A Note on Mill's Early Theory of Free Speech[+]

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The question of the exceptions John Stuart Mill allows in his robust and influential defence of free expression continues to occupy scholars and readers. In *On Liberty* (1859), which is unquestionably considered the *locus classicus* of his views on the subject, Mill claims that even opinions do not deserve protection, if their expression constitutes 'a positive instigation to some mischievous act',[1] and then he gives the well-known corn dealer case as an example. Apart from this instance, his references to the limits of free expression are scarce so the question becomes more pressing as contemporary free speech theorists try to assess whether Mill would condemn pornography, hate speech and other categories of expression many people nowadays find morally objectionable and legally punishable.

The point I would like to make here is that a close reading of Mill's rather neglected or undervalued early essay 'Law of libel and liberty of the press', which appeared in the *Westminster Review* in April 1825, sheds light on the issue of the legitimate restrictions of free expression and helps us consider the corn dealer example from a broader perspective.[2] This is true despite the well established fact that in *On Liberty* Mill set aside the

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1 John Stuart Mill, *On Liberty and other Essays*, edited with an introduction by John Gray (Oxford: Oxford University Press 1991) 62.

2 Among those few who do not hesitate to give credit to this article are Himmelfarb, who maintains that 'it is as mature a piece of writing as anything that appeared in that sophisticated journal', and O' Rourke, who describes it as 'a first attempt to promulgate a comprehensive case for freedom of discussion, using arguments which are used both implicitly and explicitly in his later writings'. Gertrude Himmelfarb, *On Liberty and Liberalism: The Case of John Stuart Mill* (New York: Alfred A. Knop 1974) 33, K. C. O' Rourke, *John Stuart Mill and Freedom of Expression: The Genesis of a Theory* (London and New York: Routledge 2001) 21.

political approach to free speech, which prevails in the 'Law of Libel', for the epistemic one, which in the same essay appears only in a rudimentary and crude form. In particular, I will argue that of the two exceptions he admitted in 1825, he did not change his mind in regard to the first; as far as the second objection is concerned, there are some inconclusive reasons to believe that he did not reject it either.

Before moving to the objections, it is instructive to offer a brief presentation of the main argument of the 'Law of Libel'. Mill, echoing Bentham,[3] starts with an expression of indignation against the prevailing partisan interpretation of the law of libel by judges and lawyers, and then he uses this as a platform for highlighting the evils that ensue from the stifling of political speech. The law gives absolute power to the magistrates to prosecute any opinions they regard as dangerous and subversive. This means that the magistrates are in fact vested with despotic powers. As judges can decide which opinions are allowed to be heard, they are in a position to exercise control on the formation of citizens' beliefs and opinions. Magistrates in turn are dependent on the government, which has a vested interest in keeping people in the dark and this situation is a source of misgovernment and misery for the many. This utilitarian political defence of free speech is supplemented by another argument reminiscent of the second chapter of *On Liberty*. Truth can be promoted only by uninhibited public discussion and the consideration of all views no matter how mistaken or misleading they might appear. People are not incapable of forming correct opinions and discussion is the only remedy for their

3 Bentham reacted to the numerous controversial prosecutions for libel initiated by Sir Vicary Gibbs, His Majesty's Attorney-General, in 1808 and 1809 by writing *The Art of Packing,* which he eventually published in 1821. For more details see John Dinwiddy, *Bentham: Selected Writings of John Dinwiddy* (Stanford: Stanford University Press 2003) 118 and Philip Schofield, *Utility and Democracy: The Political Thought of Jeremy Bentham* (Oxford: Oxford University Press 2006) 131-36. Among the major claims Bentham makes in this book is his derisory description of the current legal understanding of libel as 'any paper in which, he, who to the will adds the power of punishing to it, sees any thing that he does not like' as well as his complain that prosecution for libel implies conviction, since no jury could practically come to a decision that contravenes the will of the magistrate. The system for selecting jurors does not allow this. Bentham favors a stricter definition of libel and holds that only the parliament can put an end to this embarrassing situation, which if left unrestrained, it could gradually lead to despotism and absolutism. Jeremy Bentham, *The Elements of the Art of Packing as Applied to Special Juries, Particularly in Cases of Libel Law* (London: Effingham Wilson 1821) 2, 91.

ignorance.[4] In conclusion, no matter how grave the evils of freedom of speech are, it is evident to Mill that the benefits of this freedom far exceed the costs of its suppression.[5]

However, Mill's defence of free speech is not absolute as he allows two exceptions: he objects (a) to the use of speech as a means (or instrument) to commit criminal acts and (b) to the publication of false statements of fact.

