

CHICK-FIL-HEY: AN IN-DEPTH LOOK INTO JOHN STUART MILL'S HARM
PRINCIPLE AND ITS APPLICATION IN MODERN AMERICAN SOCIETY

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ABSTRACT

Chick-fil-Hey: An In-depth Look Into John Stuart Mill's Harm Principle and Its Application in Modern American Society

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Americans claim to deeply cherish the rights of Freedom of Speech and Expression. We have firmly cemented these rights into our legal code through numerous Supreme Court cases. American society however is a different story. While most Americans claim to be open minded and willing to discuss ideas they find offensive, the facts simply do not support that notion. The negative reaction of a major section of the United States population to statements made by Dan Cathy, CEO of Chick-fil-A, where he spoke against same-sex marriage, highlights how American society is not very inclusive to conflicting or offensive opinions. In the end, Mill's Harm Principle, which the American Legal System has so carefully adopted, should be adopted by American Society as well; if we as Americans hope to have a thriving and intellectual society.

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Chapter One

Introduction

The final bag rattled to the bottom of the dumpster, as the minimum-waged employee slowly walked back inside to clock out. Across the country this scene was playing out, as it does every night. But on this day, it was different, even if many people did not then realize it. These dumpsters had become the cache of the weapons of a newly-waged battle in the American culture war. Inside the bags of trash were cups, which had once held freshly squeezed lemonade. Alongside these cups lay the small aluminum-lined pockets that held the precious cargo of chicken sandwiches. Beside these bags lay the weapons of the opposing side. The glossy sheen of a picket sign's poster board, with its clever slogan, could be seen stapled to a splintered wooden handle. The contents of the dumpster spoke to the battle that had raged that day. To understand this battle it is vital to look at the events that led up to this clash. It is equally important to look forward and see the ramifications of this conflict for American society.

This battle began with an interview. This interview by the Baptist Press was not truly about Chick-fil-A, but rather about Chick-fil-A Chief Executive Officer Dan Cathy. The interviewer was quick to ask Cathy about his personal beliefs. Cathy readily admitted that he has been a Baptist, which is an evangelical Christian group, from very early on in

his life.¹ The personal beliefs that Cathy holds obviously impact his business, just as anyone's religious or political beliefs impact their lives. How a man chooses to run his business is clearly an aspect of how he chooses to live his life. Still, Cathy clearly stated that his company is not a "Christian company" by citing a business mentor of his who said, "There is no such thing a Christian business."²

This statement by Cathy was an important aspect of the interview. It points to Cathy's view that he could not entirely separate his personal beliefs from the way he runs his company. Cathy used different terminology in the interview to describe how his company operates. He describes his company as one "[that is] based on biblical principles, asking God and pleading with God to give us wisdom on decisions we make about people and the programs and partnerships we have."³ Though he avoids calling Chick-fil-A a Christian company, he explicitly states that his company is based on the same Christian values that inform his personal life. This is not outrageous; in fact, anyone who founds a company will undoubtedly run it in the way they think best. It is against this backdrop that the Baptist Press interviewer reached the question of homosexuality.

The interviewer's line of questions, which led to asking about Cathy's position on homosexuality, began with a discussion of Chick-fil-A's charity work. The questions revolved around the WinShape Foundation, which Chick-fil-A supports.⁴ The foundation

¹ Blume, K. Allen. 2012. "'Guilty as Charged,' Cathy Says of Chick-fil-A's Stand on Biblical & Family Values." *Baptist Press*. July 16. <http://www.bpnews.net/BPnews.asp?ID=38271>.

² Ibid.,

³ Ibid.,

⁴ Ibid.,

does numerous things, including funding college scholarships and foster care programs, but one activity was of particular interest in the interview.⁵ Dan Cathy is quoted as saying “[the other programs] morphed into a marriage program in conjunction with national marriage ministries.”⁶ It was this connection with the marriage ministries that led the interviewer to ask if Cathy supported traditional marriage. To this Cathy responded “Guilty as charged.”⁷ It is important to note that many of the articles that cite what Cathy said only discuss his “guilty as charged” statement leaving out much of the context that has been discussed here.

Before discussing the fallout of the comment, it is important once again to recall the context. The company’s view on marriage stems directly from Dan Cathy’s own view, since he is the company’s owner. His statement was clearly not meant to target any particular individual or group; he said only that he ran his company on the basis of his religious beliefs. This is not a radical concept and it is certainly not an assault on the homosexual lifestyle. The final words of his interview are eerie given what happens next. Cathy remarked that “[w]e know that it might not be popular with everyone, but thank the Lord, we live in a country where we can share our values and operate on biblical principles.”⁸ The fallout resulting from his statements seems to indicate that it may not be as easy to “share our values” or “operate on biblical principles” as Cathy may believe.

⁵ Ibid.,

⁶ Ibid.,

⁷ Ibid.,

⁸ Ibid.,

The reaction to his statement came quickly and strongly. Liberals, and supporters of gay rights, quickly condemned the statement, with many groups calling for a boycott of Chick-fil-A. Conservatives responded in kind, asking for the support of Chick-fil-A. In fact, the conservative response was unlike anything seen before. Conservative pundit and former presidential candidate, Mike Huckabee, organized a Chick-fil-A Appreciation Day, in response to the boycotts by the liberal side.⁹ Huckabee promoted his event on Facebook, where a staggering 667,710 people agreed to patronize Chick-fil-A to show their support.¹⁰ What makes this even more remarkable is that Chick-fil-A Appreciation Day was on August 1, 2012, a mere sixteen days after Dan Cathy made his statements to *The Baptist Press*.

It is hard to believe that in only sixteen days Dan Cathy's personal statements went from the pages of a small Baptist newspaper to the center of a nationwide boycott and counter-boycott. Clearly, this is a unique situation, in that it inspired so many Americans to act in support of their beliefs. Cathy's statement was a line in the sand. He took a stand on an issue that many Americans from across the political spectrum were willing either to defend or contest.

There is something troubling about the idea that one man's personal belief, expressed in an interview, could provoke such a heated response. Even more troubling is that the typical response of Americans was not to speak civilly to one another about their differences of opinion, but instead to stand in opposing pickets outside fast food

⁹ Huckabee, Mike. 2013. "Chick-fil-A Appreciation Day". Social Media. *Facebook*. August 1. <https://www.facebook.com/events/266281243473841/>.

¹⁰ *Ibid.*,

restaurants. There was even some evidence of property destruction. One Chick-fil-A restaurant, in California had graffiti spray painted on the side “Tastes like hate.”¹¹ There was also an organized protest to Mike Huckabee’s Chick-fil-A Appreciation Day. The opposing side organized named itself “the kiss in.”¹² Carly McGehee, a young lesbian woman organized the kiss in.¹³ She told USA Today that “once Dan Cathy released his statements, I thought there is no better time than now [to protest].”¹⁴ It is interesting that she took Dan Cathy’s comments as the catalyst for her protest. The context of his comments discussed above does not support her reading of them. Cathy did not seek to punish McGehee in any way, yet she felt the need to boycott Cathy’s business merely because of his personal beliefs.

It is also important however to remember the context that Carly McGehee, and other homosexuals, reads Dan Cathy’s comments through. It appears clear to me the context of Dan Cathy’s comments were not to attack the homosexual community; however, Carly McGehee sees the world quite differently. McGehee sees a community that has faced all kinds of discrimination and ostracism throughout American history. It is out of this history that Carly McGehee and the other homosexual protestors read Dan Cathy’s comments, and react to them. Remembering the different lens that the protestors

¹¹ Petrecca, Laura. “Chick-fil-A Protesters Holding ‘Kiss-in’.” *USA Today*. <http://usatoday30.usatoday.com/news/nation/story/2012-08-01/chik-fil-a-appreciation-day-gay-marriage/56668468/1>.

¹² Ibid.,

¹³ Ibid.,

¹⁴ Ibid.,

view the world through is vital to truly understanding the whole picture of what happened in this Chick-fil-A scenario.

The backlash against Chick-fil-A was not limited just to everyday citizens. Some political figures, eager not to miss an opportunity for publicity, came out against Chick-fil-A. Chicago Alderman Joe Moreno fought to keep Chick-fil-A from opening a restaurant in his section of the city.¹⁵ Moreno said that “because of [Dan Cathy’s] ignorance, I will now be denying Chick-fil-A’s permit to open the in first ward.”¹⁶ The ironic part of Alderman Moreno’s quote is that what he calls “ignorance” is the genuine religious belief of millions of Americans. Moreno, however had a great deal of support. Chicago Mayor Rahm Emanuel commented that “Chick-fil-A values are not Chicago values.”¹⁷ These are very aggressive statements coming from these politicians, and the *Chicago Tribune* points out that Moreno comes from a ward that has a large number of homosexuals.¹⁸ This political fallout in Chicago brings up two questions. The first: should politicians even be able to set the “moral requirements” for a company that wishes to operate in their region? The second: to what extent should a business owner need to compromise his morality in order to do business?

In my opinion, what is occurring in Chicago is deeply troubling. That politicians would use the religious beliefs of the owner of a company as a justification to keep that

¹⁵ Dardick, Hal. 2012. “Alderman to Chick-fil-A: No Deal.” *Chicago Tribune*. July 25. http://articles.chicagotribune.com/2012-07-25/news/ct-met-chicago-Chick-fil-A-20120725_1_1st-ward-gay-marriage-ward-alderman.

¹⁶ Ibid.,

¹⁷ Ibid.,

¹⁸ Ibid.,

company from doing business in their city is terrifying. What is even more troubling is that they are calling religious beliefs ignorance, and trusting only themselves to determine that what is ignorance and what is truth. This problem was not only confined to the politicians of Chicago. The same *Chicago Tribune* article, that described the Chicago situation, revealed that the same situation was occurring in Boston.¹⁹ This trend of politicians using their morality as a justification for denying businesses the right to operate is, in my opinion, a negative development in American political life.

The second challenge of the Chicago situation is the question how much of a business owners morality needs to change for it to be considered worthy of doing business. Alderman Moreno is uncompromising on this question. Alderman Moreno lists terms for allowing Chick-fil-A into his Chicago ward as follows: “[the company must do] a complete 180 . . . [Chick-fil-A must] work with LGBT groups in terms of hiring, and there would have to be a public apology from [Cathy].”²⁰ This requirement that Chick-fil-A not only reject its own values, but offer full support to a lifestyle they find sinful, is quite troubling. Alderman Moreno is essentially giving Dan Cathy the choice of either selling his soul or *not* selling his chicken sandwiches. That the government has the power to deny companies the right to do business, merely because of the religious beliefs they hold, should trouble every American.

My fears about our contemporary approach to political and social differences are similar to those voiced many years ago by British political philosopher John Stuart Mill. In *On Liberty*, Mill perceived the problem that afflicts American society today. He saw

¹⁹ Ibid.,

²⁰ Ibid.,

that dissenting opinions, if not handled correctly, can become a problem for any society. Mill notices that dissenting opinions are both necessary and problematic. According to Mill, if dissenting opinions are allowed to flourish they are the lifeblood of moving a society into the future. Mill believes that society moving forward is the ultimate goal, and he protects dissenting opinions because he believes they are necessary to reach this goal. Mill argues that dissenting opinions become a problem, however, when they are silenced by the majority. If dissenting opinions are silenced then society cannot receive the benefit of hearing them.

My thesis is an attempt to apply Mill's insights on these matters to American contemporary political disputes. I begin, in chapter two, by focusing on the problems Mill identifies when dissenting opinions are not allowed. Mill shows how his ideal society protects these dissenting opinions, since in his view dissenting opinions are not in themselves problems, but are rather *required* if society is to make any advances at all. Mill provides three reasons that dissenting opinions are needed and they are discussed at length in the chapter.

Also in *On Liberty*, Mill provides his solution to the problem of dissenting opinions, which he calls the "Harm Principle." The Harm Principle is designed to protect those who hold dissenting opinions from unjust legal or social consequences. The third chapter of this thesis is therefore dedicated to investigating exactly what the goals of Mill's Harm Principle are, and how it seeks to accomplish these goals. With the understanding of the Harm Principle, it is then possible to see how modern American society is failing to reach Mill's goals.

