Chapter II of On Liberty contains John Stuart Mill’s now classic defense of freedom of expression. This defense of expressive liberties has proved extremely influential and finds important echoes in First Amendment jurisprudence within United States constitutional law. Though important in its own right, Mill’s defense of freedom of expression also plays an important, though sometimes overlooked, role in his more general defense of individual liberties. Mill turns to freedom of expression immediately after his introductory chapter in the belief that there is general agreement on the importance of freedom of expression and that, once the grounds for expressive liberties are understood, this agreement can be exploited to support a more general defense of individual liberties.

It will be convenient for the argument if, instead of at once entering upon the general thesis [the defense of various individual liberties], we confine ourselves in the first instance to a single branch of it on which the principle here stated is, if not fully, yet to a certain point, recognized by the current opinions. This one branch is the Liberty of Thought, from which it is impossible to separate the cognate liberty of speaking and writing. Although these liberties … form part of the political morality of all countries which profess religious toleration and free institutions, the grounds, both philosophical and practical, on which they rest are perhaps not so familiar to the general mind … Those grounds, when rightly understood, are of much wider application than to only one division of the subject, and a thorough consideration of this part of the question will be found the best introduction to the remainder. (CW xviii, 227 [1, 16])

This means that a proper understanding of the significance of Mill’s defense of freedom of expression requires not only reconstructing his arguments on behalf of expressive liberties and exploring their bearing on issues of freedom of expression, but also seeing how these arguments generalize to other kinds of liberties. In this regard, it will be especially instructive to consider how his claims about freedom of expression inform his liberal principles, especially what his discussion of the best grounds for expressive liberties can
tell us about the best grounds for opposing paternalism. But it is also worth exploring whether philosophical pressure runs in the other direction as well – whether Mill’s discussions of liberalism, in general, and paternalism, in particular, have implications for the proper articulation of principles governing expressive liberties. This perspective requires that we view Mill’s defense of freedom of expression in the context of his liberalism.

**Millian Principles**

Mill begins *On Liberty* by distinguishing old and new threats to liberty. The old threat to liberty is found in traditional societies in which there is rule by one (a monarchy) or a few (an aristocracy). Though one could be worried about restrictions on liberty by benevolent monarchs or aristocrats, the traditional worry is that when rulers are politically unaccountable to the governed they will rule in their own interests, rather than the interests of the governed. In particular, they will restrict the liberties of their subjects in ways that benefit the rulers, rather than the ruled. It was these traditional threats to liberty that the democratic reforms of the Philosophical Radicals were meant to address. But Mill thinks that these traditional threats to liberty are not the only ones to worry about. He makes clear that democracies contain their own threats to liberty – this is the tyranny, not of the one or the few, but of the majority (*CW xviii*, 217–20 [1, 1–5]). Mill sets out to articulate the principles that should regulate how governments and societies, whether democratic or not, can restrict individual liberties (*CW xviii*, 220–1 [1, 6]).

In an early and famous passage Mill offers one formulation of his basic principles concerning liberties.

The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control, whether the means used be physical force in the form of legal penalties or the moral coercion of public opinion. That principle is that the 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. 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, because, in the opinions of others, to do so would be wise or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him, or entreating him, but not for compelling him or visiting him with any evil in case he do otherwise. To justify that, the conduct from which it is desired to deter him must be calculated to produce evil to someone else. The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself, his independence, is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign. (CW xviii, 223 4 [i, 9])

Notice that Mill is concerned with articulating principles to apply to restrictions on liberty in various contexts. He is perhaps most interested in cases where the state uses civil or criminal law to forbid conduct and applies sanctions for noncompliance. But he is also interested here and elsewhere – for instance, in The Subjection of Women – in other sorts of cases, including those in which social groups or individuals use the threat of force or disapprobation to limit liberty and ensure conformity. Having noted these complexities, let us focus, as Mill himself does, on the central case of legal prohibition by the state.

In this passage, Mill distinguishes paternalistic and moralistic restrictions of liberty from restrictions of liberty based upon the harm principle.

- A’s restriction of B’s liberty is paternalistic if it is done for B’s own benefit.
- A’s restriction of B’s liberty is moralistic if it is done to ensure that B acts morally or not immorally.
- A’s restriction of B’s liberty is an application of the harm principle if A restricts B’s liberty in order to prevent harm to someone other than B.

Here, Mill seems to say that a restriction on someone’s liberty is legitimate if and only if it satisfies the harm principle (cf. CW xviii, 223–4 [iv, 1–4, 6; v, 2]). Later, he distinguishes between genuine harm and mere offense. In order to satisfy the harm principle, an action must actually violate or threaten imminent violation of those important interests of others in which they have a right (CW xviii, 225–6 [i, 12], 260–1 [iii, 1], 276 [iv, 3], 281–2 [iv, 10], 283–4 [iv, 12], 293–5 [v, 5]). So he seems to be saying that the harm principle is always a good reason for restricting liberty, but that mere appeals to morality, paternalism, or offense are never good reasons for restricting liberty.

