



MILTON, MILL, AND (MAYBE) ARISTOTLE ON  
WHY HEARING HORRIBLE SPEECH MAKES YOU A BETTER PERSON

*Andrew Koppelman*\*

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INTRODUCTION

In the fall semester of 2020, Prof. Jason Kilborn, of the University of Illinois at Chicago’s John Marshall School of Law, gave a routine exam in his Civil Procedure II course. One of fifty questions offered a hypothetical in which a company, sued for discrimination, had obtained evidence that damaged its own defense. The question was whether the company must disclose that evidence to the plaintiff—an ordinary question of law.

In the scenario described on the exam, a former employee told the company’s lawyer “that she quit her job at Employer after she attended a meeting in which other managers expressed their anger at Plaintiff, calling her a ‘n\_\_\_\_\_’ and ‘b\_\_\_\_\_’ (profane expressions for African Americans and women) and vowed to get rid of her.” The exam did not spell out those words, which appeared exactly as you just

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\* John Paul Stevens Professor of Law and Professor (by courtesy) of Political Science, Department of Philosophy Affiliated Faculty, Northwestern University. Thanks to Amy Tomaszewski for research assistance and to Jack Balkin, Eugene Volokh, and Marty Redish for comments. A shorter version of this article previously appeared as *The First-person Appeal of Free Speech*, 68 NAT’L AFFAIRS 29 (Summer 2026).

read them. (The answer, by the way, is yes: The company must disclose the information if it is asked for probative evidence.<sup>1</sup>)

Kilborn had used the same question for years, but this time it provoked an uproar. The Black Law Students Association went to the law school dean and to the central administration, demanding that Kilborn be stripped of his committee assignments. It denounced him on Instagram, LinkedIn, and Twitter, and filed a complaint with the Office of Access and Equity. It also issued this statement:

The slur shocked students, created a momentous distraction and caused unnecessary distress and anxiety for those taking the exam. . . . The question was culturally insensitive and tone deaf. It lacked basic civility and respect for the student body, especially considering our social justice efforts this year. . . . When asked how reading those words while trying to complete a law school exam impacted her, one student stated, “I was completely flustered by the question and had to take several moments to gather myself prior to proceeding with the exam.” The student added, “I had to seek counsel immediately after the exam to calm myself from what I had just experienced.” Another student stated that upon reading “n\_\_\_” . . . she became “incredibly upset” and immediately began to experience “heart palpitations.” One Black student was left in a hopeless mental state after learning about the words implicated on the exam. . . . He added, reading “n\_\_\_” and “b\_\_\_” was triggering, and made him feel as if he no longer belonged at the school.<sup>2</sup>

The question of course was entirely appropriate, and students who can’t cope with seeing any reference to this word have no business being lawyers.<sup>3</sup> If lawyers are going to be competent to do their jobs, they must be able to handle the fact that humans sometimes do and say very bad things. Discrimination is among those bad things. Students must thus be able to know the facts of discrimination lawsuits and be able to perform legal analysis in the face of those facts. In the real world, racist slurs are not bowdlerized as they were on Kilborn’s exam.

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<sup>1</sup> The facts of the Kilborn case are drawn from my own journalism. See Andrew Koppelman, *Yes, This Is a Witch-Hunt*, CHRON. HIGHER EDUC. (Nov. 17, 2021), <https://www.chronicle.com/article/yes-this-is-a-witch-hunt>; Andrew Koppelman, *Is This Law Professor Really a Homicidal Threat?*, CHRON. HIGHER EDUC. (Jan. 19, 2021), <https://www.chronicle.com/article/is-this-law-professor-really-a-homicidal-threat>.

<sup>2</sup> Quoted in Eric Zorn, *The Ongoing Saga at UIC over a Certain Word*, SUBSTACK: PICAYUNE SENTINEL (Jan 13, 2022), <https://perma.cc/SJ5D-JLGX>.

<sup>3</sup> Randall L. Kennedy & Eugene Volokh, *The New Taboo: Quoting Epithets in the Classroom and Beyond*, 49 CAP. U. L. REV. 1 (2021).

The school's administration, which ought to have firmly told the students that, instead pandered to them. The dean placed Kilborn on indefinite administrative leave, cancelled his classes hours before one was set to meet for the first time, cancelled his committee memberships, and barred him from campus and from all faculty communications. It later justified these sanctions by lying about the facts.

Here I want to focus on the pedagogy of this performance. It encourages the students to collaborate in a narrative of fragility that damages them, both intellectually and personally.<sup>4</sup> And that is a window into one of the most important benefits of freedom of speech, one that is curiously neglected in contemporary free speech theory—a benefit that is individual rather than collective, and so does not depend on faith that an unregulated marketplace of ideas will produce good collective outcomes.

John McWhorter, a black academic who is not unfamiliar with racial slurs, offered this response to the students' narrative:

As all of us can detect on some level, black students who purport upset of this degree, at passing things that their very equivalents just some years ago never even noticed, are faking it. . . . Such students are not fragile; they are histrionic. They are pretending to be hurt. . . .

These students are acting this way out of the simple human temptation of the noble victim complex. This is a human personality type, but it can manifest itself in countless ways depending on circumstances. For a black person given to the temptation for any number of reasons, the handiest way of giving it vent is to exaggerate the extent to which racism affects you day to day. The formal expression is one of anger and injury, but behind this is a balm, the sense that you are worthy on some level of a cookie or a pat on the head just for getting through your days and weeks. . . . It gives you a sense of significance as a member of a group on a fraught but epic trajectory towards justice. You, in times when civil rights can seem so much less dramatic a thing

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<sup>4</sup>For other, similar episodes, see Andrew Koppelman, *A Climate of Fear Comes for Scholarship: Intimidation at Columbia and Harvard is an Ominous Sign of Things to Come*, CHRON. HIGHER EDUC. (June 11, 2024), <https://www.chronicle.com/article/a-climate-of-fear-comes-for-scholarship>; Andrew Koppelman, *Stanford Law Students' Infantile Protests*, CHRON. HIGHER EDUC. (Apr. 3, 2023), <https://www.chronicle.com/article/stanford-law-students-infantile-protests>; Andrew Koppelman, *Yale Law's Bullying, Coercive Diversity Leaders*, CHRON. HIGHER EDUC. (Oct. 18, 2021), <https://www.chronicle.com/article/yale-laws-bullying-coercive-diversity-leaders>; Andrew Koppelman, *Michael McConnell and the N Word*, BALKINIZATION (Aug. 12, 2020), <https://perma.cc/SG5E-DLA3>.

than it was 50 years ago and before, have a sense of being part of that “Struggle,” as it used to be put. . . .

Normal people don’t fall to pieces when seeing “n\*\*\*\*\*” on a piece of paper, regardless of their race. The neoracists who have barred Jason Kilborn from campus in pretending this isn’t true are operating upon an assumption that black people are morons. This is a rather fascinating rendition of “antiracism” . . . .<sup>5</sup>

The repression here is professionally nonsensical, like tailoring a medical school curriculum to students who can’t stand to be around sick people. But McWhorter’s response emphasizes that it also encourages students to be (or at least to represent themselves as) contemptible, too delicate to withstand contact with reality.

This pathology spans the political spectrum. Recent statutes in fourteen Republican-dominated states prohibit any teaching in public schools—and, in ten of them, in state universities—of “divisive concepts,” among them that anyone “should feel discomfort, guilt, anguish, or any other form of psychological distress” on account of his or her race or sex.<sup>6</sup> There happen to be uncomfortable facts that implicate these identities—notably, that white people enslaved black people for centuries.<sup>7</sup> The consequence of this vague legislation, like that engendered by the Kilborn episode, is confusion and fear. Teachers fearing for their jobs have been “avoiding lessons that discuss people who are not heterosexual, white, Christian, or American.”<sup>8</sup> Books dealing with race, gender, or sexual orientation have been

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<sup>5</sup> John McWhorter, *Black Fragility?*, SUBSTACK: IT BEARS MENTIONING (Jan. 27, 2021), <https://perma.cc/GG6F-QH68>.

<sup>6</sup> ARIZ. REV. STAT. ANN. § 15-717.02(B)(6); ARK. CODE ANN. § 25-1-901(6)(2024); FLA. STAT. ANN. § 1000.05(4)(a)(7); GA. CODE ANN. § 201-11(a)(1)(G); IOWA CODE ANN. § 261H.8(1)(c)(ii)(8); MISS. CODE ANN. § 37-191-3(1)(e)(vii); N.C. GEN. STAT. ANN. § 126-14.6(c)(6); N.D. CENT. CODE ANN. § 15-10.7-01(3)(f); OHIO REV. CODE ANN. § 3345.88(C)(7); OKLA. STAT. tit. 70, § 24-157(A)(7)(2021); TENN. CODE ANN. § 49-7-1902(1)(F); S.D. CODIFIED LAWS § 13-1-67(B)(6); UTAH CODE ANN. § 53B-1-118(1)(ii)(F); W. VA. CODE ANN. § 18-2-9b(b)(6). Of these, all but Arizona, Arkansas, North Carolina, and South Dakota apply to state universities. This language originated in a Trump Administration regulation restricting employee trainings by federal contractors. Exec. Order 13950, *Combating Race and Sex Stereotyping*, 85 FED. REG. 60683 (Sept. 28, 2020).

<sup>7</sup> Greg Lukianoff et al., *13 Important Points in the Campus & K-12 ‘Critical Race Theory’ Debate*, FIRE (June 28, 2021), <https://perma.cc/6YXQ-USL2>.

<sup>8</sup> *The Far-Right Attack on Education: How Curriculum and Classroom Censorship Stifles Educators, Harms Students, and Threatens Our Democracy*, AMERICAN OVERSIGHT 17 (Feb. 13, 2025),

purged from school libraries.<sup>9</sup> Textbooks have been rejected for containing forbidden material, and publishers have self-censored in response.<sup>10</sup>

In state universities, faculty have cancelled courses, censored their syllabi, and avoided controversial topics.<sup>11</sup> These statutes typically forbid them to “teach, instruct, or train” anyone “to adopt or believe any divisive concepts,” and declare that this does not forbid impartial teaching. But these formulations don’t work. One faculty member explained:

I am a philosopher and it is my job to present as many arguments and counterarguments as I can and to teach my students how to evaluate these. I am fearful that positions that I defend in the line of duty—whether or not I actually hold them—can and will be used against me. How can I be a competent teacher in such a climate?<sup>12</sup>

The normal imperatives of teaching now compete with a mandate that there are some ideas that students—even college students—are too frail to be exposed to.

