regulations that are context-dependent.[32] But that reading of Mill is difficult to square with his assertion that even though it "belongs to that part of the conduct of an individual which concerns other people," the "liberty of expressing and publishing opinions" rests "in great part on the same reasons" and "is practically inseparable from" the "absolute freedom of opinion and sentiment on all subjects" and does not "fall under a different principle."[33] Mill's failure to mention his Harm Principle in delineating the liberty of expressing opinions is a particularly telling omission in that in the very same paragraph he goes on to describe two additional liberties, the "liberty of tastes and pursuits" and the liberty "of combination among individuals," each of which he explicitly limits by the caveat "so long as what we do does not harm [our fellow creatures]."[34] The claim that the liberty of expressing opinions is qualified by the Harm Principle is also hard to square with the stunning fact that in all of Chapter

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> public good, a constitutive element of a public culture [that makes individual autonomy possible]. It points to a strong positive case for free expression. It points to the importance not only of the absence of censorship but of providing access to the means of public expression to those who portray various ways of life, and express different points of view. At the same time the argument supports only a weak, overridable right. Like all public-good arguments, it is weak on setting boundaries. No major difficulty arises if one allows, say private television stations to deny access to certain views, so long as those views can find other avenues of expression. No major problem arises from restricting the areas in towns in which demonstrations can be held, so long as the areas available provide for a reasonably effective way of expressing views and displaying the intensity with which they are felt.

Id. I believe that Mill's emphasis on collective well-being via progress in truth-seeking, and especially the role that a high general level of disputational and inquisitive energy throughout the society plays in serving that good, implies stronger rights against time-manner-place regulations of speech than does Raz's theory.

[32] *See, e.g.*, David O. Brink, *Mill's Liberal Principles and Freedom of Expression*, *in* MILL'S ON LIBERTY: A CRITICAL GUIDE 40, 52–57 (C. L. Ten ed., 2008); David Dyzenhaus, *John Stuart Mill and the Harm of Pornography*, *in* MILL'S ON LIBERTY: CRITICAL ESSAYS 31, 41–48 (Gerald Dworkin ed., 1997); Jonathan Riley, *Racism, Blasphemy, and Free Speech*, *in* MILL'S ON LIBERTY: A CRITICAL GUIDE 62, 62–66 (C. L. Ten ed., 2008); Jeremy Waldron, LIBERAL RIGHTS: COLLECTED PAPERS 1981–1991, at 117–19, 131–33 (1993).

[33] MILL, *supra* note 11, at 82–83.

[34] *Id.* at 83.

Two of *On Liberty*, the chapter entitled "Of the Liberty of Thought and Discussion," his longest and most thoroughly elaborated chapter, Mill never once considers the harms that speech might cause, only the multifarious benefits.

Immediately following Chapter Two, of course, Mill does indeed consider the harm that various exercises of liberty can cause. This is where his corn dealer passage appears.[35] This is where he says that "[n]o one pretends that actions should be as free as opinions" and that "even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act."[36] After offering his two distinguishable instances of vilifying corn dealers—in the press and to an excited mob before the house of a corn dealer—Mill restates the general principle that these examples are meant to illustrate:

> Acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled by the unfavorable sentiments, and, when needful, by the active interference of mankind. The liberty of the individual must be thus far limited; he must not make himself a nuisance to other people.[37]

It is noteworthy that the example Mill offers of the expression of an opinion that he asserts *is* governed by the Harm Principle is delineated by the circumstances surrounding the act of dissemination and is characterized by loaded terms ("positive instigation," "nuisance") that serve to differentiate the activity from the processes of "thought and discussion" that are the subject of Chapter Two, where the Harm Principle never appears. Furthermore, Mill is careful in stating his general principle to say, not that acts that do harm to others may be regulated, but rather only acts "which, *without justifiable cause*, do harm to others."[38] Deliberately instigating harm or making oneself a nuisance to others does not qualify as "justifiable cause" in Mill's regime of progressive utilitarianism. But contributing to the truth-seeking activities he canvasses in Chapter Two—introducing new ideas, defending unpopular old ideas, separating the wheat

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[35] *Id.* at 121.
[36] *Id.*
[37] *Id.*
[38] *Id.* (emphasis added).

from the chaff of public discussion, propounding errors that serve as productive foils—certainly does.

To counter this textual evidence that Mill does not intend his Harm Principle to limit all the liberties he discusses, and specifically not the liberty of thought and discussion, one might observe that Mill offers a rather unitary description of his project in *On Liberty*: "The object of this Essay is to assert one very simple principle . . . . That principle is, . . . the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others."[39] But just because harm prevention is the *only* justification for limiting liberty does not imply that it is invariably a *sufficient* reason to limit each of the liberties that he considers. Mill himself is at pains in *On Liberty* to make this important point:

> [I]t must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference. In many cases, an individual, in pursuing a legitimate object, necessarily and therefore legitimately causes pain or loss to others.[40]

He rates the "liberty of thought and discussion," the inseparable combination of "the liberty of thought and feeling," and the "liberty of expressing and publishing opinions," as illustrated by his example of circulating a harsh characterization of corn dealers through the press, to be of such transcendent social value, so integral to "utility in the largest sense, grounded on the permanent interests of man as a progressive being," that it must be treated as an "absolute freedom" even though it "belongs to that part of the conduct of an individual which concerns other people."[41] And

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[39] *Id.* at 80.

[40] *Id.* at 156.

[41] *Id.* at 81–82, 86. A number of leading scholars conclude that Mill does not view the liberty of thought and discussion as limited by the Harm Principle in the way that the other liberties he discusses in the essay are. *See, e.g.*, SKORUPSKI, JOHN STUART MILL, *supra* note 19, at 373–74 ("[W]e must see liberty of expression as supplementing the Liberty Principle [what in this essay I am calling the "Harm Principle"], rather than as constituting a special case of it. All acts, including acts of expression, are protected by the Liberty Principle if they do not harm others. In the case of expressions, however, the Principle of Liberty of Expression spells out further safeguards, defining limits within which a certain type of discourse—discussion, honest dialogue—is protected from social sanction."); *see also* JOHN GRAY, MILL ON LIBERTY: A DEFENCE 103–06 (2d ed. 1996); GEOFFREY SCARRE, MILL'S ON

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for Mill, I maintain, "absolute" means unqualifiedly immune from comprehensive, context-independent regulation—the kind of regulation that aims to banish an idea, not just contain its harmful effects. In this regard, a partial, context-dependent regulation of speech, as in his example involving the excited mob assembled before the house of a corn dealer, does not violate the "absolute freedom of thought and sentiment on all subjects," and thus, can be justified under certain circumstances by its contribution to the prevention of harm.[42]

This reading of Mill not only makes sense of the corn dealer example, it also resolves an apparent major inconsistency in his argument. How, it might be asked, can Mill claim at the outset of *On Liberty* that "I regard utility as the ultimate appeal on all ethical questions"[43] and still favor unqualified protection for the liberty of thought and discussion? Utilitarians, "progressive" no less than "hedonic," by definition count the cost.[44] Noticing this problem, some astute and sympathetic students of Mill refuse to take him at his word regarding his utilitarian *bona fides*, at least in *On Liberty*.[45] I think they are mistaken. For the limited set of activities that he labels "thought and discussion"—the activities that Geoffrey Marshall elaborates as "discussion, advocacy, debate, or

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LIBERTY: A READER'S GUIDE 39–40 (2007); Richard Vernon, *Beyond the Harm Principle: Mill and Censorship*, *in* MILL AND THE MORAL CHARACTER OF LIBERALISM 115, 120–22 (Eldon J. Eisenach ed., 1998).

