

ON THE RELATION BETWEEN CHAPTERS ONE AND TWO OF JOHN STUART MILL'S *ON LIBERTY*

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John Stuart Mill's essay *On Liberty* is an icon of the liberal tradition.¹ It is without question the most important articulation of the classical liberal (or, if you will, libertarian) position that the state has no legitimate authority to restrict the actions of an individual except when those actions produce harm to others. And *On Liberty* is also among the preeminent defenses of a distinct principle of freedom of speech, or, as Mill expressed it, a liberty of thought and discussion.²

Mill's defense of the so-called Harm Principle is the chief concern of Chapter One of *On Liberty*, where Mill sets out and explains his "one very simple principle":³

[T]he sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.⁴

Chapter Two of *On Liberty*, entitled "On the Liberty of Thought and Discussion," appears initially to address a different topic. That is, although a liberty of thought might well be understood to be an instance of the self-regarding conduct that is the subject of Chapter One,⁵ "discussion" seems different. Discussion, which in its standard sense for non-delusional

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¹ See JOHN STUART MILL, *ON LIBERTY* (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

² See *id.* at 86–120.

³ *Id.* at 80.

⁴ *Id.*

⁵ On Mill's distinction between self-regarding and other-regarding conduct, see R.J. Halliday, *Some Recent Interpretations of John Stuart Mill*, 43 PHIL. 1 (1968).

people typically requires multiple participants, is almost by definition the kind of other-regarding conduct that affects others. Moreover, although most communications, just like most actions, are harmless, the capacity of discussion, expression, speech, printing, and other forms of public communication to cause harm in the ordinary sense of “harm” appears plain.⁶ Damage to reputation, mental anguish, exposure of embarrassing facts, and persuasion to commit antisocial acts, among many others, are the kinds of harmful consequences sometimes produced by the communicative acts of others.⁷ Thus, it seems simply mistaken to treat communication as a category of harmless actions, or even, albeit more controversially, as a type whose tokens are statistically less likely to be harmful than the tokens of the type we call actions.⁸ Consequently, there appears initially to be some tension between Chapters One and Two of *On Liberty*. More specifically, it is by no means clear whether Chapter Two and the liberty of thought and discussion were intended by Mill (or are best understood) to represent an example of the kind of self-regarding conduct he discussed in Chapter One, or if instead Mill believed that the liberty of, especially, discussion was, in effect, an exception to the principles set forth in Chapter One, to be protected not because of its harmlessness, but, and for other reasons, despite the harm it could cause.

In his Sullivan Lecture, Professor Blasi offers an insightful and imaginative interpretation of Mill’s views on harm and the consequences of thought and discussion that render Mill’s arguments in Chapters One

⁶ My own views on the harm-producing capacities of communication, and the implications of that fact for free speech theory, are set out in, *inter alia*, FREDERICK SCHAUER, FREE SPEECH: A PHILOSOPHICAL ENQUIRY 10–12 (1982) [hereinafter SCHAUER, FREE SPEECH]; Frederick Schauer, *Is It Better to Be Safe than Sorry?: Free Speech and the Precautionary Principle*, 36 PEPP. L. REV. 301 (2009); Frederick Schauer, *The Phenomenology of Speech and Harm*, 103 ETHICS 635 (1993) [hereinafter Schauer, *The Phenomenology*]; Frederick Schauer, *Uncoupling Free Speech*, 92 COLUM. L. REV. 1321 (1992).

⁷ See SCHAUER, FREE SPEECH, *supra* note 6, at 10.

⁸ An assumption to just this effect—“[i]t is almost certainly true [that] in the overwhelming majority of cases that speech is less immediately dangerous than conduct”—can be found in MARTIN H. REDISH, FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS 19 n.48 (1984). Once we recognize that almost all conduct is not dangerous, whether immediately or otherwise, however, the factual basis for Redish’s conclusion appears elusive.

and Two compatible with each other.⁹ Blasi's interpretation, however, may well serve the goal of making the initial chapters of *On Liberty* (and indeed, the entire book) internally coherent at the possible expense of understating the social consequences, sometimes positive and sometimes negative, of speech and discussion. Blasi's understanding of Mill may well be as accurate exegetically as it is insightful, but if Blasi's explication accurately captures Mill's views, then perhaps it is Mill that is in need of challenge. In seeking to defend here the view that Chapter Two is best understood as an exception to Chapter One rather than an instantiation of it, I offer in this essay an interpretation that is accordingly partly a challenge to Blasi and partly a challenge to Mill. It is a challenge which may at times be in tension with some portions of Mill's text, but it is one which is compatible with others. Moreover, the challenge appears to make the most sense of Mill's enduring epistemic arguments in Chapter Two concerning the relationship between the liberty of discussion and the social acceptance of truth and rejection of falsity. And thus the challenge I offer is, I believe, an interpretation that makes Mill's contributions most relevant to many of the free speech issues that arise a century and half after *On Liberty* was written.¹⁰

I.

The basics of Millian liberalism are well known and widely analyzed.¹¹ Mill was concerned, principally, with guarding the domain of individual

⁹ See Vincent Blasi, *Shouting "Fire!" in a Theatre and Vilifying Corn Dealers*, 39 *CAP. U. L. REV.* 535, 537–59 (2011) (Part II).

¹⁰ Unlike Blasi, I am not a historian, and consequently, have fewer qualms than others might about the "presentist" tone of the previous several sentences in the text. Although it is indeed troublesome to attempt to understand history largely in terms of its current pragmatic or prescriptive value, *On Liberty* has become such a staple of contemporary free speech law, scholarship, and public discourse that an attempt to situate it in current issues may have value even if doing so goes beyond the boundaries of pure historical analysis.

