

specific person and the action to be taken against him as extreme (murder). It is far from the more subtle question of disobedience—not necessarily violent—to a government coercing its citizenry to transgress a commandment.

33. Etzion, "Rabbis' Hand," 53.

34. Zechariah 3:6.

35. Cf. 3996/95 *State of Israel v. Feiglin and Saket* (Jerusalem Magistrate Court) (11 November 1997).

Should Hate Speech Be Free Speech? John Stuart Mill and the Limits of Tolerance

L. W. Sumner

Hate literature is a hard case for liberals, since it exposes a conflict between the two values—liberty and equality—that are most central to their political morality. Though liberals are committed to a wide-ranging freedom of political expression, it is particularly difficult for them to defend anyone's right to threaten the very ideals of tolerance and mutual respect that are for them the cornerstones of a free and civil society. The response to this dilemma on the part of most contemporary liberal theorists has been to come down, however reluctantly, on the side of free expression, thereby opposing any form of legal restriction on, or regulation of, hate literature. This civil libertarian orthodoxy has been especially strong in the United States, which remains the sole jurisdiction to offer near absolute legal protection to racist speech.

I do not intend here to challenge this orthodoxy directly, though I have questioned it elsewhere.¹ Instead, I want to explore a different perspective on the issue by turning the clock back from contemporary to classical liberal theory. The differences between the two genres lie primarily in the fact that classical liberals were less reluctant than their modern counterparts to ground their political theory in (what Rawls has come to call) a "comprehensive moral theory" and were therefore more willing to endorse one particular conception of the good life. As the advocate of both a utilitarian moral theory and a "theory of life" that assigned a high value to individuality and self-development, J. S. Mill is the paradigmatic classical theorist in both respects. The question I intend to ask, therefore, is how the issue of legal restraints on hate literature would (or should) have been treated within the version of liberalism he defended. Since Mill's liberalism remains of interest to this day for more than merely historical reasons, there is some reason to think that its treatment of the problems raised by hate speech might be instructive.

The question of how Mill's principles might apply to pornography in its current forms has recently been the subject of some debate among

philosophers.² Less attention has been given to the same issue concerning hate speech.³ This asymmetry may result from the conviction, or perhaps just the assumption, that the latter question admits of a much more obvious answer than the former. While it may be possible to make out some sort of case that Mill would, or should, favor censorship of pornography, the prospects of a similar case for hate speech seem slim. The reasons for thinking that Mill would extend legal protection to hate speech and literature are very strong, perhaps even overwhelming. These reasons include the following:

1. *Hate literature expresses opinions.* Hate literature communicates derogatory views about target groups identified by such features as race, ethnicity, religion, gender, and sexual orientation. This is enough for Mill to locate it squarely within the domain of “the liberty of expressing and publishing opinions” (225).⁴ In this respect, hate literature is a much clearer case for protection than is pornography. While the latter has come to be included, in most legal jurisdictions, within the broad range of “expression” and thus has been sheltered under the umbrella of freedom of expression, it is at least doubtful whether most pornography expresses opinions of any sort. However, as Richard Vernon has pointed out,⁵ what Mill has in mind by “expression” is strictly the expression of opinions. Indeed, he rarely uses the term *expression* at all, more frequently referring to speaking, writing, or discussion.⁶

2. *The opinions expressed in hate literature are political.* Hate literature typically addresses genuine social or political issues: immigration policies, the civil status of visible minorities, the desirability of an ethnically homogeneous (usually white Christian) society, and so on. The kinds of opinions whose circulation Mill was particularly anxious to protect were those concerning “morals, religion, politics, social relations and the business of life” (244–45). He therefore clearly regarded political speech, of which hate literature is one particular example, as lying in the heartland of the protected domain of liberty.

3. *Mill’s liberties are absolute.* Mill’s aim in *On Liberty* is to define “a limit to the legitimate interference of collective opinion with individual independence” (220). He regards the principle of liberty he defends “as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control” (223) and says that no society is completely free in which the liberties it protects “do not exist absolute and unqualified” (226). With respect to freedom of thought and discussion in particular, Mill’s view is that “there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered” (228n).