In Chapter four, I then move to several case studies in contemporary American culture. In this section I show that the effectiveness of Mill's Harm Principle depends upon both law and society. America has been very effective at applying Mill's ideas in its legal system. These protections have mainly come through Supreme Court decisions, beginning with early decisions from Supreme Court Justices Holmes and Brandeis, as they sought to protect individual liberty. Three more recent court cases reveal how the trend towards greater individual liberty seems to be continuing. While the legal system has been effective at protecting individual liberty, American *society* has largely failed to adopt Mill's suggestions about the benefits of free expression. Modern culture is full of examples, like the Chick-fil-A scenario already discussed, of America's collective failure to protect dissenting opinions.

Finally, I argue in Chapter Five that Mill's ideas are not effective when they are only adopted by the law, and not by society as well. This is true because society is ultimately more effective at getting men to change their behavior than the law alone. This chapter will investigate the numerous ways which society can punish a man for breaking its rules, and how these punishments have a negative impact on both society and the individual.

It is evident that this nationwide war waged about Chick-fil-A is a small piece in a much larger cultural trend that increasingly does not allow the full expression of dissenting opinions. As I shall argue, this is not a new trend, nor is it unique to America. Many thinkers, and most notably John Stuart Mill, have identified this struggle with dissenting opinions. The challenge to American society, however, remains the same: Will America embrace dissenting opinions or will it crush them?

Chapter Two

The Problem of Dissenting Opinions

Dissenting opinions offer a challenge to any society, since they are both beneficial and potentially dangerous. John Stuart Mill offers one solution to the question of what to do about dissenting opinions. Mill sees dissenting opinions as the key to improving society, but they must be understood and embraced, rather than ignored or suppressed. Of course, one might wonder what exactly Mill has in mind as an ideal society. What kind of society does he see as best, and why is freedom of expression such an important part of this vision? In the second chapter of *On Liberty* he lays out exactly the nature of freedom of expression and gives three major arguments for why he believes that it is the best solution to the problem of dissenting opinions. Mill also makes clear the great danger of not allowing freedom of expression.

Mill's ideal society is one that constantly improves, thanks to the work of the individuals who compose it. Mill differs from other political philosophers because he does not specifically outline his ideal state. He even mocks the idea of creating a rigid code that would govern society.¹ Instead, he aims at a *dynamic* society, where “improvement” is the ultimate objective. Mill supports a dynamic society because he

¹ Mill, John Stuart. 1989. *On Liberty*. Cambridge University Press. 75.

understands that “[particular ages] are no more infallible than individuals.”² Thus, in his view, each generation can improve where its predecessor failed, while retaining the achievements of prior generations. It is freedom of expression that drives this constant change. Mill believes that the common people are uniquely suited to the task of improving society.³ However, he recognizes that the challenge for many societies has been in allowing these capable individuals the freedom necessary to change society.

Mill’s focus on the individual also shows the degree to which the well-being of the state itself depends upon the well-being of the individual. Mill actually never speaks in terms of the “state” itself. Instead, he focuses on protecting the individual, since it is only the individual who will change the state.⁴ Thus Mill seems not nearly as concerned about the state as an entity as with the individuals who comprise it. This reality becomes even clearer in Chapter Three of *On Liberty*, where Mill argues that brilliant men need to be given space to be brilliant, for the betterment of society.⁵ It would appear that the positive effects on the state are a side effect of the positive effects of the individual.

Mill sets up freedom of expression as the means of achieving his ultimate goal of building the best possible society. He presents three main arguments to support this contention. First, all men are fallible.⁶ Although this may seem obvious to us in the abstract, Mill thinks people are remarkably bad at recognizing this in concrete situations.

² Ibid., 21.

³ Ibid., 36.

⁴ Ibid., 53-54

In⁵ Ibid., 64-65.

⁶ Ibid., 53

Second, even false opinions are likely to contain part of the truth.⁷ Mill notices that even wrong ideas can be useful because they could motivate people to formulate new ideas or to eliminate bad ones. Finally, ideas need to be contested. If they are not, men will either believe them for the wrong reasons or, worse, not know why they believe them at all.⁸ Mill observes here that the reason why a man holds his beliefs is as important, if not more important, than what he actually believes.

Argument 1: Fallibility

Mill's first argument is that a person who silences an opposing opinion assumes a position of infallibility.⁹ He writes that "[such people] have no authority to decide [questions] for all mankind."¹⁰ In other words, it is the responsibility and privilege of each individual to choose for himself what he believes. Mill is giving incredible power to the individual and he justifies it by noting that "each [individual] is the proper guardian of his own health, whether bodily, or mental and spiritual."¹¹ This is a logical conclusion because each individual knows himself better than anyone. Mill is arguing that no one can justly force his beliefs on another person.

⁷ Ibid., 53.

⁸ Ibid., 53.

⁹ Ibid., 20, 53.

¹⁰ Ibid., 21.

¹¹ Ibid., 16.

Even the government is not allowed to silence dissenting opinions. Mill observes that “the power [to silence objecting opinions] itself is illegitimate.”¹² The illegitimacy of the power ties directly back to the question of fallibility. Since any government is an organization of fallible people ruling over other fallible people, Mill correctly argues that no outside power can legitimately silence another. In other words, no outsider has the authority to infringe on the freedom of an individual’s beliefs, even if that outsider has political authority.

Mill also notices that men rarely think about the consequences of assuming their infallibility. He notes “everyone well knows himself to be fallible, [yet] few think it necessary to take any precautions against their own fallibility.”¹³ He challenges those who refuse to think about this point or who do not believe it to be an issue in their understanding of the world. Mill sees the consequences of man’s fallibility as one of the great challenges for human beings, and it appears to annoy him that others do not share this belief. He observes, with frustration, that people largely fail to recognize that their beliefs are historically, geographically and temporally conditioned. “[Man] devolves upon his own world the responsibility of being in the right, and it never troubles him that mere accident has decided which of these numerous world is the object of his reliance.”¹⁴ Mill’s exasperation is evident in this passage. The second part of passage has a critical tone, where Mill is criticizing a man for failing to understand why he believes what he does. Clearly, Mill believes it is the responsibility of every man to consider and

¹² Ibid., 20.

¹³ Ibid., 21.

¹⁴ Ibid., 21.

understand why he holds a particular opinion, and what outside forces impact that decision. In Mill's opinion, failure to do this is unacceptable.

Mill further supports his arguments about infallibility by discussing a misconception that many people have about certainty. "To refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same thing as *absolute* certainty."¹⁵ Thus he emphasizes one of the common ways men fall into the trap of assuming infallibility. Yet he goes even further and attempts to eliminate this mistaken understanding. Mill simply argues that "there is no such thing as absolute certainty."¹⁶ This means that society must allow all ideas to be heard, because no one can be *certain* whether they are silencing the truth or a lie. This argument again supports the idea that Mill is seeking an ideal society, even if getting to this new society might be damaging to those currently in authority, or to society at a particular moment.

Furthermore, Mill criticizes those who seek to keep certain ideas from being challenged. He argues against people who "think some particular principle or doctrine should be forbidden to be questioned because it is *so certain*, [only] because *they are certain* it is certain."¹⁷ His criticism has two parts. First, he disputes the idea that anyone can become a judge of certainty itself rather than of the truth of a particular idea.¹⁸ Mill has already argued that absolute certainty *does not exist*, so it would be foolish for men to attempt to judge certainty. Second, men attempt to judge certainty while only hearing one

¹⁵ Ibid., 21.

¹⁶ Ibid., 22.

¹⁷ Ibid., 25.

¹⁸ Ibid., 25.

side of the argument.¹⁹ Any judge would be worthless if he only heard one side of case. Mill thus argues that it is wrong to judge based only on your own interpretations of the facts, and that this is another example of fallibility hindering free expression.

Mill even argues that perceived immorality is no basis for silencing an idea. “[F]ar from being less objectionable or less dangerous because the opinion is called immoral or impious, this is the case of all others in which it is most fatal.”²⁰ In fact, Mill uses even stronger language against this mistake: “These are *exactly* the occasions on which the men of one generation commit those dreadful mistakes, which excite the astonishment and horror of posterity.”²¹ He supports this position with two powerful historical examples.

The examples he cites are the Trial of Socrates and the Crucifixion of Jesus Christ. In these two historical examples he hopes to show that the charge of immorality should not be used as justification for silencing an idea.²² It is interesting that Mill, who was also a minister, would see these two instances as nearly equal in error. In both cases, men did not “merely mistake their benefactor; they mistook him for the exact contrary of what he was and treated him as that prodigy of impiety, which they themselves are now held to be.”²³ He uses these two powerful examples to highlight his belief that it is a terrible mistake to use contemporary notions of morality as a justification for silencing

¹⁹ Ibid., 25.

²⁰ Ibid., 27.

²¹ Ibid., 27.

²² Ibid., 27.

²³ Ibid., 28.

speech. The price paid by Socrates and Jesus is obvious, but the price paid by everyone else is more subtle. In Mill's mind however it is just as costly.

Argument 2: Partial Truth

Mill's second argument for freedom of expression focuses on the idea of partial truth, and his discussion has three components. First, he observes that "though the silenced opinion be an error, it may, and very commonly does, contain a portion of the truth."²⁴ This argument stems from the fact that most ideas contain at least a partial truth. The second part of the argument is an extension of part one. "The general or prevailing opinion on any subject is rarely or never the whole truth."²⁵ Mill comes to the logical conclusion that if the silenced opinion is partially true, then the majority opinion cannot be completely true. The third part of the argument results from the first two. "It is only by the collision of adverse opinions that the remainder of the truth has any chance of being supplied."²⁶ Each of these aspects of the argument should be considered independently.

The dissenting opinion "commonly does contain a portion of the truth" and thus it is significant.²⁷ Mill strongly defends the necessity of hearing dissenting opinions, even though most people would prefer not to be challenged. "All that part of the truth which

²⁴ Ibid., 53.

²⁵ Ibid., 53.

²⁶ Ibid., 53.

²⁷ Ibid., 39, 53.

turns the scale, and decides the judgment of a completely informed mind, they are strangers to.”²⁸ In this passage Mill places great value on the portion of truth that the dissenting opinion may hold, by calling it “that part of the truth which turns the scale.”²⁹ This reveals how significant Mill believes the dissenting opinion is to the discovery of truth.

The second part of this argument is that “the general or prevailing opinion on any subject is rarely or never the whole truth.”³⁰ Again, this argument clearly follows from part one. If objectors possess *part* of the truth, then the common opinion cannot possess the whole of it. Mill provides a historical example in the case of Roman Emperor Marcus Aurelius. Mill writes that “his writings were the highest ethical product of the ancient mind.”³¹ However, Marcus Aurelius is remembered for his persecution of the Christian faith, something with which Mill strongly disagrees. For all his genius, “[Marcus Aurelius] failed to see that Christianity was to be a good and not an evil for a world.”³² In other words, Marcus Aurelius was unable, even with all of his power and education, to see that he failed to perceive the entire truth. This part of the argument is another way Mill encourages his readers to embrace their own fallibility.

The final part of Mill’s second argument is the result of the dissenting and common opinion. “It is only by the collision of adverse opinions that the remainder of the

²⁸ Ibid., 39.

²⁹ Ibid., 39.

³⁰ Ibid., 53.

³¹ Ibid., 28.

³² Ibid., 29.

truth has any chance of being supplied.”³³ This is clear justification for the first two parts of Mill’s second argument. The world needs both the dissenting and the common opinion for this “collision with error” to be produced, while the positive effects of this “collision with error” are completely dependent on freedom of expression allowing such a collision to occur. Mill believes that society needs individuals with contrary opinions so that society can be assured it is on the best possible route.

Mill argues that true knowledge requires both sides of an opinion. “[T]hey [who] have never thrown themselves into the mental position of those who think differently . . . do not in any proper sense of the word know the doctrine which they profess.”³⁴ In other words, failing to hear both sides of an argument means that we will fail to have the fullest possible understanding of that argument. Mill gives the historical example of Cicero, who sought to understand both sides of an argument before beginning his debate.³⁵ This example reveals that Mill is not advocating a new concept. The smartest men in history considered both sides of an argument before forming their opinions. In reality, Mill is simply reinforcing his argument that a person must understand the opposite point of view to truly understand his own.