¹¹ Among the leading works are: MAURICE COWLING, *MILL AND LIBERALISM* (1963); JOHN GRAY, *MILL ON LIBERTY: A DEFENCE* (1983); JOSEPH HAMBURGER, *JOHN STUART MILL ON LIBERTY AND CONTROL* (1999); GERTRUDE HIMMELFARB, *ON LIBERTY AND LIBERALISM: THE CASE OF JOHN STUART MILL* (1974); H.J. McCLOSKEY, *JOHN STUART MILL: A CRITICAL STUDY* (1971); *MILL: A COLLECTION OF CRITICAL ESSAYS* (J.B. Schneewind ed., 1968); JOHN C. REES, *JOHN STUART MILL'S ON LIBERTY* (1985); JONATHAN RILEY, *MILL ON LIBERTY* (1998); ALAN RYAN, *JOHN STUART MILL* (1970); JOHN SKORUPSKI, *JOHN STUART MILL* (1989); C.L. TEN, *MILL ON LIBERTY* (1980); *THE CAMBRIDGE COMPANION TO MILL* (John Skorupski ed., 1998).

liberty against the “tyranny of the majority.”¹² And by this he meant not only the power of a democratic government, but also, and perhaps more importantly, the less formal but no less effective control exercised by the tyranny or “yoke”¹³ or “moral coercion”¹⁴ wrought by social norms and prevailing opinion.

Mill’s focus on protecting individual liberty has two dimensions. First, he would limit the power of society to “self-protection,” which can be understood as an articulation of the “Harm Principle”—the principle that society may proceed only against genuine harms and not against other forms of individual or social discomfort.¹⁵ And, second, the harms encompassed by the Harm Principle would include only those to individuals other than the actor.¹⁶

His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, [or] because, in the opinion of others, to do so would be wise, or even right.¹⁷

This is the anti-paternalism principle,¹⁸ which establishes that even the harms with which society may legitimately deal are limited to those

¹² Mill explicitly uses the phrase, “tyranny of the majority,” MILL, *supra* note 1, at 76, but the phrase owes its provenance to Voltaire, who referred to “la tyrannie . . . plusieurs” (tyranny of the many) in his *DICTIONNAIRE PHILOSOPHIQUE* 918 (Paris, Imprimerie de Cosse et Gaultier-Laguionie 1838) (1764); to James Winthrop, who explicitly mentioned the “tyranny of the majority” in his anti-Federalist Agrippa (#18) letter of February 5, 1788, Letter from James Winthrop to The Massachusetts Convention (Feb. 5, 1788), in *THE ANTIFEDERALISTS* 154 (Cecilia M. Kenyon ed., 1966); and to Alexis de Tocqueville, who made the phrase famous in 1835 by using it as a subheading in Chapter XV of *Democracy in America*. ALEXIS DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 270 (Henry Reeve trans., The Colonial Press 1900) (1835).

¹³ MILL, *supra* note 1, at 78.

¹⁴ *Id.* at 80.

¹⁵ The most extensive and influential analysis is 1 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* (1984) and 4 JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING* (1988). Also valuable is Larry Alexander, *Harm, Offense, and Morality*, 7 *CAN. J.L. & JURISPRUDENCE* 199 (1994).

¹⁶ MILL, *supra* note 1, at 80.

¹⁷ *Id.*

¹⁸ See Joel Feinberg, *Legal Paternalism*, 1 *CAN. J. PHIL.* 105, 105 (1971); Kent Greenawalt, *Legal Enforcement of Morality*, in *A COMPANION TO PHILOSOPHY OF LAW AND LEGAL THEORY* 475, 480–83 (Dennis Patterson ed., 1996).

suffered by individuals other than the one causing the harm.¹⁹ For Mill, the only conduct which is within society's legitimate purview is that which is "calculated to produce evil to someone else. The only part of the conduct of any one, for which he is amenable to society, is that which concerns others."²⁰

Chapter One of *On Liberty* thus stands for the proposition that both government and public opinion are properly used to prevent harm to others, but that self-regarding conduct, whether because harmless or because harmful but only to the agent, is the domain of individual liberty. And this is so, Mill says, not because of "abstract right" but because utility, defined as "the permanent interests of man as a progressive being," demands it.²¹

II.

Chapter Two of *On Liberty* is concerned almost entirely with the liberty of thought and discussion. But in contrast to Chapter One, which is directed to the liberty of the individual, much of Chapter Two appears initially to be focused on the social as opposed to the individual benefits of a regime of freedom of thought and expression. Indeed, Chapter Two is most famous for being the definitive exposition of the (social) epistemic arguments for freedom of expression—the ways in which freedom of expression functions as an indispensable aid in the societal identification of

¹⁹ It is common to refer to Mill's principle capaciously as the "Harm Principle," but because harmful actions can harm either the actor or others, it is important to recognize a distinct anti-paternalism principle, without which the state might be thought of as being legitimately empowered to deal with all harms, whether to others or to the actor producing them.

²⁰ MILL, *supra* note 1, at 80–81.

²¹ *Id.* at 81. There is an extensive debate about whether Mill's understanding of utility in terms of liberty or in terms of "man as a progressive being" in fact represented a departure from the utilitarianism with which Mill claimed to subscribe. Compare KARL BRITTON, JOHN STUART MILL 50–56 (1953) (arguing that considerations of non-utilitarian justice infuse Mill's writings on utilitarianism), with L.W. SUMNER, THE HATEFUL AND THE OBSCENE: STUDIES IN THE LIMITS OF FREE EXPRESSION 20–51 (2004) (offering a utilitarian account of Mill's arguments). Blasi and I agree on Mill's "ultimate" utilitarianism, although Blasi's Mill, in stressing more than I do the way in which utility is fostered by allowing the flourishing of the human mind, is arguably more susceptible to the "not really utilitarian" critique than an account, like the one I offer here, that sees Mill as positing a more direct relationship between the liberty of expression and the aggregate social benefit of epistemic progress.

truth (and exposure of falsity), and, thus, in the fostering of public knowledge.²²

In arguing for the epistemic advantages—whether to the individual or to a society committed to truth—of the social and political acceptance of a strong liberty of discussion and publicly expressed opinion, Mill famously divides the topic into three parts, all proceeding on the assumption that the typical impulse to suppress is based on the alleged falsity of the idea or articulation to be restricted. Such an impulse to suppress the public expression of that which is perceived to be false, Mill argues first, is misguided because the idea suppressed on account of its falsity may in fact be true.²³ To fail to recognize that possibility, he insists, even in the face of psychological certainty, is to assume, irrationally, one's own infallibility.²⁴ Second, the idea suppressed on account of its falsity may indeed be false, but confrontation with false ideas is necessary to assure the robustness and understanding of true ones.²⁵ And third, even ideas that are largely false may contain a germ of truth, such that allowing them to be expressed will enable us to advance our understanding by modifying the beliefs we now have in light of the partial truths offered by even those ideas that are substantially false.²⁶

Mill's epistemic arguments have been highly influential. Indeed, even scholars who disagree with Mill's account of the reasons underlying the freedom of thought and discussion often describe their arguments as

²² See Tom Campbell, *Rationales for Freedom of Communication*, in FREEDOM OF COMMUNICATION 17, 20 (Tom Campbell & Wojciech Sadurski eds., 1994) (relating Mill's ideas to the "population" as a determiner of truth); Jan Narveson, *Freedom of Speech and Expression: A Libertarian View*, in FREE EXPRESSION: ESSAYS IN LAW AND PHILOSOPHY 59, 75 (W.J. Waluchow ed., 1994) (relating Mill's arguments in *On Liberty* to the promotion of "general knowledge").