[42] Jonathan Riley agrees with this interpretation regarding how Mill's "absolute" protection for the liberty of thought and discussion does not preclude regulation of the time, place, and manner of speech. Riley, *supra* note 32, at 63. However, Riley also maintains that a number of content-based total prohibitions designed to prevent harm are also compatible with Mill's analysis in Chapter Two of *On Liberty*, *id.* at 76–79, a reading I do not find persuasive.

[43] MILL, *supra* note 11, at 81.

[44] *See* J. J. C. SMART & BERNARD WILLIAMS, UTILITARIANISM FOR & AGAINST 12–13 (1973).

[45] *See, e.g.*, Isaiah Berlin, *John Stuart Mill and the Ends of Life*, *in* FOUR ESSAYS ON LIBERTY 173, 190–92 (1969) ("At the centre of Mill's thought and feeling lies, not his utilitarianism, nor the concern about enlightenment, nor about dividing the private from the public domain . . . but his passionate belief that men are made human by their capacity for choice—choice of evil and good equally. Fallibility, the right to err, as a corollary of the capacity for self-improvement; distrust of symmetry and finality as enemies of freedom—these are the principles which Mill never abandons."); ALAN RYAN, J. S. MILL 132 (1974) ("[I]t is clear that claiming this as a utilitarian position is silly; its real status is that of an ideal-regarding defence of liberalism, and one would do better to own up to it.").

expression of opinion,"[46] that John Skorupski calls "honest dialogue,"[47] and that Richard Vernon defines as "propositions about actual or desirable states of affairs in the world, propositions capable of being accumulated into larger bodies of knowledge"[48]—Mill is prepared to assert at a high level of generality that their long-run social benefits outweigh their long-run social costs. As a result, such activities are, in his utilitarian calculus, entitled to "absolute freedom"[49] in the sense that society has no authority to attempt to eliminate them, no warrant to treat them as per se illegitimate, no power to prohibit them so long as they retain their basic character as endeavors of inquiry and persuasion. In this one respect, Mill is making what we now call a "rule utilitarian" (as contrasted with "act utilitarian") argument.[50] For all the other liberties he defends, however, including the liberty of "tastes and pursuits," of "combination among individuals," and of forms of communication (including "instigation") that are more action-oriented, less open-ended and deliberative, than is "thought and discussion" as he uses those terms, Mill employs a context-sensitive act utilitarian methodology. Such activities, valuable though they may be, can be restricted when the harms they are thought to cause outweigh their benefits in the particular circumstances.

This difference between the two kinds of utilitarian arguments that Mill is making in *On Liberty* is why Chapter Two, the only chapter in which he makes a rule utilitarian argument of high generality, contains neither a discussion of the Harm Principle nor any analysis of the specific harms that particular thoughts and discussions might engender. When Mill gets to Chapter Three and the subject of "positive instigation," he becomes highly specific about context and consequences, for there he is making an act utilitarian argument governed by the Harm Principle. And there is where the on-site corn dealer example appears.[51] Mill then continues to

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[46] *See* MARSHALL, *supra* note 23, at 157.

[47] *See* SKORUPSKI, JOHN STUART MILL, *supra* note 19, at 374.

[48] *See* Richard Vernon, *John Stuart Mill and Pornography: Beyond the Harm Principle*, 106 ETHICS 621, 623 (1996).

[49] MILL, *supra* note 11, at 82.

[50] *See, e.g.*, J. D. Mabbott, *Interpretations of Mill's 'Utilitarianism'*, 6 PHIL. Q. 115, 115–20 (1956); Maurice Mandelbaum, *Two Moot Issues in Mill's Utilitarianism*, *in* MILL: A COLLECTION OF CRITICAL ESSAYS, 206, 206–21 (J.B. Schneewind ed., 1968); J. O. Urmson, *The Interpretation of the Moral Philosophy of J .S. Mill*, 3 PHIL. Q. 33, 33–39 (1953).

[51] His reference in Chapter Three to the activity of circulating through the press the opinion that corn dealers are starvers of the poor is to illustrate how this Chapter Two

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apply his act utilitarian methodology as he analyzes in Chapters Three, Four, and Five a number of activities that qualify as exercises of liberty but that do not qualify as thought or discussion. In these passages, he treats it as relevant, though not conclusive, that the activity in a particular instance is likely to cause harm. Such harm-causing potential in individual instances receives no attention in Chapter Two because there he is applying a rule utilitarian methodology under which the balance of benefit and harm has already been determined at a very high level of generality. For the narrow set of activities that he classifies as thought and discussion, a set much smaller than the full corpus of communicative activities we commonly label as "speech," the benefits of thought and discussion are ruled to outweigh the harms categorically.

It may seem strange that Mill should apply different forms of utilitarian analysis in different chapters of *On Liberty*, but the reason is simple. Only for the uniquely valuable activities he calls thought and discussion—uniquely valuable in *his* view of the world, which places such emphasis on progress through knowledge[52]—is he able to say with any confidence that their long-run benefits on the whole exceed their long-run costs, and that efforts to carve out specific exceptions to this generalization are likely to result in myopic judgments or social dynamics that undercut the process by which the benefits are generated.

To test this reading of Mill further, and to explore which kinds of context-sensitive regulations of speech his principle of liberty, as illustrated by the corn dealer example, would permit, I will examine two cases decided a decade ago involving very different forms of anti-abortion advocacy. *Planned Parenthood v. American Coalition of Life Activists*[53] raised the issue of whether various messages displayed by anti-abortion activists on posters and on a website were entitled to First Amendment protection.[54] One poster distributed at several rallies contained under the heading "The Deadly Dozen" the names, photographs, and addresses of thirteen doctors who were said to be performing abortions.[55] The poster accused these doctors of crimes against humanity and offered a $5,000

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activity differs from his example of on-site positive instigation that is subject to his act utilitarian Harm Principle. Vilifying corn dealers through the press Mill takes to fall within the absolutely protected liberty of thought and discussion. As such, a discussion of its harm potential is irrelevant (and thus never supplied by Mill).

[52] *See* MILL, *supra* note 11, at 96–97, 101–03.

[53] 290 F.3d 1058 (9th Cir. 2002).

[54] *Id.* at 1062.

[55] *Id.* at 1064–65.

award "for information leading to arrest, conviction and revocation of license to practice medicine."[56] One of the website postings listed the names of 200 "abortionists" with the legend: "Black font (working); Greyed-out Name (wounded); Strikethrough (fatality)."[57] The names of abortion providers on the list who had been murdered were struck through, and those who had been injured in attacks were greyed out.[58] On other occasions, several of the defendants in the case had publicly defended as justifiable homicide previous killings of doctors who had performed abortions, some of whom had been targeted in earlier "wanted" posters published by opponents of abortion.[59]

The judges of the Ninth Circuit Court of Appeals, hearing the case en banc, divided over whether under these circumstances the speakers should have believed that the targeted doctors would interpret the postings as expressing an intention on the part of the speakers, or agents under their control, personally to harm or assault the named doctors. Six judges answered this question in the affirmative,[60] five in the negative.[61] All the judges agreed, however, that such a finding of belief on the part of the speakers is necessary for the communication to be a "true threat" that can be regulated under current First Amendment doctrine.[62] Moreover, all the

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[56] *Id.*

[57] *Id.* at 1065.