Mill sees great significance even in small pieces of truth that emerge in dissenting opinions. “So essential is [listening to both sides] to a real understanding of moral and human subjects, that if opponents of all important truths do not exist, it is indispensable

³³ Ibid., 53.

³⁴ Ibid., 39.

³⁵ Ibid., 38.

to imagine them, and supply them with the strongest arguments.”³⁶ Clearly, Mill sees the presence of these dissenting opinions as vital to the true understanding of all opinions.

The requirement that the truth must be challenged creates people who are thoughtful, which is a positive effect of the “collision with error” Mill wants to foster.

Mill is concerned that society is punishing its best thinkers:

The greatest harm done is to those who are not heretics, and whose whole mental development is cramped, and their reasoned cowed, by fear of heresy. Who can compute what the world loses in the multitude of promising intellects combined with timid characters.³⁷

The lack of freedom of expression, Mill argues, is destroying the greatest minds of society because they are too afraid to speak. Argument, persuasion, and understanding all require people who are thoughtful, and when these things are done effectively people grow in knowledge. This growth is required to undergird the dynamic, growing society that Mill wishes to promote. A dynamic society cannot afford to have people who are afraid to speak about change.

Argument 3: Intellectual Honesty

Mill’s third and final justification for freedom of expression is the promotion of intellectual honesty. In short, one must consider all options before coming to an informed conclusion. “Even if the received opinion be not only true, but the whole truth,” Mill observes, “unless it is suffered to be, and actually is, vigorously and earnestly contested,

³⁶ Ibid., 39

³⁷ Ibid., 35.

it will, by most of those who receive it, be held in the manner of a prejudice, with little comprehension or feeling of its rational grounds.”³⁸ This part of the argument is key to achieving Mill’s objective of a dynamic society. It is vital to understand the most important aspect here is not what a man believes, but *why* he believes it. The passage reveals that it is not acceptable to Mill to believe the truth, if it is believed for the wrong reasons. Mill sees such intellectual honesty as essential for advancing society. “If the cultivation of the understanding consist in one thing more than in another, it is surely in learning the grounds of one’s own opinions.”³⁹ Being able to justify your beliefs is a requirement for true understanding.

Being intellectually honest also has a positive effect on society. The positive effect is sincerity. The achievement of intellectual honesty requires the freedom of discussion for which Mill has been so earnestly arguing. He is trying to persuade individuals not to believe something simply because it is the prevailing opinion. He would much prefer that they believe it because they have done the work to understand why it is the best option. This is the very definition of sincerity, because an individual has worked for his opinion instead of simply siding with the public because it is the popular idea. Mill further argues that any intellectual has the *obligation* to do this searching for truth. “As a thinker it is his first duty to follow his intellect to whatever conclusions it may lead.”⁴⁰ In using the language of obligation, Mill requires that the thinker also act.

³⁸ Ibid., 53.

³⁹ Ibid., 37.

⁴⁰ Ibid., 36.

Another important aspect of Mill's third justification is that if an idea is not allowed a vigorous defense, then "the meaning of the doctrine itself will be in danger of being lost, or enfeebled, and deprived of its vital effect on the character and conduct."⁴¹ Mill considers this a great danger. Earlier Mill was concerned that individual would believe an idea for the wrong reasons, but he now argues that falsely believing an idea negatively impacts the idea itself.⁴² The major loss Mill notices is that this "prevent[s] the growth of any real and heartfelt conviction, from reason or personal experience."⁴³ This passage, more than any other, clearly outlines the positive objectives Mill has in allowing the freedom of expression.

It is important to notice that the language of the third justification concerns how an idea impacts the individual. Mill uses phrases like "personal conviction", "heartfelt conviction," "reason," and "character and conduct."⁴⁴ These phrases reveal that Mill's ultimate priority is the individual, an argument supported by the title of his next chapter, which is "Of Individuality, as one of the elements of well being."⁴⁵ Mill wholeheartedly believes that individuals and their ideas, if genuine, can change the world. He purposefully chooses to argue that individuals will be the ones who will change society, not the other way around. This is an optimistic view.

⁴¹ Ibid., 53.

⁴² Ibid., 36.

⁴³ Ibid., 54.

⁴⁴ Ibid., 53-54.

⁴⁵ Ibid., 56.

Mill's belief that people with greater personal freedoms will make a better society is, of course, debatable. Thomas Hobbes, for example, holds the exact opposite belief. In his book, *The Leviathan*, Hobbes argues for a society where liberty is limited and authority is placed in the hands of one man, the sovereign.⁴⁶ Hobbes does not share Mill's faith in individuals, which is why his political system tempers the liberties of individuals. Mill's belief, however, that greater personal liberty is a good for society is clearly the driving force behind all three of his major justifications in chapter two. This faith in humanity goes through all of *On Liberty*, and presents a challenge to modern readers. But is Mill right? Are we confident, like Mill, that greater personal liberty will lead to a better society?

I would argue that Mill is right, and that freedom of expression provides the greater good for society. In my opinion, the benefits of free expression that Mill argues for, which are the things previously discussed in this chapter, dramatically outweigh any risk caused by free expression. I believe, Mill would agree, that it is better to live a society where someone can freely challenge what I believe rather than go my whole life believing a lie, because no one presented another option to me. The challenge of this is that to allow free expression, individuals need to be willing to work harder and think about what they believe and why they believe it, and many are unwilling to do so. Mill finds that society fails to properly protect freedom of expression in two distinct and important ways. First, a society can reject freedom of expression altogether, and continue

⁴⁶ Hobbes, Thomas. 1991. *The Leviathan*. New York: Cambridge University Press. 121.

to suppress new or different ideas.⁴⁷ Second, society loses the new ideas that freedom of expression would have brought forward.⁴⁸ Moreover, if free expression is allowed, but no speaker has any intention of changing his mind, then all the potential goods of free expression are destroyed.

Mill offers historical examples of what happens when freedom of expression is rejected. Dr. Johnson provides an argument against free expression, making the case, contra Mill, that freedom of discussion is *not* essential. Dr. Johnson argues “persecution is an ordeal through which the truth ought to pass, and always passes successfully.”⁴⁹ Although many people hold this belief, it is questionable; and Mill has harsh words for believers of this theory. “The dictum that truth always triumphs over persecution is one of those pleasant falsehood . . . which all experience refutes.”⁵⁰ Mill backs this bold statement by citing the numerous failed attempts at reformation prior to Martin Luther.⁵¹ Mill also cites the numerous European governments that were able to successfully keep Protestantism from taking hold in their countries through persecution.⁵² Mill correctly argues that the only reason the truth ever emerged from these historical situations is because it was finally presented at time when it was not *immediately oppressed*.⁵³ All of

⁴⁷ Mill. *On Liberty*. 30.

⁴⁸ Ibid., 20.

⁴⁹ Ibid., 30.

⁵⁰ Ibid., 30-31.

⁵¹ Ibid., 31.

⁵² Ibid., 31.

⁵³ Ibid., 31.

these truths were needlessly delayed in their acceptance because of the lack of freedom of expression. This continued ignorance is one of the prices paid for failing to listen to new and opposing ideas.

Mill's second point goes even further than the first. Sometimes ideas are not only delayed; they may even be destroyed. "The peculiar evil of silencing the expression of an opinion is, that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion still more than those who hold it."⁵⁴ This reveals just how far the negative effects of silencing an opinion may reach. Mill calls the silencing of an idea a "peculiar evil," highlighting his belief that it is a unique kind of injustice. Mill believes that it is evil for two reasons. The first reason is the number of people who suffer. Destroying an idea could potentially impact millions of lives, which could have been changed if the idea had been allowed to grow. The second reason is that it is impossible to know what ideas society is losing or what the impact of those ideas might have been.

Mill argues that everyone loses something when an idea is silenced.⁵⁵ The question remains: what might be lost? First: the freedom to speak. This is what Mill has already observed in the examples of Socrates and Jesus.⁵⁶ But this is only one of the potential losses of not allowing an idea. The other losses are more subtle, though no less devastating. Mill argues: "[the other groups] are deprived of their ability to exchange

⁵⁴ Ibid., 20.

⁵⁵ Ibid., 20.

⁵⁶ Ibid., 28.

error for truth . . . [or] the clearer perception an livelier impression of the truth.”⁵⁷ In other words, not allowing free expression prevents others from learning the truth. Men long to know the truth, and freedom of expression allows them the best opportunity to learn it.

There is one further danger in not allowing freedom of expression, to which Mill only alludes. This consists in free discussion *without* the assumption of fallibility. Inevitably, when this occurs arguments descend into bickering. Mill’s problem here may be that he is asking too much. Mill is calling on men to be humble, even to the point of changing their mind on significant questions. This asks a great deal of them in terms of bravery and character. If these brave men exist in society then Mill’s freedom of expression will work flawlessly, creating all of the benefits already discussed. The problem comes when these men are not present or are not willing to do all the work free expression requires. This is a very real danger of Mill’s ideas about free expression, and it reveals that to only go halfway with freedom of expression is just not far enough.

These, then, in summary are Mill’s major arguments for freedom of discussion: First, all men are fallible, and therefore capable of improving themselves.⁵⁸ Second, false opinions likely contain part of the truth, and even that part of the truth must be protected.⁵⁹ Finally, ideas must be contested for them to be justly held.⁶⁰ Mill is also correct in his argument that the rights of the individual must be protected for the

⁵⁷ Ibid, 20.

⁵⁸ Ibid., 53.

⁵⁹ Ibid., 53.

⁶⁰ Ibid., 53.

advancement of society. The case has now been made for freedom of expression, though Mill will go even further than just free expression. This further step is his Harm Principle, which I will elaborate in Chapter Three.

Chapter Three

The Harm Principle

Mill offers his Harm Principle as the next logical step following the freedom of expression. The question remains, however: what is the Harm Principle? The Harm Principle distinguishes between rights of the individual and the rights of society. The Harm Principle also addresses two major ways society can impact the lives of the individuals in it. The first is through varying degrees of social pressures, which according to Mill can be used either when the individual alone is harmed, or when more than one individual is harmed. The second is through legal pressures, which according to Mill can only be used when others are affected by a man's actions.

Mill argues that there are two aspects of every human life. The first is individuality.¹ "To individuality should belong the part of life in which it is chiefly the individual that is interested."² Mill's focus on the individual should be no surprise, as he is once again trying to protect the individual from the negative effects society can impose. Mill does recognize that the distinction is unclear between what only affects the individual and what affects society *as well as* the individual. He notes "the distinction here pointed out between the part of a person's life which concerns only himself, and that

¹ Mill. *On Liberty*. 75.

² Ibid., 75

which concerns others, many persons refuse to admit.”³ Mill does however outline his view of this distinction.

Mill allows a wide scope for individuality, but this individuality does have limits. Mill’s employs the term “definite damage” to explain when society can intervene in an individual’s life.⁴ Mill writes “[w]henever, there is definite damage, or risk of damage, either to the individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law.”⁵ The challenge, however, is that Mill does not clearly define “definite damage” or the even more vague “risk of definite damage.”⁶ Mill does provide an example, however, in which he attempts to explain what he means.

Mill offers the example of a drunken man: “No person ought to be punished simply for being drunk.”⁷ Mill explains that while being drunk hinders the individual, and does take some of his contribution away from society, the man is still free to make his own choices. However, “[a] soldier or policeman should be punished for being drunk on duty.”⁸ Mill correctly argues that because the man has a specific responsibility, his drunkenness presents a greater risk. This is what justifies society in punishing the individual. Again, Mill fails to specifically define “definite damage” with this example, but he clearly indicates that there are times when protecting society outweighs the rights

³ Ibid., 80.

⁴ Ibid., 82.

⁵ Ibid., 82.

⁶ Ibid., 82.

⁷ Ibid., 82.

⁸ Ibid., 82.

of the individual. The question remains: to what extent do the rights of society outweigh the rights of the individual?