Which brings us to a contemporary problem of rhetoric: How do you sell the idea of free speech to people who worry that words hurt? In the last few years, there have been increasing demands, most prominently on college campuses, to shut down hateful speech. Many Americans, especially younger adults, think that such

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<https://perma.cc/57BG-PEBB>; see also Ashley Woo et al., *Walking on Eggshells—Teachers’ Responses to Classroom Limitations on Race- or Gender-Related Topics: Findings from the 2022 American Instructional Resources Survey*, RAND (Jan. 25, 2023), <https://perma.cc/VJG8-UYCJ>.

<sup>9</sup> Rebecca Gaunt, ‘Divisive Concepts’ Law at Work: LGBTQ Books Pulled from Cobb Schools, *Shakespeare Flagged for Review*, COBB COURIER (July 9, 2024), <https://perma.cc/8HMP-PQ2J>. The censorship is intensified by laws that threaten school librarians with criminal penalties if they provide materials vaguely defined as “harmful to minors.” Hannah Natanson, *School Librarians Face a New Penalty in the Banned-Book Wars: Prison*, WASH. POST (May 18, 2023); *Fayetteville Public Library v. Crawford County*, 760 F. Supp. 3d 811 (W.D. Ark. 2024) (enjoining one such statute).

<sup>10</sup> Hannah Natanson, *Red-State Education Restrictions Leave Textbook Publishers in a Bind*, WASH. POST (July 19, 2023); Sarah Mervosh & Dana Goldstein, *Florida Rejects Dozens of Social Studies Textbooks, and Forces Changes in Others*, N.Y. TIMES (May 9, 2023); Dana Goldstein, *Florida Rejects Math Textbooks, Citing ‘Prohibited Topics’*, N.Y. TIMES (Apr. 18, 2022).

<sup>11</sup> Jeffrey Adam Sachs & Jeremy C. Young, *America’s Censored Classrooms 2024*, PEN AM. (Oct. 8, 2024), <https://perma.cc/R3PM-94CY>; Nell Gluckman, *This Is How Censorship Happens*, CHRON. HIGHER EDUC. (Feb. 2, 2023), <https://www.chronicle.com/article/is-this-how-censorship-happens>.

<sup>12</sup> Jeremy C. Young et al., *America’s Censored Classrooms 2023*, PEN AM. (Nov. 9, 2023), <https://perma.cc/8JZV-ULSB>.

speech ought to be restricted.<sup>13</sup> A defense of free speech needs to explain why we should let people say vile things that no one should ever say to anyone. (Kilborn never said such things, but his students were triggered by imagining that he had.)

The familiar arguments for free speech aren't responsive to these concerns. Consider a few pronouncements by the Supreme Court. The judges sometimes focus on good consequences: "It is the purpose of the First Amendment to preserve an uninhibited marketplace of ideas in which truth will ultimately prevail."<sup>14</sup> "The right of citizens to inquire, to hear, to speak, and to use information to reach consensus is a precondition to enlightened self-government and a necessary means to protect it."<sup>15</sup> Sometimes they just invoke rights: "The right to speak and the right to refrain from speaking are complementary components of the broader concept of 'individual freedom of mind.'"<sup>16</sup>

Suppose that you (like many today) are unmoved by these considerations, that you don't believe that the good consequences are likely to follow, or that you don't believe that people have a right to say worthless and harmful things. What reason have you to want to live in a regime that protects such speech?

Fortunately, some classic formulations of free speech do not depend on optimism or the bald claim of rights. John Stuart Mill's essay *On Liberty* is best known as an attack on government censorship. But the state is not the only censor he worries about. He denounces "a social tyranny more formidable than many kinds of political oppression, since, though not usually upheld by such extreme penalties, it leaves fewer means of escape, penetrating much more deeply into the details of life, and enslaving the soul itself."<sup>17</sup> He fears a population "whose whole mental development is cramped and their reason cowed by the fear of heresy," and "who dare not follow out any bold, vigorous, independent train of thought, lest it should land

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<sup>13</sup> Jacob Mchangama, *From Defenders to Skeptics: The Sharp Decline in Young Americans' Support for Free Speech*, CONVERSATION (May 12, 2025), <https://perma.cc/G8T2-FDMQ>.

<sup>14</sup> *Red Lion Broadcasting v. FCC*, 395 U.S. 367, 390 (1969).

<sup>15</sup> *Citizens United v. FEC*, 558 U.S. 310, 339 (2010).

<sup>16</sup> *Wooley v. Maynard*, 430 U.S. 705, 714 (1977) (quoting *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624, 637 (1943)).

<sup>17</sup> JOHN STUART MILL, *ON LIBERTY* 63 (Gertrude Himmelfarb ed., Penguin Press 1974) (1859).

them in something which would admit of being considered irreligious or immoral.”<sup>18</sup> John Milton made a similar argument in 1644: censorship can induce a “gross conforming stupidity,” and officials should understand that “that which purifies us is trial, and trial is by what is contrary.”<sup>19</sup>

These formulations focus not on the collective benefits of free speech but on the kind of person one wants to be. It is good to be awake rather than asleep, to have contact with the actual minds of other people instead of living one’s life in a solipsistic haze. And it is good to be resilient in the face of stress. A regime of free speech is more likely to produce people of that sort. That produces a distinctive kind of collective social unity: a society of citizens who interact on terms of mutual respect, by genuinely knowing what one another think and discussing their differences like adults.

I like living in a world where people can say what they’re thinking, even if I am repelled by what they say. Other minds are interesting. I’m curious about how they work. When I ask, “how can you possibly believe that shit?,” it’s not a rhetorical question. I really want to know what’s true, and it’s true that you believe what you believe and that you probably can’t help believing it. It hurts to know that you believe that awful stuff, and I’m offended, but the hurt is worth enduring. I want to be someone who does not decompensate, or feel the need to summon the authorities, when faced with the truth.

The counterarguments tend to invoke social justice. But social justice is unlikely to be achieved by people who are brittle and vulnerable. I tell my law students: If you can’t stand to look at arguments you find repellent, you won’t be able to respond to them when you encounter them in litigation. And you’ll lose and that would be bad.<sup>20</sup>

*Concern for character is the primitive origin of the idea of free speech.* It is a persistent theme, of older provenance than democracy, truth, or autonomy. It still operates silently.<sup>21</sup> It is one of the idea’s deepest attractions: the possibility of holding

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<sup>18</sup> *Id.* at 95.

<sup>19</sup> JOHN MILTON, AREOPAGITICA (1644), reprinted in COMPLETE POEMS AND MAJOR PROSE 728 (Merritt Y. Hughes ed., 1957).

<sup>20</sup> I expand on the point in Koppelman, *Stanford Law Students’ Infantile Protests*, *supra* note 4.

<sup>21</sup> The silence is, perhaps, a consequence of the fact that one can decide most litigated free speech issues without reference to it. It is most relevant when government compels people to parrot

one's views on purpose, with full awareness of the alternatives. It is central to the arguments of John Milton and John Stuart Mill, and is an important theme in the writings of Louis Brandeis, Alexander Meiklejohn, and others. All think that a regime of free discourse will make us into better people. We ought to develop our minds and characters by encountering all sorts of ideas, including evil and destructive ones.

## I. MILTON

The earliest articulation of the basis of free speech is John Milton's 1644 pamphlet, *Areopagitica*.<sup>22</sup>

In 1641, during the struggles leading up to the English Civil War, Parliament abolished one of King Charles I's most potent means of repression, the Court of Star Chamber. Until that point, one could legally publish only with a license from the Star Chamber. Its abolition was primarily aimed at depriving the King of his most potent means of exercising arbitrary power over his adversaries. An unintended side-effect was the removal of all restrictions on printing. "The immediate result," Vincent Blasi reports, "was a flourishing of political and religious ideas the likes of which England had never before experienced. . . By one count, the number of pamphlets published during the year 1640 was 22; in 1642, it was 1,966."<sup>23</sup>

In August 1642, Charles I raised his standard at Nottingham for the coming war against Parliament. Fighting began in October. In June 1643, Parliament, concerned about royalist propaganda, its own internal unity, and the proliferation of heretical religious opinions, decided to reinstitute licensing. It was this law that elicited Milton's protest.

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an official ideology; see *West Va. Bd. of Educ. v. Barnette*, 319 U.S. 624 (1943). It also helps to explain why free speech protection is extended to art and literature. See Andrew Koppelman, *In Praise of Evil Thoughts*, 37 SOC. PHIL. & POL'Y 52 (2020).

<sup>22</sup> I agree with John Durham Peters that the call to tolerate speech that articulates evil ideas for the sake of a greater good is already present much earlier, in Socratic dialogue, Jewish Torah study and Talmudic commentary, and the epistles of St. Paul. None of these however attempted anything like the creation of a legal doctrine that protects speech. JOHN DURHAM PETERS, *COURTING THE ABYSS: FREE SPEECH AND THE LIBERAL TRADITION* 29–67 (2005). Milton, on the other hand, is addressing state actors and calling for a reform of the law.

<sup>23</sup> Vincent Blasi, *Milton's Areopagitica and the Modern First Amendment* 2 (Yale L. Sch. Occasional Papers, 1995).

In opposing licensing, Milton developed a positive account of the benefits of free speech. These benefits redounded to both the individual and society. His account of those benefits was shot through with Protestant assumptions—assumptions that continue to influence modern thought about free speech.

For Milton, people are to be entrusted with the task of exploring all manner of ideas, good and evil alike, so that they can resist temptation, work toward the salvation of their souls, and advance the Reformation.

At the core of Milton's account was a Christian ideal of virtue as the ability to face and overcome temptation. It demanded that each person grasp religious truth inwardly, not just by outward show. The truth that was to be pursued had distinctive characteristics: it was permanently elusive and would emerge over time, as a consequence of the collision of opposing ideas in a regime of unfettered discourse. The idea that truth was fixed once and for all, and that it could be advanced by blind allegiance to authority, was the core error of Roman Catholicism.

Milton thinks individual autonomy is important, but only because it is necessary to the development of virtue. The cultivation of virtue is each person's responsibility: "God commits the managing of so great a trust, without particular law or prescription, wholly to the demeanor of every grown man."<sup>24</sup> Rather than relegating man "under a perpetual childhood of prescription," God "trusts him with the gift of reason to be his own chooser."<sup>25</sup> Correct choice depends on awareness of the options:

Good and evil we know in the field of this world grow up together almost inseparably; and the knowledge of good is . . . involved and interwoven with the knowledge of evil . . . As therefore the state of man now is; what wisdom can there be to choose, what continence to forbear without the knowledge of evil? He that can apprehend and consider vice with all her baits and seeming pleasures, and yet abstain, and yet distinguish, and yet prefer that which is truly better, he is the true warfaring Christian.<sup>26</sup>

One must know how "to ordain wisely as in this world of evil, in the midst whereof God hath placed us unavoidably."<sup>27</sup> Reading is the best path to such knowledge: "how can we more safely, and with less danger, scout into the regions of sin and

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<sup>24</sup> MILTON, *supra* note 19, at 727.