²³ MILL, *supra* note 1, at 118.

²⁴ *Id.*

²⁵ *Id.* David O. Brink explicates and sympathizes with this argument in David O. Brink, *Millian Principles, Freedom of Expression, and Hate Speech*, 7 LEGAL THEORY 119, 123 (2001). For Brink, or for Mill as interpreted by Brink, confrontation even with that which is false is essential for the fostering of individual deliberative capacities, and censorship by the state is an illegitimate preemption of individual deliberation. Brink's argument is usefully further discussed in LARRY ALEXANDER, IS THERE A RIGHT OF FREEDOM OF EXPRESSION? 72–75 (2005).

²⁶ MILL, *supra* note 1, at 118.

“Millian,”²⁷ precisely because the arguments in Chapter Two of *On Liberty* are so widely taken to represent the basic idea that citizens who articulate even the most seemingly false and dangerous ideas should be allowed to do so free of the constraints both of legal regulation and of social pressure. As Professor Blasi correctly notes in analyzing Mill’s example of the inflammatory speech made in front of the house of a corn dealer, Mill did not believe that there should be unlimited freedom to say everything under all possible circumstances.²⁸ But it is precisely the extremity of the corn dealer example—Mill asks us to imagine the inciting opinion offered to an already gathered and angry crowd—that reinforces the implication that for Mill almost all else was to be protected. It is thus the combination of the extremity of the conclusion and the arguments supporting it that establishes Chapter Two’s status as a member of the small pantheon of the most enduring and powerful arguments for a degree of free speech protection that would resist all but the most compelling (and narrow) reasons for restriction.²⁹

III.

The foregoing skeletal—almost cartoonish—presentation of the basic themes of Chapters One and Two should be sufficient to expose the basic problem I wish to address here. Chapter One appears to be largely focused on the individual and on the importance of individual choice, individual freedom, and individual decision-making about matters that concern only that individual.³⁰ But of course Mill recognized that this degree of

²⁷ *E.g.*, Thomas Scanlon, *A Theory of Freedom of Expression*, 1 PHIL. & PUB. AFF. 204, 213 (1971).

²⁸ The example is to be found at the beginning of Chapter Three.

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 out among the same mob in the form of a placard.

MILL, *supra* note 1, at 121.

²⁹ Blasi’s cast of characters in that pantheon is valuably discussed in VINCENT BLASI, *IDEAS OF THE FIRST AMENDMENT* (2006).

³⁰ A prominent criticism of *On Liberty* for being excessively preoccupied with the individual is GERTRUDE HIMMELFARB, *LORD ACTON: A STUDY IN CONSCIENCE AND POLITICS* 75 (1952) (echoing some of what can be found in JAMES FITZJAMES STEPHEN, *LIBERTY, EQUALITY, FRATERNITY* 46 (1882)). Mill is defended against this charge in Richard B. (continued)

individual freedom could be accepted only for self-regarding activities.³¹ Mill was hardly advocating anarchy, nor did he have anything favorable to say, at least in Chapter One, about people who wished to exercise their liberty by harming others. So an action being harmless—or, more broadly, not socially detrimental³²—was for Mill a necessary condition for the exercise of the individual freedom he so forcefully touted in Chapter One.

Applying the argument for the protection of self-regarding or harmless acts to people's thoughts seems straightforward. And that is because we might think of thoughts as being internal, personal, private, and thus of necessity beyond the reach of official or social intervention. This conclusion is not a normative one. Rather, it is the empirical—biological, technological, or physiological—assumption that thoughts are safe from social intrusion by virtue of the physical sanctity and non-transparency of the mind.³³ The nineteenth century German song—*Die Gedanken sind Frei*—captures this insight, one that provides the empirical support for the Millian position that thoughts are self-regarding.³⁴ Thus, it is not the

Friedman, *A New Exploration of Mill's Essay On Liberty*, 14 POL. STUD. 281, 300–04 (1966).

³¹ See MILL, *supra* note 1, at 82–83.

³² Lurking in the vicinity of any discussion of Mill's political philosophy, and especially the views expressed in *On Liberty* when considered along with the positions in John Stuart Mill's *Utilitarianism*, J. S. Mill, *Utilitarianism*, in J. S. MILL & JEREMY BENTHAM, *UTILITARIANISM AND OTHER ESSAYS* 272 (Alan Ryan ed., 1987), is the question of whether Mill's utilitarianism (assuming, *arguendo*, that his claims to be a utilitarian are sound) should be understood as act-based or rule-based. See J.D. Mabbott, *Interpretations of Mill's "Utilitarianism,"* 6 PHIL. Q. 115, 115 (1956); Maurice Mandelbaum, *Two Moot Issues in Mill's Utilitarianism*, in MILL: A COLLECTION, *supra* note 11, at 206, 207–21; J. Margolis, *Mill's Utilitarianism Again*, 45 AUSTRALASIAN J. PHIL. 179, 179–84 (1965); J.O. Urmson, *The Interpretation of the Moral Philosophy of J.S. Mill*, 3 PHIL. Q. 33, 35 (1953). If Mill is understood as an act-utilitarian who would evaluate every proposed action individually to determine its net effect on aggregate utility, he might well have been willing to regulate even seemingly harmless acts which had harmful or utility-diminishing secondary consequences and would (or should) have been willing to allow harmful acts where their regulation would produce a net reduction in utility. More plausibly, however, Mill is best understood in rule-utilitarian terms, and from this vantage point we can understand the prescriptions in *On Liberty* as being about categories of acts and about the utility-enhancing or utility-diminishing tendency of regulation of categories as opposed to individual acts. See SUMNER, *supra* note 21, at 18–51 (2004).