4. *The untruths in hate literature are irrelevant to its protection.* Most of the opinions about target groups expressed in hate literature are (to put the matter gently) false. However, the structure of Mill’s arguments (in chap. 2 of *On Liberty*) in defense of freedom of discussion is explicitly intended to neutralize the issue of truth. Briefly, Mill argues for protecting the expression of unorthodox opinions whether those opinions are wholly true, wholly false, or a mixture of both. For Mill, the truth of an opinion is not necessary for its protection, nor is its falsity sufficient for its suppression. Racist, sexist, or homophobic opinions are, needless to say, not merely false but odious. But this does not matter for Mill either: however immoral an opinion may be considered to be, the grounds for its protection remain intact (228n, 234).

5. *The unpopularity of hate literature is irrelevant to its protection.* In most liberal societies racist literature is produced and circulated by, and also largely within, relatively small groups of white supremacists or neo-Nazis. Some of the opinions it expresses may receive a favorable hearing on the part of a somewhat wider audience, largely made up of economically disadvantaged, alienated, disenfranchised white males, but they are rejected by the great majority of citizens, who support the ideal of an ethnically pluralistic society. However, like their truth or morality, the minority status of racist opinions also has no bearing for Mill on their entitlement to protection: “If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind” (229).

6. *The tone of hate literature is irrelevant to its protection.* Hate literature is typically strident, polemical, vituperative, vulgar, and aggressive. But Mill explicitly considers and rejects the argument that “the free expression of all opinions should be permitted, on condition that the manner be temperate, and do not pass the bounds of fair discussion” (258). While Mill favors high standards for public discussion and condemns “every one, on whichever side of the argument he places himself, in whose mode of advocacy either want of candour, or malignity, bigotry, or intolerance of feeling manifest themselves” (259), he thinks it no business of the law to enforce those standards.⁷

7. *The offensiveness of hate literature is irrelevant to its protection.* Opinions alleging the inferiority of racial or ethnic minorities are bound to give offense to members of the target groups, as well as to anyone of liberal sensibilities. But Mill is committed to the view that, however offensive an opinion may be, this cannot constitute a legitimate ground for its suppression: “there is no parity between the feeling of a person for his own opinion, and the feeling of another who is offended at his holding it; no

more than between the desire of a thief to take a purse, and the desire of the right owner to keep it" (283).⁸

The reasons for thinking that Mill would have argued for the toleration of hate speech are therefore straightforward and compelling. Perhaps in the end they will prove conclusive. But it is time to look at the other side of the story. A number of considerations combine to convince me that Mill too would find hate literature a hard case, were he familiar with the forms it takes and the purposes it serves at the end of the twentieth century. To begin with the most abstract and general of these considerations, it is easy to overlook the contextualism of Mill's arguments in *On Liberty*. The essay begins by announcing its subject as "the nature and limits of the power which can be legitimately exercised by society over the individual," a question that Mill takes to be as old as society itself but which, he says, now "presents itself under new conditions, and requires a different and more fundamental treatment" (217). The "new conditions" he has in mind have to do with the attainment of a reasonable degree of democracy in much of Europe and North America, which made it both harder for the governments of those nations to oppress the majority of their peoples and easier for the majority, through the mechanisms of government, to oppress internal minorities. This "tyranny of the majority" might operate either through the official sanctions of public law or through the unofficial sanctions of public opinion. In either case, in Mill's view it had emerged as the principal threat to liberty and individuality, and it was with that threat in mind that Mill set about defining the limits to the authority of society over its individual members.

What interests me here is Mill's idea that, while the abstract question of the relationship between the individual and society is perennial, it can assume different concrete forms in different epochs and under different sociopolitical conditions. The arguments of *On Liberty*, as well as the issues that it foregrounds, are clearly shaped by Mill's analysis of the direction from which liberty was most likely to be imperiled in the England of his own age. Might they then take a different shape in a different age, such as ours? Were Mill living today in any of the liberal democracies of the West, it is hard to believe that he would be more optimistic about the prospects of resisting the suffocating power of conformity. More likely, he would regard most of the political, economic, and technological developments since his own day as so many additional means for public opinion to stifle independent thought: public education systems, mass communication, multinational corporations, highly concentrated ownership of the media, the global hegemony of American culture, and so on. At the same time, some of these very same vehicles are available to, and regularly uti-

lized by, hate groups with their own messages to spread. Through the use of telephone hotlines, cable television, videos, and the Internet, these groups are now able to preach their gospel of racial intolerance to a global audience of millions. Just how the balance between social control and individual self-expression would seem to Mill today is not easy to guess at. It may well be that, after taking stock of the spirit of the age, he would wish to reaffirm at least the fundamental principles of *On Liberty*, if not all of their practical applications. But he would at least be committed by the boundaries of his own argument to rethinking the question.