<sup>25</sup> *Id.*

<sup>26</sup> *Id.* at 728.

<sup>27</sup> *Id.* at 733.

falsity than by reading all manner of tractates and hearing all manner of reason?”<sup>28</sup> The alternative is not merely futile, but contemptible, “a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race,”<sup>29</sup> “a gross conforming stupidity,”<sup>30</sup> “the forced and outward union of cold and neutral and inwardly divided minds.”<sup>31</sup>

This understanding of the proper aspiration of individuals led in turn to a distinct conception of society. Human society was to be understood as unified, not by unanimity concerning any particular proposition, but rather by the common will to pursue truth together. The benefits of truth thus attained greatly outweighed whatever harms were caused by error, and in fact error itself made its own contributions to the emergence of truth. The activity of contending about the truth creates an atmosphere that is more likely to produce a virtuous citizenry—only more likely, with no guarantee, because virtue is up to each of us.

Milton’s theology is key to understanding his claims about free speech. He radicalized the Protestant insistence on the unmediated communion between man and God. Even correct religious doctrine would not bring about salvation if it was the consequence of blind conformity rather than active engagement with religious questions. “A man may be a heretic in the truth; and if he believe things only because his pastor says so, or the Assembly so determines, without knowing other reason, though his belief be true, yet the very truth he holds becomes his heresy.”<sup>32</sup>

Religious salvation is to be achieved only by struggle against temptation. “Assuredly we bring not innocence into the world, we bring impurity much rather: that which purifies us is trial, and trial is by what is contrary.”<sup>33</sup> Traditionally, the crucifixion was the central event in Christian history, but for Milton, the great moment was Christ’s rejection, in the desert, of Satan’s temptations.<sup>34</sup> It follows that “all

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<sup>28</sup> *Id.* at 729.

<sup>29</sup> *Id.*

<sup>30</sup> *Id.* at 747.

<sup>31</sup> *Id.* at 742.

<sup>32</sup> *Id.* at 739.

<sup>33</sup> *Id.* at 728.

<sup>34</sup> That episode is the subject of JOHN MILTON, *PARADISE REGAINED* (1671), reprinted in JOHN MILTON, *COMPLETE POEMS AND MAJOR PROSE* 470 (Merritt Y. Hughes ed., 1957).

opinions, yea errors, known, read, and collated, are of main service and assistance toward the speedy attainment of what is truest.”<sup>35</sup>

The truth does not need state assistance to prevail: “And though all the winds of doctrine were let loose to play upon the earth, so Truth be in the field, we do injuriously by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter.”<sup>36</sup> The state, moreover, is likely to err in deciding what ideas to restrict: “If it come to prohibiting, there is not aught more likely to be prohibited than truth itself; whose first appearance to our eyes bleared and dimmed with prejudice and custom, is more unsightly and unplausible than many errors.”<sup>37</sup> Even if errors can be prevented by coercion, coercion cannot produce virtue, and “God sure esteems the growth and completing of one virtuous person more than the restraint of ten vicious.”<sup>38</sup>

Orthodoxy in doctrine is not important. What matters is not outward conformity, but adherence to the inner light. The diversity that toleration would produce is not a bad thing; “those neighboring differences, or rather indifferences . . . whether

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<sup>35</sup> *Id.* at 727. The importance of a free choice between good and evil is likewise emphasized in JOHN MILTON, *PARADISE LOST* (1667), reprinted in *COMPLETE POEMS AND MAJOR PROSE* 260, Book III, lines 102ff. (Merritt Y. Hughes ed., 1957). The speaker here is God the Father, explaining why it was right to allow the rebel angels and, later, Adam to transgress:

Freely they stood who stood, and fell who fell.  
Not free, what proof could they have giv’n sincere  
Of true allegiance, constant Faith or Love,  
Where only what they needs must do, appear’d,  
Not what they would? what praise could they receive?  
What pleasure I from such obedience paid,  
When Will and Reason (Reason also is choice)  
Useless and vain, of freedom both despoil’d,  
Made passive both, had serv’d necessity,  
Not mee.

<sup>36</sup> MILTON, *supra* note 19, at 746.

<sup>37</sup> *Id.* at 748. Censors are also likely to be incompetent, because no intelligent person will want their jobs. *Id.* at 734–35.

<sup>38</sup> *Id.* at 753.

in some point of doctrine or of discipline . . . though they be many, need not interrupt ‘the unity of spirit,’ if we could but find among us the ‘bond of peace.’”<sup>39</sup>

In an England in which speech is unrestricted, “there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making.”<sup>40</sup> But all of this should be understood to be division of a superficial kind, concealing “one general and brotherly search after truth.”<sup>41</sup> Truth is not a static thing that can be possessed once and for all. “Truth is compared in scripture to a streaming fountain; if her waters flow not in a perpetual progression, they sicken into a muddy pool of conformity and tradition.”<sup>42</sup> Even religious division is a religious good. “[T]here must be many schisms and many dissections made in the quarry and in the timber, ere the house of God can be built.”<sup>43</sup> This united effort will bring about historical progress, the completion of the great Protestant revolution: “There be pens and heads there, sitting by their studious lamps, musing, searching, revolving new notions and ideas wherewith to present, as with their homage and their fealty, the approaching reformation.”<sup>44</sup>

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<sup>39</sup> *Id.* at 747–48. See also MILTON, *PARADISE LOST*, *supra* note 35, at 262–63, Book III, lines 183ff., where the “sincere intent” of prayer is a lot more important than its content:

Some I have chosen of peculiar grace,  
Elect above the rest; so is my will:  
The rest shall hear me call, and oft be warn’d  
Thir sinful state, and to appease betimes  
Th’ incensed Deity while offer’d grace  
Invites; for I will clear thir senses dark,  
What may suffice, and soft’n stony hearts  
To pray, repent, and bring obedience due.  
To Prayer, repentance, and obedience due,  
Though but endeavor’d with sincere intent,  
Mine ear shall not be slow, mine eye not shut.  
And I will place within them as a guide,  
My Umpire Conscience, whom if they will hear,  
Light after light well us’d they shall attain,  
And to the end persisting, safe arrive.

<sup>40</sup> MILTON, *supra* note 19, at 743.

<sup>41</sup> *Id.* at 744.

<sup>42</sup> *Id.* at 739.

<sup>43</sup> *Id.* at 744.

<sup>44</sup> *Id.* at 743.

Individual dignity, a major theme in modern free speech theory, plays a very limited role in Milton's argument. For an author to be compelled to bring his work "to the hasty view of an unleisured licenser, perhaps much his younger, perhaps far his inferior in judgment, perhaps one who never knew the labor of book-writing," and to then "appear in print like a puny with his guardian . . . cannot be but a dishonor and derogation to the author, to the book, to the privilege and dignity of learning."<sup>45</sup> But this is a secondary theme, it is closely linked to a claim about state incompetence, and Milton spends little time discussing it.

The argument as a whole depends not just on Protestantism, but on Milton's peculiarly latitudinarian Protestantism. Christopher Hill observes that Milton's theology rests on a radical Arminianism, in which salvation is available to all men who believe, and is in no way dependent on the formal ceremonies of Catholicism or of the Anglican Church.<sup>46</sup> In sacraments, as Milton understands them, "it is the attitude of the recipient that matters, not the ceremony."<sup>47</sup> This radical individualism is connected with a range of heretical religious views, many of them idiosyncratic to Milton.<sup>48</sup> Prominent among these is the priesthood of all believers: Anyone with a gift for making the Word of God known should be free to disseminate it.<sup>49</sup> Milton's defense of free speech depends crucially on his religious views.<sup>50</sup> If you don't share those views, Milton won't move you.

Milton does not propose to abolish all viewpoint-based restrictions on publication. "I mean not tolerated popery and open superstition, which, as it extirpates all religions and civil supremacies, so itself should be extirpate . . . that also which is impious or evil absolutely, either against faith or manners, no law can possibly permit, that intends not to unlaw itself."<sup>51</sup> It is not clear why he draws the line here.

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<sup>45</sup> *Id.* at 735.

<sup>46</sup> CHRISTOPHER HILL, *MILTON AND THE ENGLISH REVOLUTION* 268–78 (1977).

<sup>47</sup> *Id.* at 306.

<sup>48</sup> See generally *id.* at 233–337. His religious views rested on a reading of Biblical authority which was equally idiosyncratic. See Regina M. Schwartz, *Milton on the Bible*, in *A COMPANION TO MILTON* (Thomas N. Corns ed., 2001).

<sup>49</sup> See WILLIAM HALLER, *LIBERTY AND REFORMATION IN THE PURITAN REVOLUTION* 56–64 (1955).

<sup>50</sup> See generally Blasi, *supra* note 23.

<sup>51</sup> MILTON, *supra* note 19, at 747.

Was Milton convinced that there was a Catholic conspiracy to enslave England?<sup>52</sup> Did he think that the Catholics, because they did not themselves believe in (and indeed aimed to subvert) toleration, were therefore not entitled to it? Did he think that Catholic speech was not about a matter reasonably in doubt, and so could not contribute to the advancement of truth?<sup>53</sup> Was tolerance only for the “neighboring differences” of those committed to Protestantism?<sup>54</sup> Was Milton simply betraying his own principles?<sup>55</sup>

We cannot know. It is a mistake, however, to rush to the conclusion that he is merely inconsistent. Speech that defeats the purposes of free speech is appropriately outside the protection of the right of free speech. Because the aim is to create a certain kind of people in a certain kind of society, and because speech is instrumental to that end, there is no way to deduce from first principles the limits of toleration. There are multiple ways to defeat the purposes of free speech, and Milton was not forthcoming about which of these he had in mind.

## II. MILL

An argument with the structure developed by Milton can however be formulated without the religious elements, and this was in fact done more than 200 years later by John Stuart Mill.

The structure of the argument of Mill’s 1859 book *On Liberty* contains all of the elements just described in Milton, standing in a similar relationship to one another. The foundation is different: The Christian idea of salvation through faith has been replaced by a Romantic ideal of authenticity. But the moves are recognizably Milton’s.<sup>56</sup> Most importantly, they are equally teleological. Mill is not reasoning from

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<sup>52</sup> HILL, *supra* note 46, at 155–58.