Mill also discusses moments where the impact on the state is small but the impact for the individual is great. Mill argues:

With regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself, the inconvenience is one which society can afford to bear, for the sake of human freedom.⁹

Mill makes an interesting move in this passage. Instead of attempting to make a distinction between what solely impacts the individual and what also impacts society, as his critics did, he concedes that all action will have some impact on society. However, Mill argues in some cases freedom of the individual outweighs the small amount of damage done to society.

Mill has given the individual a great deal of freedom under his Harm Principle, but he also kept a strong role for society. “To society, belongs the part [of life] which chiefly interests society.”¹⁰ Mill argues that two things are “chiefly the interest of society.” These are not infringing on the rights of another person and taking responsibility for defending society, and they must be considered in greater detail.¹¹

First, the individual may not infringe on the rights of another. If this occurs, society can then react against that individual.¹² “This conduct consists first, in not

⁹ Ibid., 82.

¹⁰ Ibid., 75.

¹¹ Ibid., 75.

¹² Ibid., 75.

injuring the interest of another, or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered rights.”¹³ Mill is careful to limit when society can intervene under this justification. He lists two very specific instances of things that must be violated for society to justly intervene: “legal provision” and “tacit understanding.” I believe that Mill limits this justification in this way because he sees the danger of society claiming a small damage and using it as a justification for silencing a whole idea.

In “legal provision,” the law has been written and enacted. Thus it is easy to determine when a law has been broken. Mill uses this term to explain that violating the law is obviously a justifiable reason for society to react against an individual. He also gives a general explanation of “tacit understanding,” but it is more vague than his “legal provision” category. Mill writes: “It is necessary that general rules should for the most part be observed, in order that people may know what they have to expect.”¹⁴ The “general rules” described in this passage are the “tacit understanding” that Mill is talking about. These rules of “tacit understanding” are another category of rights that, if violated, would trigger a justified interference by society.

The second justification for society interfering with the individual is when the individual is not meeting his responsibility to society.¹⁵ A person’s responsibility consists in “bearing his share . . . of the labors and sacrifices incurred for defending society or its

¹³ Ibid., 75.

¹⁴ Ibid., 77.

¹⁵ Ibid., 75.

members from injury and molestation.”¹⁶ In other words, the freedom of individuality cannot be used as an excuse to get out of the responsibilities every individual has to society. The example of the drunken soldier, which has already been discussed above, is the best example of Mill’s second justification. Yet Mill also argues that there is another way that society can influence individuals beyond these two justifications.

He makes the case that society has a special ability to impact the people with in it. “[Society] has the whole period of childhood and nonage in which to try whether it could make [its people] capable of rational conduct in life.”¹⁷ Notice that Mill has given society the entire early life of a person to make its impact on him, and try to make him “capable of rational conduct.”¹⁸ On the surface this appears to be an easy goal to reach, but Mill correctly argues that it is challenging. “[The current generation] cannot indeed make them perfectly wise and good, because it is itself so lamentably deficient in goodness and wisdom.”¹⁹ Mill’s argument here, that the previous generation should teach the following generation even though they do not have all the answers, should come as no surprise. This argument is similar to his argument for freedom of expression discussed in the previous chapter.

It is clear that Mill has set up two opposing parties in his Harm Principle, and these are the Individual and Society.²⁰ “To individuality should belong the part of life in

¹⁶ Ibid., 75.

¹⁷ Ibid., 82.

¹⁸ Ibid., 82.

¹⁹ Ibid., 82.

²⁰ Ibid., 75.

which it is chiefly the individual that is interested; to society, the part which chiefly interests society.”²¹ These are the groups that have been discussed earlier in this chapter. Mill sets up ways that society can react against the individual when he steps beyond his rights. The first is through social pressures and the second is through legal pressures, and Mill argues that both of these pressures can be used in different situations. The remainder of this chapter will focus on these two pressures, and how and when Mill argues they can be used.

Mill argues that the individual must always be able to choose for himself. “Considerations to aid his judgment, exhortations to strengthen his will, may be offered to him, even obtruded on him, by others, but he himself is the final judge.”²² This is clearly a strong defense of individuality: that even after others have their chance to try and correct the man he is still free to choose his own path. Mill also offers a clear justification for this position. “All errors which he is likely to commit against advice and warning, are far outweighed by the evil of allowing others to constrain him to what they deem is good.”²³ Mill clearly values the individual’s choice, even if that choice is damaging to him. Mill will not allow others to make these important choices in an individual’s life; however, Mill gives others multiple ways to influence an individual’s decisions.

²¹ Ibid., 75.

²² Ibid., 77.

²³ Ibid., 77.

Mill argues that it should be acceptable to criticize another's life choices. "It would be well . . . if one person could honestly point out to another that he thinks him in fault, without being considered unmannerly or presuming."²⁴ Mill sees a benefit to all members of society if they are allowed to freely talk about their ideas. The above passage reveals however that in Mill's day the manners of society hindered the discussion of ideas. This is a clear example of how aspects of society can negatively impact the growth of the individuals within it.

Mill offers a justification for why men should be able critique one another: because it is an expression of their individuality. "We have a right, also, in various ways, to act upon our unfavorable opinion of any one, not to the oppression of his individuality, but in the exercise of our own."²⁵ Mill's argument here avoids the critics who would argue that no one has the right to critique another's life choices. Mill clearly argues that it is an expression of individuality to criticize another's ideas, and it would appear that all of Mill's social pressures stem from this right of individuality that everyone has.²⁶ Social pressure is normally seen as negative; in fact, the majority of this thesis will focus on the negative effects of social pressure. However, Mill does recognize that there some moments where social pressure can be used positively, to the benefit of an individual. In each of the next three paragraphs that discuss how Mill allows expression of individuality, he shows when people have gone too far in using social pressure. Up to the point of that condition Mill sees that societal pressure as positive. But once society

²⁴ Ibid., 77.

²⁵ Ibid., 77-78.

²⁶ Ibid., 77-78.

oversteps its boundaries, such pressure becomes a negative. This leads to another question: When does Mill encourage free expression?

Mill argues that there are multiple ways for one individual justly to exercise his individuality against the individuality of another. The first is that “we have the right to avoid [a person] (though not to parade the avoidance).”²⁷ The most interesting aspect of this passage is what Mill put in the parentheses. Mill argues that it is legitimate to avoid an individual, but it is not legitimate to make the fact you are avoiding him obvious. I believe that Mill ties this distinction back to his idea that all individuals are free to decide for themselves, and that Mill believes “parading the avoidance” would unjustly impact others opinions of that person. Whatever the reason Mill makes this distinction, it is *very significant*, especially to the case studies presented in the following chapters.

The second way Mill argues that people may justly use their own individuality against the individuality of someone else is to tell others about the wrong choices of an individual, but under certain conditions.²⁸ “We have the right, and it may be our duty, to caution others against him, if we think his example or conversation [is] likely to have a pernicious effect on those with whom he associates.”²⁹ Again the most interesting aspect of this is not the main point, but Mill’s condition. The passage reveals that Mill believes there is only one instance when it acceptable for one man to caution against another. This one instance is when it is believed the speaker’s actions will have a negative effect on his

²⁷ Ibid., 78.

²⁸ Ibid., 78.

²⁹ Ibid., 78.

friends.³⁰ Mill's support of the individual can be seen here once again, because the speaker can only be cautioned against for the good of others. Mill continues to protect the right of the speaker to believe whatever he wants.

The final way that men may justly use their individuality against the individuality of another is by keeping him from certain jobs.³¹ "We may give a preference over him in optional good offices, except in those which tend to his improvement."³² Once again Mill's condition is most significant. Mill by saying "except those [positions] which tend to his improvement" reveals his belief that society should be seeking to correct and better the individuals within it. This is an instance where social pressures are being used for the good of the individual. Mill by allowing society to put a man in to office "which tends to his improvement" reveals that the goal of the social pressure in this instance is being used to help the individual. This appears to be Mill's goal for social pressure.

Mill argues that the three ways society can impact the individual should come as the natural result of his actions.³³

He suffers [the penalties discussed above] only in so far as they are the natural, and, as it were, the spontaneous consequences of the faults themselves, not because they were purposely inflicted on him for the sake of punishment.³⁴

It is interesting that Mill argues, in the above passage that society will naturally tend to punish men in the ways discussed above. This idea, that the punishments are the natural

³⁰ Ibid., 78.

³¹ Ibid., 78.

³² Ibid., 78.

³³ Ibid., 78.

³⁴ Ibid., 78.

results of a man's actions, Mill uses to support the idea that the individual does not have the right to object to any of these punishments.³⁵

A person . . . who cannot live within moderate means [and] who cannot constrain himself from hurtful indulgences . . . must expect to be lowered in the opinions of others, and have a less favorable sentiment; but of this he has no right to complain.³⁶

In simple terms, Mill is arguing that when a man clearly cannot show self-control in his actions, he should expect that his society will look down on him. This is the extent of what society can justly do to punish a man, when his actions harm only himself.

However, the other tool that may be used to silence an individual is law. The law is different from society in what Mill believes it can justly be used for. "The acts of an individual may be hurtful to others or wanting in due consideration for their welfare, without going the length of violating their constituted rights. The offender may then be justly punished by opinion, though not by law."³⁷ This passage clearly reveals the divide between when only society is justified in punishing an individual and when the law is also allowed to be used. Mill set that line at the "violation of a constituted right."³⁸ It is now important to look at the ways Mill applies the law to this line he has set up.

Mill argues that government can use the law to prevent bad things from happening, but only to an extent.³⁹ Mill gives the examples of a government warning

³⁵ Ibid., 78.

³⁶ Ibid., 78

³⁷ Ibid., 75.

³⁸ Ibid., 75.

³⁹ Ibid., 96.

people not to cross a bridge and placing a label on poisonous items as ways of using the law to prevent injury to citizens.⁴⁰ Mill provides a different justification for both examples. In the bridge example, Mill points out that “liberty consists in doing what one desires, and [the man] does not desire to fall into the river.”⁴¹ This is a clever distinction, because in this example a man’s liberty would seem to be infringed upon because he is not allowed to cross the bridge. In fact, however, the law *protects* his liberty. Mill uses a different justification in the poison example. In the case of poison “the buyer cannot wish not to know that the thing he possesses has poisonous qualities.”⁴² The strength of this argument is found by asking a rhetorical question: Wouldn’t you want to know if you just bought poison?

Mill is not ignorant of the dangers of law attempting to prevent injury. “The preventive function of government, however is far more liable to be abused, to the prejudice of liberty, than the punitive function.”⁴³ Clearly, Mill understands this issue that in allowing the government to prevent some things there is danger that it will grow to control things it should not. He does however have strong words for the state that attempts to prevent an idea from being heard. “All attempts by the state to bias the conclusions of its citizens on disputed subjects, are evil.”⁴⁴ This passage reveals Mill’s understanding of the legitimate reasons for legal punishment.

⁴⁰ Ibid., 96-97.

⁴¹ Ibid., 96.

⁴² Ibid., 97.

⁴³ Ibid., 96.

⁴⁴ Ibid., 107.

Mill also argues that the legal punishments are designed protect the state. The individual “may be subjected to . . . legal punishment, if society is of opinion that [legal punishment] is requisite for [the state’s] protection.”⁴⁵ It seems that Mill is using legal punishments as a last resort in silencing ideas. I have already considered how social punishments attempt to convince the individual to change, because it would be more challenging to live in society if he did not. It would appear that these legal punishments only become relevant if the social punishments are not effective enough, and the speaker is still a threat to society. The legal punishments also require a greater crime, which is the person infringing on a “constituted right.” They thus at least appear to be more severe. Mill does leave a question unanswered, however, which will be investigated more fully in subsequent chapters. Which of the forms of punishment, legal or the social, are more effective at silencing a speaker?

In conclusion, Mill argues that both society and the law can be used to punish an individual, but under different circumstances. The punishment society inflicts is the natural result of a man’s actions, and this is used when the man’s actions affect only himself. Mill also argues that the goal of these punishments is to change the individual for the better. On the other hand, law may be used against him when a man’s actions violate a “constituted right” of another. Now it is important to see look at how these ideas, both the legal and the social, have been adopted in the United States.

⁴⁵ Ibid., 94.

