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## On Freedom of Expression

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Mill's essay *On Liberty* begins with an introduction that ends in an apology. As he approaches his famous chapter, *Of the Liberty of Thought and Discussion*, he writes: "Those to whom nothing which I am about to say will be new . . . may . . . , I hope, excuse me, if on a subject which for now three centuries has been so often discussed, I venture on one discussion more."<sup>1</sup>

One hundred and twenty years later, I too apologize for venturing on "one discussion more," and for calling that discussion *On Freedom of Expression*. I use the title strictly out of respect: I do not know how to think about this subject without Mill. My explanation for one discussion more is simply that I continue to have difficulty with two fundamental, interrelated questions that any theory or hypothesis about liberty of expression must resolve. First, why should expression have greater immunity from government regulation than most other forms of human conduct; second, what are the limits of this immunity?

The answers to these questions—if indeed there are satisfactory answers—would be a long first step, though only a first step, toward a theory of free expression. For a theory would have to come explicitly to grips with such additional questions as: if expression is to have more immunity from regulation than other forms of conduct, how does one, for this purpose, identify expression?<sup>2</sup> And, to what extent may or

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1. J.S. MILL, *On Liberty*, in *ON LIBERTY AND REPRESENTATIVE GOVERNMENT* 13 (R. McCallum ed. 1946) (1st ed. 1859).

2. *Compare* Spence v. Washington, 418 U.S. 405, 410 (1974) (per curiam) (college student who hung inverted flag and attached peace symbol "engaged in a form of protected expression") with United States v. O'Brien, 391 U.S. 367, 376 (1968) (Court rejected contention that "apparently limitless variety of conduct can be labelled 'speech' whenever the person . . . intends thereby to express an idea"). See generally Ely, *Flag Desecration: A Case Study in the Roles of Categorization and Balancing in First Amendment Analysis*, 88 HARV. L. REV. 1482 (1975).

should government affirmatively promote (as distinguished from interfere with) the liberty of expression?<sup>3</sup>

I do not deal with the last question at all and only indirectly with identification problems. The two fundamental questions have to be answered first and, as will become clear, this essay is at best only partially successful in that effort.

The first part of the essay, in attempting to explain why expression deserves extensive governmental immunity, takes seriously the relationship between expression and individual autonomy as well as the role of expression in the political process. Here problems of identification are dealt with indirectly. Part two addresses the proper limits of expression's immunity. Accordingly, it is concerned with such familiar topics as governmental control over the dissemination of ideas and doctrines that challenge widely held fundamental beliefs and with governmental control over the advocacy of illegal action.

Throughout the essay, but especially in part one, I shall be looking rather critically at the writings of a small number of scholars whose work I respect greatly. There is much of high quality by many others.<sup>4</sup> Some of this writing could have served perhaps as well, and some of the writers discussed are not finished with Mill's subject. Their views, therefore, may have changed as views about freedom of expression are wont to do.

## I.

### 1.

Intuition at first may suggest that an individual ought to have more freedom to speak than he has liberty in other areas. There would seem to be some truth in the adage, "sticks and stones can break my bones, but words will never hurt me." Yet speech often hurts. It can offend, injure reputation, fan prejudice or passion, and ignite the world.<sup>5</sup>

3. Compare *Miami Herald Publishing Co. v. Tornillo*, 418 U.S. 241, 254 (1974) (government regulation designed to facilitate expression "brings about a confrontation with the express provisions of the First Amendment") with *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367, 390 (1969) (constitutional to regulate broadcasting in order to safeguard "right of the public to receive suitable access to social, political, esthetic, moral, and other ideas"). For discussions of broadcast regulation and the First Amendment, see generally B. OWEN, *ECONOMICS AND FREEDOM OF EXPRESSION* (1975); B. SCHMIDT, *FREEDOM OF THE PRESS VS. PUBLIC ACCESS* (1976); Robinson, *The FCC and the First Amendment: Observations on 40 Years of Radio and Television Regulation*, 52 MINN. L. REV. 67 (1967).

4. See, e.g., Z. CHAFEE, *FREE SPEECH IN THE UNITED STATES* (1941); T. EMERSON, *THE SYSTEM OF FREEDOM OF EXPRESSION* (1970); H. KALVEN, *THE NEGRO AND THE FIRST AMENDMENT* (1965).

5. See, e.g., *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring) (compensating for injury caused by defamatory expression comports with "our basic concept

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Moreover, a great deal of other conduct that the state regulates has less harmful potential. Victimless crimes and sexual relations between consenting adults have no direct effect on the public; much speech does. Indeed, some constitutionally valid regulation of innocent conduct may itself directly harm the public. Restrictions placed on the sale of eyeglasses, for example, can decrease the freedom of a class of vendors and increase the price of spectacles, while failing to afford protection to any group of purchasers.<sup>6</sup> Moreover, the vendor forced out of business, the drug user, and the homosexual might happily exchange some free expression for other freedoms lost.

There are several well-known ways of separating expression from other freedoms—some more successful than others in establishing expression's relative immunity from regulation. Some appeal to the Constitution and particularly to the First Amendment; others do not.<sup>7</sup>

Consider the following from an interview between Edmond Cahn and Hugo L. Black. The speaker is the Justice:

The beginning of the First Amendment is that "Congress shall make no law." I understand that it is rather old-fashioned and shows a slight naivete to say that "no law" means no law. It is one of the most amazing things about the ingeniousness of the times that strong arguments are made, which *almost* convince me, that it is very foolish of me to think "no law" means no law. But what it says is "Congress shall make no law . . ."<sup>8</sup>

And the Justice went on to say, "I believe [the Amendment] means what it says."<sup>9</sup>

of the essential dignity and worth of every human being"); *Beauharnais v. Illinois*, 343 U.S. 250, 261 (1952) (states may punish "false or malicious defamation of racial and religious groups . . . calculated to have a powerful emotional impact"); *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting) ("Every idea is an incitement. . . . Eloquence may set fire to reason.")

6. See *Williamson v. Lee Optical Co.*, 348 U.S. 483, 487 (1955) (although statute regulating opticians "may exact a needless, wasteful requirement[.] . . . it is for the legislature, not the courts, to balance the advantages and disadvantages").

7. Compare C. BLACK, *STRUCTURE AND RELATIONSHIP IN CONSTITUTIONAL LAW* 39-45 (1969) (structure of Constitution requires uninhibited political expression) and A. MEIKLEJOHN, *FREE SPEECH AND ITS RELATION TO SELF-GOVERNMENT* 27 (1948) (First Amendment "a deduction from the basic American agreement that public issues shall be decided by universal suffrage") with J.S. MILL, *supra* note 1, at 46 ("necessity to the mental well-being of mankind . . . of freedom of opinion, and freedom of the expression of opinion") and R. WOLFF, *THE POVERTY OF LIBERALISM* 3 (1968) (attempt at "analysis and clarification" of Mill's philosophy of free expression).

8. *Justice Black and First Amendment "Absolutes": A Public Interview*, 37 N.Y.U. L. REV. 549, 553 (1962) (footnote omitted) [hereinafter cited as *Public Interview*].

9. *Id.* at 563. It should be noted that the Amendment refers only to Congress. If it means what it says (whatever that may mean) are we to assume that the Amendment does not bind the other branches of government? May the President abridge the freedom of speech by executive order? Justice Black would have been the first to say no.

In an earlier lecture, Black had maintained: "It is my belief that there *are* 'absolutes' in our Bill of Rights, and that they were put there on purpose by men who knew what words meant, and meant their prohibitions to be 'absolutes.'"<sup>10</sup> Yet historical research rejects absolutely the Justice's view of the founders' purpose.<sup>11</sup> Nor can an appeal to the Amendment's language—"Congress shall make no law . . . abridging the freedom of speech"<sup>12</sup>—sustain the absolutist's position. Robert Bork is clearly correct when he insists that "[a]ny such reading is, of course, impossible. . . . Is Congress forbidden," he asks,

to prohibit incitement to mutiny aboard a naval vessel engaged in action against an enemy, to prohibit shouted harangues from the visitors' gallery during its own deliberations or to provide any rules for decorum in federal courtrooms? Are the states forbidden, by the incorporation of the first amendment in the fourteenth, to punish the shouting of obscenities in the streets?<sup>13</sup>

One can back away from the extreme version of the absolutist's position without abandoning the claim that the language of the First Amendment elevates expression to a preferred freedom. Thus, for example, some of Bork's concerns were anticipated by Alexander Meiklejohn who insisted that the Amendment "does not forbid the abridging of *speech*. But . . . it does forbid the abridging of *the freedom of speech*."<sup>14</sup> Meiklejohn argued that the phrase, "the freedom of speech" implies the existence of rules regarding procedure, order, forum, etc. He used the New England town meeting as his model: there could be no freedom of speech if everyone spoke at once. But any view relevant to the question before the meeting, no matter how unpopular, was protected by the strong language of the Amendment.<sup>15</sup>

10. Black, *The Bill of Rights*, 35 N.Y.U. L. REV. 865, 867 (1960).

11. See L. LEVY, *LEGACY OF SUPPRESSION* vii (1960) ("I have been reluctantly forced to conclude that the generation which adopted the Constitution and the Bill of Rights did not believe in a broad scope for freedom of expression, particularly in the realm of politics.")

12. U.S. CONST. amend. I ("Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.")

13. Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 21 (1971).

14. A. MEIKLEJOHN, *supra* note 7, at 19 (emphasis altered).

15. *Id.* at 22-27; cf. *Gregory v. City of Chicago*, 394 U.S. 111, 125 (1969) (Black, J., concurring) ("Were the authority of government so trifling as to permit anyone with a complaint to have the vast power to do anything he pleased, wherever he pleased, and whenever he pleased, our customs and our habits of conduct, social, political, economic, ethical, and religious, would all be wiped out . . .")

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“The freedom of speech,” of course, is not a self-defining phrase: what cannot be abridged is what is protected. Nor is the word “abridging” unambiguous. What is protected and how extensively it is protected must be determined through interpretive tools extrinsic to the language of the Amendment. As we shall see, Meiklejohn himself had a full kit of interpretive tools.<sup>16</sup>

This much does seem clear. On the one hand, the language of the Amendment points to a special status for expression. It creates a stronger presumption against state regulation than weaker language would. To say “Congress shall make no *unreasonable* law . . . abridging the freedom of speech” adds an adjective that weakens a liberty.<sup>17</sup> On the other hand, the language does not tell a legislature or a court much. They must look elsewhere to determine the strength of the presumption.<sup>18</sup> And Justice Black knew this. Perhaps it explains his position:

I have to be honest about it. I confess not only that I think the Amendment means what it says but also that I may be slightly influenced by the fact that I do not think Congress *should* make any law with respect to these subjects. That has become a rather bad confession to make in these days, the confession that one is actually for something because he believes in it.<sup>19</sup>

Moreover, it should be observed that total reliance on the language of the First Amendment in separating freedom of expression from less-protected freedoms not only fails in fact; it is inadequate in conception. For even if the language supported the conception, many would be left unsatisfied. The contemporary American lawyer has trouble resting his case exclusively on what was written almost two hundred years ago.<sup>20</sup> Yet he knows that he has no case at all without legitimate authority. This is symptomatic of our constitutional law: the appeal to

16. See pp. 1110-12 *infra*. Paradoxically, they are also Bork's. See Bork, *supra* note 13, at 23 (self-government structured by Constitution requires free political expression).