<sup>53</sup> Ernest Sirluck, *Introduction*, in JOHN MILTON, THE COMPLETE PROSE WORKS OF JOHN MILTON 2 (Ernest Sirluck ed., 1959), *excerpted in* VINCENT BLASI, IDEAS OF THE FIRST AMENDMENT 124–26 (2006).

<sup>54</sup> Willmoore Kendall, *How to Read Milton’s Areopagitica*, 22 J. POLITICS 439 (1960).

<sup>55</sup> THOMAS N. CORNS, JOHN MILTON: THE PROSE WORKS (1998), *excerpt in* BLASI, *supra* note 53, at 126–28.

<sup>56</sup> The parallels have also been noted by ALAN HAWORTH, FREE SPEECH 118–30 (1998), LANA CABLE, CARNAL RHETORIC: MILTON’S ICONOCLASM AND THE POETICS OF DESIRE 129–35 (1995), and STEWART JUSTMAN, THE HIDDEN TEXT OF MILL’S LIBERTY 75–110 (1991). In a remarkable coincidence, Mill once lived in a house formerly occupied by Milton. EUGENE AUGUST, JOHN STUART MILL:

first principles. He, like Milton, has a vision of individual perfection within a good society, and is proposing rules calculated to realize that vision.

The liberty that Mill wants to defend encompasses “liberty of expressing and publishing opinions,” but also “liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow; without impediment from our fellow-creatures, so long as what we do does not harm them even though they should think our conduct foolish, perverse, or wrong.”<sup>57</sup> The protection of speech is an exception to his principle that the state may interfere with liberty only to prevent harm to others: Almost all speech, he thinks, should be protected even when it is harmful. But the exception is derived from the same commitments that generate the broader protection of liberty.

The reason for this broad liberty is an ideal of individuality. God is absent from that ideal—here is the fundamental difference between Milton and Mill—but it continues to be the case that every individual ought to respond to an inwardly felt calling, which if courageously pursued will bring him closer to the ultimate good. Free speech and freedom of conduct are valuable as means, because they smooth the path toward this good.<sup>58</sup>

Like Milton, Mill places enormous value upon the ability to face and overcome temptation. Society needs “open, fearless characters.”<sup>59</sup> His argument that truth is likely to emerge from the collision of ideas is familiar. Much more than Milton, he relies on the experience of the scientific revolution (though Milton does augment his case against censorship by recalling his visit with Galileo, then under house arrest in Italy).<sup>60</sup> But like Milton, Mill cares about the capacity to grasp truth inwardly, not just by outward show. He values “the clearer perception and livelier impression of truth produced by its collision with error.”<sup>61</sup> If the reasons for even a true opinion

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A MIND AT LARGE (1975), *excerpted in* BLASI, *supra* note 53, at 312. Mill may be read as refurbishing Milton’s argument, stripping it to the beams and rebuilding, but relying on the same basic structure.

<sup>57</sup> MILL, *supra* note 17, at 71.

<sup>58</sup> See FRED R. BERGER, HAPPINESS, JUSTICE, AND FREEDOM: THE MORAL AND POLITICAL PHILOSOPHY OF JOHN STUART MILL 271–74 (1984).

<sup>59</sup> MILL, *supra* note 17, at 94.

<sup>60</sup> MILTON, *supra* note 19, at 737–38.

<sup>61</sup> MILL, *supra* note 17, at 76; *see also id.* at 95.

are held without understanding the arguments both for and against it, “it will be held as a dead dogma, not a living truth.”<sup>62</sup> As in Milton, a man may be a heretic even in the truth.<sup>63</sup> Truth held dogmatically “is but one superstition the more, accidentally clinging to the words which enunciate a truth.”<sup>64</sup> The pursuit matters more than the attainment: “Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think.”<sup>65</sup> Again like Milton, he uses a military metaphor<sup>66</sup> to describe the struggle he wishes to elicit: “Both teachers and learners go to sleep at their post as soon as there is no enemy in the field.”<sup>67</sup> Jeremy Waldron has shown that Mill (like Milton) thinks that the moral distress of contemplating ways of life antithetical to your own is good for you.<sup>68</sup>

Independence of character is valuable in itself. Mill’s vision of free speech is as teleological as Milton’s, driven by his own beatific vision of salvation:

It is not by wearing down into uniformity all that is individual in themselves, but by cultivating it and calling it forth, within the limits imposed by the rights and interests of others, that human beings become a noble and beautiful object of contemplation; and as the works partake the character of those who do them, by the same process human life also becomes rich, diversified, and animating, furnishing more abundant

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<sup>62</sup> *Id.* at 97.

<sup>63</sup> As Justman observes, Mill uses this metaphor sympathetically in his earlier essay on Coleridge. JUSTMAN, *supra* note 56, at 92.

<sup>64</sup> MILL, *supra* note 17, at 97.

<sup>65</sup> *Id.* at 95.

<sup>66</sup> Peters observes that for Mill, truth’s triumph is less inevitable, more a matter of probability. “If Milton took truth as an undefeated wrestler, never vanquished in a match against falsehood, Mill’s sporting metaphor might be a batting average.” PETERS, *supra* note 22, at 129.

<sup>67</sup> MILL, *supra* note 17, at 105.

<sup>68</sup> See Jeremy Waldron, *Mill and the Value of Moral Distress*, in LIBERAL RIGHTS: COLLECTED PAPERS 1981–91 115 (1993). This answers Justman’s objection: “If people know best what makes them happy, then Mill has no warrant to criticize Victorians for their conformism, their meanness of soul—perhaps that’s what makes them happy.” JUSTMAN, *supra* note 56, at 100. Mill is not a neutralist liberal: He thinks that “the most important point of excellence which any government can possess is to promote the virtue and intelligence of the people themselves.” MILL, CONSIDERATIONS ON REPRESENTATIVE GOVERNMENT (1861), *reprinted in* 19 COLLECTED WORKS 390 (John M. Robson ed., 1996), quoted in JUSTMAN, *supra* note 56, at 77.

aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth belonging to.<sup>69</sup>

As John Durham Peters observes, Mill's ideal of character is an unstable mix of Stoicism and Romanticism. As listeners, citizens must be willing to subject their dearest beliefs to challenge and criticism, and learn to articulate views the opposite of their own. Yet as speakers, they must present their ideas powerfully and with conviction.<sup>70</sup>

The valuable traits of character promoted by a regime of free speech have a negative counterpart in the malign effects of censorship. "The greatest harm done is to those who are not heretics, and whose whole mental development is cramped, and their reason cowed, by the fear of heresy."<sup>71</sup> The consequence is "a low, abject, servile type of character,"<sup>72</sup> and Mill bombards it with nasty metaphors: automata in human form, apes, cattle, sheep; he even borrows Milton's metaphor of a "stagnant pool."<sup>73</sup> The rhetorical aim is to make the reader see the value of the kind of character that Mill prizes. Alan Ryan observes that *On Liberty* "does not so much lay out compelling arguments as depict a type of character to which one can react favourably or unfavourably."<sup>74</sup>

As in Milton, the truth is permanently elusive and will emerge over time, as a consequence of the collision of opposing ideas in a regime of unfettered discourse. "The exclusive pretension made by a part of the truth to be the whole must and ought to be protested against . . ."<sup>75</sup> Progress is nonetheless possible: "As mankind improve, the number of doctrines which are no longer disputed or doubted will be constantly on the increase; and the well-being of mankind may almost be measured

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<sup>69</sup> MILL, *supra* note 17, at 127. The same theme is apparent in his essay *The Subjection of Women*, which condemns "the dull and hopeless life to which [society] often condemns them, by forbidding them to exercise the practical abilities which many of them are conscious of, in any wider field than one [childrearing] which to some of them never was, and to others is no longer, open." JOHN STUART MILL, *THE SUBJECTION OF WOMEN* 99–100 (MIT Press 1970) (1869).

<sup>70</sup> PETERS, *supra* note 22, at 130–36.

<sup>71</sup> MILL, *supra* note 17, at 95.

<sup>72</sup> *Id.* at 114.

<sup>73</sup> *Id.* at 129.

<sup>74</sup> ALAN RYAN, *J.S. MILL* 141 (1974). For a similar reading of Mill, see Isaiah Berlin, *John Stuart Mill and the Ends of Life*, in *FOUR ESSAYS ON LIBERTY* 173 (1969).

<sup>75</sup> MILL, *supra* note 17, at 114.

by the number and gravity of the truths which have reached the point of being uncontested.”<sup>76</sup>

Like Milton, Mill also stresses the likely incompetence of state authorities. Censorship of opinion presumes an infallibility to which the state is not entitled. Even when it interferes with conduct rather than speech, “the odds are that it interferes wrongly, and in the wrong place.”<sup>77</sup>

This understanding of the goals of individuals leads in turn to a distinct conception of society, unified not by common opinions but by the common will to pursue truth. Again, error contributes to the emergence of truth.

The liberty of conduct, which is treated in a different section of *On Liberty* from the freedom of speech, has the same foundation. Liberty of conduct is good for one’s character; it also has collective benefits, because it makes important information available to mankind. Mill’s call for “experiments of living”<sup>78</sup> is not merely a metaphor; it is offered in a scientific spirit. He thinks that it is possible to make progress with respect to values as well as facts: Mankind can discover higher pleasures which, once known, will be preferred to the lower ones.<sup>79</sup> “[T]he only unfailing and permanent source of improvement is liberty, since by it there are as many possible independent centres of improvement as there are individuals.”<sup>80</sup> Developed human beings are of use to the undeveloped primarily because “they might possibly learn something from them.”<sup>81</sup> As with Milton, even errors help to advance truth. Action that brings “great harm to the agent himself” are beneficial to others, because, “if it displays the misconduct, it displays also the painful or degrading consequences which, if the conduct is justly censured, must be supposed to be in all or most cases attendant on it.”<sup>82</sup> This is why “[m]ankind are greater gainers by suffering each other to live as seems good to themselves, than by compelling each to live as seems good to the rest.”<sup>83</sup>

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<sup>76</sup> *Id.* at 106.

<sup>77</sup> *Id.* at 151.

<sup>78</sup> *Id.* at 120.

<sup>79</sup> See BERGER, *supra* note 58, at 30–63.

<sup>80</sup> MILL, *supra* note 17, at 136.

<sup>81</sup> *Id.* at 129.