Chapter Four

The Harm Principle Applies Legally and Socially

The United States has adopted some of Mill's protections for free speech, thanks in large part to Supreme Court Justices Holmes and Brandeis and their opinions in cases that took place during the 1920s. The legal system has set clear boundaries for when speech may be silenced by law, and has largely obeyed these limits. On the other hand, American society as a whole has struggled fully to adopt Mill's Harm Principle. The modern example of the controversy surrounding President Obama's Second Inauguration, as I will explain below, highlights American society's ultimate failure to adopt Mill's ideas and to protect the free expression of all citizens.

From its origins the United States enshrined freedom of speech in its legal code. The Bill of Rights, especially through the First Amendment, lays out the legal position of the United States government and is the basis of the freedom of speech. The passage reads as follows:

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.¹

This is a very expansive right to free speech. In using the words "make no law," the government has effectively declared that nothing will justify its intrusion into the free of

¹ *U.S. Constitution* Amend. I.

expression of its people. This doctrine is radical and will need to be defended and nuanced over time. This legal definition of free speech comes under assault towards the end of World War I, as the dangers of this freedom become more evident.

In the American legal context, doctrines about free speech have evolved over time with respect to what constitutes “harm.” The challenge of this legal evolution is that it attempts to strike a balance between protecting individuality and protecting society as a whole. The first high-profile Supreme Court case addressing the question of freedom of Speech was *Schenck v. United States* in 1919.

The issue in *Schenck v. United States* arises out of an incident with the Socialist Party, as many of the free speech cases did at the time. Schenck and other defendants were arrested for creating and distributing handouts that encouraged men to avoid the draft of World War I.² The government used the Espionage Act to justify the men’s arrests.³ The Supreme Court unanimously decided that the government was justified in arresting the individuals who created and passed out the leaflets.⁴ The Supreme Court’s rationale in this decision remains to this day the most important definition of when speech may be limited by law in the United States.

The Supreme Court’s rationale is known as the “clear and present danger” test. Justice Holmes wrote the decision in *Schenck v. United States* and argued as follows: “the question in every case is whether the words used are used in such circumstances and are of such a nature as to create a clear and present danger that they will bring about

² *Schenck v. United States*. 1919.

³ *Ibid.*,

⁴ *Ibid.*,

the substantive evils that Congress has a right to prevent.”⁵ Holmes provides a famous example of clear and present danger, arguing that no one would say it is acceptable for a man to yell fire in a theater if there is no fire.⁶ The man’s speech is obviously limited, but it is limited only to protect the safety of the other people in the theater. This example is Mill’s Harm Principle in action, because it allows full scope of expression *up to the point of* endangering another person.

The clear and present danger test is only the first evolution in the United States legal system, but Justice Holmes has already brought Mill’s Harm Principle to the forefront of the American system. He has done so by protecting the individual expression of ideas, even those that pose a potential danger, so long as they do not pose an *imminent* threat. This freedom stems from Mill’s idea that “the individual is not accountable to society for his actions, insofar as these concern the interests of no person but themselves.”⁷ As discussed in the previous chapter, Mill simply argues that people should be free to speak their minds until their speech hinders the rights of another human being. This, however, is only the first case where the Justices bring Mill’s ideas into the American legal system on the question of free speech. The second case comes only a few months after *Schenck v. United States*.

The central issue of *Abrams v. United States* (1919) was whether the government could punish men for handing out leaflets that supported socialist ideas and

⁵ Ibid.,

⁶ Ibid.,

⁷ Mill. *On Liberty*. 94.

encouraged a strike among workers during a time of war.⁸ The Supreme Court ruled 7-2 against the men in this case. However, the trend towards freedom of speech came to the forefront in Justice Holmes's dissenting opinion. Justice Holmes sought to explain the limits of freedom of speech in the United States. It is important to notice that this is similar case to *Schenck v. United States*, but Justice Holmes has now switched sides. He is now arguing for allowing these men to speak, using the clear and present danger test he created in *Schenck v. United States*. "No argument seems to me necessary to show that these pronouncements in no way attack the form of government of the United States."⁹ It appears, from the quote, that the reason for this switch by Justice Holmes lies in the difference content of the leaflets, and how they were presented.

Gitlow v. New York (1925) was another case just following World War I that challenged the notion of freedom of speech in America. Benjamin Gitlow was indicted in the Supreme Court of New York for the crime of criminal anarchy. As in the *Abrams* case, Gitlow was handing out left-wing propaganda and was encouraging strikes among workers. The Supreme Court, also as in *Abrams*, upheld Gitlow's conviction by a 7-2 majority, with Justice Holmes and Brandeis the only two dissenters, once again. The difference between *Gitlow v. New York* and *Abrams v. United States* was that Gitlow was convicted of "advocating, advising or teaching the doctrine that organized government should be overthrown by force, violence or any unlawful means."¹⁰ This

⁸ *Abrams V. United States*. 1919

⁹ *Ibid.*,

¹⁰ *Gitlow v. New York*. 1925.

distinction is vital to understanding the evolution of the Harm Principle tradition in the American legal system.

The majority opinion of *Gitlow v. New York* rested its decision against Benjamin Gitlow on the basis that his publication was an “incitement to violence.” The majority Justices were careful to argue that “the statute does not penalize the utterance or publication of abstract ‘doctrine’ or academic discussion having no quality of incitement to any concrete action.”¹¹ In other words, it was not Gitlow’s ideas that got him into trouble, since the First Amendment protects publishing and speaking such ideas; rather, it was his call to action. This was what the majority opinion viewed as a threat to the security of United States, and for that reason the Court determined it was legal to silence Gitlow's speech. The dissenting opinion disagrees with this interpretation of the law and reaches a different conclusion.

The dissenting Justices Holmes and Brandeis argue, like Mill, that ideas need to be protected and discussed even if they pose a danger to society. Justice Holmes, the writer of the dissenting opinion, argues against the majority’s notion that a call to action makes the speech unconstitutional. Justices Holmes and Brandeis argue that “[e]very idea is an incitement. It offers itself for belief and if believed it is acted on unless some other belief outweighs it or some failure of energy stifles the movement at its birth.”¹² Justices Holmes and Brandeis argue that every idea has the potential to lead to violence, or change in society. This is the very *purpose* of ideas, according to Mill. Ideas need to be allowed to flourish so that they can push society into the future. In arguing for

¹¹ Ibid.,

¹² Ibid.,

allowing Gitlow's speech, Justices Brandeis and Holmes define free speech as the belief that "[ideas] should be given their chance and have their way."¹³ This belief comes directly from the pages of Mill and is a further evolution of the Harm Principle in the American legal system.

The extent to which Justice Holmes and Brandeis are applying Mill's principles in their dissenting opinions is noteworthy. Their refusal to convict men for their ideas is an extension of ideas championed by Mill. Mill argues that "[t]o refuse a hearing to an opinion, because they are sure that it is false, is to assume that *their* certainty is the same as *absolute* certainty."¹⁴ Justices Holmes and Brandeis refuse to allow their opinions of the ideas, even socialist or anarchist ideas, to color their judgments of the right that Mr. Abrams and Mr. Gitlow have to voice their beliefs.

This position is further supported in Mill's work as well, since Mill argues that conflicting ideas are necessary to support one's own opinions. "The steady habit of correcting and completing his own opinion by collating it with those of others, so far from causing doubt and hesitation in carry it into practice, is the only stable foundation for a just reliance on [human intellect]."¹⁵ Justices Holmes and Brandeis are moving the American legal tradition in the direction of greater protection of free expression, and especially of minority opinions. They do so because they believe, with Mill, that conflicting ideas are required so that the truth may be correctly determined.

¹³ Ibid.,

¹⁴ Mill. *On Liberty*. 21.

¹⁵ Ibid., 24.

There is however, a limit to how far free expression is allowed to continue before it must be checked. Another Supreme Court example reveals that even Justices Brandeis and Holmes are willing to check freedom of expression. This case was *Whitney v. California* in 1927. In this case a woman was tried under the Criminal Syndicalism Act, which made it illegal to: “to knowingly be or become a member of or assist in organizing an association to advocate, teach or aide and abet the commission of crimes . . . as a means of accomplishing industrial or political changes.”¹⁶ What distinguishes this case from the *Schenck*, *Gitlow*, and *Abrams* is that this case involves the joining of a group. The reality that Whitney was in a group of people that was advocating violence instantly made her a more credible and dangerous threat than just an individual. This distinction of advocating as a group versus just as an individual is what the justices attach themselves to in their opinions.

Justice Brandeis explained, in his concurring opinion, when and why law may limit the freedom of expression:

But, although the rights of free speech and assembly are fundamental, they are not in their nature absolute. Their exercise is subject to restriction, if the particular restriction proposed is required in order to protect the State from destruction or from serious injury, political, economic or moral.¹⁷

Brandeis draws the line allowing speech to be limited by the government when the restriction is “required in order to protect the state from destruction.”¹⁸ This line once again comes directly out of Mill.

¹⁶ *Whitney v. California* 274 U.S. 357 (1927).

¹⁷ *Ibid.*,

¹⁸ *Ibid.*,

Justice Brandeis brings Mill's Harm Principle into the American legal system, virtually word for word, in *Whitney v. California*. Mill argues that society has the right to protect itself from harm that is caused by people pursuing their own interests. "[F]or such actions as are prejudicial to the interests of others, the individual is accountable, and may be subjected either to social or legal punishment, if society is of opinion that the one or the other is requisite for its protection."¹⁹ Justice Brandeis was clearly influenced by Mill, as he writes into the law of the United States that speech could be silenced in order to protect the state from injury. This again reveals that both Mill's Harm Principle and the American legal system are permissive with respect to the individual's right of free of expression up until a similar point of danger.

The American legal system has continued to evolve even after *Whitney*. Two cases that have occurred within the past twenty-five years are cases, which clearly continue to defend the freedom of the individual. The first of these two cases is *Texas v. Johnson* from 1989. The Supreme Court's opinion details the background of this case. Johnson was a member of a political protest outside of Republican National Convention in 1984, when the protesters burned an American flag.²⁰ "Johnson alone was charged with a crime. The only criminal offense with which he was charged was the desecration of a venerated object . . . he was sentenced to one year in prison and a 2,000 dollar fine."²¹ Naturally Johnson objected, using the First Amendment as his justification. The case reached the Supreme Court in 1989.

¹⁹ Mill. *On Liberty*. 94.

²⁰ *Texas V. Johnson*. 1989.

²¹ *Ibid*,.

Texas v. Johnson was a split decision with the majority touching on two main points. The first major question was whether Johnson's flag-burning counted as an act of expression that is protected by the First Amendment. To answer the question Justice Brennan, the writer of the majority opinion, cites a precedent from *Spence v. Washington* and says "Johnson's flag burning was conduct 'sufficiently imbued with elements of communication' to implicate the First Amendment."²² This first part of the decision is clearly a victory for personal liberty.

The majority's second major point the majority was the state's reason for passing a law that would limit flag burning as a type of expression. The Supreme Court opinion cites two reasons that Texas gives for outlawing flag-burning. "Texas claims that its interest in preventing breaches of the peace justifies Johnson's conviction for flag desecration."²³ Justice Brennan rejects this claim, arguing that "we have not permitted the government to assume that every expression of a provocative idea will incite a riot."²⁴ In other words, Texas has stretched the justification of keeping the peace too far, and individual free expression is more important than preventing the few incidents that may be caused by flag burning. The second justification that Texas gives is its interest in "preserving the flag a symbol of nationhood and national unity."²⁵ Brennan and the majority again reject this a reasonable justification because "[the law

²² Ibid.,

²³ Ibid.,

²⁴ Ibid.,

²⁵ Ibid.,

is] not aimed at protecting the physical integrity of the flag in all circumstances, but is designed instead to protect it only against impairments that would cause serious offense to others.”²⁶

It is important to remember that *Texas v. Johnson* was a 5-4 opinion. Chief Justice Rehnquist wrote the dissenting opinion in this case, which was joined by two other dissenting justices. One main argument of the dissent was that the American flag is special, and needs to be given extra protection with the law.