[58] *Id.*

[59] *Id.* at 1064.

[60] *Id.* at 1085–86.

[61] *Id.* at 1090–92.

[62] *Id*. at 1075–77, 1089. In *Virginia v. Black*, 538 U.S. 343 (2003), the Court offered this description of the doctrine of true threats:

> "True threats" encompass those statements where the speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals. The speaker need not actually intend to carry out the threat. Rather, a prohibition on true threats "protect[s] individuals from the fear of violence" and "from the disruption that fear engenders," in addition to protecting people "from the possibility that the threatened violence will occur." Intimidation in the constitutionally proscribable sense of the word is a type of true threat, where a speaker directs a threat to a person or group of persons with the intent of placing the victim in fear of bodily harm or death.

Id. at 359–60 (internal citations omitted). Presumably, although the matter is debatable, under this definition a speaker's intention to intimidate by informing his targets that third

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Ninth Circuit judges assumed that in the absence of such a finding of the specific intent necessary to constitute a true threat, a poster or website advocating the killing of abortion providers is protected under the First Amendment, even when accompanied by names and addresses and even in a context in which several such killings had followed the earlier publication of messages of a similar content and format.[63]

Does Mill's argument in *On Liberty* support this understanding of the freedom of speech? I doubt it, though I think the question is close. Had the posters and websites contained only general arguments or assertions to the effect that doctors who perform abortions are murderers who deserve to die, the case would be analogous to that of circulating in the press the opinion that corn dealers are starvers of the poor. The extra degree of moral condemnation and greater specificity of the suggested retribution in the abortion example do not seem to me to be enough to differentiate the cases so far as Mill's argument is concerned. The "absolute freedom of opinion and sentiment" that Mill endorses[64] entails as a general matter the right to disseminate even the most dangerous and disgusting views no matter the harm that is likely to follow. It is central to his basic understanding of the relationship between the liberty of thought and human flourishing that all ideas must be free to circulate as widely as audience interest can sustain, not least in order to instruct by virtue of their falsity and dangerousness. Mill's qualification of the liberty to express opinions

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parties not under the control of the speaker will engage in violence against them is insufficient to make an utterance a true threat in the First Amendment sense. That is what all of the judges of the Ninth Circuit concluded in *Planned Parenthood*, 290 F.3d at 1076, 1089–90, and what seems to be implied by the first sentence of the passage from *Virginia v. Black* just quoted. On the other hand, if the essence of the harm from a "true threat" is not so much the risk of a violent act by the speaker but rather, as the court asserts, the debilitating fear that is intentionally created in the target's mind by the speaker's statement, then perhaps it should not be necessary that the frightened target is led to believe that the speaker himself or someone under his control will be the agent of the promised attack. Plenty of fear can be deliberately generated by a speaker talking about the violent intentions of independent third parties. For a critique of the *Virginia v. Black* decision that questions whether the true-threats exclusion should be conditioned on any sort of speaker intent requirement, let alone one so strict as the Court appeared to impose in that case, see Frederick Schauer, *Intentions, Conventions, and the First Amendment: The Case of Cross-Burning*, 2003 SUP. CT. REV. 197, 216–22.

[63] *See* Kenneth L. Karst, *Threats and Meanings: How the Facts Govern First Amendment Doctrine*, 58 STAN. L. REV. 1337, 1391–92, 1395 & n.293, 1402 (2006).

[64] MILL, *supra* note 11, at 82.

is not activated by a sufficient measure of predicted harm, only by the presence of special circumstances that make the dissemination something more than the expression of an opinion, circumstances that make it "a positive instigation to a mischievous act."[65]

In my judgment, the addition to the anti-abortion postings of names, pictures, and especially addresses crosses the line that Mill seeks to identify with his corn dealer example. I reach this conclusion not because the addition of names, pictures, and addresses increases the probability that the characterization of abortion providers as murderers will lead to their being harmed, though surely the inclusion of such targeting information does increase that probability. Were the postings with the added information to qualify as integral to the freedom of thought, as Mill understands the concept, under his argument in *On Liberty* the extra measure of danger would not suffice to justify regulation. But two other features of the postings that follow from the added information might indeed constitute special circumstances that would turn the postings into positive instigations to mischievous acts.

First, the additional information provides a basis to impute to the speakers the intention to cause the killing, harming, or intimidation of the named abortion providers, even if not necessarily the intention personally to undertake a violent act.[66] The speaker addressing an excited mob

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[65] *Id.* at 121.

[66] Judge Kozinski, dissenting in *Planned Parenthood v. American Coalition of Life Activists*, noted the absence of any evidence in the record of the speakers' intentions apart from what might be inferred from the posters and websites themselves. *Planned Parenthood*, 290 F.3d at 1092 (Kozinski, J., dissenting). He found that absence crucial: "Given this lack of evidence, the posters can be viewed, at most, as a call to arms for *other* abortion protesters to harm plaintiffs." *Id.* In his view, and that of the majority of the Ninth Circuit as well, such an intention is not sufficient to exclude a speech from First Amendment protection under either the "true threats" exclusion or under the Supreme Court's holding in *Brandenburg v. Ohio*, 395 U.S. 444 (1969), which permits the regulation of the advocacy of violence that is to be undertaken by third parties only when such advocacy is "directed to inciting or producing *imminent* lawless action and is likely to incite or produce such action." *Id.* at 447 (emphasis added). As explained above, under the current law of the First Amendment, it very likely is significant for the application of the "true threats" exclusion whether the speaker threatens personally to engage in violence or instead deliberately causes the targets of his protest to fear that others not under his control will attack them, *see supra* notes 53–63 and text accompanying, but that difference is not significant for the argument I am making regarding how a speaker's intention bears on Mill's understanding of the limits of free speech. Even if Judge Kozinski is correct

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outside the home of a corn dealer also can fairly be assumed to have violence in mind by virtue of his choice of venue and audience. Mill's use of the term "positive instigation" to mark the limits of his liberty principle suggests that he considers the speaker's intent to be a variable that bears on whether the communicative activity falls within the scope of the liberty of thought and discussion.[67]

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regarding what the inclusion of the names and addresses of abortion providers implies about the speaker's intention, my analysis still holds.

[67] C. L. Ten, a careful and perceptive reader of Mill, might disagree with me on this point. Ten says that in Mill's example of a speech to an excited mob before the house of a corn dealer:

> [T]he speaker may neither intend nor even welcome any harm to the corn-dealers, and yet, in the given circumstances, his speech would be a causally relevant factor in bringing about the harm. He need not be urging the excited crowd to commit any 'mischievous act', but none the less harmful acts are very likely to result. The most that one could infer from Mill's description is that the speaker was carelessly indifferent to the fate of the corn-dealer, or that he was unusually stupid in not foreseeing that harm would result from the expression of his view in the given situation.