<sup>82</sup> *Id.* at 150–51.

<sup>83</sup> *Id.* at 72.

Finally, as in Milton, the limits of the tolerable are not deduced from the theory in any direct way. Opinions lose immunity

when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard.<sup>84</sup>

How is a court to tell what constitutes a “positive instigation”? The fact that bad conduct is a probable result of the speech? That test was adopted by the Supreme Court for a while, with lamentable results.<sup>85</sup> Or something more speech-protective, such as clear and present danger, the counseling of actual law violation, or the requirement in modern American law that speech “is directed to inciting or producing imminent lawless action and is likely to incite or produce such action”?<sup>86</sup> Mill does not say. He is as vague about the boundary as Milton. It is not his central concern. Like Milton, he is trying to create a distinctive kind of society, inhabited by a distinctive kind of person, and to get the reader to see its appeal. The creation of appropriate rules of law is ancillary to his project. It can be left to the lawyers to work out, so long as they understand what free speech rules are for.

### III. MILTON AND MILL COMPARED

In short, there are major structural similarities between the arguments of Milton and Mill. At the core of both is an ideal of individual perfection that is not reducible to any formula or set of behaviors. The good toward which the individual strives is dynamic and ever-changing, and demands a corresponding dynamism in the individual. Individual virtue consists in the ability and the courage to weigh alternatives for oneself and choose properly.

One facet of this virtue is the capacity to discern truth, a truth that one can only progress toward in an asymptotic process that is never complete. The collision of ideas helps the individual in this task, by forcing her to confront the real range of

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<sup>84</sup> *Id.* at 119. But see a somewhat different articulation of the limit at *id.* at 76n., where he says that incitement to violence may be punished “only if an overt act has followed, and at least a probable connection can be established between the act and the instigation.” Mill does not appear to notice the large differences between these two formulations.

<sup>85</sup> See MARTIN H. REDISH, *FREEDOM OF EXPRESSION: A CRITICAL ANALYSIS* 175–83 (1984).

<sup>86</sup> *Brandenburg v. Ohio*, 395 U.S. 444 (1969).

choices before her. Because we ought to cultivate this capacity, we have a right that the state not interfere when we do so.

Both also have a vision of communal life that is oriented around the hope of realizing this individual ideal. This theme is a familiar one from Aristotle: the purpose of the polity is to make it possible for the citizens to live good, virtuous lives. The task for society is to foster conditions of experimentation and debate that make it likely that the individual will engage in the necessary moral confrontation. Even errors are valuable, and their dissemination should be tolerated, because they help to promote such confrontation. The struggles of individuals produce benefits for society, both in the advancement of truth and the discovery of new and better ways of living. The social unity both Milton and Mill envision depends on a general understanding of the way in which a regime of liberty tends to promote self-development, which is the core ideal for both.

Their ideals of self-development have culturally specific roots (though neither of them would likely have seen this). Milton's depends on his radical Protestantism, Mill's on his peculiar combination of Romanticism and Stoicism. Neither embraces anything so abstract as truth, democracy, or self-realization. Their visions of individual and society are more specific than that. Yet their appeal has turned out to transcend their parochial origins.

It is a demanding aspiration. What Jeremy Waldron writes about Mill is equally true of Milton: "Being disturbed by a shocking attack on one's views, even one's deepest and most cherished religious convictions, is not something people have an interest in being protected against."<sup>87</sup> The aspiration is for "committed open-mindedness—the openness of a man who is anxious to listen and respond to criticism precisely because he takes his view seriously and is interested in it as a view about the good life or whatever and not just as a verbal habit from which he finds it psychologically difficult to dissociate himself."<sup>88</sup> Freedom of thought and discussion must be positively valued, "more on account of the prevalence of a spirit of liberty

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<sup>87</sup> Jeremy Waldron, *Dignity and Defamation: The Visibility of Hate*, 123 HARV. L. REV. 1596, 1613 (2010).

<sup>88</sup> Waldron, *supra* note 68, at 123.

among the people and their representatives—a political culture of mutual respect—than as a result of formal declarations or other institutional arrangements.”<sup>89</sup>

Alan Haworth, who has also noted the similarities between *Areopagitica* and *On Liberty*, thinks that the very different context in which Mill is writing weakens Mill’s reformulation of Milton’s argument. “Milton gains sharpness by keeping his target restricted”:<sup>90</sup> He is arguing against licensing, not against all silencing of discussion. When Milton argues that speech advances truth, he is only thinking about moral truth, the knowledge of right and wrong, and he is right that licensors have no legitimate claim to superior understanding about that. Mill tries to generalize the point into areas of discourse where it is less clearly correct. Milton’s argument against taking ideas on trust, too, makes more sense in the context of Protestant religion than it does with respect to the rest of human knowledge, where such trust is indispensable to the conduct of ordinary life.

Haworth’s objections do not undermine Mill so much as make his claims more diffuse. *Areopagitica* has moved generations of readers who did not share Milton’s religious commitments. Mill understood this. Mill’s secular reconstruction shows that when Milton’s arguments are displaced from their original context, they continue to articulate a set of aspirations that can shape our understanding of which speech should be tolerated and even protected, in contexts that Milton did not imagine. Mill’s power comes from the ideal that he is putting forth, not from his arguments.<sup>91</sup>

#### IV. THE LATER TRADITION

The same theme, about the kind of character that free speech elicits, appears in many later writers on free speech, though none of them elaborates it in as much detail as Milton or Mill.

Both of them remain relevant because they both offer attractive responses to certain inescapable tendencies of modernity. That is the source of their enduring appeal. In modern societies, individuals typically live in a plurality of life-worlds, in which family life at home, one’s tasks and identity at work, and political life involve

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<sup>89</sup> JEREMY WALDRON, *LAW AND DISAGREEMENT* 310 (2001).

<sup>90</sup> HAWORTH, *supra* note 56, at 123.

<sup>91</sup> Berlin, *supra* note 74.

vastly different, often discrepant meanings and experiences. Ideologies of pluralism, such as these writers articulate, function to legitimate this experience.<sup>92</sup> Given the extent to which the individual must continually refashion his social identity, the right to freely plan and shape one's own life naturally becomes salient, because it is rooted in the fundamental structures of modern society.<sup>93</sup> Self-fashioning is a responsibility in this society because our economy and lifeworld depend on individuals engaging in it.

That dependence is recognized by Mill's contemporary John Henry Cardinal Newman, who offers an argument from character that draws on themes familiar from both Milton and Mill. The pertinent capacity, to deal with the world, is indispensable because the world is there, and you can't shield people from it forever. Milton's derision of "a fugitive and cloistered virtue" remains pertinent. Newman makes a similar argument for exposing students to all sorts of literature:

If then a University is a direct preparation for this world, let it be what it professes. It is not a Convent, it is not a Seminary; it is a place to fit men of the world for the world. We cannot possibly keep them from plunging into the world, with all its ways and principles and maxims, when their time comes; but we can prepare them against what is inevitable; and it is not the way to learn to swim in troubled waters, never to have gone into them. Proscribe (I do not merely say particular authors, particular works, particular passages) but Secular Literature as such; cut out from your class books all broad manifestations of the natural man; and those manifestations are waiting for your pupil's benefit at the very doors of your lecture room in living and breathing substance. They will meet him there in all the charm of novelty, and all the fascination of genius or of amiableness.<sup>94</sup>

Newman is nearly paraphrasing Milton: "Banish all objects of lust, shut up all youth into the severest discipline that can be exercised in any hermitage, ye cannot make them chaste, that came not hither so."<sup>95</sup>

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<sup>92</sup> PETER BERGER, BRIGITTE BERGER & HANSFRIED KELLNER, *THE HOMELESS MIND: MODERNIZATION AND CONSCIOUSNESS* 68 (1974).

<sup>93</sup> *Id.* at 79.

<sup>94</sup> JOHN HENRY CARDINAL NEWMAN, *THE IDEA OF A UNIVERSITY* 205–06 (Chelsea House Press 1983) (1852).

<sup>95</sup> Milton, *supra* note 19, at 733.

The capacity to cope with the disorienting cacophony of modernity is one that does not develop automatically. It is best if its development is recognized as a common project. That is one basis for social unity in a diverse society.

Alexander Meiklejohn declared that freedom of speech is “a deduction from the basic American agreement that public issues shall be decided by universal suffrage.”<sup>96</sup> As his critics have noted, Meiklejohn’s pretensions to deduction are a sham. His work is full of undefended assumptions about the appropriate scope of the political agenda and the nature of political freedom, and the boundary he draws between protected and unprotected speech is notoriously conclusory and indeterminate.<sup>97</sup> No court could administer his philosophy as a rule even if it wanted to.

Yet he is one of the most important theorists of free speech. His main achievement lies in stating reasons why speech that advocates the overthrow of the government, the speech of Communists, has political value and should be protected. In the United States, the power to suppress such speech was used, throughout Meiklejohn’s career, to repress legitimate dissent, almost always from the political left, and thereby to deprive the electorate of legitimate political choices.

In modern free speech theory, there has been a persistent problem about whether those who reject democracy are entitled to free speech.<sup>98</sup> Meiklejohn offered the best response: “a government is maintained by the free consent of its citizens only so long as the choice whether or not it shall be maintained is recognized as an open choice, which the people may debate and decide, with conflicting advocacies, whenever they may choose.”<sup>99</sup>

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<sup>96</sup> ALEXANDER MEIKLEJOHN, *POLITICAL FREEDOM: THE CONSTITUTIONAL POWERS OF THE PEOPLE* 27 (1960).

<sup>97</sup> LEE BOLLINGER, *THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA* 147–58 (1986); Martin H. Redish & Abby Mollen, *Understanding Post’s and Meiklejohn’s Mistakes: The Central Role of Adversary Democracy in the Theory of Free Expression*, 103 NW. U. L. REV. 1303, 1312–21 (2009); ROBERT POST, *CONSTITUTIONAL DOMAINS* 268–89 (1995); Harry H. Wellington, *On Freedom of Expression*, 88 YALE L.J. 1105, 1110–12, 1116–17 (1979).

<sup>98</sup> For arguments that they are not, see Robert Bork, *Neutral Principles and Some First Amendment Problems*, 47 IND. L.J. 1, 31 (1971); Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173, 186–89 (1956).