17. See C. BLACK, *THE PEOPLE AND THE COURT* 217-18 (1960) (absolute character of First Amendment's language creates presumption that any government regulation of expression is unconstitutional).

18. After looking, it may be that some will find justification for speaking in absolutes. Charles Black, for one, endorsed a variant of the absolutist position. See Black, *Mr. Justice Black, the Supreme Court, and the Bill of Rights*, HARPER'S, Feb. 1961, at 68 (“The ‘absolutist’ view, taken sensibly, would tend to carve out large areas of personal freedom to be enjoyed without regard to transient legislative views on the pressing necessity of shutting people up . . . .”)

19. *Public Interview*, *supra* note 8, at 553.

20. In his Holmes Lectures, Guido Calabresi suggests that continued judicial deference to outdated statutes leads to “legal petrification.” G. Calabresi, *The Common Law Function in the Age of Statutes* (Holmes Lectures, Harvard Law School, unpublished manuscript, Mar. 1977). Calabresi advocates controlled judicial revision of such statutes as part of the common law. *Id.*

text is seen as important but generally in need of support;<sup>21</sup> and satisfactory support is hard to find because it so frequently leads to indeterminate results.<sup>22</sup> This is as true in the area of the freedom of speech as it is elsewhere.

## 2.

After Mill, Alexander Meiklejohn may be the foremost philosopher of free expression. Unlike Mill, he addressed expression in the context of the American Constitution and was careful to distinguish between the protection that speech is afforded under the First Amendment and that which speech, as well as other conduct, receives under the due process clause of the Fifth.<sup>23</sup> The structure of American democracy in particular, and "the necessities of self-government by universal suffrage" in general, define the scope of the First Amendment.<sup>24</sup> Its guarantee "is assured only to speech which bears, directly or indirectly, upon issues with which voters have to deal—only, therefore, to the consideration of matters of public interest."<sup>25</sup> Other conduct, including speech that fails of Meiklejohn's definition, is protected by the substantially less rigorous requirement of the Fifth Amendment.

Private speech, or private interest in speech . . . has no claim whatever to the protection of the First Amendment. If men are en-

21. See Wellington, *Common Law Rules and Constitutional Double Standards: Some Notes on Adjudication*, 83 YALE L.J. 221, 265-66 (1973) (legitimacy and scope of judicial review based only in part on appeal to text of Constitution); *id.* at 267-70 (language of First Amendment suggests legitimate scope of judicial review but does not define it). For a critical inspection of a variety of contemporary approaches to constitutional interpretation, see Ely, *The Supreme Court, 1977 Term—Foreword: On Discovering Fundamental Values*, 92 HARV. L. REV. 5, 16-54 (1978).

22. The Supreme Court's struggle with the constitutionality of the death penalty is illustrative. Judicial appeals to the text of the Eighth Amendment are inevitably colored by divergent evaluations of the historical context, *compare* *Gregg v. Georgia*, 428 U.S. 153, 176-78 (1976) (plurality opinion) (capital punishment accepted by Framers) *with* *Furman v. Georgia*, 408 U.S. 238, 296 (1972) (Brennan, J., concurring) (controversy over constitutionality of penalty traced to "beginning of our Nation"), the deterrent effect of the penalty, *compare* 428 U.S. at 185 (plurality opinion) ("no convincing empirical evidence" that death penalty does not deter crime) *with* 408 U.S. at 353 (Marshall, J., concurring) ("capital punishment is not necessary as a deterrent to crime in our society"), the legitimacy of retribution as a goal of punishment, *compare* 428 U.S. at 183 (plurality opinion) (retribution neither "a forbidden objective nor one inconsistent with our respect for the dignity of men") *with id.* at 240 (Marshall, J., dissenting) ("mere fact that the community demands the murderer's life . . . cannot sustain the death penalty"), and the relevance of contemporary morality, *compare id.* at 179 (plurality opinion) ("large proportion of American society continues to regard [death] as an appropriate and necessary criminal sanction") *with id.* at 232 (Marshall, J., dissenting) ("American people, fully informed," would reject death penalty "as morally unacceptable").

23. A. MEIKLEJOHN, *supra* note 7, at 37-39. In the case of the states, Meiklejohn drew a distinction between the First Amendment and the Fourteenth. *Id.* at 59.

24. *Id.* at 94.

25. *Id.*

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gaged, as we so commonly are, in argument, or inquiry, or advocacy, or incitement which is directed toward our private interests, private privileges, private possessions, we are, of course, entitled to "due process" protection of those activities.<sup>26</sup>

One can take Meiklejohn to mean that private speech is protected in the same limited way by due process as is the vendor of eyeglasses or the user of drugs. The First Amendment, he says, "has no concern over such protection. That pronouncement remains forever confused and unintelligible unless we draw sharply and clearly the line which separates the public welfare of the community from the private goods of any individual citizen or group of citizens."<sup>27</sup>

What a wonderful faith Meiklejohn must have had in human abilities if he believed that any person could draw the public-private line sharply and clearly.<sup>28</sup> And he was truly innocent if he thought that anyone's line was not determined in large part by the outcome desired rather than the other way around.<sup>29</sup> "Private" and "public" are

26. *Id.*

27. *Id.* Although Meiklejohn, at least in his early work, did not designate specific categories of "public" and "private" expression, he did undertake to elaborate the conceptual basis of the distinction:

On the one hand, each of us, as a citizen, has a part to play in the governing of the nation. In that capacity, we think and speak and plan and act for the general good. On the other hand, each of us, as an individual or as a member of some private group, is rightly pursuing his own advantage, is seeking his own welfare. . . . [Each man's] private rights, including the right of "private" speech, are liable to such abridgments as the general welfare may require.

*Id.* at 95. Under this conceptual scheme, Meiklejohn asserted that both academic scholarship, *see id.* at 100, and broadcasting, *see id.* at 104, constitute "private" expression. *But see* p. 1112 *infra* (Meiklejohn's revised views).

28. Consider the following from Meiklejohn:

The statement that the First Amendment stands guard over the freedom of public speech but is indifferent to the rights of private speech has sharp and, at times, decisive implications for many issues of civil liberty now in dispute among us. It would be a fascinating and important task to follow those implications as they bear upon the rights to freedom which are claimed, for example, by lobbyists for special interests, by advertisers in press or radio, by picketing labor unions, by Jehovah's Witnesses, by the distributors of handbills on city streets, by preachers of racial intolerance, and many others. In all these cases the crucial task is that of separating public and private claims.

A. MEIKLEJOHN, *supra* note 7, at 99. He continues:

Under present circumstances it is criminally stupid to describe the inquiries of scholarship as merely "the distinterested pursuit of knowledge for its own sake." Both public and private interests are clearly involved. They subsidize much of our scholarship. And the clashes among them may bring irretrievable disaster to mankind. It may be, therefore, that the time has come when the guarding of human welfare requires that we shall abridge the private desire of the scholar—or of those who subsidize him—to study whatever he may please. It may be that the freedom of the "pursuit of truth" must, in that sense, be abridged.

*Id.* at 99-100.

29. "The outcome desired" may rest on intuition about the good society, or on some theory, rigorous or otherwise.

like blocks of clay that can be shaped as the potter desires. Thus, Meiklejohn himself was to find “novels and dramas and paintings and poems,”<sup>30</sup> within “the freedom of speech,” within “public speech,” within “speech which bears . . . upon issues with which voters have to deal.”<sup>31</sup> And he stated clearly that the First Amendment protected “novels which portray sexual experiences with a frankness that, to the prevailing conventions of our society, seems ‘obscene’.”<sup>32</sup>

## 3.

Both Alexander Bickel and Robert Bork have acknowledged in their writings a debt to Meiklejohn. Bickel put it this way (and his reading of Bork seems correct):

The social interest that the First Amendment vindicates is . . . , as Alexander Meiklejohn and Robert Bork have emphasized, the interest in the successful operation of the political process, so that the country may be better able to adopt the course of action that conforms to the wishes of the greatest number, whether or not it is wise or is founded in truth.<sup>33</sup>

Yet, in Meiklejohn’s terms, Bickel drew the public-private line to exclude the obscene from “the freedom of speech,”<sup>34</sup> and Bork’s line banishes most *belles-lettres*, obscene or not.<sup>35</sup> Nor did either draw his line in a way that is inconsistent with Meiklejohn’s main contention: Bickel and Bork disagree with their predecessor (and with each other) on what it takes to operate the political process successfully, including what a responsible voter needs to know. They do not disagree with Meiklejohn on the justification for the special place accorded freedom of expression in the American constitutional system.<sup>36</sup> They also disagree—although this may just reflect their more fundamental differences—on the status given to expression by the language of the Amendment: Meiklejohn takes the linguistic formulation—the presumption it may be thought to create—seriously; Bickel and Bork do not.<sup>37</sup> But the

30. Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263.

31. A. MEIKLEJOHN, *supra* note 7, at 93-94.

32. Meiklejohn, *supra* note 30, at 262.

33. A. BICKEL, *THE MORALITY OF CONSENT* 62 (1975) (footnotes omitted).

34. *Id.* at 73-76.

35. Bork, *supra* note 13, at 27 (“If the dialectical progression is not to become an analogical stampede, the protection of the first amendment must be cut off when it reaches the outer limits of political speech.”)

36. Bickel deploys other justifications as well. See A. BICKEL, *supra* note 33, at 87 (First Amendment “ordains an unruly contest between the press, whose office is freedom of information . . . , and government”).

37. Compare A. MEIKLEJOHN, *supra* note 7, at 17 (“no one who reads with care the text of the First Amendment can fail to be startled by its absoluteness”) with A. BICKEL,

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disagreement over the requirements of the political process is vastly more important. It has both empirical and normative dimensions. All three theorists make different assumptions about how legal rules affect human behavior, and these assumptions are influenced by each scholar's conception of American democracy. We know this in part because they tell us<sup>38</sup> and in part because we know that there is so little information about the consequences of the legal rules with which we are concerned.<sup>39</sup>

4.

If the "social interest that the First Amendment vindicates is . . . the interest in the successful operation of the political process,"<sup>40</sup> a legal rule affecting expression might well be tested by asking the question: what are its consequences for the political process? For example, assume that there is no line of cases beginning with *New York Times Co. v. Sullivan*,<sup>41</sup> and that a state has a statute declaring it a tort for newspapers negligently to publish false information that injures the reputation of a candidate for political office. A newspaper publishes a story about a candidate for governor that asserts that he took a bribe when he was a congressman. After losing the election by less than a per-

*supra* note 33, at 63 (rejecting Justice Black's assertion that "when the Framers . . . said 'no law' they meant 'no law'") and Bork, *supra* note 13, at 21 (it is "impossible" to hold view that "Framers commanded complete freedom of expression without governmental regulation of any kind").