As this recounting of Mill’s principles suggests, his defense of individual liberties appears to be part of what might be called a categorical approach. To decide whether an individual’s liberty ought to be protected, we must
ascertain to which category the potential restriction of liberty belongs. The main categories for potential restrictions are these:

- offense (mere offense)
- moralism (mere moralism)
- paternalism (mere paternalism)
- harm principle

The potential restriction is permissible if and only if it is an application of the harm principle; if not, the restriction is impermissible and the liberty must be protected.\(^2\)

It is generally thought that by applying this categorical approach to liberty and its permissible restrictions Mill is led to offer a fairly extensive defense of individual liberties against interference by the state and society. In particular, it is sometimes thought that Mill recognizes a large sphere of conduct that it is impermissible for the state to regulate. We might characterize this sphere of protected liberties as Mill’s conception of liberal rights. On this reading, Mill is deriving his conception of liberal rights from a prior commitment to the categorical approach and, in particular, to the harm principle.\(^3\)

**M I L L A G A I N S T P A T E R N A L I S M**

Consider Mill’s opposition to paternalism. Presumably, Mill’s concern with paternalism is general and includes paternalism practiced by individuals or groups, as well as by states. But, as we have already noticed, his focus is on paternalism practiced by the state. Why the blanket prohibition on paternalism? He offers two explicit reasons.

First, state power is liable to abuse. Politicians are self-interested and corruptible and will use a paternalistic license to limit the freedom of citizens in ways that promote their own interests and not those of the citizens whose liberty they restrict (\*CW\* xviii, 306–10 [v, 20–3]).

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\(^2\) Sometimes Mill suggests that the harm principle is equivalent to letting society restrict other-regarding conduct (\*CW\* xviii, 224–5 [i, 11], 276 [iv, 2]). On this view, conduct can be divided into self-regarding and other-regarding conduct. Regulation of the former is paternalistic, and regulation of the latter is an application of the harm principle. So on this view it is never permissible to regulate purely self-regarding conduct and always permissible to regulate other-regarding conflict. But this is over-simple. Some other-regarding conduct causes mere offense, not genuine harm (\*CW\* xviii, 276 [iv, 3], 283–4 [iv, 12]). So Mill cannot equate harmful behavior and other-regarding behavior and cannot think that all other-regarding behavior may be regulated.

Second, even well-intentioned rulers will misidentify the good of citizens. Because an agent is a more reliable judge of his own good, even well-intentioned rulers will promote the good of the citizens less well than would the citizens themselves (CW xviii, 276–7 [iv, 4], 283–4 [iv, 12]).

These are reasonably strong consequentialist arguments against giving the state a broad discretionary power to engage in paternalistic legislation whenever it sees fit. However, they do not support a categorical ban on paternalism. In particular, these arguments provide no principled objection to paternalism – no objection to successful paternalistic restrictions on B’s liberty that do in fact benefit B. Perhaps some who object to paternalism are concerned only with unsuccessful paternalism. They would have no objection to successful paternalism. But, for many, doubts about paternalism run deeper. They would be inclined to think that much, if not all, paternalism would be impermissible even if it was successful. For it is common to think that individuals have a right to make choices in their own personal affairs and that this includes a right to make choices that are imprudent.

Mill’s view of paternalism is ultimately more complicated than these explicit arguments suggest. In particular, he has the resources for another, stronger argument against paternalism. These resources are clearest in his defense of free speech. As noted earlier, Mill thinks that there is general agreement on the importance of free speech and that, once the grounds for free speech are understood, this agreement can be exploited to support a more general defense of individual liberties (CW xviii, 227 [i, 16], 260–1 [iii, 1]). So his defense of expressive liberties is important not only in its own right but also insofar as it lays the foundation of his liberal principles.

**MILL AGAINST CENSORSHIP**

Mill’s discussion of censorship in chapter II focuses on censorship whose aim is to suppress false or immoral opinion (CW xviii, 228–9 [II, 1–2]). Here too, Mill is apparently concerned with censorship whether practiced by individuals, groups, or states. However, here, as elsewhere, he focuses on restrictions on liberty imposed by the state. He mentions four reasons for maintaining free speech and opposing censorship:

1. A censored opinion might be true (CW xviii, 228–43 [II, 1–20], 258 [II, 41]).
2. Even if literally false, a censored opinion might contain part of the truth (CW xviii, 252 [II, 34], 257 [II, 39], 258 [II, 42]).
3. Even if wholly false, a censored opinion would prevent true opinions from becoming dogma (CW xviii, 228–9 [II, 1–2], 231–2 [II, 6–7], 243–5 [II, 22–3], 258 [II, 43]).

4. As a dogma, an unchallenged opinion will lose its meaning (CW xviii, 247 [II, 26], 258 [II, 43]).

It is natural to group these four considerations into two main kinds: the first two invoke a truth-tracking defense of expressive liberties, while the second two appeal to a distinctive kind of value that free discussion is supposed to have.

(i) The truth-tracking rationale

The first two claims represent freedom of expression as instrumentally valuable; it is valuable, not in itself, but as the most reliable means of producing something else that Mill assumes is valuable (either extrinsically or intrinsically), namely, true belief. Though Mill seems to assume that true belief is valuable, it is not hard to see how true beliefs would possess at least instrumental value, if only because our actions, plans, and reasoning are likely to be more successful when based on true beliefs. Of course, the most reliable means of promoting true belief would be to believe everything. But that would bring a great deal of false belief along too. A more plausible goal to promote would be something like the ratio of true belief to false belief. Freedom of expression might then be defended as a more reliable policy for promoting the ratio of true belief to false belief than a policy of censorship. This rationale for freedom of expression is echoed by Justice Oliver Wendell Holmes, in his famous dissent in Abrams v. United States, when he claims that the best test of truth is free trade in the marketplace of ideas.