³³ I will put aside questions of torture, truth serum, neuroimaging, and other methods by which people's thoughts might be revealed against their will.

³⁴ See UNKNOWN COMPOSER, *DIE GEDANKEN SIND FREI*.

question whether thoughts really are self-regarding or not. It is that thoughts must be treated as self-regarding because neither the state nor public opinion can reach or change them. Insofar as this is so, the arguments in Chapter One of *On Liberty* apply with ease, and of necessity, to the principle of freedom of thought. Indeed, the entire topic of freedom of thought is an interesting one for just this reason. If thoughts themselves are beyond the possibility of control, then the typical arguments against so-called mind-control, or in favor of freedom of thought, are arguments not about minds or thoughts, but instead about the external influences on minds and the overt manifestations or consequences of thoughts. But of course thoughts produce actions, and we rarely see arguments for the protection of otherwise regulable actions on the grounds that they reflect and emanate out of thoughts, although of course they do. To attempt to explain freedom of speech, for example, by reference to freedom of thought³⁵ thus assumes at the outset an answer to the very question on the table—whether speech (or discussion, or communication, or publication), which is of course thought-produced and thought-producing, is different from the actions whose thought-produced and thought-producing status and capacity does not provide them with an immunity they would otherwise not have possessed. The central question about the status of freedom of speech as a distinct principle is the question whether propositions uttered by others that influence our thoughts and behavior, and which emanate out of the thoughts and behavior of those who utter them, are entitled to greater immunity from governmental and social control than the non-utterance actions taken by others that influence our thoughts and behavior, and the announcements about the importance of freedom of thought to not address this question at all. Freedom of thought, therefore, is better understood as a physical fact—certainly at Mill's time even if not now—than as a useful normative position in the political, moral, or legal theory of freedom of expression.

It is a mistake, however, to conflate the physical sanctity of thought with thought's lack of causal consequences. Thoughts may well be largely beyond the reach of social sanction or legal compulsion, but they are hardly ineffectual. Actions have their origins in thoughts, and that obvious fact is no less true for bad actions than for good. It may be impossible for society to influence private thoughts, or at least Mill seems to have believed, but if society is, as Mill asserts in Chapter One, legitimately

³⁵ See, e.g., Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 237–38 (1992).

interested in other-regarding and harm-producing actions,³⁶ then, in theory if not in practice, the causal thoughts of people would seem to fall within the domain of the other-regarding.

Still, whatever might be the case in a world in which thoughts were controllable, in the world in which we live—and, certainly, in the world in which Mill lived—such a scenario is in the realm of fantasy. Far more real, however, is the world not of thought, but of talk. Mill referred to “discussion,”³⁷ and in doing so plainly was thinking of the universe of speeches, publications, conversation, and the myriad other ways in which ideas, facts, and opinions are conveyed and publicly expressed. And it is this universe that constituted the primary object of Mill’s analysis in Chapter Two.

Thus, whatever we might think about the inevitable physical immunity of thought, the same cannot be said about the printed or spoken word. Words—and pictures—are overt and external, and cannot find refuge from social or official sanction in the recesses of the mind. More importantly, words and other forms of communication can hardly be relegated to the category of the self-regarding. We talk principally for the purpose of having some effect on others, whether that purpose be informing, persuading, shocking, comforting, or any of a vast number of other ways in which what we say may influence the thoughts and actions of other people. And although most speech does not cause harm, nor does most action.³⁸ Just as only a small subset of action is harm-producing, or harmful in itself, so too is only a small subset of speech, talk, or discussion also potentially harm-producing, by, for example, damaging reputation, causing emotional distress, fostering belief in that which is false, or increasing the likelihood that others will engage in harmful action. To treat speech, talk, or discussion as lying in a different category from action, or in a different

³⁶ See MILL, *supra* note 1, at 80–81.

³⁷ *Id.* at 86.

³⁸ One occasionally sees arguments for freedom of speech premised on the belief that speech is, as a category, less harmful or less dangerous than action as a category. See, e.g., REDISH, *supra* note 8, at 19. If this were true, it would constitute a significant argument for a free speech principle, but whether it is true is far from obvious once we recognize that almost all actions, just like almost all speech, are not dangerous. Typically, the case for the non-dangerousness of speech is based on a normative or moralized conception of harm or danger, e.g., JUDITH JARVIS THOMSON, *THE REALM OF RIGHTS* 262–69 (1990); compare Schauer, *The Phenomenology*, *supra* note 6, at 651–52 (responding to Thomson), that tends to disguise the normative questions about freedom of speech as factual questions about the existence of harm.

category from non-communicative actions, at least with respect to harm-causing capacity, requires the use either of questionable empirical assumptions for which there is no existing support or of a question-begging definition of harm that embeds precisely the free speech question that is at issue into the definition of harm.

Mill, of course, plainly recognized and acknowledged all of this. In Chapter One, which he did, after all, designate as “Introductory,” he observes:

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.³⁹

This is a curious passage. For one thing, it is the only reference to discussion and expression to be found in Chapter One, the remainder of the chapter being devoted entirely to the basics of the harm and anti-paternalism principles. In addition, it is three times qualified, first when Mill notes that expressing and publishing opinions is of “almost” as much importance as the liberty of thought,⁴⁰ and then when he says that the liberty of expressing and publishing opinions rests “in great part” on the same reasons as liberty of thought,⁴¹ and finally when he describes the liberty of expressing and publishing opinions as “practically inseparable” from the liberty of thought.⁴² But most curious of all is the fact that Mill offers little in the way of argument in Chapter One about why the admittedly other-regarding liberty of expressing and publishing opinions ought to be considered any more inseparable from the liberty of thought than are other-regarding actions. Surely, Mill could not have believed that actions are not the product of thought, yet he did not maintain that the liberty of other-regarding action is inseparable from the liberty of thought. And if we suppose the causation going in the other direction—from expression and discussion to thought—again there seems little reason to suppose that the situation is different for discussion than for non-communicative actions. Yes, our thoughts are informed by the ideas we

³⁹ MILL, *supra* note 1, at 82–83.