38. See A. BICKEL, *supra* note 33, at 74-76; A. MEIKLEJOHN, *supra* note 7, at 7-16; Bork, *supra* note 13, at 2-4.

39. Compare *Zurcher v. Stanford Daily*, 436 U.S. 547, 566 (1978) (Court not convinced that unannounced searches of newspaper offices will inhibit political expression) and *Branzburg v. Hayes*, 408 U.S. 665, 693 (1972) ("evidence fails to demonstrate" that compelled disclosure of news sources to grand jury will lead to "significant constriction of the flow of news to the public") with *New York Times Co. v. Sullivan*, 376 U.S. 254, 279 (1964) (scope of state defamation law curtailed because "would-be critics of official conduct may be deterred from voicing their criticisms") and *Herbert v. Lando*, 568 F.2d 974, 980 (2d Cir. 1977), *rev'd*, 47 U.S.L.W. 4401 (U.S. Apr. 18, 1979) (discovery of journalist's thought processes "endangers a constitutionally protected realm" because reporter "would often be discouraged from . . . verbal testing, probing, and discussion").

The Supreme Court's attempt to restructure the law of defamation is instructive. The justices appear to accept the major premise that "speech concerning public affairs is more than self-expression; it is the essence of self-government," *Garrison v. Louisiana*, 379 U.S. 64, 74-75 (1964), as a mandate to constitutionalize defamation law. Nonetheless, sharp divisions within the Court have left that body of law unsettled for 15 years, and only five justices supported the current reformulation. Compare *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29, 43 (1971) (plurality opinion) (defamation plaintiffs must prove "actual malice" whenever matter of "public or general interest" involved) with *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 344-48 (1974) (though public officials and public figures must prove actual malice, private individuals involved in matters of public interest need not). See generally Note, *The Editorial Function and the Gertz Public Figure Standard*, 87 YALE L.J. 1723 (1978) (*Gertz* standard itself inhibits free expression).

40. A. BICKEL, *supra* note 33, at 62.

41. 376 U.S. 254 (1964).

centage point, the candidate sues. A jury determines that the story is false, that the newspaper was negligent (there was no showing of "actual malice"),<sup>42</sup> and that the candidate's reputation has been besmirched. It awards "compensatory" damages.<sup>43</sup>

Claiming that the statute violates the First Amendment, the newspaper appeals. It asks the court to consider the case "against the background of a profound national commitment to the principle that debate on public issues should be uninhibited, robust, and wide-open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials."<sup>44</sup> It argues that the statute will make newspapers overly cautious, that they will be "deterred from voicing their criticism, even though it is believed to be true and even though it is in fact true, because of doubt whether it can be proved in court or fear of the expense of having to do so."<sup>45</sup> And it insists that the statute "dampens the vigor and limits the variety of public debate."<sup>46</sup>

The candidate, to the contrary, begs the court to recognize that the lies published about him misled the voters and thereby injured the political process. The statutory standard of due care, he insists, is the ideal standard for ensuring that the public is informed, rather than misled. Negligence is not to be encouraged in the reporting of political news any more than elsewhere, and if due care costs more than carelessness, the purpose of the First Amendment requires that newspapers rather than voters should bear that cost.<sup>47</sup> Moreover, if newspapers are free to lie, some of our most capable citizens will be deterred from running for office; the risk to reputation may outweigh the charm of public life.<sup>48</sup>

42. *Id.* at 280 ("actual malice" defined as knowing falsehood or "reckless disregard" of truth); see *St. Amant v. Thompson*, 390 U.S. 727, 731 (1968) (reckless disregard standard requires that press "in fact entertained serious doubts as to the truth" of published material).

43. That is, the court awards only money damages sufficient to compensate the candidate for the injury to his reputation, but does not overturn the election or award damages for the loss of it. Compare *Brewer v. Weakley*, 2 Tenn. (2 Overt.) 99, 99-100 (1807) (same situation) ("The loss of an election . . . must be conceived injurious, for which the law will afford redress . . . .")

44. The language, of course, is from the majority opinion in a case that I have assumed has not been decided, *viz.*, *New York Times Co. v. Sullivan*, 376 U.S. 254, 270 (1964).

45. *Id.* at 279.

46. *Id.*

47. This may mean in practice that the class of newspaper owners, subscribers, and advertisers, many of whom are voters, will bear the cost.

48. See *Commonwealth v. Wardwell*, 136 Mass. 164, 169 (1883) (using this rationale to uphold criminal libel conviction for charges made against sheriff who declined to state whether he would run for reelection). Note that the arguments made by the candidate in my example do not go directly to the value society does or should attach to an in-

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It is doubtful that we can ascertain whether all or some of the newspaper's or the candidate's predictions about the impact of the statute on the political process are correct. Nor would we be able to evaluate the court's holding in consequentialist terms.<sup>49</sup> If we drop our assumption about the *Sullivan* case, we can be reasonably confident that the newspaper would win today and would have lost in the not-too-distant past.<sup>50</sup> But who would have the temerity to say that the increased protection of defamatory speech can be shown to have contributed to a political process that functions better?<sup>51</sup>

A consequentialist argument about the relationship between literature or obscenity and the functioning of the political process is also bound to founder on an absence of obtainable information. One learns

dividual's reputation. See *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 341 (1974) ("legitimate state interest underlying the law of libel"). Although such arguments would of course be made, I have not advanced them here because I wish to make the point that the effect of the legislation on the political process is unclear—not that the legislation, if sustained, vindicates a "private" interest. Put another way, the arguments made by the candidate in the text do not involve "balancing."

49. In philosophical writing, "consequentialism" . . . has come to mean the doctrine that one should judge the morality of an action by its consequences." Barry, Book Review, 88 *YALE L.J.* 629, 629-30 (1979). All that I mean by the sentence in the text, however, is that whatever the court holds, we will not know the effect of that holding on the successful operation of the political process. Recall that the successful operation of the political process is stipulated as the social interest vindicated by the First Amendment. See p. 1113 *supra*.

One way of resolving the problem of the court would be to say: when in doubt, prefer speech. This much at least, it might be thought, can be justified by the language of the First Amendment. But of course this approach represents a conclusion, not a reason. Why, after all, should some justices of the Supreme Court suddenly decide in the 1960s that defamatory utterances fit within the phrase "the freedom of speech?" Before this, few had had difficulty excluding defamation from the ambit of the protection provided by that phrase. See *Chaplinsky v. New Hampshire*, 315 U.S. 568, 572 (1942). A presumption in favor of speech, based on the language of the First Amendment, is apt to shift attention toward a definition of speech. For reasons that have been largely indicated to this point, I doubt on the whole that efforts to define speech will help very much in answering the questions addressed in this essay.

50. The rule of *New York Times Co. v. Sullivan*, 376 U.S. 254 (1964), although not without support in prior state cases, see, e.g., *id.* at 280 & n.20, was new federal constitutional doctrine. See *id.* at 299-300 (Goldberg, J., concurring in result).

51. The English law of defamation grants less protection to the press than does the American. See generally R. O'SULLIVAN, *GATLEY ON LIBEL AND SLANDER* (5th ed. 1960). Yet Professor Harry Street, a powerful advocate of free expression and an authority on the law of torts, has written: "There is nothing to support the Press view that the [English] law of libel prevents newspapers from commenting on many matters about which the public should know." H. STREET, *FREEDOM OF THE INDIVIDUAL AND THE LAW* 152 (1963). Indeed, Professor Street concludes that the "general verdict" is that "the obstacles in the way of the plaintiff's success are severe and probably larger than they ought to be." *Id.* Nor is the press of one mind. Although calling for drastic changes in the English law of contempt, the Editor of London's *Sunday Times*, Mr. Harold Evans, spoke sharply on the subject: "Minor charges could be made but I do not protest . . . about the law of libel. Those who do strenuously protest are usually the casual purveyors of character assassination." Evans, *The Half-Free Press*, in *THE FREEDOM OF THE PRESS* 44 (Granada Guild Hall Lectures 1974).

much about political behavior from Anthony Trollope and about social behavior from Jane Austen. Does this knowledge help the voter discharge his obligation? The obscene teaches about the human condition. Is that not important to the voter as a voter?<sup>52</sup>

Bickel did not directly address the problem of political<sup>53</sup> versus non-political<sup>54</sup> speech or how one can get at its empirical dimension. His argument on obscenity, for example, rather relies in part on its side effects: "Perhaps each of us can, if he wishes, effectively avert the eye and stop the ear. Still, what is commonly read and seen and heard and done intrudes upon us all, wanted or not, for it constitutes our environment."<sup>55</sup> Bork does not disagree,<sup>56</sup> but both he and Meiklejohn do explicitly grapple with the line-drawing problem and both use the same approach.<sup>57</sup> Although it helps them to reach conclusions about literature and obscenity, it would not, it seems to me, assist a judge to decide the defamation case I hypothesized.

Bork and Meiklejohn, in effect, create presumptions: "*explicitly and predominantly* political speech," Bork says, is "the only form of speech that a principled judge can prefer to other claimed freedoms."<sup>58</sup> The First Amendment protects speech, Meiklejohn tells us, "which bears, directly or *indirectly*, upon issues with which voters have to deal."<sup>59</sup> Armed with one or the other of these presumptions (and they come close to being opposites) each writer, as we shall see, is able to overcome many of the difficulties of a consequentialist approach. But the presumptions, as we shall also see, derive from premises that contain observable difficulties.

## 5.

Meiklejohn writes out of the great contractarian tradition. The Constitution is a compact that, if properly understood, requires the citizen to obey laws satisfying the weak due process requirements of the Fifth or Fourteenth Amendment. For on Meiklejohn's reading of

52. Even if one had clear evidence about consequences, one might formulate a position on obscenity or literature that was contrary to the evidence. One could not, however, justify the position on consequentialist grounds.

Consider as an analogous problem the death penalty. One can be for or against it regardless of evidence about its deterrent impact. *See* note 22 *supra*.

53. This speech would be "public" in Meiklejohn's terminology. *See* p. 1110 *infra*.

54. This speech would be "private" in Meiklejohn's terminology. *See* pp. 1110-11 *supra*.

55. A. BICKEL, *supra* note 33, at 74.

56. *See* Bork, *supra* note 13, at 27-28.

57. *See id.*; Meiklejohn, *supra* note 30, at 255-57; *cf.* P. DEVLIN, *THE ENFORCEMENT OF MORALS* 14, 111 (1965) (no theoretical limit can be set at which seemingly self-regarding actions have capacity to destroy society).