Notice that this instrumental defense of freedom of expression does not require the mistaken assumption, which Mill sometimes makes, that the censor must assume his own infallibility (CW xviii, 229 [II, 3]). The censor need not assume that he is infallible. He can recognize that he might be mistaken, but insist that he must act on the best available evidence about what is true. Mill’s better reply is that proper recognition of one’s own fallibility should generally lead one to keep discussion open and not foreclose discussion of possibilities that seem improbable.

This instrumental rationale may justify freedom of expression in preference to a policy of censorship whenever the censor finds the beliefs in

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4 250 U.S. 616 (1919) (upholding the conviction of a wartime pamphleteer on behalf of the Russian Revolution under the Espionage Act of 1917).
question implausible or offensive. But it does not justify freedom of expres-
sion in preference to more conservative forms of censorship. If the question is
what policies are likely to increase the ratio of true to false belief, we would
seem to be well justified in censoring opinions for whose falsity there is
especially clear, compelling, and consistent or stable evidence. We would be
on good ground in censoring flat-earthers (both literal and figurative).

Another way to see the weakness of the truth-tracking justification of
freedom of expression is to notice a parallel with Mill’s explicit arguments
against paternalism. Mill’s instrumental opposition to paternalism, we saw,
could not explain principled opposition to successful paternalism (cases in
which A’s restriction of B’s liberty does in fact benefit B). In a similar way,
Mill’s instrumental defense of freedom of expression cannot explain what is
wrong with censorship that is successful in truth-tracking terms. Suppose we
lived in a society of the sort Plato imagines in the Republic in which cognitive
capacities are distributed unequally between rulers and citizens and in
which maximally knowledgable and reliable censors – call them “philosopher-
kings” – censor all and only false beliefs. The truth-tracking argument would
provide no argument against censorship in such circumstances. This shows that
the truth-tracking argument condemns only unsuccessful or incompetent
censorship. For some, this may be the biggest worry about censorship. But many
would have residual worries about successful or competent censorship. They
would object to censorship, even by philosopher-kings. Answering this worry
requires a more robust defense of expressive liberties.

(ii) **The deliberative rationale**

The resources for a more robust defense of freedom of expression can be
found in Mill’s claim that it is needed to keep true beliefs from becoming
dogmatic, because this reason for valuing freedom is intended to rebut the
case for censorship even on the assumption that all and only false beliefs
would be censored (CW xviii, 229 [II, 2], 243 [II, 21]). Mill’s argument here
is that freedoms of thought and discussion are necessary for fulfilling our
natures as progressive beings (CW xviii, 242–3 [II, 20]). We can and should
read Mill as appealing to his perfectionist assumptions about happiness to
defend expressive liberties.

In his introduction to On Liberty, Mill claims that his defense of liberty
relies on claims about the happiness of people as progressive beings:

> It is proper to state that I forgo any advantage which could be derived to my
argument from the idea of abstract right as a thing independent of utility. 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.
(CW xviii, 224 [1, 11])

Mill thinks that it is our deliberative capacities, especially our capacities for
practical deliberation, that mark us as progressive creatures and that, as a
result, the principal ingredients of our happiness or well-being must be
activities that exercise these deliberative capacities. At its most general,
practical deliberation involves reflective decision-making. In On Liberty,
Mill thinks of practical deliberation in terms of capacities to form, assess,
choose, and implement projects and goals.

He who lets the world, or his own portion of it, choose his plan of life for him has
no need of any other faculty than the ape like one of imitation. He who chooses his
plan for himself employs all his faculties. He must use observation to see, reasoning
and judgment to foresee, activity to gather materials for decision, discrimination to
decide, and when he has decided, firmness and self control to hold his deliberate
decision. And these qualities he requires and exercises exactly in proportion as the
part of his conduct which he determines according to his own judgment and
feelings is a large one. It is possible that he might be guided in some good path, and
kept out of harm’s way, without any of these things. But what will be his
comparative worth as a human being? (CW xviii, 262 [iii, 4])

Mill makes similar claims about the importance of self-examination and
reflective decision-making in his discussion in Utilitarianism of the higher
pleasures doctrine, where he recognizes a categorical preference on the part
of competent judges for activities that exercise their higher capacities –
claiming that “it is better to be a human being dissatisfied than a pig
satisfied; better to be Socrates dissatisfied than a fool satisfied.”

Even if we agree that these deliberative capacities are unique to humans
or that humans possess them to a higher degree than other creatures, we
might wonder in what way their possession marks us as progressive beings
or their exercise is important to human happiness. Mill thinks an account of
human happiness ought to reflect the kinds of beings we are or what is
valuable about human nature. Though he is not as clear about this as one
might like, his discussion of responsibility in A System of Logic (“Of Liberty
and Necessity”) suggests that he thinks that humans are responsible agents
and that this is what marks us as progressive beings. There he claims that
capacities for practical deliberation are necessary for responsibility. In

Ethics, Religion and Society, ed. John M. Robson (Toronto: University of Toronto Press; London:
particular, he claims that moral responsibility involves a kind of self-mastery or self-governance in which one can distinguish between the strength of one’s desires and their suitability or authority and in which one’s actions reflect one’s deliberations about what is suitable or right to do. Non-responsible agents, such as brutes or small children, appear to act on their strongest desires or, if they deliberate, to deliberate only about the instrumental means to the satisfaction of their strongest desires. By contrast, responsible agents must be able to deliberate about the appropriateness of their desires and regulate their actions according to these deliberations. If this is right, then Mill can claim that possession and use of our deliberative capacities mark us as progressive beings, because they are what mark us as moral agents who are responsible. If our happiness should reflect the sort of being we are, then Mill is in a position to argue that higher activities that exercise these deliberative capacities form the principal or most important ingredient in human happiness.