To understand the first objection, we have to go back to James Mill's 'Liberty of the Press', extracts of which are quoted verbatim and are wholeheartedly endorsed by his son in 'Law of Libel'. The elder Mill argues that the press 'can be employed as an instrument' in almost any violation described by the penal code. However, it is not necessary to make a special law for punishing the means used in perpetrating an unlawful act. 'It is enough that a law is made to punish him who has been guilty of the murder or theft, whether he has employed the press or anything else as the means for accomplishing his end'.[6]

I will try to show that the corn dealer example can be categorised under the above restriction. The only difference is that now Mill is not concerned with freedom of the press, but with the freedom to express opinions in general. If the example in question is re-described in more general terms, we have a case where:

A uses speech as a means to make B commit a criminal act y.

This is true because under the circumstances B—the angry and desperate mob that has been gathered outside the corn dealer's house—is manipulated by the words of A, who wants his audience to harm the corn

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4 Cf also James Mill's argument that discussion is also good for the rulers since it makes them 'sensible of their defects'. James Mill, 'Liberty of the Press', in Terence Ball (ed), *Political Writings* (Cambridge: Cambridge University Press 1992) 128.

5 Similar views are found in James Mill Ibid and Jeremy Bentham, 'Indirect Legislation', in Peter Mack (ed) *A Bentham Reader* (New York: Pegasus 1969) 176.

6 Mill Ibid, 98. The elder Mill seems not to admit unlawful acts in which the very words uttered or written constitute the offense. One is entitled to assume that for him blackmail, which in the English Criminal Law is described as 'making unwarranted demands with menaces, with a view to gain for himself or another or with intent to cause loss to another', would not be classified as a crime.

dealer. In different circumstances, such as when B read a similarly invective article while enjoying the warmth of their fireplace, they cannot be regarded as an instrument in A's hands, since *ceteris paribus* they are in a state of mind that enables them to decide freely about the case. However, A should be punished by law only if:

> (i) y occurs (i.e. if the mob kills the corn dealer or burns his house)[7] and
> (ii) A probable connection can be established between A's words and y (In our case this connection can be established only if the mob had not already planned to harm the corn dealer). [8]

Undoubtedly, many things can be said about this example, but it appears that here Mill follows his father's view that there are no speech crimes, but only crimes that involve the use of speech. In this trivial sense only, certain opinions do not deserve protection.

The second exception bears upon the distinction between opinions and facts, which is central to Mill's doctrine. Given his claim that we cannot with absolute certainty distinguish true from false opinions and that it would be a grave error to trust any authority political or judicial in doing so, there is no choice but to allow the expression of all opinions. However, the formation of true opinions is impossible if people have no access to true facts. In addition, facts are not like opinions in the sense that their truth or falsity can be decided more or less easily. If courts are left to decide upon evidence whether A has committed murder, why should they not be left to decide whether a published statement of fact y is true or false? Hence, Mill comes to the conclusion that

> [t]here is no corresponding reason for permitting the publication of false statements of fact. The truth or falsehood of an alleged fact is a matter, not of opinion, but of evidence; and may be safely left to be decided by those, on whom the business of deciding upon evidence in other cases devolves.[9]

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7 If, as O' Rourke, above n 2, 131 notes, the mob reacts to the incitement by laughing and 'the people disperse in good humour', there is 'no need to speak of punishment'.

8 Mill makes these provisions in his assessment of the instigation to tyrannicide. Mill, above n 1, 20-1. It is also noteworthy that Mill gives the corn dealer example in the context of a discourse on the permissibility of actions.