58. Bork, *supra* note 13, at 26 (emphasis added).

59. A. MEIKLEJOHN, *supra* note 7, at 94 (emphasis added).

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the compact, the citizen becomes “We the people,” the lawgiver himself.<sup>60</sup> Accordingly, obedience does not transform the citizen into a slave; he is obeying his own decree.<sup>61</sup> It is the vote and, of course, the First Amendment that enable Meiklejohn to view the citizen as the maker of the laws.

Even if one can surmount the difficulty in a representative form of government of taking seriously the citizen-lawgiver metaphor, one is still free to choose between Meiklejohn’s presumption and Bork’s—between extending the First Amendment to speech “which bears directly or indirectly upon issues with which voters have to deal,” or confining it to “explicitly and predominantly political speech.” When he comes right down to it, Meiklejohn rests on history, language, and *faith* in what will work best. He says:

[N]o one who reads with care the text of the First Amendment can fail to be startled by its absoluteness. The phrase, “Congress shall make no law . . . abridging the freedom of speech,” is unqualified. It admits of no exceptions. To say that no laws of a given type shall be made means that no laws of that type shall, under any circumstances, be made. That prohibition holds good in war as in peace, in danger as in security. The men who adopted the Bill of Rights were not ignorant of the necessities of war or of national danger. It would, in fact, be nearer to the truth to say that it was exactly those necessities which they had in mind as they planned to defend freedom of discussion against them. Out of their own bitter experience they knew how terror and hatred, how war and strife, can drive men into acts of unreasoning suppression. They planned, therefore, both for the peace which they desired and for the wars which they feared. And in both cases they established an absolute, unqualified prohibition of the abridgment of the freedom of speech. That same requirement, for the same reasons, under the same Constitution, holds good today.<sup>62</sup>

Wonderful! But the history is bad,<sup>63</sup> the language inadequate,<sup>64</sup> and the faith so optimistic as to be suspect even if it could count as a source of law.

60. *Id.* at 6, 9-11.

61. *Cf.* J.J. ROUSSEAU, *THE SOCIAL CONTRACT* 153 (M. Cranston trans. 1968) (1st ed. Paris 1762) (footnote omitted) (“The citizen consents to all the laws, even to those that are passed against his will, and even to those which punish him when he dares to break any one of them. The constant will of all the members of the state is the general will . . . .”)

62. A. MEIKLEJOHN, *supra* note 7, at 17.

63. The leading work is L. LEVY, *supra* note 11; *cf.* Bork, *supra* note 13, at 22 (“The framers seem to have had no coherent theory of free speech and appear not to have been overly concerned with the subject. . . . The first amendment . . . appears to have been a hastily drafted document upon which little thought was expended.”)

64. *Cf.* Ely, *Constitutional Interpretivism: Its Allure and Impossibility*, 53 *IND. L.J.* 399, 400 (1978) (language and history of Constitution seldom suggest intent to prohibit

6.

Bork approaches the First Amendment through an inspection of judicial review. He is concerned, as many constitutional law scholars have been before him, with justifying and defining the scope of the Supreme Court's power to declare duly enacted laws unconstitutional.

Bork follows and expands upon Herbert Wechsler's approach.<sup>65</sup> Judicial review is mandated by the Constitution, but its exercise is confined by the form and structure of the Constitution. Duly enacted laws are the will of the majority, yet the Court, as a constitutional court, often functions to protect the minority. Its "power is legitimate only if it has, and can demonstrate in reasoned opinions that it has, a valid theory, derived from the Constitution, of the respective spheres of majority and minority freedom."<sup>66</sup> The personal views of the justices—no matter how philosophically sophisticated—never count as valid theory. Justices are under an obligation to be neutral in the sense that the principles that constitute their theory must be "derived" from the Constitution. "The judge must stick close to the text and the history, and their fair implications . . ."<sup>67</sup> Those principles must also be neutrally defined and applied. A "neutral judge must demonstrate why principle X applies to cases A and B but not to case C"<sup>68</sup> (neutrality in application); "he must by the same token, also explain why the principle is defined as X rather than as X *minus*, which would cover A but not cases B and C, or as X *plus*, which would cover all cases, A, B and C"<sup>69</sup> (this is the requirement of neutrality in definition). "Similarly," and this is the requirement of neutrality in derivation, "he must explain why X is a proper principle of limitation on majority power at all. Why should he not choose *non-X*?"<sup>70</sup>

Bork, as he makes clear, does not purport to present us with a fully developed position, and there are, accordingly, many questions one might ask. I, for example, am most troubled by his concept of neutral derivation. Each generation sees the past through the prism of its experience and ideology; what is true of history is true of the open-textured language, as well as the structure and form, of the Constitution.<sup>71</sup>

specific practices: "More often it proceeds by briefly indicating certain fundamental principles whose general purport is clear enough but whose specific implications for each age were meant to be determined in contemporary context.")

65. See Bork, *supra* note 13, at 2 (quoting H. WECHSLER, *Toward Neutral Principles of Constitutional Law*, in PRINCIPLES, POLITICS, AND FUNDAMENTAL LAW 27 (1961)).

66. Bork, *supra* note 13, at 3.

67. *Id.* at 8.

68. *Id.* at 7.

69. *Id.* (emphasis in original).

70. *Id.* at 7-8 (emphasis in original).

71. Compare *Towne v. Eisner*, 245 U.S. 418, 425 (1918) (Holmes, J.) (same word may mean different things when used in Constitution and in statute: "A word is not a crystal,

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Be that as it may, neutral principles are meant to mark out the judicial role and to separate it from the legislative. This means that there are certain factors in any situation that the neutral judge must exclude from consideration. So Bork states with respect to liberty and equality: "There is no principled way in which anyone can define the spheres in which liberty is required and the spheres in which equality is required. These are matters of morality, of judgment, of prudence. They belong, therefore, to the political community. In the fullest sense, these are political questions."<sup>72</sup>

What Bork prevents his neutral judge from considering makes it impossible for that judge to accept Bork's approach to the First Amendment. Bork, like Meiklejohn, sees the Amendment as concerned with what Bickel has called "the successful operation of the political process."<sup>73</sup> But, on this view of the Amendment, it is a mystery how a judge can decide, based on inadequate data, when he is deprived of the power to make prudential judgments.<sup>74</sup> How does he decide my defamation case? How should he decide whether a statute barring public employees from engaging in partisan political activities,<sup>75</sup> a broad shield law for newspaper reporters,<sup>76</sup> or a statute regulating campaign contributions and expenditures<sup>77</sup> aids or interferes with the successful operation of the political process?<sup>78</sup>

Bickel seemed to recognize that this consequentialist view of the First Amendment, to which he subscribed, requires judges to make prudential decisions. "[A]mbiguity and ambivalence," he said,

[are], if not the theory at any rate the condition, of the First Amendment . . . . Nothing is more characteristic of the law of the

transparent and unchanged, it is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used.") and Bickel, *The Original Understanding and the Segregation Decision*, 69 HARV. L. REV. 1, 63-64 (1955) (framers of Fourteenth Amendment intended that language be capable of growth in accordance with future opinion) with pp. 1107-08 *supra* (Justice Black's view that meaning of words in First Amendment obvious and immutable).

72. Bork, *supra* note 13, at 12.

73. A. BICKEL, *supra* note 33, at 62.

74. Because a judge cannot begin to *know* what the effect of a decision will be on the political process, he must rely on prudential considerations at some point or other in the deliberative process, find another justification for a strong First Amendment interpretation, or defer to the legislature.

75. See *Broadrick v. Oklahoma*, 413 U.S. 601 (1973); *United States Civil Serv. Comm'n v. National Ass'n of Letter Carriers*, 413 U.S. 548 (1973).

76. See, e.g., *In re Farber*, 78 N.J. 259, 394 A.2d 330, *cert. denied*, 99 S. Ct. 598 (1978).

77. See *Buckley v. Valeo*, 424 U.S. 1 (1976).

78. One way of handling this, of course, is for a court to turn the prudential question over to the legislature—*i.e.*, to accept the legislative determination. Given the consequentialist view of the First Amendment, however, this requires abandoning any effort to separate expression—even plainly political expression—from other freedoms. It is to treat expression as if it were economic due process. See note 6 *supra*.

First Amendment . . . than the Supreme Court's resourceful efforts to cushion rather than resolve clashes between the First Amendment and interests conflicting with it. The Court's chief concern has been with procedural compromises (using the term in a large sense), and with accommodations that rely on the separation and diffusion of power . . . . The devices of compromise and accommodation that are perhaps in commonest use go by the names of vagueness and overbreadth.<sup>79</sup>

Bickel was concerned with neutrality and, like Bork, thought it central to an explanation of judicial review. But he found leeways in constitutional adjudication that he called the "passive virtues": procedural—"using the term in a large sense"—ways of resolving cases without making substantive—using the term in a narrow sense—constitutional law.<sup>80</sup> Here, prudence is permissible, indeed, inescapable, and here he located much First Amendment law.

Bork rejects the judicial exercise of prudence in First Amendment law as he does in all constitutional law. From Brandeis's concurrence in *Whitney*, he isolates four benefits to be derived from speech: "1. The development of the faculties of the individual; 2. The happiness to be derived from engaging in the activity; 3. The provision of a safety [valve] for society; and 4. The discovery and spread of political truth."<sup>81</sup> For Bork, benefits one and two fail to justify a strong First Amendment, because "these benefits do not distinguish speech from any other human activity."<sup>82</sup> Three also fails: "The safety valve function raises only issues of expediency or prudence, and, therefore, raises issues to be determined solely by the legislature or, in some cases, by the executive."<sup>83</sup>

So it would seem that four, "the discovery and spread of political truth," must also fail if it requires a judge to make prudential judgments. It is to avoid this, and to distinguish speech from other freedoms, that Bork would limit the First Amendment to "explicitly and predominantly political speech." But such a limitation does not eliminate issues of prudence, as my defamation, public employees, campaign contributions, and shield law examples suggest. No consequentialist justification for freedom of expression can be derived, defined, and

79. A. BICKEL, *supra* note 33, at 78.

80. See A. BICKEL, *THE LEAST DANGEROUS BRANCH* 111-98 (1962).

81. Bork, *supra* note 13, at 25 (discussing *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring)).

82. Bork, *supra* note 13, at 25. Meiklejohn would say that in these instances the speech is private, or that the speaker has private reasons for the speech. See pp. 1110-11 *supra*.

83. Bork, *supra* note 13, at 25. This safety valve function is related to the problems of majority rule and minority rights. See pp. 1136-38 *infra*.

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applied neutrally.<sup>84</sup> For this reason, given the purpose he attributes to the First Amendment, Bork's quest for neutrality seems perverse: in pursuit of the unobtainable, he would deny protection to expression that "bears, . . . *indirectly*, upon issues with which voters have to deal."<sup>85</sup>

7.