Mill’s claim that the value of freedom of expression lies in keeping true beliefs from becoming dogmatic reflects his view that freedoms of thought and discussion are necessary for fulfilling our natures as progressive beings (CW xviii, 242–3 [II, 20]). For instance, we can see Mill appealing to a familiar distinction between true belief, on the one hand, and knowledge, understood as something like justified true belief, on the other hand. Progressive beings seek knowledge or justified true belief, and not simply true belief. Whereas the mere possession of true beliefs need not exercise one’s deliberative capacities, because they might be the product of indoctrination, their justification would. One exercises deliberative capacities in the justification of one’s beliefs and actions that is required for theoretical and practical knowledge. This is because justification involves comparison of, and deliberation among, alternatives (CW xviii, 231 [II, 6], 231–2 [II, 7], 232 [II, 8], 243–5 [II, 22–3], 258 [II, 43]). Freedoms of thought and discussion are essential to the justification of one’s beliefs and actions, because individuals are not cognitively self-sufficient (CW xviii, 256–7 [II, 38–9], 260 [III, 1]). Sharing thought and discussion with others, especially about important matters, improves one’s deliberations. It enlarges the menu of options, by identifying new options worth consideration, and helps one better assess the merits of these options, by forcing on one’s attention new

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considerations and arguments about the comparative merits of the options. In these ways, open and vigorous discussion with diverse interlocutors improves the quality of one’s deliberations. If so, censorship, even of false belief, can rob both those whose speech is suppressed and their audience of resources that they need to justify their beliefs and actions (*CW* xviii, 228–9 [II, 1]).

We should be careful not to overstate the significance of this argument against censorship. Deliberative values may not always speak in favor of expanding one’s option set.⁸ Cognitively limited agents cannot consider all logically possible options, and careful consideration of many options – especially irrelevant options and options known to have failed – is likely to retard, rather than advance, their deliberations. More options are not always better than fewer. Nonetheless, it is important to note that this perfectionist appeal to deliberative values can explain why it is often wrong to censor even false beliefs. In this way, Mill’s defense of expressive liberties that relies on his perfectionist appeal to deliberative values is a more robust defense than the one provided by his truth-tracking arguments alone.

**FROM EXPRESSIVE LIBERTIES TO LIBERAL PRINCIPLES**

Though important in its own right, Mill’s defense of freedom of thought and discussion provides the resources for an argument for various basic liberties. The deliberative rationale for freedoms of thought and discussion is a special case of a more general defense of basic liberties of thought and action that Mill offers in the balance of *On Liberty*. A good human life is one that exercises one’s higher capacities (*CW* xviii, 224 [I, II], 242–3 [II, 20], 260–82 [III, 1–10]). A person’s higher capacities include her deliberative capacities: in particular, capacities to form, revise, assess, select, and implement her own plan of life. This kind of self-government requires both positive and negative conditions. Among the positive conditions it requires is an education that develops deliberative competence by providing understanding of different historical periods and social possibilities, developing cultural and aesthetic sensibilities, developing skills essential for critical reasoning and assessment, and cultivating habits of intellectual curiosity, modesty, and open-mindedness (*CW* xviii, 301–5 [V, 12–15]). Among the negative conditions that self-government requires are various liberties of thought and action. If the choice and pursuit of projects and plans are to be

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deliberate, they must be informed as to the alternatives and their grounds, and this requires intellectual freedoms of speech, association, and press that expand the menu of deliberative options and allow for the vivid representation of the comparative merits of options on that menu. If there is to be choice and implementation of choices, there must be liberties of action such as freedom of association, freedom of worship, and freedom to choose one’s occupation.

Indeed, liberties of thought and action are importantly related. Mill values diversity and experimentation in lifestyles not only insofar as they are expressions of self-government but also insofar as they enhance self-government. For experimentation and diversity of lifestyle expand the deliberative menu and bring out more clearly the nature and merits of options on the menu (CW xviii, 244, 245 [ii, 23, 38], 260–1 [iii, 1]). So experiments in living not only express the autonomy of the agent at the time of action, but they provide materials for the agent and others in future deliberations. But diversity and experimentation presuppose liberties of action, and in this way liberties of action, as well as thought and discussion, are essential to the full exercise of deliberative capacities.

This interpretation provides Mill with a robust rationale for various liberties of thought and action; they are important as necessary conditions for exercising our deliberative capacities and so for producing the chief ingredients of human happiness. In particular, it provides a more robust defense of Mill’s general anti-paternalism. For if a person’s happiness depends on her exercise of the capacities that make her a responsible agent, then a principal ingredient of her own good must include opportunities for responsible choice and reflective decision-making. But then it becomes clear how autonomy is an important part of a person’s good and how paternalism undercuts her good in important and predictable ways. Mill may still not have an argument against successful paternalism, but his perfectionist defense of basic liberties does give him an argument that successful paternalism is much harder to achieve than one might have thought, because it is very hard to benefit an autonomous agent in paternalistic ways.

**Limits on Liberty**

Despite this robust rationale for liberties of thought and action, it is also important to see that Mill is not treating liberty as an intrinsic good or endorsing an unqualified right to liberty.