TEN, *supra* note 19, at 132–33. He then concedes that this reading of the corn dealer example raises some problems for Mill's argument:

> Because the notion of 'instigation' in the corn-dealer case is a causal and not an intentional concept, it appears that Mill is not confining restrictions to freedom of expression merely to contexts where someone urges others, with the probability of success, to commit specific harmful acts. But there is now a real danger that the restrictions of freedom of expression that are permitted by Mill's remarks in the corn-dealer example may be far greater than he supposes, or would be prepared to accept.

Id. at 133. Ten proceeds to examine the case in which "'the publication of a certain book may reasonably be expected to lead, after a time-lag, to much more serious damage than would have been caused by the speech outside the corn-dealer's house.'" *Id.* (quoting J. W. N. Watkins, *John Stuart Mill and the Liberty of the Individual*, *in* POLITICAL IDEAS 154, 165 (David Thomson ed., 1966)). He argues that such a book ought not to be considered "causal" of that damage for the purpose of Mill's analysis due to the contingencies and uncertainties introduced by the time factor. *Id.* at 135.

My own view is that a better way to rescue Mill's argument while being faithful to his text is to read "instigation" to imply intention on the part of the speaker to cause harm (including the harm of intimidation) or at least careless indifference about consequences.

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In other respects as well, Mill holds speakers to demanding standards regarding their intentions. For example, unlike most leading proponents of a strong free speech principle, Mill believes there is no objection in principle to the enforcement of what he terms a "morality of public discussion."[68] Were it not for the practical difficulty of administering such limitations evenhandedly, he says in *On Liberty* that he would favor laws and social punishments designed to eliminate from public debate such tactics as "to argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion," all instances of a wrongful intention to deceive one's audience.[69] Admittedly, there is a difference between the intention to cause material harm and the intention to deceive, so far as Mill's valuing of the freedom of speech is concerned. Only in the latter case is the audience's agency compromised. Just as Mill famously argues for the value of false ideas as foils that can contribute to a deeper understanding of true propositions,[70] he might consider messages from ill-intentioned speakers to be resources that well-intentioned listeners might use to advance social utility. But when the speaker's (imputed) intention to cause harm is combined with the additional circumstances of an audience Mill describes as "an excited mob" and the presence of an inviting target of the speaker's wrath ready at hand, the audience's agency might be thought to fall short of the minimum that Mill considers necessary for the liberty of thought and discussion to be implicated.[71] The presumed intentions, capacities, and even attitudes that typically animate particular activities, including various activities of

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Moreover, even if Ten is right that intention or careless indifference on the part of the speaker need not be a *necessary* element of "positive instigation" as Mill uses the term, such that the unlawfulness of the speech to the excited mob before the corn dealer's house might follow entirely from the probability of immediate harm under the circumstances, that would not mean that in other cases the speaker's intention would be irrelevant to the finding of "positive instigation"; the presence of a speaker's specific intention to cause harm could still be a weighty factor rendering a speech regulable under Mill's analysis or even a *sufficient* condition for Mill to consider the speech a "positive instigation" subject to regulation. Such a specific intention to cause at a minimum the harm of intimidation can be inferred, I maintain, from the speaker's act of including the names and addresses of abortion doctors whom he characterizes as murderers deserving of retribution.

[68] MILL, *supra* note 11, at 120.

[69] *Id.* at 118–20.

[70] *Id.* at 103–12.

[71] On the role that this concern for the autonomous agency of listeners plays in Mill's argument, see GRAY, *supra* note 41, at 104–05.

communicating, play a more significant role in Mill's analysis of the claims and bounds of liberty than is commonly recognized. *On Liberty* is an unusual type of utilitarian argument that is based in large part on a character ideal,[72] and intentions are an important dimension of character.

Second, adding the targeting information alters the focus of the anti-abortion message, making it less of an invitation to discussion and reflection and more of a guide to action. Mill's entire argument in Chapter Two of *On Liberty* is a call to reap the benefits of open-minded, sustained truth-seeking. It has nothing to do with acting out, getting grievances off one's chest, or making other persons an instrument of one's will by appealing to their baser instincts or giving them the tools (including information) to do one's bidding. The use of words for any purpose is not what Mill seeks to protect with his arguments for the liberty of thought and discussion.[73] Communications that are not so facilitative of discussion as to be integral to the freedom of thought are exercises of liberty in Mill's theory, but they are exercises of liberty that are potentially regulable under his act utilitarian Harm Principle, though only if the harms they are predicted to cause outweigh the benefits they generate.[74] The harm that targeting speech can cause—indeed *has* caused—is obvious and considerable.[75] That anti-abortion targeting speech comes wrapped in a moral argument does not inoculate it from regulation under Mill's analysis. Recall that his speaker addressing an excited mob before the corn dealer's house is expressing a moral criticism.[76]

The second abortion case that I will use to explicate Mill's corn dealer example is *Hill v. Colorado*,[77] decided by the United States Supreme Court in the year 2000. In the wake of several cases involving injunctions against on-site anti-abortion protests that were prompted by incidents of physical harassment and intimidation of women entering clinics,[78] the

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[72] *See* Peter Berkowitz, *Mill: Liberty, Virtue, and the Discipline of Individuality*, *in* MILL AND THE MORAL CHARACTER OF LIBERALISM, *supra* note 41, at 13, 25–39; Ten Cate, *supra* note 13, at 50–52.

[73] *See* SKORUPSKI, JOHN STUART MILL, *supra* note 19, at 369–76.

[74] *See supra* note 40 and accompanying text.

[75] *See, e.g.*, Planned Parenthood v. Am. Coalition of Life Activists, 290 F.3d 1058, 1063–64 (9th Cir. 2002).

[76] MILL, *supra* note 11, at 121.

[77] 530 U.S. 703 (2000).

[78] *See, e.g.*, Schenck v. Pro-Choice Network, 519 U.S. 357 (1997); Madsen v. Women's Health Ctr. Inc., 512 U.S. 753 (1994). *See generally* Alan E. Brownstein, *Rules of Engagement for Cultural Wars: Regulating Conduct, Unprotected Speech, and Protected*

(*continued*)

Colorado legislature attempted to address the problem with a general law, backed by criminal sanctions, that governed conduct within 100 feet of the entrance of any health-care facility, including on a public street or sidewalk.[79] Would-be speakers were prohibited from knowingly approaching within eight feet of another person, without her consent, for the purpose of passing a leaflet, displaying a sign, or engaging in oral protest, education, or counseling.[80] The law did not single out specific messages for restriction,[81] but no one could doubt the content of the messages that would be most affected. A divided Supreme Court upheld the law on the basis that it was not a total prohibition but rather a reasonable regulation of the time, manner, and place of speech that served the legitimate state interest of protecting "those who seek medical treatment from the potential physical and emotional harm suffered when an unwelcome [speaker] delivers a message (whatever its content) by physically approaching an individual at close range."[82]

In dissent, Justice Kennedy found the restriction of speech to be anything but partial and reasonable:

> The means of expression at stake here are of controlling importance. Citizens desiring to impart messages to women considering abortions likely do not have resources to use the mainstream media for their message, much less resources to locate women contemplating the option of abortion. Lacking the aid of the government or the media, they seek to resort to the time honored method of leafleting and the display of signs. Nowhere is the speech more important than at the time and place where the act is about to occur.
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> . . . What the statute restricts is one person trying to communicate to another, which ought to be the heart of civilized discourse.