Thomas Scanlon has written an elegant essay in which he, unlike Meiklejohn, Bork, or Bickel, undertakes to distinguish freedom of expression from other freedoms without resort to the American Constitution.<sup>86</sup> The attempt to distinguish expression from other freedoms separates Scanlon from Mill. For while *On Liberty* is preoccupied with a defense of expression, Mill aims at a general theory of individual freedom. Moreover, unlike Mill, Scanlon's theory relies only incidentally on consequentialist arguments. Accordingly, Scanlon here parts company with Bickel, Bork, and Meiklejohn as well.

The heart of Scanlon's theory—ignore for the moment its justification—its author takes "to be a natural extension of the thesis Mill defends in Chapter II of *On Liberty*."<sup>87</sup> Therefore he calls it "the Millian Principle":

There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.<sup>88</sup>

Observe that both parts of the Millian Principle extend immunity to expression that a government might wish to suppress. Seductive ideas or doctrines challenging widely held fundamental beliefs may be seen as dangerous to the longrun well-being of society. Yet one can infer that they are protected by the first part of the Principle. Moreover, if those ideas or doctrines substitute among the population false

84. See Wellington, *supra* note 21, at 267-70.

85. A. MEIKLEJOHN, *supra* note 7, at 94 (emphasis added).

86. Scanlon, *A Theory of Freedom of Expression*, 1 *PHILOSOPHY & PUB. AFF.* 204 (1972).

87. *Id.* at 213.

88. *Id.*

for true beliefs (however such qualities might be determined), the harm is exacerbated, but the immunity persists. The second part of the Principle taxes governmental patience even more, for it prohibits government from controlling the successful advocacy of illegal action.

The Millian Principle, however, is limited; it does not forbid a state from taking into account types of speech-related harms that it does not specify. Thus, for example, government could bar the use of loud-speakers because they are too noisy, and it could ban all parades because they disrupt traffic and cause litter. It is clear, therefore, that the Millian Principle is only one part of a complete theory of expression. But if Scanlon were able to justify the Principle, he would provide us with a core meaning for the First Amendment<sup>89</sup> and one that was, in its domain, absolute.<sup>90</sup> Nor would that core meaning be restricted to political speech. It would embrace all forms of "expression"—scientific, religious, and artistic—covered by the Principle.

Scanlon's justification for the Millian Principle has some features in common with the justification in Meiklejohn's theory of the First Amendment: it is not an individual right, but a limitation on the authority of government. And, in Scanlon's words, it derives from the proposition "that a legitimate government is one whose authority citizens can recognize while still regarding themselves as equal, autonomous, rational agents."<sup>91</sup> For Meiklejohn, as we have seen, these conditions are satisfied by universal suffrage, so long as there is an informed electorate. The purpose of the First Amendment is to protect the flow of information necessary to make the political process work.

Meiklejohn is a consequentialist; Scanlon is not. Scanlon tells us that he "would like to believe that the general observance of the Millian Principle by governments would, in the long run, have more good consequences than bad." But his "defense of the principle does not rest on this optimistic outlook."<sup>92</sup> The question is not consequences; it is legitimate government. For a government to be legitimate, citizens must be able to regard "themselves as equal, autonomous, rational

89. This is so because Scanlon purports to explain why a state (including the United States), to be legitimate must comply with the Millian Principle. *See id.* at 215. What Scanlon ultimately does, therefore, is to supply extrinsic tools for giving content to the First Amendment. Whether a court may legitimately use Scanlon's tools is a separate question.

90. Scanlon suggests that there might be extraordinary situations calling for suspension of the Principle. *See id.* at 224 (deviations allowed "in cases of diminished rationality" and "in time of war or other grave emergency").

91. *Id.* at 214. For the purposes of this essay, the reader need not struggle with all the implications of this quotation. My concern is limited to the relationship between citizens and government in a society that would be described as a secular democracy.

92. *Id.*

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agents.” The Millian Principle makes this possible. Most particularly, it makes it possible for the citizen to regard himself as autonomous.

“To regard himself as autonomous,” Scanlon says, “a person must see himself as sovereign in deciding what to believe and in weighing competing reasons for action. He must apply to these tasks his own canons of rationality, and must recognize the need to defend his beliefs and decisions in accordance with these canons.”<sup>93</sup> Scanlon tells us that an

autonomous person cannot accept without independent consideration the judgment of others as to what he should believe or what he should do. He may rely on the judgment of others, but when he does so he must be prepared to advance independent reasons for thinking their judgment likely to be correct, and to weigh the evidential value of their opinion against contrary evidence.<sup>94</sup>

Nor does a person’s right to participate in the political process as a voter or as a member of an interest group change the situation with respect to duly enacted law:

What is essential to the person’s remaining autonomous is that in any given case his mere recognition that a certain action is required by law does not settle the question of whether he will do it. That question is settled only by his own decision, which may take into account his current assessment of the general case for obedience and the exceptions it admits, consideration of his other duties and obligations, and his estimate of the consequences of obedience and disobedience in this particular case.<sup>95</sup>

Many may have difficulty with Scanlon’s conception of the autonomous person, which, he tells us, has its roots in Kantian thought.<sup>96</sup> It strikes me, however, as being an entirely plausible—although not inescapable—description of one aspect of the contemporary American understanding of the relationship between the individual and the state. If this is so, then Scanlon, whether or not he has justified the Millian Principle on his terms, has succeeded in separating expression from most other forms of conduct and in indicating why government has such limited power to regulate expression. For although restrictions on other forms of conduct may be *unwise*, they are not apt to be *illegiti-*

93. *Id.* at 215.

94. *Id.* at 216.

95. *Id.* at 216-17 (footnote omitted).

96. *See id.* at 214.

*mate*. The individual retains his autonomy. He remains able intelligently to decide whether to obey.

I shall return later for a closer look at both parts of the Millian Principle, but it seems desirable now to observe that Scanlon's arguments fail to support the second part of the Principle: the part protecting speech that causes harmful acts. He says that to argue in support of the second part of the Principle one must argue against "the view that the state, once it has declared certain conduct to be illegal, may when necessary move to prevent that conduct by outlawing its advocacy."<sup>97</sup> He admits that "[c]onceding to the state the right to use this means to secure compliance with its laws does not immediately involve conceding to it the right to require citizens to believe that what the law says ought not to be done ought not to be done."<sup>98</sup> But he insists: "[n]onetheless, it is a concession that autonomous citizens could not make, since it gives the state the right to deprive citizens of the grounds for arriving at an independent judgment as to whether the law should be obeyed."<sup>99</sup> Yet outlawing the advocacy of illegal conduct will not generally deprive citizens of "the grounds for arriving at an independent judgment" about obeying the law that makes the conduct illegal. Scanlon would be correct only if the word "advocacy" was meant to embrace the advocacy of ideas or doctrine as well as action or conduct,<sup>100</sup> to include speech that Learned Hand in his *Masses* opinion designated "keys of persuasion," as well as speech that constitutes "triggers of action."<sup>101</sup> Today, of course, the advocacy of ideas or doctrine generally is protected by the First Amendment, while the advocacy of action or conduct enjoys less protection.<sup>102</sup> At any rate, Scanlon seems to be concerned with the advocacy of conduct. If he is, his claim about autonomy is factually incorrect in most situations.<sup>103</sup>

An opponent of enacted law can, without advocating disobedience to it, mount a campaign for its repeal, test it in the courts, publish advertisements or editorials against it in the newspapers, lecture against it, write a book attacking its wisdom, etc. It often may not be a good idea for a state to attempt to prevent illegal conduct by outlawing direct advocacy of that conduct, but the result of such legislation is not to

97. *Id.* at 218.

98. *Id.*

99. *Id.*

100. *Cf.* *Yates v. United States*, 354 U.S. 298, 320 (1957) (noting "traditional [First Amendment] dividing line between advocacy of abstract doctrine and advocacy of action").

101. *Masses Pub. Co. v. Patten*, 244 F. 535, 540 (S.D.N.Y.), *rev'd*, 246 F. 24 (2d Cir. 1917).

102. *See* *Yates v. United States*, 354 U.S. 298, 325-26 (1957).

103. Advocacy of ideas or doctrine, indeed, belongs in the first part of the Millian Principle. *See* p. 1121 *supra*.

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“deprive citizens of the grounds for arriving at an independent judgment as to whether the law should be obeyed.” They will have the bulk of the information they would have had in the absence of a law prohibiting such advocacy.

The effect of outlawing the advocacy of illegal conduct, therefore, has very little to do with individual autonomy. It does, of course, have a great deal to do with the political power of minority groups. That, however, is a very different branch of theory, and one to which I will return later in this essay.<sup>104</sup>

Moreover, the effect of outlawing the advocacy of illegal conduct has very little to do with the philosophy of John Stuart Mill. In the third chapter of *On Liberty*, Mill wrote:

[E]ven opinions lose their immunity when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer . . . .<sup>105</sup>

The second part of the Millian Principle—or so it seems to me—is pure Scanlon.

### 8.

I have remarked that Scanlon and Meiklejohn both view the protection offered expression as a limitation on the authority of government rather than as an individual right. And this is true as well of Bickel and Bork.<sup>106</sup> Scanlon differs from the other three in the justification he offers for the limitation. He rests his case on the respect that legitimate government owes to personal autonomy; they derive theirs from the demands of American constitutional government. All four have answered affirmatively the first question I put at the start of this paper: should expression have greater immunity from governmental regulation than most other forms of human conduct? I believe they have all been successful in this limited endeavor because of the common strategy they adopted. This is not to say that an individual-rights theory

104. See pp. 1136-38 *infra*.

105. J.S. MILL, *supra* note 1, at 49.

106. If normal principles are to be applied, it would seem to follow that the individual has a legally enforceable right to redress if the government oversteps the limitations.

would necessarily fail. But it is a much more ambitious task.<sup>107</sup> Its success would depend on the development of a comprehensive political theory, and whether such a theory could then legitimately be used to elaborate our Constitution is an open question on which my own mind is provisionally closed.<sup>108</sup>

I am presently content to accept the success of the limited endeavor and move on to a more careful examination of the degree of difference between the permissible control of expression and the permissible control of most other conduct. It should first be observed, however, that the success of the four writers has been achieved because the problem I put was limited: my concern was with why expression should have greater immunity from governmental regulation than *most* other conduct. Not one of the writers has demonstrated that expression should have greater immunity than *all* other conduct.<sup>109</sup> The rationale that each develops for his position *vis-à-vis* expression may apply to some other forms of conduct. Whether it does, moreover, depends only in part on how one defines expression. For it may be that the successful functioning of the political process or even autonomy, as Scanlon uses the concept, requires that some conduct that in ordinary language could not reasonably be called expression be granted the same immunity from regulation.<sup>110</sup>

Second—and this leads us into the next topic—my criticism of Scanlon, Meiklejohn, and Bork has not been meant to undermine their efforts to separate expression from most other conduct. On the whole, it has been directed toward either their account of what expression is protected or their arguments about how much protection expression should receive.