First, insofar as Mill defends individual liberties by appeal to deliberative values, he can distinguish the importance of different liberties in terms of
their role in practical deliberation. A central part of practical deliberation is forming ideals and regulating one’s actions and plans in accordance with these ideals. But some liberties seem more central than others to the selection of personal ideals. For instance, it seems plausible that liberties of speech, association, worship, and choice of profession are more important than liberties to drive in either direction on streets designated as one-way, liberties not to wear seatbelts, or liberties to dispose of one’s gross income as one pleases, because restrictions on the former seem to interfere more than restrictions on the latter with deliberations about what sort of person to be. If so, Millian principles arguably defend rights to certain basic liberties, rather than a right to liberty per se. If so, Mill’s liberalism should not be confused with traditional libertarianism, which does recognize a right to liberty per se.

Second, even the exercise of basic liberties is limited by the harm principle, which justifies restricting liberty to engage in actions that cause harm or threaten imminent harm to others. There are interesting questions about the correct interpretation of the harm principle, such as how we draw the line between harm and offense. But his commitment to some version of the harm principle as a ground for restricting liberty is hard to dispute.

Third, it is important to be clear about how Mill values basic liberties. To account for the robust character of his perfectionist argument, it is tempting to suppose that Mill thinks these basic liberties are themselves important intrinsic goods. But limitations in the scope of Mill’s argument show that this cannot be his view.

It is, perhaps, hardly necessary to say that this doctrine is meant to apply only to human beings in the maturity of their faculties … Liberty, as a principle, has no application to any state of things anterior to the time when mankind have become capable of being improved by free and equal discussion. ([CW](xviii, 224 [1, 10]))

So, for instance, the scope of Mill’s prohibition on paternalism does not include paternalistic restrictions on the choices of the very young. Presumably, Mill is also willing to permit some forms of censorship for the young that he would reject for mature adults. Such restrictions on the

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scope of Mill’s principles make no sense if basic liberties are dominant intrinsic goods, for then it should always be valuable to accord people liberties – a claim that Mill here denies. These restrictions make perfect sense if the liberties in question, though not intrinsically valuable, are necessary conditions to realizing dominant goods, for then there will be, or need be, no value to liberty where, as in these circumstances, other necessary conditions for the realization of these higher values – in particular, sufficient rational development or normative competence – are absent.

**Limits on Freedom of Expression**

Does Mill recognize any limitations on his defense of free speech? If one read only chapter II of *On Liberty* one might be excused for concluding that Mill is a free-speech absolutist who believes that censorship is never permissible (at least for mature competent adults). Were we to combine this free speech absolutism with the assumption that liberty can be restricted if and only if it causes harm, we would have to conclude that Mill believes that speech can never be harmful – “sticks and stone can break my bones, but words can never hurt me.” However, Mill does recognize that speech can be harmful, and he applies the harm principle to speech, as well as other action, when he claims that the regulation of incendiary speech is permissible.

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 justifiably 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. (*CW* xvi, 260 [iii, 1])

One question that the corn-dealer passage raises is how much censorship would be justified by applying the harm principle. Mill would presumably accept at least some aspects of First Amendment jurisprudence. He would agree with some version of the “clear and present danger test” recognized by Justice Holmes in his majority opinion in *Schenck v. United States*. 11

The most stringent protection of free speech would not protect a man in falsely shouting fire in a crowded theater, and causing a panic … The question in every

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11 249 U.S. 47 (1919) (upholding conspiracy convictions, under the Espionage Act of 1917, for the distribution of literature aiming to obstruct the military draft).
This raises the more general question of how good the match is between Mill’s defense of freedom of expression and some central aspects of First Amendment jurisprudence. This is especially relevant to ascertaining which limitations Mill can and should recognize on freedom of expression, because First Amendment jurisprudence is not absolutist.

**Deliberative Values and First Amendment Categories**

It is a general proposition governing the adjudication of cases involving individual rights within constitutional law in the United States that when a court determines that an individual’s interest or liberty is a fundamental constitutional value it accords that value special protection by subjecting legislation that interferes with that value to strict scrutiny or some comparable standard. To pass strict scrutiny, legislation must pursue a compelling state interest in the least restrictive manner possible. Strict scrutiny and its relatives contrast with a weaker standard of review, known as rational basis review that is applied to legislation affecting interests and liberties that are not fundamental. To pass rational basis review, legislation need only pursue a legitimate interest in a reasonable manner. With some notable exceptions in which courts recognize intermediate levels of scrutiny, the analysis of the importance of interests or liberties and associated standards of scrutiny is generally bivalent: interests or liberties are either fundamental or they are not; fundamental ones trigger strict scrutiny or some comparable standard, whereas non-fundamental ones trigger rational basis review or some comparable standard. For the most part, liberties of expression are treated as fundamental liberties, because of the central role open discussion plays in both public and private deliberations. Insofar as liberties of expression are fundamental, the court protects them by subjecting legislation that interferes with them to strict scrutiny or some comparably exacting standard, such as the clear and present danger test.