Expression in Anti-Abortion Protests, 29 U.C. DAVIS L. REV. 553, 554 (1996) ("The goal of this paper is to resolve three issues related to freedom of speech and abortion rights that arise out of the civil and criminal litigation surrounding protest activity in the vicinity of clinics providing abortion services.").

[79] *See* COLO. REV. STAT. § 18-9-122 (2010) (originally enacted in 1993).

[80] *Id.* § 18-9-122(3).

[81] *See id.* § 18-9-122.

[82] *Hill*, 530 U.S. at 704–05, 719 n.25.

> . . . .
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> . . . I am in full agreement with Justice Scalia's explanation of the insult the Court gives when it tells us these grave moral matters can be discussed just as well through a bullhorn.[83]

How, in light of his corn dealer example, should Mill think about this case? I do not believe that the restriction imposed by the Colorado law should be considered a total ban on whatever ideas the protestors wish to communicate to women about to have abortions. Even if the speaker's "idea" is conceived to be not a general moral proposition but rather a personally directed message ("*You* should not do this because it is immoral"), the alternative means of communicating that specific message left open by the statute, including signs visible and statements audible from a distance of greater than eight feet,[84] are enough to take the case outside the realm that Mill marks off for absolute protection incident to the freedom of thought. Accordingly, under the analysis presented in *On Liberty* his Harm Principle applies. Protection turns on whether the freedom claimed by the protestors to approach within eight feet of their unwilling addressees causes harm of a sort and magnitude that outweighs the benefits that flow from such an opportunity to speak at close quarters.

One kind of harm that can be caused by the type of communication at issue in *Hill* is that of creating in the recipients of the anti-abortion message the kind of distress that all of us commonly experience when we learn that others find our beliefs or actions to be immoral. But even though this type of harm is real, and can be intense, Mill cannot count it, as Jeremy Waldron has demonstrated.[85] For Mill's argument in *On Liberty*, not just in Chapter Two but throughout, is all about the benefits that follow from the fact that even our most cherished beliefs and practices are corrigible, subject to alteration in the face of evidence, argument, and experience.[86] The capacity to rethink basic understandings and practices is the key to progress in Mill's utilitarian conception, but the experience of altering one's ways in response to criticism is seldom pain-free. Moral distress, we might even say, is integral to improvement, at least for persons who care deeply about their beliefs and practices, and those are precisely the kinds

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[83] *Id.* at 788–89 (Kennedy, J., dissenting).

[84] *See* COLO. REV. STAT. § 18-9-122.

[85] *See* Waldron, *supra* note 32, at 115–33.

[86] MILL, *supra* note 11, at 90.

of persons that Mill considers most likely to advance collective well-being.[87] Because moral distress is integral to progress, it cannot count as harm in Mill's analysis, however painful it might be.

There are other kinds of harm, however, that might be caused by the act of a protestor approaching at close quarters a woman who is en route to have an abortion. One is apprehension about physical harassment, an apprehension that can have adverse medical consequences even when in the event physical harassment does not occur and may never have been likely to occur. Another potential harm is upset resulting from having one's personal space invaded by an unwelcome critic. This is not quite the same thing as the distress that is a product of the judgments and accusations one endures when being subjected to serious moral criticism. Nevertheless, physical invasion is a tricky type of harm for Mill because he does explicitly recognize a right in each of us to "obtrude" on another person whom we believe to be going astray with "considerations to aid his judgment, exhortations to strengthen his will."[88] The question is debatable, but I conclude that these experiences of physical apprehension and invasion are harms that can count in Mill's analysis because they do cause pain and to consider them would not subvert his overall utilitarian argument, as would counting the harm of moral distress.

But what should a Millian make of Justice Kennedy's claim that much valuable speech is lost when on-site abortion protestors are denied the opportunity to plead their cause at close quarters, face-to-face with personal appeal, rationally and quietly, without having to resort to bullhorns or shocking signs and pictures capable of grabbing attention from afar? Can such attempted up-close-and-personal moral persuasion be analogized to addressing an excited mob before the home of a corn dealer, so far as the social value of the speech is concerned? By choosing a venue in which his audience is "an excited mob" capable of acting immediately, the speaker in the corn dealer example reduces the likelihood that his message will serve the values relating to adaptation, self-authorship, variety for its own sake, and progress that Mill identifies as the reasons for according liberty exceptionally high priority in his utilitarian calculus.[89] That is not so clearly the case with the speakers' claim in *Hill* to be able to approach within eight feet of their addressees. There, the speakers' choice

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[87] *Id.* at 124–25.

[88] *Id.* at 140.

[89] *See* SKORUPSKI, JOHN STUART MILL, *supra* note 19, at 371–72; TEN, *supra* note 19, at 130–31.

of time and venue can be explained on grounds other than the desire to take advantage of vulnerable listeners analogous to the stirring up of an excited mob. Although the background noise and social pressure of a mass demonstration reduces the probability that Millian thought and discussion will result from the face-to-face encounter—as does the fact that the addressee is likely to be hurried, nervous, and defensive—the speaker's intention may very well be to communicate in a way that is respectful of the listener's moral agency. If so, Mill's argument in *On Liberty* offers reasons to consider the speaker's effort to be an exercise of liberty that deserves a high degree of protection from social regulation. That the participants in this conversation begin miles apart in their moral understanding and sharply divergent in their objectives is a gulf that Mill, of all thinkers, cannot treat as a factor that diminishes its utility. As he remarks in *Principles of Political Economy*:

> It is hardly possible to overrate the value, in the present low state of human improvement, of placing human beings in contact with persons dissimilar to themselves, and with modes of thought and action unlike those with which they are familiar. . . . Such communication has always been, and is peculiarly in the present age, one of the primary sources of progress.[90]

I conclude that even though the regulation of speech at issue in *Hill v. Colorado* was context-dependent and as such not a violation of Mill's "absolute freedom of opinion and sentiment on all subjects,"[91] the social value of some of the sidewalk counseling communications that were disallowed by the Colorado statute should count for quite a bit in calculating the balance of goods and harms that an application of Mill's Harm Principle requires.[92]

Moreover, a plausible reason to decide to protest at a health-care facility by means of face-to-face conversations with women about to have abortions is to bear witness to one's moral beliefs in a deeply personal way

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[90] JOHN STUART MILL, THE PRINCIPLES OF POLITICAL ECONOMY WITH SOME OF THEIR APPLICATIONS TO SOCIAL PHILOSOPHY (1848), *in* 3 THE COLLECTED WORKS OF JOHN STUART MILL 594 (J. M. Robson ed., 1965).

[91] MILL, *supra* note 11, at 82.

[92] For a careful analysis of the implications of Mill's argument for laws regulating the manner of communication, with specific reference to *Hill v. Colorado*, see Heidi Kitrosser, *From Marshall McLuhan to Anthropomorphic Cows: Communicative Manner and the First Amendment*, 96 NW. U. L. REV. 1339, 1376–80 (2002).

by confronting at its source the practice one condemns, even when the odds of changing any woman's mind are very small. That experience of bearing witness might not be an exercise of the liberty of thought and discussion, but it is an instance of what Mill terms the liberty of pursuits, practicing a self-defining way of life.[93] This is a liberty he does not protect absolutely but rather subjects to his Harm Principle, but still it is a liberty that Mill considers to be important to human flourishing. The value of this liberty must also count in the balance against the harms that can flow from unwanted, and sometimes overly aggressive, sidewalk counseling by opponents of abortion.