## II.

### 9.

The power of American governments to regulate conduct that cannot reasonably be designated expression is sharply limited in a number of areas: those covered specifically in the Bill of Rights and by absorp-

107. Scanlon is aware of the distinction throughout his essay.

108. See Wellington, *supra* note 21, at 279-80.

109. This may mean that, in the context of the United States Constitution, they have not demonstrated that there is no room for substantive due process or its equivalent.

110. Autonomy is less apt than the successful functioning of the political process to be available as a justification for the immunity of conduct other than speech. Restrictions on conduct do not deprive the individual of the ability to decide intelligently whether to obey the law. See pp. 1123-24 *supra*.

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tion into the Fourteenth Amendment;<sup>111</sup> those designated “fundamental interests” or “suspect classifications” for the purposes of the equal protection clause;<sup>112</sup> and those, such as abortion and contraception, to which a “right of privacy” or substantive due process has been extended.<sup>113</sup> In these areas, one might say that the presumption is strongly against control; the burden of justification rests heavily upon the state. In other areas, the presumption is strongly in favor of the constitutionality of regulation; the state’s actions need only be “rational.”<sup>114</sup>

It seems plain to me that the authors whose writings have been discussed succeed in separating expression from this second category of conduct in which regulation is presumptively constitutional. My purpose now is not necessarily to differentiate expression from, or to square it with, the first category; it is rather to inquire into the extent, if any, of legitimate state control over expression. One place to begin is with a discussion of the first part of the Millian Principle. Recall that Scanlon put it this way:

There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression . . . .<sup>115</sup>

I wish to come at this discussion obliquely by attempting to defend the first part of the Principle in a hypothetical context. Consider the following story. A prominent individual named Smith is actively committed to informing everyone who will listen of his belief that blacks are genetically inferior to other races in analytical ability. A small town called Grovers Corners has achieved a fair degree of racial integration. Many whites and blacks are proud of the goodwill that has attended their integration efforts. Indeed, the citizens of Grovers Corners consider their town a model in this respect.

The town owns a meeting house and makes it available to organizations in the community for public talks, concerts, and plays. A well-established discussion group, which often has used the meeting house

111. See, e.g., *Mapp v. Ohio*, 367 U.S. 643 (1961).

112. See, e.g., *In re Griffiths*, 413 U.S. 717 (1973); *Levy v. Louisiana*, 391 U.S. 68 (1968).

113. See, e.g., *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965). The list is not meant to be exclusive at the federal level. Moreover, state courts may have broader review powers over state law.

114. See, e.g., *New Orleans v. Dukes*, 427 U.S. 297 (1976); *Williamson v. Lee Optical Co.*, 348 U.S. 483 (1955).

115. Scanlon, *supra* note 86, at 213.

in the past, arranges to use it again and invites Smith to present his views at a public meeting. When news of the invitation and its acceptance becomes known, the town begins to stir. Grovers Corners becomes a troubled and divided community. The disagreement over whether Smith should be permitted to speak is marked by passionate concern, angry exchanges, and broken friendships. It is hardly possible for anyone in the community to avoid the debate. And although there is much talk of the right to free speech and whether it should be allowed in an unjust—because unequal—society, there is also the sinister assumption on the part of some that anyone committed to Smith's right to speak is inescapably and unquestionably a racist.

The mood is threatening when Smith arrives at Grovers Corners. With his hosts, he enters the meeting house; the auditorium is packed with blacks and whites. When they see Smith, they applaud derisively and shout insults and obscenities. The mayor of the town, who is present, goes up on the stage, asks Smith and his hosts to leave, and tells the audience that the meeting is cancelled. The action of the mayor is greeted with cheers.

The next day, however, many citizens insist that the mayor acted improperly—that he had an obligation on behalf of the town to see to it that Smith was permitted to say what he had come to say. The mayor himself is troubled and he appoints a Committee on Freedom of Expression, made up of prominent black and white residents of Grovers Corners, charged with considering the Smith incident and with determining the importance of speech *vis-à-vis* other values in the community. It is told not to worry about the law, but only about what would be right.

A central conclusion of a report issued six months later by the Committee is that cancellation by the town of a speech on the ground that the speech contains false and divisive ideas is never justified.<sup>116</sup> The report argues that free expression is fundamental to a free society and goes on to propose guidelines for protecting the future exercise of wide-open and robust debate.

The drafting of the report precipitates sharp disagreement in Grovers Corners. Although many think it essential that anyone invited to speak at the meeting house be permitted to speak, some continue to have no such commitment to the primacy of free expression. Many well-mean-

116. This was the conclusion of the Committee on Freedom of Expression at Yale, on which I served, which was convened by President Kingman Brewster after a group of students prevented William Shockley from speaking by shouting him down. See Report of the Committee on Freedom of Expression at Yale (Jan. 8, 1975). My own views on this incident, as well as many of the ideas stated in this section, appeared in Wellington, *Free Speech at Yale*, YALE L. REP., Fall 1975, at 3.

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ing and highly intelligent people seem to reject the conclusion, implicit in the first part of the Millian Principle, that free expression is an empty concept when limited to ideas one likes or to speakers who symbolize positions with which one is sympathetic.

Some of the arguments that these well-meaning and highly intelligent people advance for censorship cannot be dismissed easily, although I believe that the hypothetical Committee was ultimately correct in rejecting them completely. Perhaps the most plausible of these arguments grants that free expression is important, but insists that it is merely one value among many. Harmony, tranquillity, and mutual respect are claimed to be vital to the well-being of Grovers Corners. The goal, it is said, is to find a workable balance between these community values and the need for free expression. An approach is suggested: the potential effect of a particular speech on the harmony and tranquillity of the community and the respect its residents have for each other should be weighed against the ideas apt to be contained in the speech.

Under this approach, Mr. Smith was properly denied the town's meeting hall if we posit—and let us do so—that what he had to say had no scientific validity and, in that sense, was false; that some people listening to him would have come to share his false beliefs; and that this would threaten the harmony and tranquillity of Grovers Corners. It would undermine the mutual respect of white for black and black for white.

In rejecting this approach, the Committee nevertheless accepted the proposition that harmony, tranquillity, and mutual respect are important community values. Its position simply was that they had to yield to the expression of false ideas. So put, the proposition is far from obvious. An explanation of why the Committee was correct requires rather closer attention to the conception of free expression contained in the first part of the Millian Principle.

### 10.

Our hypothetical Committee's report begins with the famous lines from John Milton's *Areopagitica*:

And though all the windes of doctrin were let loose to play upon the earth, so Truth be in the field, we do injuriously by licencing and prohibiting to misdoubt her strength. Let her and Falshood grapple; who ever knew Truth put to the wors in a free and open encounter?<sup>117</sup>

117. J. MILTON, *AREOPAGITICA* 51-52 (J. Hales ed. 1917) (1st ed. London 1644), *quoted in* Report of the Committee on Freedom of Expression at Yale, *supra* note 116, at 5.

It is naive to think that truth will *always* prevail over falsehood in a free and open encounter, for too many false ideas have captured the imagination of man. The zealot and the ideologue too often have overwhelmed the truth-teller. Often it is hard for a listener to reject false ideas, opinions, and positions that happen to coincide with his own self-interest or that appeal to his half-submerged prejudices. Form or style of presentation can be very important, and there is absolutely no assurance that the truth-teller rather than the false-speaker is the superior rhetorician.

Yet, we would give up everything were we to reject Milton totally. It is one thing to doubt the sweep of his claim—its universality must yield on inspection—but it is quite another thing to find nothing in the Miltonian position, for that would require a denial of the ability to reach the mind through reason. Nor is it justified by experience. In the long run, true ideas do tend to drive out false ones. The problem is that the short run may be very long, that one short run follows hard upon another, and that we may become overwhelmed by the inexhaustible supply of freshly minted, often very seductive, false ideas.

If, then, Milton's claim is too strong, perhaps one can get some help from Holmes. In the famous dissent in *Abrams v. United States*, he said:

Persecution for the expression of opinions seems to me perfectly logical. If you have no doubt of your premises or your power and want a certain result with all your heart you naturally express your wishes in law and sweep away all opposition. To allow opposition by speech seems to indicate that you think the speech impotent, as when a man says that he has squared the circle, or that you do not care whole-heartedly for the result, or that you doubt either your power or your premises. But when men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.<sup>118</sup>

These lines are capable of at least two interpretations. The first is a weaker, or less hyperbolic, version of the Miltonian argument. Truth may not always win in a free and open encounter with falsehood, but a free and open encounter is a way of reaching truth.

118. *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

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The second interpretation reinforces the first, but shifts the emphasis. It takes seriously an aspect of Holmes's market metaphor, that "the best test of truth is the power of thought to get itself accepted in the competition of the market."<sup>119</sup> Many people trust the market mechanism to value goods and services when conditions of competition exist. Eliminate the market, however, and many become extremely uncertain of their ability to place a value on a particular good or service, for they are suspicious of concepts like intrinsic value. It is the same with ideas and truth.

The best statement of this latter approach is found in *On Liberty* itself. Mill attacks what he calls an "assumption of infallibility":

Strange it is, that men should admit the validity of the arguments for free discussion, but object to their being 'pushed to an extreme'; not seeing that unless the reasons are good for an extreme case, they are not good for any case. Strange that they should imagine that they are not assuming infallibility, when they acknowledge that there should be free discussion on all subjects which can possibly be *doubtful*, but think that some particular principle or doctrine should be forbidden to be questioned because it is so *certain*, that is, because *they are certain* that it is certain. To call any proposition certain, while there is any one who would deny its certainty if permitted, but who is not permitted, is to assume that we ourselves, and those who agree with us, are the judges of certainty, and judges without hearing the other side.<sup>120</sup>

The Mill-Holmes approach is attractive in a rapidly changing, diverse society that lacks a central orthodoxy. For many in the West today, it is congenial to reject unshakeable belief in the truth of an idea, a doctrine, or a position. It is congenial, that is, up to a point, and up to that point the Mill-Holmes argument helps make the case for the first part of Scanlon's Millian Principle. But Mill, and Scanlon as well, would push it "to an extreme," and it is difficult to do this on the Mill-Holmes ground unless one is a person who doubts that he can ever know the truth about *anything* he believes, that the evidence is never complete, the book never closed.

At least two difficulties beset the case for the first part of the Millian Principle when it rests upon so profound a commitment to openmindedness. First, consistency requires doubt about the strong claims made by Mill. How can one accept the door-shutting truth of those claims

119. *Id.*

120. J. S. MILL, *supra* note 1, at 19 (emphasis in original).

any more than that of any other claim? In a sense, and at the extreme, the position would seem to render its holder impotent.

The more telling objection to this argument of Mill and Holmes, however, is that most of us do believe that the book is closed on some issues. Genocide is an example.<sup>121</sup> One may well be ambivalent as to whether one would want to forbid an attempt to instill a belief in the deliberate and systematic extermination of a national or racial group. Ambivalence may stem from a strong attachment to, and a concern about the effect of any exception to, free expression on the one hand and, on the other, from a lack of innocence about an encounter between truth and falsehood. Truth may win, and in the long run it may almost always win, but millions of Jews were deliberately and systematically murdered in a very short period of time. Moreover, before those murders occurred, many individuals must have come "to have false beliefs."