Quite apart from Mill's explicit avowal, the context-dependence of his views about "the appropriate region of human liberty" (225) is implied by his utilitarian methodology. Mill delineates that region by means of the "one very simple principle" that "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant" (223). While this principle of liberty defines a sphere of individual rights, Mill's arguments in defense of it appeal not to "abstract right, as a thing independent of utility" but to "utility in the largest sense, grounded on the permanent interests of man as a progressive being" (224). In other words, Mill contends that social and legal recognition of strong (possibly even absolute) liberty rights—rights capable of trumping social utility—can be justified on the ground of social utility.⁹

Now Mill might, of course, have believed that this utilitarian justification applies equally to all societies at all stages of their evolution. But we know that he did not believe this, since he restricted the application of his principle to "the time when mankind have become capable of being improved by free and equal discussion," thereby exempting "those backward states of society in which the race itself may be considered as in its nonage" (224). It is true that Mill thought this time had been reached in all of the civilized societies of his day, and thus that his arguments for individual liberty applied equally to them all, regardless of local circumstances. In this he was doubtless driven by the conviction that "the permanent interests of man as a progressive being" were the same for Italians or Americans as they were for the English. But he is not really entitled to assume that the utilitarian sums will favor liberty equally, or underwrite exactly the same set of liberties, in all these countries at all times and under all conditions. This will be especially so for any liberty that conflicts with, and thus must be balanced against, a value of similar importance, such as equality. Where such a balance must be struck, it is believable that it could come out differently, at least in certain key regions, for some of the pluralistic, multicultural, multiracial societies of the late twentieth century than it did for the comparatively homogeneous England of the mid-nineteenth

century. Whether Mill would have accepted this degree of social and cultural relativity for his results is moot; what is certain is that his utilitarianism commits him at the very least to acknowledging its possibility.

So far we have focused on framework reasons for thinking that Mill's liberalism might be sensitive to contingencies of culture and circumstance. These factors apply equally to all of the specific liberties that Mill defends. However, there are also reasons internal to the text of *On Liberty* for thinking that the liberty of thought and discussion might be especially context-dependent. By way of background, let us remind ourselves that the principal task that Mill sets himself in his essay is to determine "how much of human life should be assigned to individuality, and how much to society," a question to which he gives the following answer: "Each will receive its proper share, if each has that which more particularly concerns it. To individuality should belong the part of life in which it is chiefly the individual that is interested; to society, the part which chiefly interests society" (276). The boundary between these "parts of life" is therefore fundamental for Mill's principle of liberty, and the subject of much discussion both by Mill and by his critics.¹⁰ For the moment let us attend not to the precise location of that boundary but rather to its function within Mill's argument. Whatever falls within (what we may call) the personal sphere is protected by Mill's "very simple" principle; this is the appropriate region of human liberty. So what does lie therein? According to Mill, three things: (1) the "inward domain of consciousness," comprising conscience, thought, feeling, opinion, and sentiment; (2) "framing the plan of our life to suit our own character," as long as we do not thereby harm others; and (3) combining or uniting with others for purposes that also do not harm others (225–26). These "parts of life" are to be protected against social interference by means of rights to freedom of conscience, thought, belief, privacy (as we would now put it), and association. What is noteworthy about this list is its omission of the activity of "expressing and publishing opinions." Actually, it is misleading to say that Mill omitted mention of this activity, or that he meant to exclude it from the appropriate region of human liberty. But he did flag its special status by recognizing that "it belongs to that part of the conduct of an individual which concerns other people" (225–26). In other words, while Mill argues for an extensive "liberty of speaking and of writing" (227), he does not base his argument on the claim that these activities belong to "the part of life in which it is chiefly the individual that is interested." In this respect, freedom of expression (or discussion) is anomalous within Mill's overall argumentative scheme: it is the only activity falling within the social (rather than the personal) sphere for which Mill urges (nearly) absolute protection against social interference. His reason for giving it this preferred status is that liberty of discus-

sion "being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it" (226; cf. 227).