Thus, for a Millian, *Hill v. Colorado* is not an easy case for regulation in the way that the case of the speaker before the home of the corn dealer is. Nor is it as strong a case for regulation as is the inclusion of names, pictures, and addresses of abortion providers on a website or on posters widely circulated at anti-abortion rallies. It seems possible that a state might be able, through the combination of skillful statutory drafting and professional, even-handed law enforcement, to prevent all aggressive, physically intimidating activities by protestors at abortion facilities without having to employ general rules that also sweep peaceful, respectful sidewalk counselors into the net. If so, Mill's argument should be read to support the right of the latter type of speaker to approach an addressee at close quarters.

III. FALSELY SHOUTING "FIRE!" IN A THEATER

I turn now to what is probably the most famous of all hypothetical cases designed to mark the limits of the freedom of speech. In *Schenck v. United States*,[94] decided in 1919, Justice Oliver Wendell Holmes, writing for a unanimous Court, introduced his influential clear-and-present-danger test with these examples:

> The most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic. It does not even protect a man from an injunction against uttering words that may have all the effect of force. The question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they

[93] MILL, *supra* note 11, at 83.
[94] 249 U.S. 47 (1919).

> will bring about the substantive evils that Congress has a right to prevent. It is a question of proximity and degree.[95]

The fire-in-a-theater example has taken on a life of its own. It has become a staple of popular debate about the limits of free speech, but Holmes' specification that the shout is false is often omitted,[96] as is the datum that a panic actually ensues.[97] And for some reason, the theater is always described as crowded,[98] though Holmes never said that.

It appears that incendiary matters and metaphors held a special appeal for Holmes. When his Civil War letters and diary were published, the title chosen by the editors was "Touched by Fire," after a phrase of Holmes' in a well-known speech he had given in 1884 reflecting on his war experience.[99] One of his earliest ventures into legal scholarship was an important article he published in his early thirties on a London gas stokers strike.[100] Both in writing his book *The Common Law* and as a judge of the Massachusetts Supreme Court, Holmes was uncharacteristically expansive

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[95] *Id.* at 52 (internal citation omitted).

[96] *See, e.g.*, Edward J. Bloustein, *Criminal Attempts and the "Clear and Present Danger" Theory of the First Amendment*, 74 CORNELL L. REV. 1118, 1136 (1989); L.A. Powe, Jr., *Searching for the False Shout of "Fire,"* 19 CONST. COMMENT. 345, 345 n.2 (2002) (documenting instances in which President George H. W. Bush, Senator Jesse Helms, Charleton Heston, Christopher Hitchens, Newton Minow, and William F. Buckley all invoked the fire-in-a-theatre example while neglecting to mention that Holmes had specified that the unprotected speech is false).

[97] *See, e.g.*, HARRY KALVEN, JR., A WORTHY TRADITION 133 (Jamie Kalven ed., 1988); Darren Bush, *The "Marketplace of Ideas:" Is Judge Posner Chasing Don Quixote's Windmills?*, 32 ARIZ. ST. L.J. 1107, 1130 (2000); Maria L. Marcus, *Policing Speech on the Airwaves: Granting Rights, Preventing Wrongs*, 15 YALE L. & POL'Y REV. 447, 478–79 (1997); Jonathan Simon, *Governing Through Crime Metaphors*, 67 BROOK. L. REV. 1035, 1040 (2002).

[98] *See, e.g.*, William Van Alstyne, *A Graphic Review of the Free Speech Clause*, 70 CALIF. L. REV. 107, 113–14 (1982); Judith Schenck Koffler & Bennett L. Gershman, *The New Seditious Libel*, 69 CORNELL L. REV. 816, 838 (1984); Rodney A. Smolla, *Content and Context: The Contributions of William Van Alstyne to First Amendment Interpretation*, 54 DUKE L.J. 1623, 1629–31 (2005).

[99] *See* Oliver Wendell Holmes, Jr., U.S. Supreme Court Justice, Memorial Day Address at Keene, New Hampshire (May 30, 1884), *in* THE ESSENTIAL HOLMES 80, 86 (Richard Posner ed., 1992); TOUCHED WITH FIRE: CIVIL WAR LETTERS AND DIARY OF OLIVER WENDELL HOLMES, JR., 1861–1864 (Mark DeWolfe Howe ed., Fordham Univ. Press 2000) (1946).

[100] Oliver Wendell Holmes, Jr., *Summary of Events: Great Britain—The Gas-Stokers' Strike*, 7 AM. L. REV. 558, 582–84 (1873).

in discussing arson cases, real and hypothetical, while developing his creative and controversial theory of the law of criminal attempts.[101] Holmes' last published words, written a week before his death, were these:

> We aim at the infinite and when our arrow falls to earth it is in flames.
>
> At times the ambitious ends of life have made it seem to me lonely, but it has not been. You have given me the companionship of dear friends who have helped to keep alive the fire in my heart. If I could think that I have sent a spark to those who come after I should be ready to say Goodbye.[102]

One of Holmes' colleagues on the Supreme Court once justified the criminal conviction of a radical speaker by observing that "[a] single revolutionary spark may kindle a fire that, smoldering for a time, may burst into a sweeping and destructive conflagration."[103] Predictably, Holmes could not resist answering in kind: "It is said that this manifesto was more than a theory, that it was an incitement. Every idea is an incitement. . . . Eloquence may set fire to reason."[104] It turns out that Holmes not only wrote about fires, he followed them. Permit me to quote Scot Powe's account of this avocation:

> Charles Henry Butler, Holmes' friend and Eye Street neighbor, reports walking home from the Capitol with Holmes when the justice grabbed his arm upon hearing a fire engine: "I always go to fires, don't you?" And they were off, soon dogtrotting down Capitol Hill and up Maryland Avenue, as Holmes further observed that in Boston "we always *run* to fires."[105]

It is fun to speculate about the psychology that led Holmes to posit the case of the false shout of fire in a theater, but what we most need to know

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[101] *See* OLIVER WENDELL HOLMES, JR., THE COMMON LAW 53–56 (Dover Publ'n 1991) (1881); Commonwealth v. Peaslee, 59 N.E. 55, 55–57 (1901).

[102] Oliver Wendell Holmes, Jr., *The Arrow in Flames*, *in* THE MIND AND FAITH OF JUSTICE HOLMES 451, 451 (Max Lerner ed., 1943).

[103] Gitlow v. New York, 268 U.S. 652, 669 (1925).

[104] *Id.* at 673 (Holmes, J., dissenting).

[105] Powe, *supra* note 96, at 351.

is what the example proves. Not much, in the opinion of my First Amendment teacher, Harry Kalven, Jr:

> [T]he example has long seemed to me trivial and misleading. It is as if the only conceivable controversy over speech policy were with an adversary who asserts that *all* use of words is absolutely immunized under the First Amendment. The "fire" example then triumphantly impeaches this massive major premise. Beyond that, it adds nothing to our understanding.[106]

If Holmes' only point is that "no law abridging the freedom of speech" does not mean the same thing as "no law regulating the use of words," that such activities as perjury, blackmail, extortion, and bribery do not raise First Amendment issues, his theater example is jejune, hardly worthy of the prominence it has achieved in popular culture.