However, not all liberties of expression are treated the same. For instance, First Amendment analysis distinguishes between content-neutral restrictions

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12 The treatments of commercial speech, under First Amendment jurisprudence, and gender classifications, under Equal Protection jurisprudence, are among the exceptions to this rule, insofar as the court subjects restrictions on commercial speech and regulations distributing social benefits and burdens by gender to an intermediate standard of review.
on speech that restrict the time, manner, and place of speech but not its content, and content-specific restrictions that restrict some forms of speech on account of the topic discussed or the viewpoint expressed in the speech. Whereas content-specific restrictions are subject to heightened scrutiny, content-neutral restrictions are subject to weaker forms of scrutiny. Deliberative values would seem to explain the Supreme Court’s special concern with content-specific restrictions. Often, time, manner, and place restrictions leave open many avenues of expression and so do not significantly restrict the production, distribution, or consumption of ideas. By contrast, content-specific, especially viewpoint-specific, restrictions make it harder for certain messages to be heard and evaluated. If the representation of diverse perspectives, even mistaken ideas, can improve public and private deliberations, then there is general reason to think that content-specific restrictions constrain deliberative values in unacceptable ways.

However, not all content-specific regulations are thought to restrict fundamental liberties. First Amendment jurisprudence also distinguishes between low-value and high-value speech. The liberty to engage in low-value speech is not a fundamental liberty; content-specific regulation of low-value speech, as a result, need not satisfy strict scrutiny. By contrast, other forms of speech are high-value, and the liberty to engage in them is a fundamental liberty; as a result, content-specific regulation of high-value speech must satisfy strict scrutiny or some comparable standard. The court formulated the distinction between low-value and high-value speech in Chaplinsky v. New Hampshire:

There are certain well defined and narrowly limited classes of speech, the prevention and punishment of which have never been thought to raise any Constitutional problem. These include the lewd and the obscene, the profane, the libelous, and the insulting or “fighting” words those which by their very utterance inflict injury or tend to incite an immediate breach of the peace. It has been well observed that such utterances are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality.13

Here the court associates central First Amendment liberties with what is an essential part of the exposition of ideas and what is of value as a step toward truth. Like Mill, the court justifies freedom of expression as a way of promoting true belief. However, if the court values freedom of expression only as a means of promoting true belief, then it becomes difficult to extend

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protection to false beliefs, as the court has. But we need not interpret the court as valuing freedom of expression only as a means of acquiring true beliefs. The court appeals to what is an essential part of the exposition of ideas and what is of value as a step toward truth. We can see this rationale as invoking, as Mill also does, deliberative values about the value of free inquiry to the promotion of knowledge, and not just true belief. If we interpret the court’s rationale this way, we can provide a more wide-ranging conception of high-value speech that includes the advocacy of some false beliefs.

What would Mill think about low-value speech and the permissibility of regulating it? He might well think that some examples of low-value speech violate the harm principle. For instance, it is not hard to see how libelous speech – roughly, false and defamatory speech in which the speaker knew that her statement was false and defamatory or acted in reckless disregard of these matters – might be harmful. And some kinds of fighting words might also be harmful. Certainly, fighting words that incite pugilistic responses can be harmful, as Mill recognizes in the corn-dealer case (CW xviii, 260 [iii, 1]). In other situations, fighting words may cause genuine psychic harm that is serious in its consequences and goes beyond mere offense. It is less clear what Mill would think about the permissibility of anti-discriminatory regulations of speech of the sort embodied in employment discrimination law, hate speech regulations, and policies regulating certain kinds of pornography. Mill’s commitments here would depend, in part, on whether the regulations in question targeted mere offense or genuine harm. Insofar as such regulations target genuine harm, and not mere offense, some of them may be defensible according to Millian principles.

Insofar as these forms of speech are harmful, they would be regulable under the harm principle. But the harm principle applies to high-value speech; it says that speech can be regulated no matter how valuable it is if it is harmful. If the harm principle is Mill’s only reason for regulating speech, then he would appear to be committed to regulating harmful speech in spite of its high value. But then Mill could not really agree with Chaplinsky’s distinction between high-value and low-value speech and its claim that low-value speech possesses no significant expressive interest.

**FROM LIBERAL PRINCIPLES TO EXPRESSION LIBERTIES**

But this overlooks a way in which Mill might appeal to deliberative values to determine the comparative value of speech interests. To appreciate this possibility, consider how one might understand his free-speech principle in
light of his considered views about paternalism. Previously, we examined how his discussion of free speech could inform his liberalism and, in particular, his anti-paternalism. Now I would like to explore a way in which his liberalism and, in particular, anti-paternalism can inform his position on free speech.

Despite Mill’s many blanket prohibitions on paternalism, he does not (consistently) reject paternalism per se. For instance, he qualifies his blanket prohibition on paternalism to allow that no one should be free to sell himself into slavery.

The ground for thus limiting his power of voluntarily disposing of his own lot is apparent, and is very clearly seen in this extreme case … by selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He, therefore, defeats in his own case, the very purpose which is the justification of allowing him to dispose of himself. (*CW* xviii, 299 [v, 11])

Because it is the importance of exercising one’s deliberative capacities that explains the importance of certain liberties, the usual reason for recognizing liberties provides an argument against extending liberties to do things that will permanently undermine one’s future exercise of those same capacities. In this case, an exception to the usual prohibition on paternalism is motivated by appeal to the very same deliberative values that explain the usual prohibition. So this seems to be a principled exception to the usual prohibition on paternalism. We might call these autonomy-enhancing or deliberation-enhancing forms of paternalism.¹⁴

There might be similar deliberation-enhancing forms of censorship. There might be speech that does not engage or tends to undermine the very deliberative values that explain why content-specific forms of censorship are normally impermissible. On this view, whereas speech that engages or promotes deliberative values is high-value, speech that fails to engage or frustrates deliberative values would be low-value. I should note that Mill does not explicitly endorse the distinction between high-value and low-value speech or recognize deliberation-enhancing forms of censorship, but doing so would be one way to make his liberal principles more consistent and allow him to accept some central aspects of First Amendment jurisprudence. To see how such limitations on freedom of expression might work, reconsider two categories of low-value speech: libel and fighting words.