Mill's point is obvious, and impeccable: the freedom to hold any opinion you wish is worthless without the companion freedom to express, discuss, publish, and circulate it. However, his recognition that these latter activities are, by virtue of their capacity for harming others, social rather than personal has far-reaching implications for his defense of freedom of discussion. Whatever falls within the personal realm receives principled protection: social interference, whether by official or unofficial means, is here absolutely prohibited. The case is quite different for social acts:

As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion. But there is no room for entertaining any such question when a person's conduct affects the interests of no persons besides himself. (276)

Now Mill should not be understood as suggesting that interference with, or regulation of, an activity is warranted just because it falls within this social realm: "it must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference. In many cases, an individual, in pursuing a legitimate object, necessarily and therefore legitimately causes pain or loss to others" (292). As one example of this sort of activity, Mill mentions trade which, because it "affects the interest of other persons," comes "within the jurisdiction of society" (293).¹¹ Mill favored free trade but recognized that the case for it "rests on grounds different from, though equally solid with, the principle of individual liberty asserted in this Essay" (293). For Mill, those grounds are of course utilitarian: restraints on trade tend to be wrong because they tend to be counterproductive. However, there is room for some limitations on the liberties of owners and employers, for the purpose of preventing fraud or ensuring sanitation or workplace safety: "that they may be legitimately controlled for these ends, is in principle undeniable" (293). Whether or not a commercial activity may legitimately be interfered with in a particular way will depend on "whether the general welfare will or will not be promoted by interfering with it" (276).

Since, like trade, the expression or discussion of opinions falls within the social and not the personal realm, the question whether it should be interfered with in any way should also be "open to discussion" and settled

by reference to the general welfare. If we assume that this is the way Mill sees the question, then it becomes possible to understand what he is trying to do in chapter 2 of *On Liberty*, by far the longest chapter in the essay.¹² There are two things he is *not* trying to do in that chapter: he is not arguing for his principle of liberty (that argument begins with the defense of the value of individuality in chap. 3), and he is not arguing that the expression of an opinion can have no adverse effect on the interests of others (Mill has already conceded that expressing an opinion, unlike merely holding it, “belongs to that part of the conduct of an individual which concerns other people,” at 225–26). What he is arguing, it seems to me, is that, while the expression of opinion is indeed a social act, interference with it will nonetheless be inimical to the general welfare. His reasons for thinking this are well known: interference will cause valuable truths to be suppressed, will discourage inquiry on the part of promising intellects, will lead dominant or orthodox opinions to be held as dead letters, and in general will disserve “the mental well-being of mankind (on which all their other well-being depends)” (257).

If this interpretation is correct, then freedom of expression occupies a special position among the liberties defended in Mill’s essay, by virtue of being doubly subject to a utilitarian defense. For Mill, utility plays a role at two different levels in the arguments of *On Liberty*. On the one hand, it is appealed to as the justificatory foundation of the principle of liberty itself; this argument largely occurs in chapter 3 and appeals to the transcendent importance of individuality. The principle of liberty then invokes a distinction between the personal and the social “parts of life” and affords absolute protection against paternalistic interference in the former. With the significant exception of chapter 2, the burden of most of Mill’s argument in the essay is to condemn the use of coercion or compulsion against individuals (of sound mind and adult years) for their own good. However, this leaves open the question when interference may be justified with social acts. This question is settled, on a case-by-case basis, by a further appeal to utility: some social acts may be exempt from interference, others not, and the same act may be exempt from some forms of interference and not others. Mill’s case in favor of freedom of expression and discussion falls within this territory. I suggested earlier that the context-dependence of Mill’s utilitarian argument in favor of his principle of liberty might lead him to reconsider that principle under quite different social conditions. Now we have a reason for thinking that Mill’s defense of freedom of expression might be especially context-sensitive.