⁴⁰ *Id.*

⁴¹ *Id.* at 83.

⁴² *Id.*

learn about from the communications of others, but so too are our actions. We learn from our own actions and from observing the actions of others; yet Mill does not think of freedom of thought and freedom of action as in any way inseparable.

Thus, although Mill appears in Chapter One to acknowledge the disjunction between the main themes of this chapter and those of Chapter Two, his acknowledgement is as unsatisfactory as it is cursory.⁴³ And so the problem remains: What is the connection between the liberty of self-regarding action that is the primary theme of Chapter One and the liberty of other-regarding discussion that constitutes the bulk of Chapter Two, and which has given Chapter Two its enduring importance?

IV.

In his Sullivan Lecture, Professor Blasi recognizes the problem of trying to reconcile Chapters One and Two.⁴⁴ He well understands that speech is hardly inconsequential and understands also that Mill understood that.⁴⁵ But Blasi also finds it intriguing that nowhere in Chapter Two does Mill qualify his defense of the liberty of thought and discussion by the Harm Principle, even though, at the beginning of Chapter Three, Mill presents the famous corn dealer example that is the impetus for much of Blasi's analysis.⁴⁶

So what then is the relationship between Chapters One and Two, and between the liberty of thought and discussion and the Harm Principle? And if Chapter Two is an instantiation of, or at the very least compatible with, Chapter One, as Blasi and others appear to believe,⁴⁷ then what is the role of harm in thinking about discussion and expression? Mill surely did not think discussion and expression harmless, a point he made clear both in Chapter One and with his subsequent use of the corn dealer example. But is harmful speech to be protected by a strong liberty because of its relation to freedom of thought? Is Chapter Two only about harmless speech, and, if so, what is the conception of harm that generates this conclusion? Or is

⁴³ For the view that *On Liberty*, for all its insight and rhetorical power, was a casually argued work with numerous inconsistencies, see Richard A. Posner, *On Liberty: A Reevaluation*, in *ON LIBERTY* 197 (David Bromwich & George Kateb eds., Yale Univ. Press 2003) (1859).

⁴⁴ See Blasi, *supra* note 9, at 537–59 (Part II).

⁴⁵ See *id.*

⁴⁶ See *id.*

⁴⁷ *E.g., id.*; RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 259–65 (1977); SUMNER, *supra* note 21; Brink, *supra* note 25.

Chapter Two less related to the basic principles in Chapter One than Blasi supposes and even than Mill himself supposed? This last possibility is the one I wish to defend, and in doing so I will be taking on the formidable combination of Blasi and Mill, but in a way that I hope will enable us better to understand not only freedom of expression but also the important distinction between individual and social conceptions of that freedom.

In his discussion of the corn dealer example, Blasi concludes that Mill believes that the speaker's intent is an important variable in considering whether a "communicative activity falls within the scope of the liberty of thought and discussion."⁴⁸ And Blasi goes on to say that "Mill holds speakers to demanding standards regarding their intentions."⁴⁹ But under Blasi's interpretation of Mill—one that is focused on the "moral agency of the speaker"⁵⁰—it is not only the intentions of a speaker which relate the liberty of thought and discussion to the individual who is doing the thinking and discussing. Rather, Blasi sees Mill's focus on the liberty of thought and discussion in what appear to be substantially individualistic terms, albeit recognizing that the individualism and "human capacity to exercise independent judgment" that Blasi sees Mill as promoting may well not be an ultimate goal, but instead the aspect and development of human strength of character that will in turn maximize utility. Blasi stresses Mill's own view of the connection, quoted above, between freedom of thought and the liberty of discussion, emphasizing that for Mill "[t]he right to express opinions is valuable . . . primarily because it serves the freedom of thought."⁵¹ He also reminds us that Mill described "professing and discussing" in terms of the "ethical conviction" of the speaker—a conviction that flows from "the transcendent importance [Mill] attaches to the human capacity to exercise independent judgment."⁵² And this in turn flows from a conception of utility that is, in Mill's words, "grounded on the permanent interests of man as a progressive being," interests that Blasi describes in terms of "freedom of thought and strength of character."⁵³

All of this seems very individualistic, although again with the caveat of the individualism still being—in largely speculative ways—ultimately

⁴⁸ Blasi, *supra* note 9, at 552.

⁴⁹ *Id.* at 553. And thus Blasi is concerned with distinguishing the speaker-centered notion of "instigation" from the consequence-dependent idea of causation.

⁵⁰ *Id.* at 539.

⁵¹ *Id.* at 540.

⁵² *Id.*

⁵³ *Id.* at 541.

instrumental to maximizing aggregate utility. It is of course true that discussion is by definition and of necessity a collective process. But under Blasi's interpretation of Mill, the collective process of discussing is a vehicle for the development of individual character, which is then a vehicle for social utility. "Mill clearly believes that social interaction, especially morally and intellectually contentious interaction, is crucial to the freedom of thought."⁵⁴ This is a strong claim, especially in terms of questions about the direction of the causal arrow. Under one view—whether it is Mill's view is an important, but different, question—freedom of thought might be understood as facilitative of human interaction, such that fostering freedom of thought will produce better collective decisions, or a more robust public culture, or something else of this social rather than individual variety. Under this view, the liberty of discussion is valuable not primarily because it facilitates the development of individual character but because it produces better decisions for the society at large. Thus, it is essential to recognize the contrast between the view—Blasi's of Mill, for example—that the quality or nature of public discourse is important because it will produce more freedom of thought (and more active and lively minds, which will in turn redound to the benefit of all of society), and the contrasting view that freedom of thought is less the effect than the cause, and that freedom of thought is important because it will produce a better quality of public discourse, public decision-making, and public and collective life in general.

Blasi's Mill is thus the Mill of Chapter One, with the liberty of thought and discussion being of a piece with the individualistic (albeit instrumentally individualistic) character of the opening chapter.⁵⁵ It is true that Blasi is justifiably puzzled by Mill's failure in Chapter Two to qualify the protection of thought and discussion by the Harm Principle, but Blasi's explanation—which relies heavily on his insightful and novel characterization of the role of the corn dealer example—again relies heavily on the role that Blasi sees intentions and character playing in Mill's account. By focusing on the motives, character, and mental development of the individual (whether that be the individual as speaker or writer on the one hand, or the individual as listener or reader on the other hand), the Mill that Blasi portrays believes that the harms that a speaker or listener with

⁵⁴ Blasi, *supra* note 9, at 542.