¹⁴ Notice that Mill claims that the reasons for allowing paternalism in “this extreme case” are “evidently of far wider application” (*CW* xviii, 299–30 [v, 11]). That raises the question of what other forms of paternalism might be justified as principled exceptions to the usual prohibition on paternalism. Mill does not directly address this question.
Though libel can cause harm and so could be regulated even if it were high-value speech, in spite of the fact that it is high-value, it is also arguable that libel does not properly engage deliberative values and so should be treated as low-value speech, which requires no especially compelling justification to regulate. Libel is false and defamatory speech in which the speaker knew that her statement was false and defamatory or acted in reckless disregard of these matters. It is true, as Mill claims, that the careful consideration of claims, advanced in good conscience, that are in fact false can advance deliberation by forcing us to consider the grounds of their falsity. But libelous speech is not advanced in good conscience. It is arguably a case in which more speech is not better insofar as the introduction of false and harmful claims with no concern for their truth and consequences arguably hinders, rather than promotes, reasoned assessment of issues. But then for that reason libel could be viewed as low-value speech and its censorship could be treated as a principled exception to the usual prohibition on censorship.

Deliberative values might also explain why fighting words are low-value speech. Chaplinsky characterizes fighting words as those that “by their very utterance inflict injury or tend to incite an immediate breach of the peace.” As a matter of subsequent constitutional doctrine, the court has interpreted the category of fighting words narrowly, focusing on their tendency to incite violence. Fighting words, so understood, are words that in their context tend to evoke visceral and violent – rather than articulate – responses. However, it would be a mistake to focus on pugilistic responses, and this is why Chaplinsky rightly construes fighting words more broadly, so as to include words whose utterance would cause injury in a reasonable person. A natural response to the use of insulting epithets in many such contexts is visceral but non-violent; the victim of fighting words might be intimidated and silenced as well as provoked. Whether silence or fisticuffs, the natural response is not articulate. But then fighting words simply express, without articulating, the speaker’s perspective, and they invite various inarticulate responses. If so, we can see why the court might reasonably claim that they do not contribute to deliberative values, but often hinder them. If so, there is a case to be made for thinking that fighting words are low-value speech and that the censorship of fighting words would be a principled exception to the usual prohibition on censorship.\footnote{In this connection, one might note that Mill does consider restrictions on “intemperate” speech that exceeds “the bounds of fair discussion” (\textit{CW}xviii, 258–9 [11, 44]). He observes that there is more to be}
Another potential form of deliberation-enhancing censorship concerns campaign finance reform. Campaign finance reform is obviously a large and complex debate that cannot be satisfactorily addressed here. Nonetheless, we can put parts of this debate in a new perspective by viewing some such reforms as deliberation-enhancing censorship. Campaign finance reform can take many forms, from limitations on private expenditures by candidates, political parties, and individual donors, to the public financing of elections. There are different rationales for different kinds of reforms. Some reforms, such as expenditure limits on private donors, have as their main aim the regulation of influence-peddling. While such reforms and rationales are important in their own right, their connections with deliberative values are unclear or, at best, indirect. Of more direct relevance to our present concerns are those campaign finance reforms that limit spending by candidates and donors or that ban private expenditures and provide for equal public funding for candidates as a way of addressing concerns about the impact of unequal resources on the character of political campaigns and political debate. At least since the landmark case of *Buckley v. Valeo*, US courts have been generally skeptical about the permissibility of the limitations on political expression inherent in such reforms. Skeptics of such reforms have generally viewed this as a conflict between equality and First Amendment rights, concluding that the interest “in equalizing the relative financial resources of candidates competing for elective office is clearly not sufficient to justify the provision’s infringement of fundamental First Amendment rights.” But our Millian defense of limitations on speech that enhance deliberative values suggests a different perspective. In circumstances of significant inequalities in resources, *laissez-faire* political campaigning, in which campaigns are privately funded and in which candidates

said on behalf of such restrictions when they are applied to the expression of prevailing views than when they are applied to the expression of minority views: “In general opinions contrary to those commonly received can only obtain a fair hearing by studied moderation of language and the most cautious avoidance of unnecessary offence, from which they hardly ever deviate even in a slightest degree without losing ground, while unmeasured vituperation employed on the side of the prevailing opinion really does deter people from professing contrary opinions and from listening to those who profess them. For the interest, therefore, of truth and justice it is far more important to restrain this employment of vituperative language than the other” (*CW* xviii, 259 [ii, 44]). But he ultimately rejects all such restrictions, claiming that it is “obvious that law and authority have no business … restraining either” (*CW* xviii, 259 [ii, 44]). I discuss Mill’s concern and caution about regulating intemperate speech and argue that Millian principles may actually support narrowly crafted hate speech regulations in David Brink, “Millian Principles, Freedom of Expression, and Hate Speech,” *Legal Theory* 7 (2001), 119–57.

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16 *424* U.S. 1 (1976) (invalidating legislation imposing limits on campaign expenditures by candidates and private donors and creating a system of public funding for presidential campaigns).