Hate literature vilifies minorities on grounds such as race or ethnicity. It is not difficult to understand how the public expression of hatred or contempt for these minorities can cause them harm. If racist opinions circulate

freely, the immediate result for the target groups is likely to be diminished self-esteem and a questioning of the extent to which they are valued members of the social order. This may in turn encourage a response of quietism or passivity—a reluctance to compete too vigorously for conspicuous social positions, or to press claims of social justice, lest success breed a backlash of resentment and hostility. Those who are not so easily intimidated may nonetheless find their progress impeded by discrimination that is reinforced by derogatory racial or ethnocultural stereotypes. Nor do the indignities stop there: enmity or contempt are likely also to be expressed in racial taunts or slurs, social ostracism, the desecration of sacred places, and personal violence. But then it would seem to follow for Mill that, since hate literature “affects prejudicially the interests of others, society has jurisdiction over it, and the question whether the general welfare will or will not be promoted by interfering with it, becomes open to discussion” (276). If the question is open to discussion, then it must be addressed anew within different societies at different stages of their evolution. The answer that fits the England of Mill’s day may not fit the England, or Germany, or Canada, or Israel, of our own. If we commit ourselves, as Mill did, to answering the question by means of a utilitarian calculation, then there will be no way of ensuring that it must always receive the same answer regardless of social circumstances.

In fairness to Mill, he does not leave us entirely without guidance when we are attempting to decide whether interference would be justified in a person’s social acts. Mill outlines two kinds of conduct that he thinks society has the right to demand from its members:

This conduct consists first, in not injuring the interests of one another; or rather certain interests, which, either by express legal provision or by tacit understanding, ought to be considered as rights; and secondly, in each person’s bearing his share (to be fixed on some equitable principle) of the labors and sacrifices incurred for defending the society or its members from injury and molestation. These conditions society is justified in enforcing at all costs to those who endeavour to withhold fulfillment. (276)

What is chiefly interesting in this general formula is the reference to violating the rights of others. Mill returns to this theme a number of times, arguing that encroachment on others’ rights is a fit object of “moral reprobation, and, in grave cases, of moral retribution and punishment” (279), and that “society, as the protector of all its members, must retaliate on [the offender]; must inflict pain on him for the express purpose of punishment, and must take care that it is sufficiently severe” (280).

Mill, of course, does not suggest that the expression of opinion can violate the rights of others in this way; to do so would be to nullify his defense of freedom of discussion. He is doubtless thinking principally of direct invasions of others' security of person or property, though he does mean to include any infringement by a person of "the rules necessary for the protection of his fellow-creatures, *individually or collectively*" (280; emphasis added). Hate crimes would definitely fall into this category, since they are offenses against persons or property motivated by hatred of an identifiable social group. But could the production and circulation of hate literature constitute a violation of the rights of the target groups, or of the rules necessary for their protection? Mill does not offer us the resources in *On Liberty* to attempt an answer to this question, since he does not there sketch any general account of (individual or collective) rights. For that we need to turn instead to chapter 5 of *Utilitarianism*. The account we find there leads us in the first instance straight back to utility: "To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give him no other reason than general utility."¹³ But Mill in this instance does go on to give us some idea of the territory that considerations of social utility will lead us to protect by means of rights: "The most marked cases of injustice . . . are acts of wrongful aggression, or wrongful exercise of power over some one; the next are those which consist in wrongfully withholding from him something which is his due; in both cases, inflicting on him a positive hurt, either in the form of direct suffering, or of the privation of some good which he had reasonable ground, either of a physical or of a social kind, for counting upon."¹⁴ Mill adds that hurting another may include hindering him "in his freedom of pursuing his own good."¹⁵

None of this provides a definitive answer to the question whether vilifying a racial or ethnic minority in speech or print inflicts on the members of that minority the kind of injury against which they have a right to be protected. All that it suggests so far is that, because again this question is to be settled by reference to social utility, we may not simply assume that no such right exists, and thus that hate speech should be treated as falling within the protected domain of free expression. In settling the question for a particular legal jurisdiction we would want to know much more about the position of the target minorities within that jurisdiction and, in particular, the extent to which their freedom to pursue their own good is likely to be hindered by allowing hate groups the freedom to slander them.