⁵⁵ And, to be sure and to be fair, of Chapters Three, Four, and Five as well. To make the argument that Chapter Two is an exception to the principles in Chapter One, as I do here, is largely to make the argument that Chapter Two is an exception to the entire book.

the right character and the right motives—“introducing new ideas, defending unpopular old ideas, separating the wheat from the chaff of public discussion, [and] propounding errors that serve as productive foils”⁵⁶—can cause will, as a general rule even if not in every case, be outweighed by the benefits that such properly motivated speech will produce. By contrast, the harms that misguided speakers and listeners can cause will neither stem from nor contribute to the development of the right type of character, again understood as a claim about general tendencies and not a claim about what is necessarily true in every case. Thus, because Mill’s principal concern is with the development of human character, the harms that under-developed characters may cause or suffer are not harms systematically likely to be outweighed by the relevant kind of character development, and are accordingly not harms that the state need tolerate in pursuit of the values with which Mill is principally concerned in Chapter Two. For Blasi, therefore, the corn dealer example serves an important sorting function. The example demonstrates that the value of liberty of thought and discussion can be overridden by the harms caused by instigating speakers and their violence-prone and unthinking followers. But when such improperly motivated speakers and listeners are removed from the equation, as they are for the situations unlike those represented by the corn dealer example, it is necessarily the case, Blasi’s Mill argues, that the harms that may still be caused by speech will be outweighed by the values of independence of thought that the liberty of thought and discussion will foster.

V.

Blasi’s interpretation of Mill and the corn dealer example displays numerous virtues. Not only is it insightful and original, but it also renders Chapters One and Two compatible in ways that are faithful to the parts of the introductory Chapter One that expressly make claims for such compatibility. The compatibility is further reinforced by the view that the harm and anti-paternalism principles flow, for Mill, from the same utilitarian foundations that also spawn the liberty of thought and discussion.⁵⁷ After reading what Blasi says about Mill, one is left with the conclusion that Mill is entirely internally consistent, and that the character-developing goals of a system of freedom of thought and discussion are understood to outweigh, again in general even if not in every case, the

⁵⁶ Blasi, *supra* note 9, at 544–45.

⁵⁷ See also SUMNER, *supra* note 21.

harms that such thought and discussion may cause. And because Mill's conclusions about thought and discussion are, for Blasi, rule-generating, there is no need, at least for the discussion encompassed by the principle developed in Chapter Two, to evaluate the negative consequences—the harms—of such discussion in individual cases. Chapter Two's presuppositions about the balance of benefits and harms thus make it unnecessary for Mill to consider speech-caused harms in individual cases, but, says Blasi, this is not to say that he does not recognize that even the speech protected in Chapter Two is capable of causing harm. According to Blasi's reading of Mill, speaking, writing, publishing, and discussing may well cause harm, but the liberty of thought and discussion is only about certain forms of communication emanating from certain motives and deployed for certain reasons. And for such communications, the Harm Principle does not serve as a limitation. As so qualified, therefore, harm drops out of the equation at the definitional stage. And by virtue of a strategy of balancing of benefits and harms at this definitional stage, Mill can take the superficially anomalous positions that the liberty of thought and discussion should be "absolute" but that instigations to violence are legitimately subject to restriction.

Some of this compatibility is a compatibility that Mill—but not necessarily Blasi—buys at the expense of a romantically optimistic view of human rationality. The advocacy of non-instigating tyrannicide, for example, would be tolerated by Mill, but that tolerance, if it is to be distinguished from the corn dealer example, is premised on Mill's belief that discussing tyrannicide in a non-instigating and non-inflammatory environment cannot be considered a net harmful activity.⁵⁸ But would the king agree?⁵⁹ In his iconic *Gitlow* dissent, Justice Holmes noted that "[e]very idea is an incitement."⁶⁰ Yet even if we understand the metaphorical aspects of the statement, Holmes can be understood as offering the plausible view that many acts of advocacy, even when delivered in a sober way with no call to immediate action, will nevertheless increase the probability of the consequences they urge. Perhaps for Mill such a possibility varies with the soundness of the idea, such that if the advocated action is in fact unwise it will be rejected after careful contemplation, and that if the advocated action is accepted after careful

⁵⁸ MILL, *supra* note 1, at 86–87.

⁵⁹ I do not mean "the king" in the sense of the controller of state power, but "the king" in the sense of the one who would be killed by a successful act of tyrannicide.

⁶⁰ *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

thought, then it has demonstrated that it is an idea that deserves acceptance.⁶¹ But if Mill is committed to the rationalist view that the soundness of an idea has considerable explanatory power in determining which ideas will be accepted and which will be rejected, it is a view that may not survive more contemporary insights into the cognitive and social psychology of persuasion and belief-formation, to say nothing of the premises of virtually all of the advertising industry.⁶² As Blasi tells us, Mill can make Chapters One and Two compatible with each other, and can explain the absence of the Harm Principle from the discussion in Chapter Two, by assuming that although harms may well flow from non-instigating and properly motivated thought and discussion, those harms will not be net harms once we consider the benefits of character-development that such properly motivated thought and discussion will bring. But for this to be Mill's view, the compatibility may come at the cost either of accepting what we now recognize as a serious empirical inaccuracy emanating from an unjustified optimism about human reason, or instead from accepting

⁶¹ Under this view, there is an affinity between Mill and Holmes' statement that "the best test of truth is the power of the thought to get itself accepted in the competition of the market." *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). If we take Holmes to be offering an epistemic argument about the best way to locate truth, as opposed to an ontological argument about the meaning of truth, see SCHAUER, *FREE SPEECH*, *supra* note 6, at 19–22, Holmes can be understood as embodying a rationalist view of the human capacity to identify truth that resonates with Mill. For Blasi's view of Holmes, which seeks to understand him and the *Abrams* dissent in less marketplace-of-ideas terms, see Vincent Blasi, *Holmes and the Marketplace of Ideas*, 2004 SUP. CT. REV. 1, 24.