For nearly two hundred years, the American flag has occupied a unique position as the symbol of our Nation, a uniqueness that justifies a governmental prohibition against flag burning in the way respondent Johnson did here.²⁷

Chief Justice Rehnquist cites numerous examples of times when the American flag has been a powerful symbol to the nation. Rehnquist does concede that “Johnson was free to make an verbal denunciation of the flag that he wished; indeed he was free to burn the flag in private.”²⁸ It is clear from this passage that Rehnquist and the other dissenters are supportive of the majority’s more expansive expanded First Amendment freedom. It is also clear that the dissenters are aware and concerned about the emotions that will arise if a flag is burned in public.

Emotion comes into another recent free expression case, *Snyder v. Phelps*. The background of *Snyder v. Phelps* begins with the infamous Westboro Baptist Church. According to the Supreme Court case report, Westboro Baptist Church was protesting the funeral of a Marine who was killed in action during the War on Terror in Iraq. The

²⁶ Ibid.,

²⁷ Ibid.,

²⁸ Ibid.,

case cites Westboro as having signs that were clearly offensive and designed to provoke reactions. Specific examples include: “God Hates the USA, Thank God for 9/11, Thank God for Dead Soldiers, God Hates Fags [and numerous others].”²⁹ The father of the fallen Marine sued the Phelps family and Westboro Baptist Church in civil court. The case describes the five aspects of civil law that the soldier’s father levied against Phelps. He sued them for “defamation, publicity give to private life, intentional infliction of emotional distress, intrusion upon seclusion, and civil conspiracy.”³⁰ Two of the charges against the Phelps family were quickly dropped in the lower courts. The lower courts threw out defamation and publicity given to private life, observing that Snyder did not have enough evidence to support those claims.³¹ However, the three remaining claims stood and the Phelps family was ordered to pay Snyder millions in damages.³² At this point the Phelps family challenged the decision and the case made its way to the Supreme Court.

The Supreme Court’s decision in this case was not as divided as *Texas v. Johnson*. The 8-1 decision came out in support of the Phelps family. Chief Justice Roberts in his majority opinion cites three reasons why the court decided the way it did. First, the court decided that Westboro was not specifically attacking Mr. Snyder. Justice Roberts cited the evidence that signs all had slogans that “spoke to broader public

²⁹ *Snyder V. Phelps*. 2011.

³⁰ *Ibid.*,

³¹ *Ibid.*,

³² *Ibid.*,

issues”.³³ Second, Justice Roberts cited that the Westboro was on public land at the time of the protest.³⁴ Finally, the court decided that Snyder was not a member of a captive audience at this son’s funeral.³⁵ The court argued that “Here, Westboro stayed well away from the memorial service. Snyder could see no more than the tops of the signs when driving to the funeral.”³⁶ For these reasons, the court decided that the funeral congregation was not a captive audience.

One Justice, however, did not agree with the majority. Justice Alito wrote the only dissenting opinion in this case. He found three problems in the majority’s opinion. First, he challenged Chief Justice Roberts’ opinion that Westboro “spoke to broader public issues.”³⁷ Justice Alito argued that the “respondents attack on Matthew was of central importance.”³⁸ Justice Alito also did not accept the public land argument that Roberts put forward. Alito claimed that “The Court finds it significant that the protest occurred on a public street, but this fact alone should not be enough to preclude liability.”³⁹ In short, Alito was not willing to give Westboro the expansive free expression that the majority was allowing.

³³ Ibid.,

³⁴ Ibid.,

³⁵ Ibid.,

³⁶ Ibid.,

³⁷ Ibid.,

³⁸ Ibid.,

³⁹ Ibid.,

The case of *Snyder v. Phelps* is a perfect example of the law defending the right of a minority to speak. Westboro Baptist Church is one of the most hated groups in America because of their beliefs, and the way in which they present those beliefs. Chief Justice Roberts understands this, but nevertheless writes as follows: “As a nation we have chosen a different course—to protect even hurtful speech on public issues to ensure that we do not stifle debate.”⁴⁰ Justice Roberts clearly sees how unpopular Westboro is and wishes to remind Americans why we allow *even* people like Westboro to speak. This is a powerful example of how American law allows a great deal of individual free expression.

The final more recent case involving free expression is *Boy Scouts of America v. Dale*. This case is distinguishable from the cases of *Texas v. Johnson* and *Snyder v. Phelps* because it involves an individual’s involvement in a group. This is simply a third type of expression. *Boy Scouts v. Dale* was decided in 2000, but has background reaching as far back as 1978.⁴¹ The Supreme Court opinion cites that James Dale became a Boy Scout in 1978. He worked his way up through the organization, and eventually received the title of Eagle Scout. The court records show that Dale became an Eagle Scout in 1988, and then next year applied to be an adult leader in the Boy Scouts. “The Boy Scouts approved his application for the assistant scout master of Troop 73.”⁴² At this point everyone was happy and Dale is volunteering with the Boy Scouts, but all of that would soon change.

⁴⁰ Ibid.,

⁴¹ *Boy Scouts of America V. Dale*. 2000.

⁴² Ibid.,

College changed everything for Dale. The Supreme Court opinion reveals that it was at college where Dale declared that he was a homosexual. As a result of this “[Dale] quickly became involved with, and eventually became the co-president of, the Rutgers University Lesbian/Gay Alliance.”⁴³ He was interviewed as part of this position by a newspaper, and once that interview was published he was removed from membership in the Boy Scouts.⁴⁴ The reason cited by the Boy Scouts for Dale’s removal was that they “specifically forbid membership to homosexuals.”⁴⁵ Dale filed a lawsuit against the Boy Scouts of America and the case made it all the way to the Supreme Court on appeal.

This case was another example of a 5-4 split decision, with court deciding against Dale. Justice Rehnquist begins his majority opinion by citing the court precedent from *New York State Club Assn. v. City of New York* that the First Amendment protects what is called freedom of expressive association.⁴⁶ Justice Rehnquist then argues that the question logically becomes whether the inclusion of Dale hinders this freedom of expressive association. Justice Rehnquist discusses at length what the Boy Scouts’ view of homosexuality actually is, but he eventually comes to the conclusion that Dale’s presence would be a burden to the Boy Scouts’ freedom of expressive association. Rehnquist argues that “Dale’s presence in the Boy Scouts would, at the very least, force the organization to send a message, both to the youth

⁴³ Ibid.,

⁴⁴ Ibid.,

⁴⁵ Ibid.,

⁴⁶ Ibid.,

members and the world, that the Boy Scouts accepts homosexual conduct as a legitimate form of behavior.”⁴⁷ Rehnquist also strikes down the idea that the New Jersey public accommodation law could be used to defend Dale. He argues “the . . . interests embodied in New Jersey’s public accommodations law do not justify such a severe intrusion on the Boy Scouts’ right to freedom of expressive association.”⁴⁸

Justice Stevens writes a fiery and lengthy dissent to this case. His first claim in opposition to the majority is that the New Jersey public accommodations law should be applied to the Boy Scouts. Justice Steven argues that the New Jersey law “does not impose any serious burdens on the Boy Scouts of America.”⁴⁹ Stevens then goes after a point that the majority quickly passed over. Justice Steven points out the language of “morally straight and clean” never mentions homosexuality. He even provides the definition of these words from the Scout handbook, and even then there is no mention of homosexuality. Given this evidence, Justice Stevens concludes that “it is . . . difficult to determine any shared goals or common moral stance on homosexuality.”⁵⁰ He goes on to give example after example of why he believes the majority to be in error.

The deep and passionate division in this case among the Justices foreshadows the divide that has come to American society over the question of homosexuality. On one side there is Rehnquist and the four Justices who are willing to let the Boy Scouts legally keep a man out who holds a different belief. Rehnquist was also quick to remind

⁴⁷ Ibid.,

⁴⁸ Ibid.,

⁴⁹ Ibid.,

⁵⁰ Ibid.,

readers at the end of his opinion that personal beliefs about homosexuality should not be used as reasoning in this decision. However, it seems likely that if the Justices were required to give an honest answer, they might say that their views on homosexuality had some impact on their decision. The end result for free expression following this case is hard to grasp. On the one hand, the Boy Scouts of America have greater leeway to freely express their ideas, by being able to remove members who do not agree with their basic ideas. On the other hand, however, a form of Dale's free expression has been taken away from him. So, it appears that *Boy Scouts v. Dale* is a unique case in that it both hinders and expands freedom of expression.

To this point the only force for the limitation of speech that has been discussed is legal force. This legal force is, however, only one source of authority that can be used to hinder freedom of expression. The other force is more abstract and harder to control. It is pressure that society puts on the individuals within it to conform to certain ways of thinking or acting. This is far more powerful than many consider it to be, and in many cases rivals or surpasses legal force in creating changes in the behavior of individuals. In *On Liberty*, Mill argues for both a legal system, which protects the freedom of expression and thought of the members of a society, and a society itself, which is open to allowing new ideas to be heard. American society has struggled to protect the right of free expression for all people. The example of the Second Inauguration of President Obama highlights how even avowedly liberal politicians will not stop the strong influence that society has in silencing dissenting opinions.

The invitation of Rev. Louis Giglio to President Obama's Second Inauguration serves as a perfect case study for viewing American society's reaction to controversial

speech. Rev. Louis Giglio is the pastor at Passion City Church in Atlanta, and a leader of the Passion Conferences, which is a Christian youth conference that takes place every January in Atlanta.⁵¹ He was invited by President Obama to take part in the 2013 Inauguration by giving the benediction, largely because of Giglio's role in raising over three million dollars to fight human trafficking around the world.⁵² This would appear to be Mill's idea in action: the government reaches out to a man of faith, whose ideas on a wide range of topics differ from the President's. In fact, the Obama administration had even picked a homosexual poet, Richard Blanco, to be the poet at the event.⁵³ This placed an Evangelical Christian and a homosexual, two groups with a tenuous relationship in modern American politics, together on the same stage at the historic occasion of inaugurating a President. This moment would have been "pure Mill," but strangely it never happened due to American society's failure to adopt Mill's Harm Principle.

Controversy struck the 2013 Presidential inauguration and revealed just how far American society truly is from fully embracing the Harm Principle. In the weeks leading up to the inauguration, an almost twenty-year-old sermon was uncovered by the liberal website Thinkprogress.org. In this sermon Giglio expressed his belief (which is

⁵¹ "The Giglio Imbroglio — The Public Inauguration of a New Moral McCarthyism." 2013. *AlbertMohler.com*. Accessed March 23. <http://www.albertmohler.com/2013/01/10/the-giglio-imbroglio-the-public-inauguration-of-a-new-moral-mccarthyism/>.

⁵² Ibid.,

⁵³ Stolberg, Sheryl Gay. 2013. "Louie Giglio, Inaugural Pastor, Criticized for Antigay Sermon." *The New York Times*, January 9, sec. U.S. / Politics. <http://www.nytimes.com/2013/01/10/us/politics/louie-giglio-inaugural-pastor-criticized-for-antigay-sermon.html>.

in fact a mainstream Evangelical Christian belief) that homosexuality is a sin.⁵⁴ This set off a media firestorm, as pundits across all the major news networks debated whether such a man could speak at the inauguration of a President. The outcry grew so intense over the statements of Rev. Louis Giglio that he eventually chose to withdraw from the inauguration, saying that:

Due to a message of mine that has surfaced from 15-20 years ago, it is likely that my participation, and the prayer I would offer, will be dwarfed by those seeking to make their agenda the focal point of the inauguration.⁵⁵

In effect, what is occurring in this scenario is that American society had kept one of its members from civic participation because of his viewpoint on the subject of homosexuality. This is undoubtedly a response to unpopular speech, which does not fall into one of three categories of just responses outlined by Mill. Ideally, this lapse by American society would be corrected by the power of the government, since the law and society work together under the Harm Principle to protect speech. This ideal response, however, never came. In fact, the government only further supported society's misstep.