<sup>99</sup> Alexander Meiklejohn, *What Does the First Amendment Mean?*, 20 U. CHI. L. REV. 461, 468 (1953). Another, similarly Miltonic formulation: “If men are not free to ask and to answer the question, ‘Shall the present form of our government be maintained or changed?’; if, when that question is asked, the two sides of the issue are not equally open for consideration, for advocacy, and for

Shall we, then, as practitioners of freedom, listen to ideas which, being opposed to our own, might destroy confidence in our form of government? Shall we give a hearing to those who hate and despise freedom, to those who, if they had the power, would destroy our institutions? Certainly, yes! Our action must be guided not by their principles, but by ours. We listen, not because they desire to speak, but because we need to hear. If there are arguments against our theory of government, our policies in war or in peace, we the citizens, the rulers, must hear and consider them for ourselves. That is the way of public safety. It is the program of self-government.<sup>100</sup>

That program demanded a specific kind of courage. “Conflicting views may be expressed, must be expressed, not because they are valid, but because they are relevant. If they are responsibly entertained by anyone, we, the voters, need to hear them. . . . To be afraid of ideas, any idea, is to be unfit for self-government.”<sup>101</sup>

Meiklejohn’s argument is essentially the same as Milton’s: In order for the choice of good to be authentic, there must be a real option to choose evil. Meiklejohn, however, hasn’t got Milton’s assurance of God making it all right in the end. “I have never been able to share the Miltonian faith that in a fair fight between truth and error, truth is sure to win. And if one had that faith, it would be hard to reconcile it with the sheer stupidity of the policies of this nation.”<sup>102</sup> But the stupidity arises because we are not skilled in dealing with distressing thoughts.

The primary social fact which blocks and hinders the success of our experiment in self-government is that our citizens are not educated for self-government. We are terrified by ideas, rather than challenged and stimulated by them. Our dominant mood is not the courage of people who dare to think. It is the timidity of those who fear and hate whenever conventions are questioned.<sup>103</sup>

Democracy cannot be itself if it shrinks from danger. Meiklejohn’s career as an innovative administrator at Brown, Amherst, and the University of Wisconsin involved considerable frustration. Time after time, students failed to make good use

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adoption, then it is impossible to speak of our government as established by the free choice of a self-governing people.” See also MEIKLEJOHN, *supra* note 96, at 123.

<sup>100</sup> *Id.* at 57.

<sup>101</sup> *Id.* at 27–28.

<sup>102</sup> Alexander Meiklejohn, *The First Amendment is an Absolute*, 1961 SUP. CT. REV. 245, 263.

<sup>103</sup> *Id.*

of the freedom he gave them. But the lesson he took from those episodes, his biographer tells us, is that “the risk of self-destruction was a risk every democratic community had to take.”<sup>104</sup> In America, “our ‘experiment’ in self-government makes that freedom an absolute, while self-preservation is a conditional and relative consequence of it. It expresses the decision of the American people to establish and maintain freedom, and then watch what happens.”<sup>105</sup>

In short, what Meiklejohn really offers is a bold—in context, heroic—rhetorical intervention in a repressive political environment, masquerading as a deductive argument.<sup>106</sup> His work, Lee Bollinger argues, is best understood as “part of an overall rhetorical effort to persuade us to become the sort of people Meiklejohn would like us to be.”<sup>107</sup>

One can find similar acknowledgements of the dangerousness of free speech in other early writers. Holmes wrote that free speech “is an experiment, as all of life is an experiment.”<sup>108</sup> Brandeis wrote:

Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the processes of popular government, no danger flowing from speech can be deemed clear and present unless the incidence of the evil apprehended is so imminent that it may befall before there is opportunity for full discussion. . . . Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears.<sup>109</sup>

Brandeis is more intelligible if one reads him in light of these other writers. He does not explain why courage is relevant to free speech, what the pertinent fears are, and why they are irrational.<sup>110</sup>

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<sup>104</sup> ADAM R. NELSON, *EDUCATION AND DEMOCRACY: THE MEANING OF ALEXANDER MEIKLEJOHN, 1872–1964*, at 267 (2001).

<sup>105</sup> Meiklejohn, *supra* note 99, at 479.

<sup>106</sup> See BOLLINGER, *supra* note 97, at 152–58.

<sup>107</sup> *Id.* at 154.

<sup>108</sup> *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

<sup>109</sup> *Whitney v. California*, 274 U.S. 357, 375, 376 (1927) (Brandeis, J., concurring).

<sup>110</sup> The aspect of Brandeisian courage that I emphasize differs from that of Blasi, who focuses on “the capacity to experience or anticipate change—even rapid and fundamental change—without

Free speech aims to create a distinctive kind of human character, open to new ideas and ready to be challenged, and a social environment in which that kind of character can thrive.<sup>111</sup>

Vincent Blasi observes that “inquisitiveness, distrust of authority, willingness to take initiative, and the courage to confront evil” is generated by the environment that free speech creates, in which “dissent is both an option and an inescapable reality.”<sup>112</sup> People develop these traits in the course of having to cope with the experience of habitually encountering views with which they disagree, in an atmosphere in which it is safe to hold heretical views. The environment created by free speech generates the education of character that a liberal society needs.<sup>113</sup>

One cultivates that character by encountering ideas radically at odds with one’s own. Mill observes that in order to do that, one

must be able to hear them from persons who actually believe them; who defend them in earnest, and do their very utmost for them. He must know them in their most plausible and persuasive form; he must feel the whole force of the difficulty which the true view of the subject has to encounter and dispose of; else he will never really possess himself of the portion of truth which meets and removes that difficulty.<sup>114</sup>

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losing perspective or confidence.” Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & MARY L. REV. 653, 690 (1988).

<sup>111</sup> See Andrew Koppelman, *Veil of Ignorance: Tunnel Constructivism in Free Speech Theory*, 107 NW. U. L. REV. 647, 707–15 (2013); Vincent Blasi, *Free Speech and Good Character: From Milton to Brandeis to the Present*, in ETERNALLY VIGILANT: FREE SPEECH IN THE MODERN ERA 60 (Lee Bollinger & Geoffrey Stone eds., 2002).

<sup>112</sup> Blasi, *supra* note 111, at 84.

<sup>113</sup> As Blasi reads this tradition, “Such character traits are valuable, so the argument goes, not for their intrinsic virtue but for their instrumental contribution to collective well-being, social as well as political.” *Id.* at 62. Here I am emphasizing a different and less instrumentalist aspect of the tradition, which does focus on intrinsic virtue. There is a rich literature on the importance of education for democratic citizenship. See, e.g., STEPHEN MACEDO, *DIVERSITY AND DISTRUST: CIVIC EDUCATION IN A MULTICULTURAL DEMOCRACY* (2000); AMY GUTMANN, *DEMOCRATIC EDUCATION* (1999); EAMONN CALLAN, *CREATING CITIZENS: POLITICAL EDUCATION AND LIBERAL DEMOCRACY* (1997).

<sup>114</sup> MILL, *supra* note 17, at 99.

Any citizen of a liberal society thus might have a legitimate reason to read dangerous things, such as the recruitment literature of ISIS.<sup>115</sup> No one has a moral right to say the things ISIS says,<sup>116</sup> but one nonetheless has a right to hear them when they have been said. No one can think intelligently about the challenge of Islamic radicalism, or of any other illiberal ideology, without spending at least a little time thinking about it from the inside. More generally, one can't think intelligently about evil without entertaining evil points of view. The open, fearless character that liberal society seeks to cultivate can't worry about whether one is permitted to look at this or that.<sup>117</sup>

William Galston observes that liberalism is characteristically committed to a divided conception of the self:

On the one side stands the individual's personal and social history, with all the aims and attachments it may imply. On the other side stands the possibility of critical reflection on—even revolt against—these very commitments. The self most at home in liberal society, as understood, contains the possibility for such critical distance from one's inheritance and accepts the possibility that the exercise of critical faculties may in important respects modify that inheritance.<sup>118</sup>

The capacity for such critical distance is among the core liberal virtues.<sup>119</sup>

A world of free speech encourages us, at least temporarily and provisionally, to divide ourselves, to imagine thoughts that no one should ever think. And the reason we should do that is because we should aspire to be the kind of people who are capable of that. The capacity to thus imaginatively project oneself into alien minds is a kind of liberal virtue. People with evil thoughts exist in the world, and each of us has the potentiality for evil within us. It is better to know the world as it is than to walk around deluded. So evil ideas need to be expressed, and we need to entertain

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<sup>115</sup> Andrew Koppelman, *Entertaining Satan: Why We Tolerate Terrorist Incitement*, 86 *FORD-HAM L. REV.* 535–42 (2017).

<sup>116</sup> Jeffrey Howard, *Dangerous Speech*, 47 *PHIL. & PUB. AFF.* 208–54 (2019).

<sup>117</sup> George Kateb, *The Freedom of Worthless and Harmful Speech*, in *LIBERALISM WITHOUT ILLUSIONS: ESSAYS ON LIBERAL THEORY AND THE POLITICAL VISION OF JUDITH N. SHKLAR* 235 (Bernard Yack ed., 1996).

<sup>118</sup> WILLIAM GALSTON, *LIBERAL PURPOSES* 153 (1991).

<sup>119</sup> On the virtues associated with liberalism, see *id.* See also STEPHEN MACEDO, *LIBERAL VIRTUES* (1990); PETER BERKOWITZ, *VIRTUE AND THE MAKING OF MODERN LIBERALISM* (1999).

those ideas. In some contexts, evil thoughts are valuable and even praiseworthy.<sup>120</sup> The capacity to think them, without being overwhelmed by them, is a kind of skilled performance.<sup>121</sup>

Which brings us back to modern higher education.

A similar theme takes a minor but important role in a prominent recent defense of free speech, Greg Lukianoff and Jonathan Haidt's *The Coddling of the American Mind* (first published as an essay and then expanded into a book). They critique the alarming increase in college student demands—demands to which administrators often capitulate—for protection from words or ideas that they regard as causing them harm. (The Kilborn episode, which I described at the beginning of this essay, is of course an illustration.) This movement, they observe,

presumes an extraordinary fragility of the collegiate psyche, and therefore elevates the goal of protecting students from psychological harm. The ultimate aim, it seems, is to turn campuses into “safe spaces” where young adults are shielded from words and ideas that make some uncomfortable.<sup>122</sup>

What distinguishes the new movement from earlier forms of student activism, they argue, “is the premise that students are fragile. Even those who are not fragile themselves often believe that others are in danger and therefore need protection.”<sup>123</sup> Its clearest manifestation is in the repressive atmosphere in the colleges, but it also is evident in the patterns of childrearing that have become increasingly prevalent in America. “When children are raised in a culture of safetyism, which teaches them to stay ‘emotionally safe’ while protecting them from every imaginable danger, it may set up a feedback loop: kids become more fragile and less resilient, which signals to adults that they need more protection, which then makes them even more

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<sup>120</sup> See Koppelman, *supra* note 21.