On the other hand, we might be tempted to read Holmes as using the illustration to make a very broad claim indeed: that all speech is subject to regulation under the First Amendment if in the particular circumstances of its dissemination it is highly likely to cause harm. Notice that Holmes invoked the theater example in the same case, in fact the same paragraph, in which he introduced his famous clear-and-present-danger test.[107] In that case, and in two additional cases he decided the same year, Holmes mentioned other examples of self-evidently consequential speech that he considered unprotected by the First Amendment: persuasion to murder[108] and "uttering words that may have all the effect of force," as in a direction to boycott issued by a labor leader.[109] So is the only point of the theater example that certain instances of free speech are simply too dangerous to abide?

During the decade when Holmes devised his example, the great danger inherent in shouting "Fire!" in a theater was a matter of well-publicized recent experience. A stampede that took twenty-six lives occurred on August 26, 1911 in a silent movie theater in Canonsburg, Pennsylvania when a film projector flared up and an audience member, mistakenly believing that the building itself was burning, yelled "Fire!"[110] Two years

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[106] KALVEN, *supra* note 97, at 133.

[107] *See supra* text accompanying note 95.

[108] *See* Abrams v. United States, 250 U.S. 616, 627 (1919) (Holmes, J., dissenting); Frohwerk v. United States, 249 U.S. 204, 206 (1919).

[109] Schenck v. United States, 249 U.S. 47, 52 (1919).

[110] *See* Powe, *supra* note 96, at 348–49.

later, a meeting hall filled with hundreds of striking copper miners in Calumet, Michigan was thrown into panic when someone, apparently an outsider aggrieved by the strike, peeked in and maliciously yelled "Fire!" when there was no reason to suppose there was one.[111] Seventy-three persons died in the scramble for the exits.[112] Both tragic incidents were reported by newspapers across the country.[113]

The key question to ask about Holmes' theater example as an illustration of his test for protecting speech is whether, in addition to the obvious danger involved, he considered any of the following features of the hypothesized case to be pertinent to its probative value: (1) the falsity of the message; (2) the fact that a panic is not just a risk but actually occurs; (3) the absence from the speaker's message of any general idea or observation; and (4) the extreme inability of the intended audience under the circumstances to evaluate the truth of the message or reflect upon what to do about it assuming it to be true. If none of these variables mattered to Holmes, we might be justified in taking his example to support the notion that all speech that is sufficiently dangerous can be regulated. But if he believed that the power of his example turns on one or more of these variables, he must have thought that more than the predicted dangerousness of an utterance determines whether it is protected under the First Amendment.

Holmes famously argued in two renowned dissents that dangers likely to materialize only in the middle or distant future cannot justify making it a crime to disseminate general political ideas and criticisms;[114] that is what he took to be the import of his clear-and-present-danger test. Did Holmes think that the theater example explains why only "present" or "imminent" dangers should count? To be sure, the harm in that case occurs instantly, but why did Holmes see fit to throw in the other variables just listed that characterize the theater example? One could produce an example of speech that risks causing harm in a short time frame that has none of those variables. Mill's speaker before the home of the corn dealer is one such

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[111] *Id.* at 349.

[112] *Id.*

[113] *Id.* at 348 n.27, 349 n.34. Robert Tsai's research found that "[b]etween 1875 and 1920, there were at least four devastating theater fires in the continental United States and Puerto Rico, killing over 1200 people" and another 1020 deaths from theater fires in the United Kingdom, Paris, and Vienna. *See* Robert L. Tsai, *Fire, Metaphor, and Constitutional Myth-Making*, 93 GEO. L.J. 181, 196 n.57 (2004).

[114] *See* Gitlow v. New York, 268 U.S. 652, 672–73 (1925) (Holmes, J., dissenting); Abrams v. United States, 250 U.S. 616, 624–31 (1919) (Holmes, J., dissenting).

example, known to Holmes from his rereading of *On Liberty* a few weeks before he wrote his *Schenck* opinion.[115] Moreover, even if Holmes' theater example offers an especially vivid instance of speech causing great suffering almost immediately, that demonstration says very little about why such a short-and-direct scenario of harm causation should be not just a *sufficient* but also a *necessary* condition for regulation. It is the latter proposition that is the more interesting and controversial aspect of the clear-and-present-danger test. The requirement that the harm occur imminently, when applicable, precludes the regulation of most forms of pornography and racial hate speech, for example. Possibly Holmes was drawn to the theater situation because in it there is no opportunity for the audience to evaluate the speaker's message or for outside observers to discredit it. He might have thought the example highlights by contrast those instances in which the law can, as he put it in *Abrams v. United States*, "leave the correction of evil counsels to time."[116] Once again, however, we must ask how much the unavailability of the remedy of "time" in the theater example tells us about the adequacy of that mysterious corrective for situations in which the dangers created or exacerbated by speech may develop more slowly.

In seeking to understand the import of his theater example, it is helpful to consider other hypothetical speech cases that Holmes invoked to defend and delineate his clear-and-present danger test. In *Abrams*, he said:

> A patriot might think that we were wasting money on aeroplanes, or making more cannon of a certain kind than we needed, and might advocate curtailment with success, yet even if it turned out that the curtailment hindered and was thought by other minds to have been obviously likely to hinder the United States in the prosecution of the war, no one would hold such conduct a crime.[117]

And later in the same opinion: "Congress certainly cannot forbid all effort to change the mind of the country."[118] Ever the common-law judge, Holmes used specific examples to identify not only the speech that society

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[115] *See* Letter from Oliver Wendell Holmes, Jr., U.S. Supreme Court Justice, to Harold J. Laski (Feb. 28, 1919), *in* 1 HOLMES-LASKI LETTERS: THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916–1935, at 187 (Mark DeWolfe Howe ed., 1953).

[116] *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting).

[117] *Id.* at 627.

[118] *Id.* at 628.

must have the power to regulate but also the speech that any defensible First Amendment test must be able to protect. And what the examples as a whole demonstrate, I believe, is that Holmes looked not only to the danger posed by an utterance but also to the social function of the category of speech in dispute. Only for speech of a certain, particularly valuable sort did he think his protective clear-and-present-danger test should govern. For all other speech, Holmes was prepared to uphold regulation on the basis of the non-imminent, necessarily speculative harms it might be thought to cause. One passage of his eloquent dissent in the *Abrams* case that is too often overlooked cautions: "I am speaking only of expressions of opinion and exhortations, which were all that were uttered here."[119]

His famous free market test of truth, introduced in his *Abrams* opinion, Holmes justified on the ground that such a non-authoritative, non-dogmatic, dynamic conception of truth "is the only ground upon which [people's] wishes safely can be carried out."[120] He developed a highly speech-protective interpretation of the First Amendment because he thought that few matters of social ordering are as important as overcoming the human tendency to hold onto fixed beliefs long after they have outlived their accuracy, cogency, or usefulness. He came to favor a robust right of free speech not because he thought that controversial ideas do little harm, but rather because he believed that provocative, heretical speech is foundational to an energetic, dynamic, adaptive way of life.[121] We need to keep that emphasis in mind when trying to appreciate how his theater example helped Holmes to mark the bounds of the freedom of speech.