Perhaps, however, we can say a little more about Mill's commitments on this general territory. As we see things now, the social value threatened by hate literature is equality: the equal status of racial and ethnic minorities within the social fabric, their equal opportunities to live their lives free

of fear or intimidation and to pursue their own conceptions of the good, and their right to equal consideration and respect. So we can ask: was Mill committed to this value? If so, did he attribute to it an importance similar to that of liberty? The answer to both questions appears to be yes. The principal context in which he addresses equality issues is "The Subjection of Women," where he opens the essay by endorsing "a principle of perfect equality, admitting no power or privilege on the one side, nor disability on the other."¹⁶ Here Mill is of course referring to gender, and not racial, equality. But most of what he has to say in the essay about the corrupting influence of inequalities of power and privilege would translate readily to the racial arena, where members of oppressed groups may be as unable as the women of Mill's day to pursue their own good, or even to form an autonomous conception of it. In any case, we know from some of Mill's other writings that he abominated the forms of racism with which he was familiar, above all the social and political inequality of blacks in America.¹⁷ It seems safe to say that, for Mill, equality was a social value as much demanded by utility, as he understood that notion, as is liberty.¹⁸ But in that case, it becomes harder than ever to determine what he would have thought the general welfare requires: interfering with the liberty of hate groups or allowing them to threaten the equality of racial and ethnic minorities.

The aims of hate groups, and the role that hate literature plays in promoting these aims, leads me to a further consideration. Throughout Mill's defense of freedom of thought and discussion, his main theme is the need to protect dissident minorities against the imposition on them of orthodox majority opinion. He has in mind especially religious minorities who dissent from the established faith of their country and who wish for themselves nothing more than the freedom to follow their own consciences without fear of (official or unofficial forms of) persecution by the majority. Mill was aware that the targets of religious persecution could, and typically did, include those who reject all religion (234, 239–40). The case of unbelievers in a religious society would have been particularly close to home for Mill, since we know from his *Autobiography* that he was one himself. Mill there records the constraints his father felt, in the climate of opinion of his time, to suppress the expression of his own agnosticism: "In giving me an opinion contrary to that of the world, my father thought it necessary to give it as one which could not prudently be avowed to the world."¹⁹ Mill goes on to offer the (perhaps overly optimistic) observation that in this respect the times have changed for the better:

The great advance in liberty of discussion, which is one of the most important differences between the present time and that of my child-

hood, has greatly altered the moralities of this question; and I think that few men of my father's intellect and public spirit, holding with such intensity of moral conviction as he did, unpopular opinions on religion, or on any other of the great subjects of thought, would now either practice or inculcate the withholding of them from the world, unless in the cases, becoming fewer every day, in which frankness on these subjects would either risk the loss of means of subsistence, or would amount to exclusion from some sphere of use peculiarly suitable to the capacities of the individual. On religion in particular the time appears to me to have come, when it is the duty of all who being qualified in point of knowledge, have on mature consideration satisfied themselves that the current opinions are not only false but hurtful, to make their dissent known; at least, if they are among those whose station, or reputation, gives their opinion a chance of being attended to.²⁰

With regard to Mill's discharge of this latter duty, it is interesting to note that his own expressed skepticism concerning religious belief is both scattered and muted in his written work. The only place in which he avows it openly and directly is the *Autobiography* itself, which Mill allowed to be published only posthumously. However this may be, my point is that the minorities whose expression of opinion Mill was anxious to protect were not themselves intolerant of the majority opinion or practice, nor were they motivated by hostility toward any other minority. They wished only the freedom to be let alone to go about their lives as their own consciences dictated. They could not be regarded, by any stretch of the imagination, as threats either to their society as a whole or to any identifiable group within it (except, perhaps, those who unjustly monopolized power and wealth). If their expression of their convictions, or their mere presence in society, either gave offense or caused any degree of discomfort to others, then this fact could be attributed entirely to the intolerance of these others and not to their own.

How different it is with hate groups today. I will speak only of the neo-Nazi and white supremacist groups in my part of the world, who are relatively small, shadowy, fringe organizations motivated by hatred of all "nonwhite" minorities and dedicated to the establishment, by force if necessary, of a homogeneous white Christian society.²¹ Preaching a doctrine of "Racial Holy War," they are composed largely of disaffected white youths, most though not all male, whom they recruit principally from the ranks of skinheads and violent offenders. Their favored targets are blacks, South Asians, and Jews. Many, perhaps most, of the "hate crimes" practiced against these minorities are perpetrated by members of these groups

sent out by their leaders for this precise purpose. Those crimes usually take the form either of violence against persons (typically assaults on blacks and South Asians) or of vandalism of property (typically the desecration of synagogues or Jewish cemeteries).