9 John Stuart Mill, 'Law of Libel and Liberty of the Press', in *Collected Works*, vol XXI (Toronto & London: University of Toronto Press 1984) 14.

This legitimate regulation of free expression is not mentioned in *On Liberty*, as scholars have not failed to notice.[10] Do we have reasons to believe that now Mill finds it mistaken? I think not, although the evidence is far from conclusive. First, the distinction between facts and opinions still remains in force in the second chapter of *On Liberty*, as Mill makes use of it at least three times. This means that the need for true facts has not been superseded. Second, his main focus is on opinions presented in a discussion and this is why he is primarily interested in giving us an example of a non-protected opinion. Thirdly, he never says that one is free to make false statements of fact. The closest he comes to this is when he claims that we have to tolerate 'suppression of facts and arguments', 'misstatements of the elements of the case' and 'misrepresentations of the opposite opinion' uttered or written during a passionate and crucial debate.[11] He adds that we could not blame participants for this and that 'still less could law presume to intervene with this kind of controversial misconduct'.[12] Yet this is different from the publication of a bold false statement of fact, an issue that, as he has made clear, falls within the ambit of law. Fourthly, if Mill had changed his mind concerning this exception, which is not a minute detail, he would have said something relevant in *On Liberty*.

Although here I am interested in exegesis rather than criticism, I cannot help but register my dissatisfaction with the second exception. From an epistemological point of view, one can think of cases in which it is not clear whether the speaker is making a statement of fact or expressing an opinion.[13] But more importantly, if we take this distinction at face value, then anyone can say or publish anything against anyone else, even if it is totally misleading or mendacious and even if it is couched in the most offensive and inflammatory language imaginable. The speaker has merely to add that she does not intend her statement to be taken as fact but as a personal opinion. Then, the distinction collapses (as far as its normative force is concerned) and we are left with an account that appears to allow only one trivial ground for regulation. There are not many people (apart from Justice Black) who would be attracted to what is tantamount to an absolutist view.

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10 Raphael Cohen-Almagor, 'Why Tolerate? Reflections on the Millian Truth Principle', (1997) 25 *Philosophia* (Israel) 138, L. W. Sumner, 'Should Hate Speech Be Free Speech?: John Stuart Mill and the Limits of Tolerance', in Raphael Cohen-Almagor (ed) *Liberal Democracy and the Limits of Tolerance: Essays in honour of Yitzak Rabin* (Ann Arbor: The University of Michigan Press 2000) 150 n 23.

11 Mill, above n 1, 60.

12 *Ibid.*

13 Nevertheless, we should bear in mind that the above distinction is well understood and widely used in a courtroom.

It is not my wish to imply that these two are the only restrictions to free speech Mill would assent to,[14] but it is important to keep them in mind when we aspire to give an overall assessment of his account of the subject in question (moving beyond his famous arguments in favour of free discussion) as well as when we seek to determine the relevance of his work to the troublesome, free-speech issues of today.

14 Riley argues in detail that Mill would object *in principle* to the publication of a true account of someone's private life without her consent. This is an interference with the self-regarding part of one's conduct that it is not harmful to third con-consenting parties. The evidence comes from a combination of *On Liberty* and his 1834 article 'Mr O'Connell's Bill for the Liberty of the Press', in *Collected Works*, vol XI (Toronto & London: University of Toronto Press 1982) 165-68. Jonathan Riley, 'J. S. Mill's Doctrine of Freedom of Expression' (2005) 17 *Utilitas* 147-79. On the same topic see O' Rourke's, above n 2, extensive account. In any case Mill is very hesitant to make speech punishable by law. Yet as a statesman and man of practice, Mill seems to have adopted a more pragmatic attitude to free speech, insisting on restrictions of place, if this is absolutely necessary to prevent a highly undesirable outcome, such as a bloody conflict with the police or the army. See Mill's *Autobiography*, edited with an introduction by John M. Robson (Harmondsworth: Penguin 1989), 213-14 and Filimon Peonidis, 'Mill and the Right to Free Expression: A Critique', (in Greek) (2000) 4 *Isopoliteia* 335-58.