One way to deal with this ambivalence is to recognize that the irreversible harm—the harm that cannot be substantially mitigated by more speech—is the consequence that followed the instilling of such false beliefs in the minds of so many. This leads to some variety or other of a clear and present danger test: a rule that says speech may be prohibited if, but only if, it is likely to lead imminently to the harmful consequences advocated. Such a test bears on the second part of the Millian Principle, and I will return to it when I return to that portion of the Principle.

Let me now resume my story and, as its author, make clear that when the mayor of our town prevented Smith from speaking at the meeting house, he was not concerned with the issues raised by the second part of the Millian Principle or with any question about the clear and present danger test. Nor were the members of the audience, whose conduct led the mayor to take the action he did, concerned. They made the basic mistake of thinking that because they had closed the book on an issue, the issue was closed. Although each of us has, for himself, closed the book on some issues, none of us should be empowered to act as censor for others. Mill put it this way:

But I must be permitted to observe, that it is not the feeling sure of doctrine (be it what it may) which I call an assumption of infallibility. It is the undertaking to decide that question *for others*, without allowing them to hear what can be said on the contrary side.<sup>122</sup>

121. See A. BICKEL, *supra* note 33, at 70-72, 76-77.

122. J. S. MILL, *supra* note 1, at 20 (emphasis in original).

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The individual who hates certain ideas must recognize that if he succeeds in getting the state to bar those ideas, other ideas to which he is attached may also be barred, that censorship once established is difficult to contain, that the censor is almost always somebody else, and that the "somebody else" is generally a tired administrator.

Consider specifically the Smith affair. Grovers Corners would have to abandon its governmental organization were its citizens to empower groups of strong believers to act as ad hoc censors. That, and nothing less, is what the audience at the meeting house was in my story. And it is the case that even if groups of strong believers could be trusted to perform in perfectly good faith—to stop speech only on issues on which the group had truly closed the book—their judgment as to which issues were settled once and for all might be rejected by most others in the community.

Suppose, however, that the community tried to meet this objection by legislation. The city council might draft regulations on the limits of free expression for the mayor to administer. The council would have the responsibility for determining that very small number of subjects about which there was nothing to be said on the other side. Such subjects would no longer be available for wide-open and robust debate. The other side could not be heard, or at least it could not be heard if hearing it threatened the harmony and tranquillity of the community or undermined the respect in which groups of citizens held other citizens.

Scanlon, I assume, would argue that such legislation is illegitimate, since it is inconsistent with individual autonomy. Each individual must be able to make up his own mind on all the evidence. But why is this so? Why cannot each of us, with respect to these questions, delegate authority to our representatives?<sup>123</sup>

### 11.

In order to answer this question, and in so doing to argue for the first part of the Millian Principle, it may be helpful to relate Scanlon to Meiklejohn, Bork, and Bickel—that is, to relate autonomy to function and, indeed, to derive the meaning of autonomy from the function of government. Government does, and is expected to do, too many

123. This question may remind some of the centuries-long debate over the nature of governmental sovereignty. The traditional doctrine, traced to Hobbes, *see* T. HOBBS, *LEVIATHAN* 230, 236-37 (C. Macpherson ed. 1968) (1st ed. London 1651), was that sovereign power is "illimitable, perpetual, and indivisible," G. MARSHALL, *CONSTITUTIONAL THEORY* 35 (1971). This extreme notion has been, if not entirely discredited, at least generally disowned. *See id.*

things for one to designate any activity as its sole or primary function. But if we think of American government and permit a little circularity in reasoning, it is possible to specify a procedural function (in the large sense of the term) that has the quality of centrality if not of primacy.

Robert Paul Wolff is suggestive. His writing contains a sharp critique of Mill's defense of free expression, yet he acknowledges that:

When we turn our attention to questions of morals and politics, Mill as it were comes into his own. . . . [I]n matters of collective social action concerning moral and political issues, the freest possible expression of competing views does seem called for. Even before we have reasoned out the principles underlying the right ordering of the political community, our instincts tell us that society is diminished by the arbitrary stifling of dissenting parties. Experience suggests that a vigorous competition of opposed policies, however disruptive of social tranquillity, is to be preferred to the enforced quiet of political repression.<sup>124</sup>

Wolff's instincts seem to translate into the Meiklejohn/Bickel/Bork position on the First Amendment, which is part of a view that sees maintaining the American brand of democracy as the central procedural function of American government. Wolff, however, explains his position on freedom of expression in terms of formal justice:

[I]t is not to assist the advance of knowledge that free debate is needed. Rather, it is in order to guarantee that every legitimate interest shall make itself known and felt in the political process. Every party to the decisions of government—which is to say, every citizen—must have the opportunity to argue his case and bring his pressure to bear. A voice silenced is a grievance unredressed or an interest denied a measure of satisfaction. Justice, not truth, is the ideal served by liberty of speech.<sup>125</sup>

Whether the quest is formal justice or evolving truth—and of course it is both—Wolff's inclusion of morals and its implicit but unexplained link to politics is significant in giving content to the central procedural function of government. The link is more than the complicated connection between enacted or decisional law and ethical norms. The role of morality in the political process is pervasive, for it is at least as important that individuals debate the limits of law and government as it is for them to debate government's affirmative responsibilities and the

124. R. WOLFF, *supra* note 7, at 17.

125. *Id.* at 18. Bork, and perhaps Bickel, share this view to some extent.

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techniques for discharging those responsibilities. All these issues pose profound moral questions. Moreover, individuals must debate the ethical standards appropriate for conducting the people's business and the appropriate moral standards for those charged with that task.

The connection between morals and politics is a visible feature of American democracy at every stage of the governmental process. One simply cannot separate moral considerations from the central procedural function of government: the successful operation of democracy.

If this is so, one can derive a meaning for autonomy that does support the first part of the Millian Principle, for in a secular, democratic society there is no legitimate way in which the mature, legally competent individual can be required to surrender to others responsibility for his moral views. Although it may be consistent with such a society for its government to have authority to make contraception, abortion, homosexuality, or adultery legal or illegal, can it be consistent for it to require individuals to believe that these practices are moral or immoral? I take it that the answer must be no, unless we are prepared to define a secular democracy in a Pickwickian way. Nevertheless, if the moral aspects of these practices could be separated from the political questions they raise, perhaps the state could insist that an individual may believe anything, but may not—through the press or on the stump—corrupt others with his “false” beliefs. Of course, such separation is totally impossible, as experience with abortion and gay rights makes clear. Therefore it would seem that expression must be permitted if the individual in a secular democracy is to remain autonomous. Moreover, there seems to be little that one would designate in this context as expression that fails to shape the overlapping moral and political perspectives of the individual.

This means that Scanlon is right, and Mill would surely have agreed: the state cannot legitimately regulate expression on grounds of protecting individuals from “coming to have false beliefs.” It is the privilege of each individual in a democracy to make up his own mind, on the basis of all the evidence, on every political-moral issue that arises. This privilege is part of the democratic process. Its exercise is one of the factors that marks the difference between democracy and totalitarianism and that distinguishes societies with a moral orthodoxy from those designated as open.

When an individual delegates to others the power to limit the aspect of free expression covered by the first part of the Millian Principle, he abandons his privilege, and with it, the means to make up his mind. I see no need, for present purposes, however, to determine

whether he may do this or whether it is permissible for government to accept the delegation.<sup>126</sup> However, when a majority of individuals requires the minority to make such a delegation, it deprives each individual in the minority of his autonomy; it substitutes a limited totalitarianism for democracy and acts illegitimately. The majority has no authority to protect any dissenting adult from "coming to have false beliefs."

12.

Earlier I registered a dissent to Scanlon's "autonomy" defense of the second portion of the Millian Principle.<sup>127</sup> It states:

There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: . . . (b) harmful consequences of acts performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing.<sup>128</sup>

Scanlon's claim is that government may not outlaw the advocacy of illegal conduct, because such outlawry deprives autonomous "citizens of the grounds for arriving at an independent judgment as to whether the [underlying] law should be obeyed."<sup>129</sup> The denial of this conclusion, however, need not lead to a rejection of the Principle if a satisfactory justification for it can be found.

The quest for a new justification is best begun by asking who is likely to engage in the advocacy of illegal conduct when that advocacy may lead to harmful consequences. The answer, I believe, is a group that has been or would be unsuccessful in other, more conventional political actions: a minority group in search of political power. The power of minority groups or, put the other way around, the protection of the interests of minority groups, seems to be the most promising

126. The issue would have to be addressed if all individuals in a society made the delegation. Moreover, it has implications for the problem of unconstitutional conditions. Compare *Ackering v. Board of Educ.*, 391 U.S. 563, 568 (1968) (public teachers may not "be compelled to relinquish . . . First Amendment rights" with *Buckley v. Valeo*, 424 U.S. 1, 95 (1976) ("acceptance of public financing [of campaign] entails voluntary acceptance of an expenditure ceiling").

127. See pp. 1123-25 *supra*.

128. Scanlon, *supra* note 86, at 213.

129. *Id.* at 218.

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justification for denying governments the authority to forbid the advocacy of illegal conduct. But it turns out in our constitutional system that this is not a sufficient justification for the second part of the Millian Principle. To understand why is to endorse a more restrictive approach to these problems, yet one that is considerably less restrictive than any that can be justified solely by an appeal to individual autonomy.

The “tyranny of the majority”<sup>130</sup>—its threat to the liberty of minority groups or associations—has been an enduring theme in American history. Madison addressed it in the *Federalist Papers*.<sup>131</sup> It worried Tocqueville<sup>132</sup> and, in a later and different manifestation, it moved Martin Luther King, Jr. to compose one of the most eloquent documents we have on civil disobedience.<sup>133</sup> One must be concerned with the potential for majority excesses so long as a state operates by majority rule.<sup>134</sup> The problem of majority abuse surely does not disappear—although one’s anxiety may be diminished—as the franchise is extended. Neither universal suffrage, nor “one man, one vote,” is an adequate check on majority power. But appropriate governmental and private structures do diminish the chances of majority abuse.

Madison put at least some of his faith in structure: a republican form of government, separation of powers leading to checks and balances, and a federal system.<sup>135</sup> Today the lawyer might emphasize particularly the antimajoritarian nature of judicial review. It has its problems, since a court with veto power composed of justices appointed for life is dangerous, but it is a check on majority excess.