<sup>121</sup> Thus FRIEDRICH NIETZSCHE, *BEYOND GOOD AND EVIL* §39, §49 (Walter Kaufmann trans., Vintage Books 1996) (1886):

Something might be true while being harmful and dangerous in the highest degree. Indeed, it might be a basic characteristic of existence that those who would know it completely would perish, in which case the strength of a spirit should be measured according to how much of the ‘truth’ one could still barely endure—or to put it more clearly, to what degree one would require it to be thinned down, shrouded, sweetened, blunted, falsified.

<sup>122</sup> Greg Lukianoff & Jonathan Haidt, *The Coddling of the American Mind*, ATLANTIC, Sept. 2015.

<sup>123</sup> GREG LUKIANOFF & JONATHAN HAIDT, *THE CODDLING OF THE AMERICAN MIND* 7 (2018).

fragile and less resilient.”<sup>124</sup> Young people must not be denied “the thousands of small challenges, risks, and adversities that they need to face on their own.”<sup>125</sup>

Lukianoff and Haidt present their argument in the language of the therapist: Safetyism is a danger to mental health. But there’s also an aspiration there: to help young people “mature into strong and capable adults, able to engage productively with people and ideas that challenge their beliefs and moral convictions.”<sup>126</sup>

If the kind of character-based considerations that animate Milton and Mill seem strange as a defense of free speech, this strangeness may be a manifestation of the tendency of much modern thinking about ethics, noted by Charles Taylor, “to focus on what it is right to do rather than on what it is good to be, on defining the content of obligation rather than the nature of the good life.”<sup>127</sup>

The character-based understanding of free speech that we have been examining focuses on the considerations raised by what is now called “virtue ethics.” This is sometimes taken to be an alternative to consequentialism and deontology, a distinctive approach to moral theorizing. Martha Nussbaum argues that this is confused: Every moral philosophy contains an account of the virtues, and these accounts are different from one another, depending on the overall shape of the philosophy in question. She acknowledges that the cluster of writings that are commonly denominated “virtue ethics” does share a distinctive set of interests: “a concern for the role of motives and passions in good choice, a concern for character, and a concern for the whole course of an agent’s life.”<sup>128</sup> The tradition I am recovering here shares that focus. It is particularly urgent today, when speech is commonly regarded as a threat to emotional safety.

## V. FOR THE SAKE OF THE NOBLE

The fundamental question raised by the protection of harmful speech is, why should we put up with the danger, since the speech in question is worthless? Why should I think that enduring it will make me a better person? Why should I want to be the kind of person who listens to this stuff?

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<sup>124</sup> *Id.* at 30.

<sup>125</sup> *Id.* at 176.

<sup>126</sup> *Id.* at 31.

<sup>127</sup> CHARLES TAYLOR, *SOURCES OF THE SELF: THE MAKING OF THE MODERN IDENTITY* 3 (1989).

<sup>128</sup> Martha C. Nussbaum, *Virtue Ethics: A Misleading Category?*, 3 J. OF ETHICS 163, 184–85 (1999).

To see the first-personal appeal of such considerations, I will conclude by drawing upon some ideas of Aristotle, whose account of the virtues remains among the most influential. Mill's conception of human flourishing is essentially Aristotelian. His professions of philosophical utilitarianism tend to obscure this aspect of his thought, which is why it is helpful to turn to Aristotle to understand what Mill is urging upon us.<sup>129</sup> Aristotle never seems to have thought much about freedom of speech, but he offers reflections on what good people want, and what they ought to want, that are pertinent here.

Aristotle is particularly helpful for the problem before us, because, unlike Mill, he never takes other people's wants to count as a reason to sacrifice what is best for oneself. First-personal appeal is the only kind of appeal he recognizes. He thus offers a useful path to understanding the first-personal appeal of free speech.

Aristotle's ethics focus on the flourishing of the individual. That flourishing might entail obligations to others, but only because man is a political animal. "There is no theory of moral duty or moral right and wrong in Aristotle—either an explicit or an implicit theory—because he lacks these categories."<sup>130</sup> Obligation, distinct from the agent's own good, is absent in Aristotle.<sup>131</sup> "If egoism is the thesis that one will always act rightly if one consults one's self-interest, properly understood, then nothing would be amiss in identifying him as an egoist."<sup>132</sup> For him, "the virtuous person's only object of *concern* is his own happiness, and that he is concerned to promote the good of others only in so far as doing so is noble and so such as to advance his own good."<sup>133</sup>

Aristotle's psychology points to two pertinent considerations that, he thought, are among those that move people to action. One is obviously relevant: "All men by nature desire to know."<sup>134</sup> The idea that free speech advances truth is a familiar

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<sup>129</sup> See JOHN PETER DI IULIO, COMPLETELY FREE: THE MORAL AND POLITICAL VISION OF JOHN STUART MILL 13–70 (2022).

<sup>130</sup> Richard Kraut, *Doing without Morality: Reflections on the Meaning of Dein in Aristotle's Nicomachean Ethics*, in 30 OXFORD STUDIES IN ANCIENT PHILOSOPHY 171 (David Sedley ed., 2006).

<sup>131</sup> STEPHEN DARWALL, MODERN MORAL PHILOSOPHY: FROM GROTIUS TO KANT 4–5, 11 (2023).

<sup>132</sup> Richard Kraut, *Aristotle's Ethics* 9, STAN. ENCYCL. PHIL. (2022), <https://perma.cc/QAX6-R9M8>.

<sup>133</sup> Roger Crisp, *Nobility in the Nicomachean Ethics*, 59(3) PHRONESIS: A JOURNAL FOR ANCIENT PHILOSOPHY 231–45 (June 2014).

<sup>134</sup> He continues:

one, but here the point is that this is not only good for us communally, but also individually. As I argued earlier, the capacity to imagine even the most evil thoughts helps us to know the world and ourselves.

Aristotle's other psychological claim is that well-socialized people feel the attraction of what he calls "the noble" or "the fine"—translating *kalon*, a word that signifies what is admirable. One way of understanding the appeal of the tradition I have been examining is that the capacity to endure distressing speech is *kalon*.

Aristotle thinks that good actions are most admirable when undertaken "for the sake of the fine."<sup>135</sup> In virtuous action, "its end is acting well itself."<sup>136</sup> The virtuous person "awards himself the finest and best things all."<sup>137</sup> Those "who are unusually eager to do fine actions are welcomed and praised by everyone."<sup>138</sup> The noble is "that which, being choiceworthy because of itself, is praiseworthy."<sup>139</sup>

A noble person is for example brave for this reason: "Standing firm against what is painful makes us call people brave; that is why bravery is both painful and justly praised, since it is harder to stand firm against something painful than to refrain from something pleasant."<sup>140</sup> "[T]he brave person will find death and wounds painful, and suffer them unwillingly, but he will endure them because that is fine or because failure is shameful."<sup>141</sup> Being a noble person is such a great good that it compensates for other losses: "He is ready to sacrifice money as long as his friends

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An indication of this is the delight we take in our senses; for even apart from their usefulness they are loved for themselves; and above all others the sense of sight. For not only with a view to action, but even when we are not going to do anything, we prefer seeing (one might say) to everything else. The reason is that this, most of all the senses, makes us know and brings to light many differences between things.

ARISTOTLE, *METAPHYSICS* 1.1, *reprinted in* BASIC WORKS OF ARISTOTLE 689 (Richard McKeon ed., W.D. Ross trans., 1941).

<sup>135</sup> ARISTOTLE, *NICOMACHEAN ETHICS* 1115b12, 48; for similar formulations, *see id.* at 1116b3, 50; 1117b9, 53; 1117b17, 53; 1119b15, 57; 1120a23, 59; 1122b6, 64 (Terence Irwin trans., 2019).

<sup>136</sup> *Id.* at 1140b5–10, 105.

<sup>137</sup> *Id.* at 1168b30, 174.

<sup>138</sup> *Id.* at 1169a8, 174.

<sup>139</sup> ARISTOTLE, *RHETORIC* 1366a33, 29 (C.D.C. Reeve trans., 2018).

<sup>140</sup> ARISTOTLE, *supra* note 135, at 1117a35, 52.

<sup>141</sup> *Id.* at 1117b8–9, 53.

profit, for the friends gain money, while he gains the fine, and so he awards himself the greater good.”<sup>142</sup> The noble is worth dying for:

It is quite true that, as they say, the excellent person labours for his friends and for his native country, even if he ought to die for them if he must; for he will sacrifice money, honors, and contested goods altogether, achieving the fine for himself. For he will choose intense pleasure for a short time over slight pleasure for a long time; a year of living finely over many years of undistinguished life; and a single fine and great action over many small actions. This is presumably true of one who dies for others; he does indeed choose something great and fine for himself.<sup>143</sup>

These character ideals had political implications. Aristotle thought that “political communities must be taken to exist for the sake of noble actions, and not for the sake of living together.”<sup>144</sup> The purpose of a polity is “to make the citizens good and just.”<sup>145</sup> For Aristotle, “the good political arrangement is the one ‘in accordance with which each and every one might do well and lead a flourishing life.’”<sup>146</sup>

Modern scholars have struggled to elucidate the *kalon*. Christine Korsgaard observes that “Aristotle . . . does not tell us much about what property of an action ‘nobility’ names.”<sup>147</sup> More specifically, Gabriel Richardson Lear reports, “it is not at all clear what he means by saying that virtuous action is *kalon* or what motivation he is pointing to when he says that the genuinely good person acts for the sake of the *kalon*.”<sup>148</sup> This is, perhaps, because Aristotle presumes that the reader already knows what he is talking about. Jonathan Lear observes: “The point of the Nicomachean Ethics is not to persuade us to be good or to show us how to behave well

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<sup>142</sup> *Id.* at 1169a26–29, 175.

<sup>143</sup> *Id.* at 1169a19–25, 174–175.

<sup>144</sup> ARISTOTLE, POLITICS 1281a, 81 (C.D.C. Reeve trans., 1998).

<sup>145</sup> *Id.* at 1280b, 80; cf. ARISTOTLE, *supra* note 135, at 1103b3–4, 21; 1130b25–26, 83; 1180b23–28, 201.

<sup>146</sup> MARTHA NUSSBAUM, THE THERAPY OF DESIRE: THEORY AND PRACTICE IN HELLENISTIC ETHICS 10 (1994) (quoting and translating ARISTOTLE, POLITICS 1324a23–25).