17 Ibid., at 54.
and donors operate under no serious restrictions on the amounts they spend, gives a significant advantage in political debate and electioneering to candidates and causes backed by the most resources. But then a laissez-faire regime makes the representation of candidates, issues, and policies hostage to economic interests in a way that is likely to prevent political dialogue from representing diverse views and tracking the merits of viewpoints as required by the sort of free and open inquiry essential to the exercise of deliberative values. Insofar as this is true, laissez-faire harms the deliberative interests of Haves, as well as Have-Nots. If we appeal to the deliberative values that justify freedom of expression to help distinguish between fundamental and non-fundamental expressive liberties, then there is an interesting case to be made for the idea that campaign finance reforms designed to redress the effects of economic inequalities on political dialogue do not infringe central First Amendment liberties and that such reforms would be a principled exception to the usual prohibition on the censorship of political expression.\footnote{In “Thoughts on Parliamentary Reform” (1859), Mill expresses serious reservations about the effects of economic inequalities among candidates in elections that allow for unrestricted private expenditure by candidates and mentions publicly financed elections as a possible antidote (CW xix, 320). However, he does not object to the effects of inequalities among private donors, and he does not make explicit this deliberation-enhancing rationale for restrictions on private campaign finance.}

Yet another way in which Mill’s conception of freedom of expression might be articulated in light of his liberal principles concerns the obligation of public institutions to represent diverse points of view. Mill insists that in order to exercise our deliberative capacities properly it is essential not only to represent diverse perspectives on important moral, political, and spiritual matters but also to represent their merits faithfully and vigorously. This discipline of fair representation of alternatives is “so essential … to a real understanding of moral and human subjects that, if opponents of all important truths do not exist, it is indispensable to imagine them and supply them, with the strongest arguments which the most skilful devil’s advocate can conjure up (CW xviii, 245 [II, 23]).

arts in the *Principles of Political Economy*\(^{20}\) are examples of institutional mechanisms designed to increase the diversity and salience of political, intellectual, and artistic activities and voices so as to enhance the character of public and private deliberations. One application of this concern with the fair representation of alternatives in the domain of expression would be support for a fairness in broadcasting doctrine, of the sort at stake in *Red Lion Broadcasting Co. v. FCC*,\(^{21}\) that would, at least in some contexts, condition access to broadcast time by some candidates and viewpoints on the provision of access to broadcast time by opposing candidates or points of view. Insofar as making public speech by some conditional on the provision of public speech by others can be understood as a restriction of expressive liberties, it too can be represented as a form of deliberation-enhancing censorship.

Mill’s position on the limits of freedom of expression requires reconstruction. He is clearly not a free-speech absolutist, as his application of the harm principle to the corn-dealer case illustrates. The more interesting question is whether he can accept some other limitations on freedom of expression of the sort embodied in some central First Amendment principles and doctrines. Millian principles provide a good rationale for First Amendment doctrines about the importance of high-value speech. While Mill does not himself explicitly distinguish between high-value and low-value speech, one way to reconcile his free-speech principles with his other liberal principles would be to treat speech that fails to engage or retards deliberative values as low-value speech whose suppression could be justified as a form of deliberation-enhancing censorship, akin to the autonomy-enhancing paternalism that he explicitly recognizes.

**Conclusion**

Mill’s defense of expressive liberties has been deservedly influential, and it is important in its own right to understand these arguments. But Mill intended his free-speech principles to play a larger role in articulating and grounding more general liberal principles governing thought and action. Once we appreciate the way in which his defense of expressive liberties

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\(^{21}\) 395 U.S. 367 (1969) (upholding the FCC’s fairness doctrine and, in particular, the personal attack rule against First Amendment challenge).
appeals to the distinctive value of our nature as progressive beings – specifically, our capacities as agents – we can see how he thinks that free-speech principles, properly understood, support a broader array of individual liberties. In particular, we can see how the importance of deliberative values provides Mill with a reasonably robust defense of his general anti-paternalistic doctrine. But just as Mill’s free-speech principles can shed light on his liberal principles, so too his liberal principles can shed light on his free-speech principles. Reconciling his expressive and liberal commitments suggests some ways of extending and qualifying his explicit commitments about freedom of expression. Though Mill initially says that he will defend one “very simple” liberal principle – the harm principle – as governing the limits of the authority that the state or anyone else may have over another, this turns out to be an over-simple statement of his liberal principles. Several potential qualifications are in order. One qualification is that the harm principle need not be invoked to justify restricting liberty, for Mill endorses deliberation-enhancing forms of paternalism, as in his discussion of the permissibility of restrictions on selling oneself into slavery. This feature of his considered liberal principles has a direct bearing on freedom of expression. Mill can and does recognize permissible forms of censorship whose aim is to prevent harm, as in the corn-dealer example. But if we try to square Mill’s expressive principles with his other liberal principles, this suggests that he can and should recognize the permissibility of other forms of censorship whose aim is not to prevent harm but to advance the very deliberative values that explain why censorship is normally impermissible. When Mill’s free-speech principles are understood in this light, they provide an interesting and generally supportive perspective on some central First Amendment categories and doctrines. Viewing Mill’s principles governing freedom of expression in the context of his more general liberal principles provides distinctive and instructive information about the proper interpretation of both sets of commitments.

22 See Brink, “Mill’s Moral and Political Philosophy,” for fuller discussion of ways in which Mill’s commitment to the harm principle must be qualified.