Tocqueville saw clearly the problems and the safeguards of private associations and the Americans’ propensity to join ad hoc associations.<sup>136</sup> Today students of American government know that there is no stable majority; the reality of majority rule is the existence of coalitions of shifting minorities.<sup>137</sup> Judicial review and coalitions of

130. J. S. MILL, *supra* note 1, at 4.

131. See THE FEDERALIST No. 10 (J. Madison) at 57 (J. Cooke ed. 1961) (“By a faction I understand a number of citizens, whether amounting to a majority or minority of the whole, who are . . . adverse to the rights of other citizens, or to the permanent and aggregate interests of the community.”)

132. See 2 A. DE TOCQUEVILLE, *DEMOCRACY IN AMERICA* 307, 313 (P. Bradley ed. 1945) (1st ed. Paris 1835).

133. See King, *Love, Law, and Civil Disobedience*, NEW SOUTH, Dec. 1961, at 4, reprinted in *CIVIL DISOBEDIENCE IN AMERICA* 215-16 (D. Weber ed. 1978).

134. The exception to this proposition is the person who either does not care about himself or others, or who knows that he will always be in the majority and does not care about others.

135. See THE FEDERALIST Nos. 10 & 51, *supra* note 131, at 65, 347.

136. See 2 A. DE TOCQUEVILLE, *supra* note 132, at 106.

137. See, e.g., R. DAHL, *DEMOCRACY IN THE UNITED STATES* (3d ed. 1976).

shifting minorities may lead to legislative restraint. A majority may fear that an oppressive law directed at a minority will be declared unconstitutional or that today's minority will retaliate when it becomes tomorrow's majority.

Contemporary scholars of pluralism have built, sometimes critically, on Madison and Tocqueville. The countervailing political power of private interest groups and the rules of the game—the political culture—that generally keep any given majority, if not close to the golden rule, at least not too far down the road toward tyranny, constitute at least one version of today's conventional political wisdom.<sup>138</sup>

On this view, freedom of expression is, at a minimum, important as a means for creating a temporary majority or for persuading a majority to respect the interests, opinions, and convictions of minorities. This is another way of stating the functional component that helps to support the first part of the Millian Principle; it is also another way of phrasing Wolff's formal justice. Moreover, at least when one with limited expectations is in an optimistic mood, one can say that the "system" works tolerably well.

But the system also needs an after-the-fact (after the majority has legislated) safety valve.<sup>139</sup> One reason is that, before a law is enacted, potential minority groups may lack the information necessary to form and articulate a position or the means to make their position heard; another is that the effect of legislation on segments of society may not be known beforehand.

Of course, separation of powers itself provides an after-the-fact safety valve. The interpretation of enacted law as well as judicial review is a major American institution for protecting minority groups from the tyranny of the majority.<sup>140</sup> The First Amendment is a part of this system of protection, but, given its role, transcends it. This may become clearer if we attend to one writer's reflections on civil disobedience.

### 13.

Hannah Arendt's essay on the subject<sup>141</sup> is brilliant, quirky, and more than a little paradoxical. She claims that civil disobedience is legitimate within "the *spirit* of American laws," but rejects the notion

138. See, e.g., D. TRUMAN, *THE GOVERNMENTAL PROCESS* 512-16 (2d ed. 1971).

139. See *Whitney v. California*, 274 U.S. 357, 375 (1927) (Brandeis, J., concurring). *But see* Bork, *supra* note 13, at 25 (concern with judicial administration of "safety valve").

140. See Wellington, *supra* note 21, at 266-67. The executive branch serves as a check on the legislature, but it is not structurally designed to protect minorities except through the subtle workings of the Electoral College.

141. H. ARENDT, *Civil Disobedience*, in *CRISES OF THE REPUBLIC* 49 (1972).

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that the spirit is either the law or what the law ought to become through judicial elaboration.<sup>142</sup> And she clearly rejects a role for the First Amendment in her theory of civil disobedience.<sup>143</sup> Part of her difficulty may have to do with terminology: if civil disobedience is, or is becoming, the law, how can we call it disobedience? If this is her problem, it is caused either by a too static conception of law or by an attachment to some extreme version of positivism. This leads her to skirt judicial institutions and to hint at other sorts of political solutions that would institutionalize civil disobedience in some way or other. The momentum from this position in chief may account for her unwillingness to take the First Amendment seriously. Yet I think that the arguments Arendt makes concerning the spirit of American laws are especially helpful in guiding us to an understanding of the appropriate role for that aspect of freedom of expression covered by the second part of Scanlon's Millian Principle.

Arendt relies on Montesquieu, Locke, and Tocqueville: "The Spirit of the Laws,' as Montesquieu understood it, is the principle by which people living under a particular legal system act and are inspired to act."<sup>144</sup> The spirit of American laws is, as Arendt sees it, consent "based on the notion of a mutually binding contract, which established first the individual colonies and then the union."<sup>145</sup> Her mentor is Locke:

There was, [in addition to the Biblical covenant and the Hobbesian variety] *third*, Locke's aboriginal social contract, which brought about not government but society—the word being understood in the sense of the Latin *societas*, an "alliance" between all individual members, who contract for their government after they have mutually bound themselves. I shall call this the horizontal version of the social contract. This contract limits the power of each individual member but leaves intact the power of society; society then establishes government "upon the plain ground of an original contract among independent individuals."<sup>146</sup>

Arendt's position on contract and consent is more than metaphorical. For her the right to dissent combined with a failure to do so *is* consent, which, "in the American understanding of the term, relies on the horizontal version of the social contract, *and not on majority decisions.*"<sup>147</sup>

142. *Id.* at 99.

143. *See id.* at 82-83, 101.

144. *Id.* at 94.

145. *Id.*

146. *Id.* at 86 (quoting J. ADAMS, *Novanglus*, in 4 THE WORKS OF JOHN ADAMS 110 (Boston 1851)).

147. H. ARENDT, *supra* note 141, at 92 (emphasis added).

Although the right to dissent may exist in many forms, Arendt, following Tocqueville, emphasizes freedom of association as central to political dissent. Domesticated dissent, however, is directed not toward what Tocqueville called *consensus universalis*—the tacit agreement that binds Americans—but “to specific laws or specific policies.”<sup>148</sup> Civil disobedience is then a method—a legitimate one as Arendt sees it—for voluntary associations to demonstrate disagreement in order to change specific laws and specific policies.

It is my contention that civil disobedients are nothing but the latest form of voluntary association, and that they are thus quite in tune with the oldest traditions of the country. What could better describe them than Tocqueville’s words “The citizens who form the minority associate in order, first, to show their numerical strength and so to diminish the moral power of the majority?”<sup>149</sup>

Arendt tells us that an “accepted necessary characteristic of civil disobedience is nonviolence.”<sup>150</sup> And she sees civil disobedience as sharply distinguished from criminal disobedience, both because of motive (the “common lawbreaker” always “acts for his own benefit alone”<sup>151</sup>) and because “[t]here is all the difference in the world between the criminal’s avoiding the public eye and the civil disobedient’s taking the law into his own hands in open defiance.”<sup>152</sup>

Though it would not be inescapably wrong to call members of a clandestine terrorist organization civil disobedients, there is value in adopting Arendt’s usage; it does make the civil disobedient less frightening, locate him perhaps more easily in American tradition, and help us to feel comfortable as, along with Arendt, we aspire to order the future.

Yet her perspectives are troubling. Consent, as she understands it, is clearly part of the spirit of American laws; but so is majority rule, and her emphasis is exclusively on the former. This distorts when one insists, as she does, on a sharp separation. For it surely is the case that such actions as the extension of the franchise, voting-rights legislation, and one-man, one-vote constitutional interpretation have placed majority rule along with consent at the center of political reality. If one

148. *Id.* at 88. Advocacy of the overthrow of the government by force and violence is within the “system” if the Lockean contract is to form society, which then forms government. *But see* Bork, *supra* note 13, at 33 (such speech “has no political value within a republican system of government”).

149. H. ARENDT, *supra* note 141, at 96.

150. *Id.* at 76-77.

151. *Id.* at 76.

152. *Id.* at 75.

## Freedom of Expression

were to start with majority rule, it would be difficult to reach some of Arendt's conclusions. Nevertheless, however one comes out on civil disobedience itself, Arendt's views are powerful support for a position that would forbid government (the majority) from prohibiting the *advocacy* of civil disobedience.

The conflict between consent and majority rule—between these two aspects of the spirit of American laws—is properly accommodated through ensuring freedom of expression. Speech advocating civil disobedience, as the term is used by Arendt (peaceful, open, and group spirited), may not be regulated by government, even if such disobedience is an imminent possibility. This does not go so far as she would have wanted, but it does institutionalize that aspect of civil disobedience necessary “to diminish the moral power of the majority,” while recognizing the American commitment to majority rule.<sup>153</sup>

14.

This accommodation between majority rule and consent constitutes the core of a more restrictive approach toward the problems of expression addressed in the second part of Scanlon's Millian Principle.<sup>154</sup> The approach, however, is too restrictive. For although there is no room for violence as a political method of protest in the spirit of American laws, there is room for its advocacy. It is all well and good to draw nice distinctions between nonviolence and violence in a theory of protest, of dissent, or of minority-group power. It is another thing to try to maintain a sharp separation.<sup>155</sup> But we must try, even as we do try to distinguish between peaceful and nonpeaceful picketing in labor disputes.<sup>156</sup>

When the concern is with advocacy of violence, a distinction can take account of the likelihood that violence will result from the exhortation. If there is no time for dissuasion through talk, a clear and present danger test—or a similar test by any other name—is appropriate.

153. Accommodation between legitimate law and legitimate dissent from that law also exists when law is made, not by the majority, but by the Supreme Court. Compare First Inaugural Address by Abraham Lincoln (Mar. 4, 1861), reprinted in 6 J. RICHARDSON, MESSAGES AND PAPERS OF THE PRESIDENTS 1789-1897, at 5, 9 (1898) (Court decisions binding on parties to suit, but not “irrevocably fixed” as to government policy, though entitled to “high respect”) with *Cooper v. Aaron*, 358 U.S. 1, 17-19 (1958) (Court's interpretation of Constitution is “the supreme law of the land” and binding on all government officials).

154. I leave it to the reader to rewrite the Millian Principle if he thinks that would be a profitable exercise.

155. This indicates one of the difficulties of finding, as Arendt would have us, “a recognized niche for civil disobedience in our institutions of government,” H. ARENDT, *supra* note 141, at 99.

156. See generally C. SUMMERS & H. WELLINGTON, LABOR LAW 150-53 (1968).

I suggested earlier, in my discussion of the events at Grovers Corners, that the clear and present danger test be applied to the advocacy of genocide.<sup>157</sup> The state cannot prevent advocacy on the ground that individuals will come to believe this false doctrine. But when there is a clear and present danger of action, the state must have the power to stop advocacy. Action would plainly involve lawless violence.

It remains unfortunately imaginable that genocide could be implemented in a secular democracy: the state—including the courts—could be captured by a coalition of sick and evil minorities. But I do not believe that more restrictive control of expression would prevent such a catastrophe: unlike his cruelty, man's laws do have effective limits.

157. See p. 1132 *supra*.