<sup>147</sup> Christine M. Korsgaard, *From Duty and for the Sake of the Noble: Kant and Aristotle on Morally Good Action*, in THE CONSTITUTION OF AGENCY 193 (2008).

<sup>148</sup> Gabriel R. Lear, *Aristotle on Moral Virtue and the Fine*, in THE BLACKWELL GUIDE TO ARISTOTLE’S NICOMACHEAN ETHICS 116 (Richard Kraut ed., 2006).

in various circumstances in life; it is to give people who are already leading a happy, virtuous life insight into the nature of their own souls.”<sup>149</sup>

Roger Crisp writes that “many readers have found the notion relatively unproblematic.”<sup>150</sup> Some implications are familiar. Richard Kraut: “When we call a moral endeavour noble, we imply that it is not merely right but also supremely *attractive*: the agent is acting in an especially *becoming* and *handsome* way, conducting himself with *dignity* and *grace*.”<sup>151</sup> Gabriel Richardson Lear thinks that “Aristotle conceives of virtuous actions as fine in order to emphasize the sense in which their goodness is easily intelligible and pleasant to contemplate.”<sup>152</sup> Korsgaard argues that the *kalon* can be understood in quasi-Kantian terms:

The capacity to choose is a capacity to make a reflective judgment about the value of an action as such and to be moved by that judgment to perform or avoid the action. Importantly, this is at the same time a form of self-command, a capacity to give shape to our own characters and identities. When the agent asks whether the action is a good one she is also asking: do I wish to be a person who is so moved, a person who does that sort of act for that sort of end? To relinquish this prerogative of self-command for the sake of some mere experience or gratification is in Kant’s language heteronomous and in Aristotle’s base. To exercise it, especially under circumstances that make it difficult, is to act from duty and so to display that special form of moral worth that Aristotle calls nobility.<sup>153</sup>

It must be acknowledged that some aspects of Aristotle’s conception are simply weird to us. The reference to a short but glorious life appears to allude to a passage in Book IX of the *Iliad*, in which Achilles explains that this was precisely the choice

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<sup>149</sup> JONATHAN LEAR, *ARISTOTLE: THE DESIRE TO UNDERSTAND* 157 (1988). Similarly Howard J. Curzer: “The fact that Aristotle does not explain what he means by the term ‘noble’ within the NE suggests that he generally uses the term in a straightforward and common-sense way rather than in some complex manner.” *ARISTOTLE AND THE VIRTUES* 27 (2012).

<sup>150</sup> Crisp, *supra* note 133.

<sup>151</sup> Richard Kraut, *An Aesthetic Reading of Aristotle’s Ethics*, in *POLITEIA: ESSAYS IN HONOUR OF MALCOLM SCHOFIELD* (Verity Harte & Melissa Lane eds., 2013).

<sup>152</sup> Lear, *supra* note 148, at 132.

<sup>153</sup> Christine Korsgaard, *From Duty and for the Sake of the Noble: Kant and Aristotle on Morally Good Action*, in *THE CONSTITUTION OF AGENCY: ESSAYS ON PRACTICAL REASON AND MORAL PSYCHOLOGY* 192–93 (2008).

he made.<sup>154</sup> To the modern eye, Achilles's choice—slaughtering strangers in a ridiculous war—appears stupid and evil. Our notion of nobility is not that of the Greeks. Perhaps there is an aspect of the *kalon* that is true and important, and which Aristotle did not grasp.

Given the strangeness of ancient Greek terminology and ideals, a Yiddish word that has become part of American English might offer a helpful translation of the *kalon*, emphasizing a dimension of it that is likely to inspire us.

One wants to be a *mensch*, “someone to admire and emulate, someone of noble character.” The word elicits “respect, dignity, approbation.”<sup>155</sup> A *mensch* is dependable and does not crumble in the face of stress. He is kind and strong. (The word's antonym, *unmensch*, denotes a person who is cruel and devoid of compassion.<sup>156</sup>) It is good to have such a person as a friend.

A world of free speech helps you become a *mensch*. Mill saw this, though he would not have put it this way.

Mill's central ethical concern is what he calls nobility of character—“the strengthening, exalting, purifying, and beautifying of our common nature.”<sup>157</sup> A noble person aims at “not the agent's own greatest happiness, but the greatest amount of happiness altogether.”<sup>158</sup> Mill thought that

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<sup>154</sup> He says:

For my mother Thetis the goddess of the silver feet tells me  
I carry two sorts of destiny toward the day of my death. Either,  
if I stay here and fight beside the city of the Trojans,  
my return home is gone, but my glory shall be everlasting;  
but if I return home to the beloved land of my fathers,  
the excellence of my glory is gone, but there will be a long life  
left for me, and my end in death will not come to me quickly.

HOMER, *ILIAD* 209ff. (Richmond Lattimore trans., 1951).

<sup>155</sup> LEO ROSTEN, *THE JOYS OF YIDDISH* 237 (1970).

<sup>156</sup> This is also its meaning in German. In the libretto of Mozart's *The Magic Flute*, Tamino declares his hatred of Sarastro: “Er ist ein Unmensch, ein Tyrann!” (“He is inhuman, a tyrant!”) Thanks to George Kateb for the reference.

<sup>157</sup> JOHN STUART MILL, *INAUGURAL ADDRESS DELIVERED TO THE UNIVERSITY OF ST. ANDREWS*, reprinted in 21 *COLLECTED WORKS* 220 (John M. Robson ed., 1969), quoted in DI IULIO, *supra* note 129, at 28.

<sup>158</sup> JOHN STUART MILL, *UTILITARIANISM*, reprinted in 10 *COLLECTED WORKS* 213 (John M. Robson ed., 1969).

this ideal nobleness of character, or of a near approach to it, in any abundance, would go farther than all things else toward making human life happy, both in the comparatively humble sense of pleasure and freedom from pain, and in the higher meaning, of rendering life, not what it now is almost universally, puerile and insignificant, but such as human beings with highly developed faculties can care to have.<sup>159</sup>

John Peter DiIulio observes that Mill “realized that human beings . . . strive after ideals that pull us toward them, that exhibit a sort of magnetic attraction—what Aristotle calls final causality.”<sup>160</sup> Nobility of character has that kind of attraction, though Mill’s understanding of it would have surprised Aristotle. Mill wrote: “No person of feeling and conscience would be selfish and base, even though they should be persuaded that . . . the rascal is better satisfied with his lot than they are with theirs.”<sup>161</sup> Freedom helps to make a person “a noble and beautiful object of contemplation.”<sup>162</sup>

Suppose one had to persuade someone, not already socialized to see the value of the *kalon*, that it is valuable. There’s no master argument for doing so. It is a problem in rhetoric. Mill understood this: “Questions of ultimate ends are not amenable to direct proof. Whatever can be proved to be good, must be so by being shown to be a means to something admitted to be good without proof.”<sup>163</sup> Aristotle doesn’t worry about this in the *Nicomachean Ethics*, because he presupposes that

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<sup>159</sup> JOHN STUART MILL, *A SYSTEM OF LOGIC*, reprinted in 8 COLLECTED WORKS 952 (John M. Robson ed., 1974).

<sup>160</sup> DI IULIO, *supra* note 129, at 53.

<sup>161</sup> MILL, *supra* note 158, at 211.

<sup>162</sup> MILL, *supra* note 17, at 127.

<sup>163</sup> MILL, *supra* note 158, at 207–08.

his audience is properly socialized. Mill also relies on socialization.<sup>164</sup> Yet he understands that many people are oblivious to the ideals that he embraces.<sup>165</sup>

If attraction to the noble is not a sufficient rhetorical tool to get the job done, we ought also to consider the power of repulsion. A brave person, Aristotle writes, will endure pain and wounds “because that is fine or because failure is shameful.”<sup>166</sup> Sometimes you’ve got to accentuate the negative. One argument against censorship, sometimes effective, is that it is contemptible, and makes us contemptible. Milton warned that censorship could only produce “a fugitive and cloistered virtue, unexercised and unbreathed, that never sallies out and sees her adversary, but slinks out of the race,”<sup>167</sup> “a gross conforming stupidity,”<sup>168</sup> “the forced and outward union of cold and neutral and inwardly divided minds.”<sup>169</sup> Mill warned that forced conformity would produce “a low, abject, servile type of character.”<sup>170</sup> Aristotle was no

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<sup>164</sup> He writes:

The love of virtue, and every other noble feeling, is not communicated by reasoning, but caught by inspiration or sympathy from those who already have it; and its nurse and foster-mother is Admiration. We acquire it from those whom we love and reverence, especially from those whom we earliest love and reverence; from our ideal of those, whether in past or in present times, whose lives and characters have been the mirror of all noble qualities; and lastly, from those who, as poets or artists, can clothe those feelings in the most beautiful forms, and breathe them into us through our imagination and our sensations.

PLATO, *GORGIAS*, reprinted in 11 *COLLECTED WORKS* 150 (John M. Robson ed., 1978).

<sup>165</sup> He writes:

Having said that individuality is the same thing with development, and that it is only the cultivation of individuality which produces, or can produce, well-developed human beings, I might here close the argument: for what more or better can be said of any condition of human affairs, than that it brings human beings themselves nearer to the best thing they can be? or what worse can be said of any obstruction to good, than that it prevents this? Doubtless, however, these considerations will not suffice to convince those who most need convincing . . .

MILL, *supra* note 17, at 128.

<sup>166</sup> ARISTOTLE, *supra* note 135, at 1117b8–9, 53.

<sup>167</sup> MILTON, *supra* note 19, at 729.

<sup>168</sup> *Id.* at 747.

<sup>169</sup> *Id.* at 742.

<sup>170</sup> MILL, *supra* note 17, at 114.

liberal, but he despised abjectness and servility, and might have recognized these in their modern incarnations.

Consider again the Kilborn episode with which we began. George Kateb observes that the habit of “looking to authority to assuage our hurt from expression . . . spreads to all persons the mentality of dependence. Expressing and receiving expression by permission becomes the norm.”<sup>171</sup> On the contrary: “To be treated as an adult, as a person expected to think independently, rather than as a vulnerable and untrustworthy child who is never able to become an adult, is the profoundest meaning of liberty of thought and discussion.”<sup>172</sup> He could have been talking to the students and administrators at the University of Illinois at Chicago. We should not aspire to perpetual childhood.

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<sup>171</sup> Kateb, *supra* note 117, at 237.

<sup>172</sup> George Kateb, *A Reading of On Liberty*, in MILL, ON LIBERTY 52 (Bromwich & Kateb eds., 2003).