⁶² For an important analysis of the tension between classical (and Millian) views about the so called marketplace of ideas and the philosophy and psychology of belief formation, see Alvin I. Goldman, *Epistemic Paternalism: Communication Control in Law and Society*, 88 J. PHIL. 113 (1991). Further elaboration is in Alvin I. Goldman & James C. Cox, *Speech, Truth, and the Free Market for Ideas*, 2 LEGAL THEORY 1 (1996). On why the extent to which some ideas catch on and flourish has little to do with their truth, see CHIP HEATH & DAN HEATH, *MADE TO STICK: WHY SOME IDEAS SURVIVE AND OTHERS DIE* (2007). For example, presenting a proposition with images leads people to attribute more truth or value to the proposition than when the proposition is expressed with words alone, see David A. Bright & Jane Goodman-Delahunty, *Gruesome Evidence and Emotion: Anger, Blame, and Jury Decision-Making*, 30 LAW & HUM. BEHAV. 183 (2006), and presenting images in color affects the extent to which they will be persuasive. Aura Hanna & Roger Remington, *The Representation of Color and Form in Long-Term Memory*, 24 MEMORY & COGNITION 322 (1996). On the conditions for the identification of truth and the First Amendment in general, see Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010).

such a morally freighted conception of what is to count as a harm that Millian net harms and harms *simpliciter* emerge as not having very much in common.

VI.

Blasi's reading (and sympathetic reconstruction) of *On Liberty* is fostered by focusing on the numerous passages I have noted in the foregoing section. But it is fostered also by much of what Blasi deemphasizes rather than highlights. A character-developing and instrumentally individualistic interpretation of Chapter Two is indeed supported by the not inconsiderable textual evidence that Blasi impressively marshals, but the enduring importance of Chapter Two owes as much to its epistemic arguments as anything else. Blasi says little about Mill's claims for the liberty of thought and discussion as a means of identifying truth and exposing error, but in saying so little about what occupies so much of Chapter Two, Blasi may be seen as emphasizing the character-developing dimension of Mill's arguments at the expense of the more directly social ones—that is, the arguments that see the liberty of thought and discussion as contributing directly to the identification of truth and the advance of social knowledge, rather than as contributing to the development of those traits of character that will then be more able to separate truth from falsity.

At the heart of Chapter Two is the epistemic claim that the liberty of thought and discussion is a reliable (although far from perfect) method of increasing knowledge by identifying truth and exposing falsity.⁶³ This is Mill's version of epistemic claims going back as least as far as Milton and perhaps even much farther. When Milton asked, rhetorically, "who ever knew Truth put to the wors[t], in a free and open encounter,"⁶⁴ when the author of the First Book of Esdras proclaimed that "truth is mighty and will prevail,"⁶⁵ and when Walter Bagehot opined that "in discussion truth has an advantage,"⁶⁶ they all offered irreducibly empirical claims about the epistemic advantages of a system of freedom of expression, claims that emphasized the value of truth rather than the development and flourishing of the human mind. When Mill talks about the possibility that the received

⁶³ See MILL, *supra* note 1, at 90–91.

⁶⁴ MILTON, AREOPAGITICA 52 (John W. Hales ed., Clarendon Press 1886) (1644).

⁶⁵ UNIVERSAL DICTIONARY OF THE ENGLISH LANGUAGE 5301 (Robert Hunter & Charles Morris eds., 1897).

⁶⁶ Walter Bagehot, *The Metaphysical Basis of Toleration*, in LITERARY STUDIES 422, 425 (R.H. Hutton ed., 1879).

opinion may be false, about the way in which even mostly false opinions may contain a valuable grain of truth, and about the value even of falsity in fostering a deeper understanding of truth, he appears to be talking far less about the mind or character of the individual than of the aggregate understandings of society at large. He talks of “ages” as possessing (or not possessing) knowledge,⁶⁷ and his examples repeatedly involve widely held opinions with policy or social implications. Knowledge for Mill is not only something possessed by individuals, but is also something possessed by societies. Thus, (accurate) knowledge for Mill is not only an individual virtue, but it is also a social good. Mill may well, as Blasi argues, see the development of human character as a way of more reliably creating social knowledge, but the way in which Mill presents his examples in Chapter Two seems more compatible with seeing a much closer relationship between unfettered public discourse and the advance of social knowledge.

Mill’s claims about the creation of social and collective knowledge are no less compatible with his utilitarianism than are claims about the individual character-building value of the liberty of thought and discussion. The view that a society with more collective knowledge has more aggregate utility than one with less is hardly implausible, and it is a view that is independent of any relationship between truth seeking and freedom of thought or between truth finding and the independence of the mind.

If Mill were not so concerned about the more directly social rather than the individual character-developing value emanating from the liberty of discussion, it is hard to see why he would have devoted so much time to his epistemic arguments. Freedom of thought and the independence of the mind are valuable and utility-producing without regard to their truth-producing consequences, just as the liberty of self-regarding action is valuable without regard to what the actions are. It is precisely the fact of choice and not what is chosen that is valuable under an individualistic conception,⁶⁸ even an individualistic conception that sees individual character as utility-producing. If liberty of discussion were entirely on a par with the liberty of self-regarding action, then there would have been far less cause for Mill to have devoted so much space to the epistemic

⁶⁷ See MILL, *supra* note 1, at 91–92, 111, 113.

⁶⁸ Thus, Richard Wollheim argues that the diversity of human experience was central to Mill’s thinking, a diversity that would have led him to see choice as an end in itself. See Richard Wollheim, *Introduction* to JOHN STUART MILL: THREE ESSAYS vii, xi–xii (Oxford Univ. Press 1975) (1859).

advantages of a principle both allowing, and at times encouraging, challenges to received opinion.⁶⁹

This is not to deny that freedom of thought and some varieties of freedom of discussion have values that are compatible with the values that Mill promotes in Chapter One. Rather, it is to say that some of the arguments in Chapter Two, especially the epistemic ones, appear to make a case that travels a more direct route from liberty to utility than does the argument from individuality. If Chapters One and Two are totally compatible, then the connection between the liberty of discussion and an increase in utility journeys through a series of debatable assumptions that Mill makes about the nature of utility and the relationship between independence of individual thought and aggregate social welfare. But if Chapter Two, especially the epistemic portions of that Chapter, are understood to stand somewhat apart from Chapter One, then the more obvious connection between social truth and aggregate utility is arguably more faithful to the utilitarian dimensions of the Millian project.