This understanding of his approach to the subject leads me to think that the falsity, absence of a general idea, and audience vulnerability features of his theater example were important to Holmes, more so than the fact that in his example the harm is a completed reality rather than a prediction. Like Mill, Holmes did not believe that all uses of words are presumptively immune from legal regulation, only uses of words that play a part in the evolution of general ideas. Like Mill, Holmes believed that many instances of communication can be regulated on the basis of reasonable predictions that the speech will lead to certain specific kinds of harm, but that the nature of the harms and causal scenarios that can count for this purpose must be carefully circumscribed lest they be invoked to impair the

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[119] *Id.* at 631.

[120] *Id.* at 630.

[121] For an elaboration of this reading of Holmes, see Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1.

supremely important good of freedom of thought, the "principle of the Constitution that more imperatively calls for attachment than any other."[122]

How then do Mill and Holmes differ in the way their famous examples delimit the freedom of speech? To pursue this inquiry, I return to the two instances of corn dealer criticism and the two cases of anti-abortion speech that I discussed in conjunction with Mill.

Holmes would certainly have agreed with Mill that the principle of freedom of speech has to protect the publication in a newspaper of the opinion that corn dealers are starvers of the poor, even under circumstances of high social tension regarding the practices of corn dealers. This kind of utterance states an opinion, articulates or at least implies reasons, and gives audiences ample opportunity to decide whether to accept or reject the speaker's view. In these respects, it bears no resemblance to the false shout of "Fire!" in a theater.

Mill's on-site corn dealer example, with the audience characterized as "an excited mob," would seem to be a textbook illustration of the kind of speech that can be regulated under Holmes' clear-and-present danger test. It is a weaker case for regulation than the theater example in that it involves the expression of an opinion that cannot be proved false, could conceivably be uttered by someone who wished only to make a political point and not to cause immediate material harm,[123] and can be assessed by the audience more easily than can a warning of fire in the vicinity. Nevertheless, even more so than Mill, Holmes gives great emphasis to the time dimension,[124] and the on-site corn dealer example shares with the theater example the feature that any harm likely to follow from the speech is likely to occur in a heartbeat. Easy case for Holmes, as it was for Mill.

You will recall that I maintain that Mill could, consistently with his argument in *On Liberty*, justify punishing anti-abortion protestors for including in their messages of moral condemnation the names, pictures, and addresses of abortion providers. I take that to be an implication of Mill's argument not so much because the addition of such information increases the likelihood of harm ensuing from the publication but rather because its inclusion both permits the imputation of foul intent and changes the content of the message in a direction that diminishes the

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[122] United States v. Schwimmer, 279 U.S. 644, 654–55 (1929) (Holmes, J., dissenting) ("[N]ot free thought for those who agree with us but freedom for the thought that we hate.").

[123] *See* TEN, *supra* note 19, at 132.

[124] *See Abrams*, 250 U.S. at 630 (Holmes, J., dissenting) ("[T]ime has upset many fighting faiths . . . leave the correction of evil counsels to time.").

probability that it will serve as a contribution to ongoing open-ended moral reflection. Holmes might have other reasons to deny protection to such dangerously informative signs at rallies and in website postings. The scope of communicative activities covered by Holmes' argument for the freedom of speech is narrower than is true for Mill. Remember that Holmes cautions in *Abrams* that he is speaking "only of expressions of opinion and exhortations"[125] and then only "where private rights are not concerned."[126] The main point of the theater example, in my judgment, is to identify an instance of speech that by virtue of its subject matter, intention, and function has nothing to do with the evolution of ideas; the example is offered in the spirit of excluding certain verbal activities from the ambit of First Amendment concern.

Admittedly, the name-specific anti-abortion protest is much more political and much more capable of engendering debate than is the shout of "Fire!" but hardly more so than the posting would be without the names and addresses. The addition of that information brings the case closer to Holmes' action-oriented examples of persuasion to murder and ordering a boycott,[127] cases he says lie beyond First Amendment protection, presumably in part because the factor of individualized targeting in those examples brings private rights of personal and economic security into play. Notice that in the theater example as well the threat is to individual lives rather than collective goods such as national security, conventional morality, cultural identity, or the state of public knowledge. That distinction is central to Holmes' understanding of the freedom of speech, which he took to be mainly a constraint against the maladaptive use of state power to prop up political, moral, cultural, and philosophical orthodoxies.

My belief that Holmes' argument is much more sensitive than Mill's to the distinction between public and private harms has consequences also for the question of whether sidewalk counselors have a right closely to approach women whom they hope to persuade not to have abortions. As explained above, Mill cannot recognize the "moral distress" that such an encounter might cause, but he *can* count harms that go beyond moral distress, such as fear of physical harassment and discomfort at having one's personal space invaded without invitation, by a critic or even by a

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[125] *Id.* at 631.

[126] *Id.* at 628.

[127] *See supra* notes 108–09 and accompanying text.

supporter.[128] Under his analysis in *On Liberty*, however, Mill must balance against such harms the benefits to understanding and personal identity that sometimes can follow from unbidden attempts to persuade face-to-face, and he must accord such potential benefits considerable weight. This is why I consider *Hill v. Colorado* to be a difficult case for a Millian.

As I read him, Holmes does not offer reasons to prevent political majorities from regulating "private" speech, including speech between two individuals that is intelligible only to them, even when it occurs in the midst of a large gathering of protestors. Holmes' argument for the freedom of speech is about the need for a never-ending competition of ideas in a metaphorical "market" that is open to all. It is about the struggle for dominance among contending views, the struggle to constitute the next majority. His market requires high disputational energy and low barriers to entry in order to generate the collective good of adaptation to changing conditions. But the concern for individual integrity, engagement, and improvement that drives Mill's argument for the freedom of speech is missing from Holmes' account.[129] Mill feared majorities and sought to keep them at bay.[130] Holmes adored them.[131] This difference has implications for their treatment of private speech, and explains why Holmes should be much more willing than Mill to permit the majority to decide when one person's desire to be let alone takes priority over another's desire to persuade, bear witness, or condemn. For Holmes, *Hill* is an easy case in favor of allowing regulation; for Mill, it is anything but.

I have little doubt that persons as knowledgeable in these matters as I am will disagree with many of the judgments I have reached regarding how Mill and Holmes ought to resolve the cases I have discussed in light of the commitments they make with their famous speech limiting examples. I do believe, however, that my two most basic conclusions are demonstrably sound, even though they run counter to the way the corn dealer and theater examples are commonly invoked in modern debates about the freedom of speech. The first conclusion is that neither Mill nor Holmes employed his example to claim that in principle speech can be regulated whenever it can fairly be predicted to cause a substantial amount of harm. The second is that neither Mill nor Holmes treated all or even most instances of speech as

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[128] *See supra* text accompanying note 87.

[129] *See* Ten Cate, *supra* note 13, at 52–61.

[130] *See* Berlin, *supra* note 45, at 193–94.

[131] *See* Thomas C. Grey, *The Colin Raugh Thomas O'Fallon Memorial Lecture on Law and American Culture: Holmes, Pragmatism, and Democracy*, 71 OR. L. REV. 521, 537–38 (1992).

comparable in the sense of being subject to a single unitary standard specifying the type and level of harm that can justify regulation. Both of these great thinkers were not just discerning but discriminating in how they valued the opportunity to communicate, even as they shared the judgment that *some* opportunities to communicate are valuable beyond measure, so much so as to lie beyond the authority of society to regulate, whatever the short- or middle-run calculus of harm.