The Obama administration failed to step in to correct society from seeking to silence the speech of Rev. Giglio. Instead, the administration quickly released a statement that entirely cut ties with Rev. Louis Giglio. "We were not aware of Pastor Giglio's past comments at the time of his selection and they don't reflect our desire to

⁵⁴ Tenety, Elizabeth. 2013. "Louie Giglio Backs Out of Inaugural Benediction over Comments on Homosexuality." *The Washington Post - Blogs*. <http://www.washingtonpost.com/blogs/under-god/post/louie-giglio-backs->

⁵⁵ Jennings, Natalie. 2013. "Louie Giglio Pulls Out of Inauguration over Anti-gay Comments." Accessed March 23. <http://www.washingtonpost.com/blogs/post-politics/wp/2013/01/10/louie-giglio-pulls-out-of-inaugural-over-anti-gay-comments/>.

celebrate the strength and diversity of our country at this Inaugural.”⁵⁶ The government thus did nothing but support society in silencing an idea, simply because the idea was contrary to what a sizeable portion of society now believes. It is ironic that the government cites “celebrating strength and diversity” as a reason to remove Rev. Giglio from the inauguration ceremony, when in reality his presence would have only added to the diversity of the people on the inauguration stage.

Some would argue that the case of the Presidential Inauguration was simply politics and that the problem does not truly affect all areas of society, but this assertion ignores the similar problems that exist outside the realm of politics as well. In September of 2013 the owner of Barilla pasta came under fire for statements he made, which did not support gay marriage, in a situation similar to the Chick-fil-A case.⁵⁷ He is cited as saying that “I would never do (a commercial) with a homosexual family, not for lack of respect but because we don't agree with them. Ours is a classic family where the woman plays a fundamental role.”⁵⁸ This was the statement that launched a boycott of Barilla pasta. This boycott became a trending topic on Twitter the same afternoon the interview became public, and as I write this on October 3, 2013, people are still tweeting in support of the boycott.⁵⁹

⁵⁶ Ibid.,.

⁵⁷ Davies, Lizzy. 2013. “Pasta Firm Barilla Boycotted over ‘Classic Family’ Remarks.” *The Guardian*. September 26. <http://www.theguardian.com/world/2013/sep/26/pasta-firm-barilla-boycott-gay>.

⁵⁸ Scherer, Steve. 2013. “Italian Pasta Baron’s Anti-gay Comment Prompts Boycott Call.” *Reuters*. September 26. <http://www.reuters.com/article/2013/09/26/italy-gay-pasta-idUSL5N0HM2O120130926>.

⁵⁹ Davies. “Pasta Firm Barilla Boycotted.”

It is important to notice that the Barilla owner's statements are really not particularly offensive. All he said in the interview was that he would not do a commercial featuring a homosexual family. Is this really that outrageous? In the interview he does not attack the homosexual way of life. In fact, he makes a statement of tacit (if not hearty) approval. He says "homosexuals . . . have the right to do what they want without bothering others."⁶⁰ In other words, his pasta company is not seeking to end the homosexual way of life, or to oppress gays. His statement shows that he really does not care what homosexuals do in private life; he just does not wish to use homosexuals to promote his product. So the question becomes: what is everyone so upset about? Why did people take to Twitter by the thousands to boycott this man's product? It cannot be that they want equality, because the owner of Barilla has already conceded that. In my opinion, it must be that the homosexual community wants his approval, which is not something he is required to give. If the homosexual community is seeking his approval of their way of life, this has become no longer a legal question but a moral one. The ramifications of this shift will be discussed in the final chapter.

These case studies highlight the reality that American society has failed to adopt Mill's Harm Principle as the way it judges ideas which are contrary to the accepted norm. This is a vital realization for understanding how Mill's Harm Principle is applied in the modern American context. Mill's Harm Principle is designed to be most effective when both the law and society support it. The Second Maxim of the Harm Principle reveals this truth: "For such actions as are prejudicial to the interests of others, the

⁶⁰ Ibid.,

individual is accountable, and may be subjected either to social or legal punishment, if society is of opinion that one or the other is requisite for its protection.”⁶¹ Mill makes it clear that the social and legal aspects of life are designed to work in tandem to protect the society from harm caused by the expression of individuality. The opening of this chapter showed how the legal aspect of American society has evolved over time. In this evolution a balance has been achieved where individuality is allowed to flourish, while society is protected from ideas that pose a threat to the immediate safety of others. On the other hand American society has not seen the same growth as the legal system, and as a result we are failing to fully support free expression.

It is definitely a positive step that individuals are protected by law in speaking the ideas that they hold dear, and in trying to convince others as well. Yet “merely” legal protection is a hollow victory, and Mill recognizes this as well, which is why he put the limits on what society can do to individuals it disagrees with.⁶² In truth it appears that society can be a more powerful deterrent from saying what one actually believes than even the law, since for many the fear of losing power, prestige, or respect far outweighs the fear of any punishment the law can bring upon them. This concept of the immense power of society over individuals is the focus of the next chapter.

⁶¹ Mill. *On Liberty*. 94.

⁶² Ibid., 78.

Chapter Five

Society is the Greatest Punisher

The preceding chapters have made clear that Mill allows both legal and social punishments for harmful speech. It is also evident that the United States has partially adopted Mill's ideas on free expression. This points to one important question: which of the two types of punishment is more effective at persuading people to change their actions? In my opinion, the social punishments are a far more powerful tool. Society can punish an individual in multiple ways. American society has ostracized people and attacked their livelihoods, both of which are very effective modes of punishment. These attacks by society have also been levied against groups and businesses with the same powerful effects. A few select case studies will reveal how American society has used these two methods.

It is important first to define what it means to ostracize someone. Ostracism can either be explicit or, on the other hand, so subtle that the ostracizer may not even realize what he is doing. The explicit form of ostracizing takes place when a group refuses to associate with an individual, and is in addition quite outspoken about this refusal. It would be like a sorority refusing to accept a woman into their ranks, and rather than writing her a letter to inform her of their decision, they write her rejection in chalk on public sidewalk for all to see. The analogy clearly illustrates what blatant ostracizing is, and also how it can be effective, since it carries with it explicit social consequences for the person who is ostracized. As a result of this, we often feel bad for people who have

been ostracized in this way. We can avoid these bad feelings in the second mode of ostracizing, which is less explicit.

The second form of ostracizing is what I will call subtle ostracizing, and everyone tends to do it. Subtle ostracism sneaks up on us, and we must look carefully if we are to see it clearly. An example may clarify what I am describing. The former pastor of the church I attend in Waco, Texas, made a habit of wearing Hawaiian shirts when he preached. I never understood why he wore these to church, and not a traditional shirt and tie, but one Sunday he explained himself. He said that he wore Hawaiian shirts because our church had people of many economic backgrounds, many of whom could not afford nice, traditional Sunday clothes. He felt that some would perceive his wearing a suit and tie as a requirement for themselves as well, and that it might keep them from joining the community because they could not afford those clothes. In his view, the Hawaiian shirts were inclusive and welcoming to all who might attend his church.

My pastor noticed something that many do not. He saw that in American culture there are numerous subtle indicators that certain individuals may not be welcome. In a central Texas church it could be the expectation of a certain type of dress code that would prevent the poor from attending. In a group of friends it might be the expectation that everyone votes Republican. It could even be the graffiti on a street corner that says to go no farther. There are thousands of ways that this kind of ostracism happens every day, and prevents people from coming together. The great strength of this subtle ostracism is that most people do not even notice that they are doing it.

Ostracizing someone is an extremely effective way to change that person's opinion. Critics would argue that surely prison would be a greater deterrent to free expression than loneliness caused by being ostracized. I would argue however that the choice between prison and loneliness is not as easy as the critics think it is. Organizations are noticing the effect ostracism has on an individual and are trying to create places free from stigma to combat the negative effects. A project called *It Gets Better*, which encourages homosexual teenagers that life gets better after bullying, hosts an entire website with videos of people encouraging homosexual youths to be themselves.¹ This organization is clearly attempting to create a hospitable environment for gays, by showing them, through personal videos, that there are large segments of American society that approve of homosexuality. Surely homosexual individuals know that they will not go to jail if they speak about their sexual orientation, yet they often remain silent. It is the fear of others alone that keeps them silent. It is clear that *It Gets Better* is using approving videos to combat the negative effects of ostracism.

A college freshman also serves as a great example of how the fear of not being liked is just as strong a motivator as fear of legal punishment. It is no secret that a large amount of drinking occurs on college campuses all over the United States. What many often forget, however, is that if a student graduates high school at eighteen and completes college in four years, he will only be legally allowed to drink for twenty-five percent of his college career. So if law really were a powerful deterrent, then every college student would avoid drinking until (roughly) junior year. They would recognize the serious legal consequences if they disobeyed the law. Yet young people continue to

¹ "It Gets Better Project." itgetsbetter.org.

drink before they are of legal age. According to the *National Institute on Alcoholism and Alcohol Abuse (NIAA)*, (which, by the way, hosts an entire website devoted to preventing excessive drinking during college) “3,360,000 students between the ages of 18 and 24 drive under the influence of alcohol.”² Many college students drink because their friends do, and there is minimal fear of the legal consequences of their actions. Some have argued that underage drinkers do not fear legal consequences because police do not actively ticket every underage drinker, and if they did then the law would have a greater impact on the student’s actions. While this may be true, I argue that underage drinkers know that they are breaking the law, which means by drinking anyway they have accepted the possibility of suffering legal punishment. In short, underage drinkers know they are taking a risk, but they would rather risk the punishment of law than risk losing their friends.

The subtitle of the NIAA website reveals that even the government, the very entity which enforces law, sees the power of society over the individual. The subtitle of this website is “changing the culture.”³ The government has chosen to slightly deemphasize its strategy of enforcing the law; instead it is trying to change the social environment by disseminating information about the consequences of drinking. Campus police could easily spend Friday and Saturday night going from frat house to frat house across America ticketing underage drinkers and fining those who are giving them the alcohol, yet this is not their strategy. They choose instead to seek to “change the

² “A Snapshot of Annual High-Risk College Drinking Consequences.” *College Drinking- Changing the Culture*.
<http://www.collegedrinkingprevention.gov/statsummaries/snapshot.aspx>.

³ Ibid.,.

culture” of parties and other events, which encourages students to drink. The government has chosen this strategy because they clearly feel that the pressure of society on college students is stronger than any pressure law could place on them.

There are plenty more examples of groups using this strategy of trying to change culture to get people to stop thinking or behaving a certain way. The fact that so many groups are using this approach indicates that all of us intrinsically know that it is the most effective way to change a person’s behavior. Parents speak to their children about the dangers of peer pressure not because they want to bore their children with speeches, but because they know just how powerful an influence peers have on their child. The reality is clear. By embracing or ostracizing individuals, society has a powerful impact on their actions.

The reason that ostracism is such an effective way to get an individual to change his behavior is because we fear being alone or disliked. The problem of hazing reveals this reality. Baylor University, in its hazing policy, lays out that anything involving physical or mental stress as a requirement to join the group is hazing.⁴ The fact that this policy exists reveals that students must, at least some of the time, be willing to subject themselves to these different types of harm in hopes of joining groups. The willingness to endure physical or emotional harm to be accepted into a group reveals just how strong a motivator fear of being alone truly is.

Mill noticed this effectiveness, and does allow society to punish individuals to an extent. Mill argues that “We are not bound, for example, to seek [an individual’s]

⁴ “Statement on Hazing.” *Baylor University*.
http://www.baylor.edu/student_policies/index.php?id=32286.

society; we have a right to avoid it (though not parade our avoidance], for we have a right to choose the society most acceptable to us.”⁵ Notice that Mill allows the individual to avoid people, which is essentially ostracism. It also seems evident that he understands how powerful this avoidance is, since he limits it by arguing that the individual cannot “parade [his] avoidance.” It seems logical that the only reason Mill would outlaw this because he understands that the additional punishment is too great. Mill’s language in the last sentence of the above passage implies that at least the subtle ostracism, discussed earlier in the chapter, is allowable. This is true because if a man is “free to choose the society most acceptable to [him]” then he will exclude another aspect of society. It is simply the natural result of choosing a society. It does seem clear from Mill’s passage however that he would not allow the boycott, discussed in detail below, since they would qualify as “parading the avoidance.”