VII.

The contrast between two interpretations of *On Liberty* is now squarely before us. Under one view, Chapters One and Two are compatible, and Chapter Two, with the benefit of Blasi's insightful, creative, but arguably nonstandard explanation of the kinds and calculus of harms with which Mill was concerned, is but an instantiation of Chapter One. Under another view, Chapter One makes the case for the liberty of self-regarding action, and Chapter Two, while also based on utilitarian premises, is not an instantiation of the Harm Principle set out in Chapter One. Rather, Chapter Two under this view is devoted to the proposition that discussion, while both other-regarding (which Mill acknowledges) and potentially harm-producing, is nevertheless worthy of strong protection for epistemic social

⁶⁹ One of the deficiencies of the American free speech literature is that it devotes much attention to the value of challenging received opinion while devoting very little attention to the social conditions that might produce such challenges or to the importance of creating such challenges when they do not arise spontaneously (a noteworthy exception is STEVEN H. SHIFFRIN, *DISSENT, INJUSTICE, AND THE MEANINGS OF AMERICA* (1999)). On the problem in general, see Frederick Schauer, *Hohfeld's First Amendment*, 76 *GEO. WASH. L. REV.* 914 (2008). It is one of the chief virtues of Chapter Two of *On Liberty* that Mill recognizes the importance of creating challenges to received opinion (as with his example of the Catholic Church's use of the institution of the devil's advocate in canonization proceedings, MILL, *supra* note 1, at 91) rather than relying on the serendipitous possibility that such challenges will just happen to arise.

reasons despite the harm it may occasionally cause. And under this latter view, these epistemic social reasons are not dependent on the development of an individual independence of mind, nor are they dependent on (and limited to) the existence of speakers or listeners with certain motives or particular casts of mind.

There are obviously strong reasons to prefer Blasi's compatibility explanation. It is consistent with the fact that Chapters One and Two are, after all, in the same book; with the fact that Chapter One is entitled "Introductory"; with Mill's explicit statement that the liberty of thought and the liberty of discussion are close to "inseparable"; and with numerous other items of textual support that Blasi impressively marshals and interprets. And there may be reasons apart from Millian exegesis for seeing freedom of speech and Mill's harm and anti-paternalism principles as being merely different subspecies of the same species,⁷⁰ reasons that go to the virtues, if any, of individualistic understandings of freedom of speech in general. But to examine the full range of these arguments outside of the context of interpreting Mill would take me too far afield from what can be accomplished in any one essay.⁷¹

Yet there are also reasons to prefer the view that Chapter Two is best seen as an exception to Chapter One rather than an instantiation of it. Such an explanation may better enable Mill to avoid the charge that in *On Liberty* he abandoned (his own protestations notwithstanding) his utilitarian premises in favor of a non-utilitarian exaltation of the value of individual liberty and choice.⁷² It may explain in a more satisfactory way the enormously (and still) important analysis of fallibility and the role of fallibilist thinking that Mill offers in the bulk of Chapter Two.⁷³ And it may explain in a somewhat more straightforward way why there is so little

⁷⁰ See Joseph Raz, *Free Expression and Personal Identification*, in *FREE EXPRESSION: ESSAYS IN LAW AND PHILOSOPHY*, *supra* note 22, at 1, 27–28.

⁷¹ My initial skepticism about such arguments was first set forth in SCHAUER, *FREE SPEECH*, *supra* note 6, at 47–72, and has been reiterated on numerous occasions since. See, e.g., Schauer, *The Phenomenology*, *supra* note 6.

⁷² On the persistent question of whether the Mill of *On Liberty*, and perhaps even the Mill of *Utilitarianism*, abandoned the utilitarianism to which Mill professed to subscribe and which he learned from Jeremy Bentham and James Mill, see MCCLOSKEY, *supra* note 11, at 56–95; K.C. O'ROURKE, *JOHN STUART MILL AND FREEDOM OF EXPRESSION: THE GENESIS OF A THEORY* (2001); David Lyons, *Human Rights and the General Welfare*, 6 *PHIL. & PUB. AFF.* 113 (1977); David Spitz, *Freedom and Individuality: Mill's Liberty in Retrospect*, in *LIBERTY* 176 (Carl J. Friedrich ed., 1962).

⁷³ See SKORUPSKI, *supra* note 11, at 376–84.

discussion of harm in Chapter Two. If Chapter Two is about the protection of potentially harmful conduct despite its harmfulness, and if Chapter One is about why harmless conduct should be immune from governmental or social sanction, then it becomes clear why there would be no strong reason for harm to be featured in Chapter Two at all.

Most important, however, is the role that such an interpretation might serve in contemporary debates about freedom of speech. If speech is understood as protected because it does not create harm in the relevant sense, such an understanding may (and this too is an empirical claim) foster the view that only harmless speech is protected.⁷⁴ And if speech is protected only because and when it is harmless—a view that the association of Chapters One and Two may encourage—it may be too easy to think of harmlessness as a necessary condition for protection, and thus of harmfulness as a sufficient condition for regulation.⁷⁵ But if instead we recognize, as I believe Mill did, that the liberty of thought and discussion protects communications that may well be harmful in any plausible sense of that term, and that it does so for reasons extrinsic to the harm and anti-paternalism principles, what emerges may be the robust free speech principle to which Mill plainly subscribed, and in the service of which Mill and *On Liberty* remain so important today.

⁷⁴ For the view that understanding free speech in individual rather than social terms leads to under appreciation of free speech, see ZECHARIAH CHAFEE JR., *FREE SPEECH IN THE UNITED STATES* 33–34 (1964). For a challenge to Chafee, arguing that the individual interest may serve social goals, see Leslie Green, *Freedom of Expression and Choice of Language*, in *FREE EXPRESSION: ESSAYS IN LAW AND PHILOSOPHY*, *supra* note 22, at 135, 151.

⁷⁵ The point is recognized and explored in Joshua Cohen, *Freedom of Expression*, in *TOLERATION: AN ELUSIVE VIRTUE* 173, 180–82 (David Heyd ed., 1996).