A boycott, which is a form of ostracism, can also be used to attack an individual. Boycotts however are particularly effective at getting companies to change their mind, since one of the few ways to get a company to change its mind is by hitting its bottom line. There is an emerging trend for groups to boycott companies, when members of that company speak on controversial social issues. The cases of Chick-fil-A CEO Dan Cathy’s comments on homosexuality and the President of Barilla’s comments on homosexuality serve as excellent examples of the effectiveness of the boycott as a strategy to get a company to yield.

This trend of boycotting companies that speak about social issues has a disturbing aspect. It appears that only groups which speak in support of Evangelical

⁵ Mill. *On Liberty*. 78.

Christian social positions, which include the belief that abortion and homosexuality are sinful, suffer the wrath of boycotts. Both Chick-fil-A and Barilla pasta spoke out against homosexuality. Chick-fil-A spoke out because CEO Dan Cathy believed homosexuality is morally wrong.⁶ Guido Barilla spoke out against homosexuality, and never actually said it was morally wrong, but simply decided that he did not want a homosexual family portrayed in his companies advertising.⁷ The boycotts of these two companies led to the men at the center to change their actions. According to ABC News, Chick-fil-A was “re-evaluating the multimillion dollar donations it makes to anti-gay marriage activists.”⁸ The boycotts of these two groups were having their intended effects. In my opinion, the success of these boycotts stems from the large amount of media coverage they had and the number of people who were involved.

Critics would point out that there have been a number of cases where conservative groups have boycotted companies for their support of gay rights or some other issue they did not agree with. This is true. In fact, the *Huffington Post* counts twenty-five times over the last ten years that conservative groups have boycotted a company.⁹ This seems like a contradiction, given the earlier point that it is really only

⁶ Blume. ““Guilty as Charged,’ Cathy Says.”

⁷ Scherer. “Pasta Baron’s Anti-gay Comment Prompts Boycott.” *Reuters*.

⁸ Bingham, Amy. “Chick-fil-A Re-Evaluates Funding for Anti-Gay Marriage Groups.” *ABC News*. <http://abcnews.go.com/blogs/politics/2012/09/Chick-fil-A-re-evaluates-funding-for-anti-gay-marriage-groups/>.

⁹ Burra, Kevin, and Curtis Wong. “Oreo Cookies’ Gay Pride Backlash 25 Companies and Products Boycotted for Supporting LGBT Rights.” *Huffington Post*. http://www.huffingtonpost.com/2012/06/28/oreo-backlash-companies-anti-gay-boycott_n_1634767.html.

conservative groups who suffer from boycotts. Upon closer examination, however, there is no real contradiction. The vast majority of the boycotts referenced in the *Huffington Post* article were led by the American Family Association (AFA).¹⁰ What makes these boycotts different and less effective from the ones of Chick-fil-A and Barilla is the lack of grassroots support and the real lack of any public awareness outside of the AFA. A group like the AFA simply declaring a boycott, and amassing signatures, does not necessarily mean that a boycott of any scale is occurring.

The boycott of Chick-fil-A, by contrast, was a social firestorm. It is only at this point that a boycott is truly effective, and deserving of the name. Because of the immense size of many modern corporations, it takes an incredibly large boycott to impact the balance sheet and persuade a company to reverse course. The AFA-led “boycotts” cited in the *Huffington Post* article simply did not have the recognition nationwide to influence the companies they were boycotting. A perfect example of this is a September 5, 2013 press release from the AFA, which excitedly informed its members that the boycott of Home Depot was successful and had been officially called off.¹¹ Did this boycott have any major effect on Home Depot? No. In fact, during the over two year boycott (during which the AFA claims almost 750,000 people boycotted

¹⁰ Ibid.,

¹¹ “Home Depot Practice Reflect Change; American Family Association Suspends Boycott.” *American Family Association*. <http://action.afa.net/item.aspx?id=2147496231>.

Home Depot) the stock price of the company doubled, and there is little evidence, except that cited by the AFA, that Home Depot changed its policies.¹²

For a boycott to truly be considered an effective boycott it must strike fear into the company that is being boycotted. Clearly, Home Depot was not the least bit intimidated by the actions of AFA, and their bottom line was not impacted at all. When the boycott is levied against a group because of support for Evangelical Christian values the protesters are much more vicious and the event receives much more media coverage. Thus boycotts against Evangelical Christian positions tend to be much more effective at getting companies to change their views. In the *Huffington Post* article, not a single one of the twenty-five companies that were “boycotted” for supporting a homosexual lifestyle were ever cited as issuing an apology or removing their support.¹³ In short, a boycott without enough support from society will ultimately fail, and it appears that at this moment the only causes that are able to achieve enough social support for effective boycotts are those that protest an Evangelical Christian belief.

The effects of a successful boycott reveal the reality that ostracism can work on groups just as well as it does on individuals. A boycott, if it has enough force behind it, also has enough strength to get a company to change, or at least reconsider, its position. This shows how much power society truly has to impact actions. It is strong enough to send multi-billion dollar corporations into full damage control mode. The fact that society has such influence is a double-edged sword. This power could be used to make

¹² “Home Depot Practice Reflect Change”: “Home Depot Portfolio.” *CNN Money*. <http://money.cnn.com/quote/quote.html?symb=HD>.

¹³ Burra and Wong. “Oreo Cookies’ Gay Pride Backlash.”

many positive changes. On the other hand, there is this negative side effect when these boycotts kill the free expression of entire groups.

The other negative side effect of a boycott, or other social attacks like it, is that it is virtually impossible to fight back against. Put yourself in Dan Cathy's shoes following his statement last year. He had two real options. He could sell out what he believes and lift the boycott, and as a result continue to make money. Or he could stick to his conviction and let the boycott continue. In such a situation society has painted the man into a corner. When the options are (a) sell out your beliefs to make money or (b) stand by your beliefs and go out of business, there is little room to negotiate. This is an unfair position for anyone, yet it is happening over and over in American society today.

This position that society continues to force on some of its members has the effect of increasingly polarizing society. This is a serious problem, and it destroys the free expression that Mill found so important. However, this increased polarization should not be a surprise because people are being backed into corners. When this occurs people are forced to choose either yield or fight to the bitter end. We see that Dan Cathy was forced to partially yield his convictions; others however have chosen to stand a fight.

In the end, ostracism is the most effective way to get a man to change his behavior. These social punishments are far more effective than the law ever could be at getting men to change their minds or remain silent. Ostracism comes in two main forms. The first is explicit where a group simply refuses to accept an individual and punishes them. The second is subtle which occurs when a group unknowingly excludes people from their group, with subtle indicators that they are not welcome. Ostracism can also

be used against entire groups just as effectively as it can be used against individuals. In these instances it takes on the form of a boycott, which when done correctly are highly effective at changing the actions of a company or group. Finally, with boycotts there is no way for the group to effectively fight back, other than surrendering. This inability to have a genuine disagreement has led to the increased polarization of American society.

Chapter Six

Conclusion

What was the result of the great Chick-fil-A battle of 2012? Hundreds of thousands of people rushed to aid both sides. The weapons of this war were picket signs and chicken sandwiches. Politicians including the Mayor of Boston and Chicago Alderman Joe Moreno fired their volleys, with all the force of government behind them. Chick-fil-A CEO Dan Cathy was left in an impossible position. He was forced to choose between following the commands of his God (and being unable to run his business in certain areas of the country) or not following those commands. In the end what did Cathy choose to do, when faced with these two extreme options?

Cathy found a middle road. He stopped short of completely selling his soul in order to do business. Instead, he chose to simply stop Chick-fil-A's charitable contributions to organizations that supported traditional marriage.¹ With this choice Cathy still maintained his personal belief, but he effectively lost the ability to express that opinion. Cathy's move was enough to appease Chicago Alderman Joe Moreno, who quickly claimed this a concession as a victory for his cause. He said, "Instead of being a company that openly promotes discrimination, Chick-fil-A has vowed to move forward."² The irony of the whole situation appears to be lost on Alderman Moreno.

¹ Glueck. 2012. "Chicago Alderman Drops Opposition to Chick-fil-A." *Politico*. September 19. <http://www.politico.com/news/stories/0912/81393.html>.

² Ibid.,

Moreno, supposedly a champion for not allowing discrimination, had effectively forced a man into changing his company's policies, with respect to things that had nothing to do with its business.

I reiterate that this is an unacceptable outcome for America. How can we claim to be some of the most free and most tolerant people on Earth if we force people to choose between their beliefs and their ability to live a full life in society? The problem is pervasive. The cases discussed: Chick-fil-A, Barilla Pasta, and Louis Gigilio, are merely the tip of the iceberg of the problem in American society. There are hundreds of other cases in which average Americans are being pressured to choose between obeying what society or the law demands, or obeying what they personally believe to be right. This is not progress or even tolerance. It is a problem, and not a new one.

Chapter Two showed that this pressure on an individual with dissenting beliefs has a long history. John Stuart Mill noticed it the nineteenth century, and argued that though sometimes it could have positive effects, most of the time it negatively impacted individuals. In other words, dissenting opinions are challenging. They are always risky to those in charge, because any new idea could take away their power. Yet without these ideas society could never move forward. This is perennial problem of balance in dealing with individual free expression. Mill went beyond noticing this as a problem and offered a solution.

Chapter Three discussed Mill's solution to this problem, which he called the Harm Principle. In this principle Mill allowed the free expression of an individual up to the point where his expression hinders the rights of another individual. The chapter also showed that Mill believes there are two ways that society can correct an individual who

has affected the rights of another. The first way is through legal pressure. The second way is through social pressure. Both of these routes can have an impact on the individual. However, it is also possible for both of these ways of correction to be overdone and to punish someone unfairly or too severely for his ideas. Again, the challenge of balancing free expression and the protection of society is seen in Mill's Harm Principle.

Chapter Four moved the discussion of free expression and the Harm Principle into the American context. Six distinct freedom of expression cases are discussed at length. Justice Brandeis and Justice Holmes began to bring in Mill's ideas of free expression as early 1919. A trend quickly appears in these court cases of the United States Supreme Court toward allowing greater individual liberty. The cases were still careful to temper just how far liberty could expand, by creating things like the clear and present danger test. In the end, the line drawn by the Supreme Court on what is permissible free expression is very similar to the line that Mill drew in *On Liberty*.

The fourth chapter investigated how American *society* has been handling dissenting opinions in recent years. The results were not as promising as they were in the legal realm. It is clear that American society has been using its power over individuals to silence many dissenting opinions. The Chick-fil-A case was a perfect example in the introduction, while Louis Giglio's and Barilla Pasta's CEO's comments served as additional examples. These examples highlight another reality, which is the subject of Chapter Five.

Chapter Five presents the argument that societal pressures are the most effective at changing the mind of an individual. Numerous examples were presented of instances

where social pressure alone was effective at getting an individual to do something or stop doing something. The chapter also highlighted the two different forms of ostracism. The first type of ostracism was blatant when a group simply refuses to allow someone into its ranks. The second type was subtle, which occurs when there are little indicators everywhere that tell someone they do not belong. Both of these forms of ostracism are incredibly effective because they play off the fear everyone has of being alone.

Also in Chapter Five, the concept of the boycott as a tool to ostracize certain segments of society was discussed. It also appears that the Evangelical Christian segment of American society suffered a greater number of these boycotts than other segments. The effectiveness of boycotts also showed that ostracism affects groups, not just individuals. Finally, the chapter discussed how the strategy of a boycott was contributing to a more polarized society unwilling consider compromising with the other side. This polarization can be seen both in American politics as well as in American society.

The time has come to lay down the weapons. It is simply not productive for Americans to continually be at one another's throats, demanding we agree with and support one another's beliefs. We as Americans simply are not listening to one another or seeking to understand why others believe as they do. At present, American society is deeply divided on many issues, and both sides are unwilling to genuinely talk to one another. The time has come to not just let one another speak, and support that right with the law, but to genuinely *listen* to one another.

The question remains: is American society in its current state what we as American truly want? Is it good that politicians can effectively blackmail a businessman in to changing what political organizations his company supports, and that they would be supported by the people in doing this? This is not right, and it is hurting individuals and society as a whole. There is a way out of this tremendous mess. If American society can be convinced that *all people* are genuinely entitled to be heard, then we have the chance to be the tools of progress that Mill argued for. Until that time, however, we wait, and dodge the bullets of this ongoing culture war.