For our purposes, what is most interesting about these groups is the role played for them by hate literature. All of them either produce or disseminate materials vilifying racial and/or ethnic minorities and preaching intolerance of them and often violence against them. These materials are still circulated in print form but are increasingly available either as videos or on the Internet. All of the major hate groups have by now established World Wide Web sites, which may be visited by anyone with Internet access.²² The primary purpose of the propaganda that these groups circulate is recruitment of new members and reinforcement of morale on the part of existing members. In other words, hate literature plays a direct part in maintaining or increasing the membership of hate groups; it is designed not so much to win acceptance of the gospel of white supremacy in a broad public forum but rather to attract and retain those who are already receptive, for whatever reason, to its poisonous message.

A particularly instructive role is played in this whole system of semi-organized hate by Ernst Zundel, my hometown's gift to worldwide neo-Nazism. Zundel is a German national with permanent residency in Canada whose specialty is Holocaust denial. Operating out of a modest headquarters in the middle of Toronto, he exports antisemitic propaganda about the Holocaust, and about imagined Jewish conspiracies, around the world (including his native Germany, where he has ties to neo-Nazi groups). He maintains a Web site (the "Zundelsite") that is located in California to escape the jurisdiction of Canada's hate propaganda legislation and produces videos that are also exported to the United States for broadcast. He has connections with many hate groups but is not himself a leader, or perhaps even a member, of any of them. He also maintains links with other "Holocaust revisionists" such as the Institute of Historical Review, the leading voice of Holocaust denial in the United States. He has contributed his own pamphlet on the issue, entitled *Did Six Million Really Die?* He has never been convicted of a hate-motivated crime.²³

Ernst Zundel is the master propagandist, the Joseph Goebbels of antisemitism and other forms of racism. I think it is safe to say that Mill had no experience in his own day of anyone like Zundel whose conscious aim was to exploit freedom of discussion for the purpose of slandering and abusing a minority group. Nor did he have experience of organizations for whom freedom of expression was a means of attracting recruits to a Racial Holy War against nonwhites. Nonetheless, every opinion voiced by Zundel and by these groups, however odious it might be, falls neatly within the

domain of "morals, religion, politics, social relations and the business of life." Given that the social value threatened by the circulation of these opinions is the very equality to which Mill himself was dedicated, we may wonder just how comfortable he would have felt about extending protection to them.

Considered as a biographical question about Mill, I have no idea what the answer might be. But as my final point I want to consider one resource in his treatment of freedom of discussion that might bear on this issue. After defending (in chap. 2 of *On Liberty*) the freedom to form and express opinions, Mill turns to the further question whether men "should be free to act upon their opinions—to carry these out in their lives, without hindrance, either physical or moral, from their fellow-men, so long as it is at their own risk and peril" (260). This latter proviso refers, of course, to Mill's distinction between social acts that may adversely affect the interests of others and personal acts whose potential harms are confined to the individual. Mill then continues, in a well-known passage:

No one pretends that actions should be as free as opinions. On the contrary, even opinions lose their immunity, when the circumstances in which they are expressed are such as to constitute their expression a positive instigation to some mischievous act. An opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press, but may justly incur punishment when delivered orally to an excited mob assembled before the house of a corn-dealer, or when handed about among the same mob in the form of a placard. (260)

Elsewhere, Mill says that "the case of a person who solicits another to do an act, is not strictly a case of self-regarding conduct. To give advice or offer inducements to any one, is a social act, and may, therefore, like actions in general which affect others, be supposed amenable to social control" (296).

Mill is here discussing cases of counseling or abetting another to do something that is itself a personal and not a social act, and he finds these cases to "lie on the exact boundary line between two principles" with "arguments on both sides" (296). But how do matters stand when someone solicits another to commit an antisocial act, such as a hate crime? Mill addresses this issue briefly in a footnote in which he discusses the case of a prosecution for "circulating what was deemed to be an immoral doctrine, the lawfulness of Tyranicide" (228n). Mill allows that circulating this opinion through the press might constitute an instigation to the act and thus "a proper subject of punishment, but only if an overt act has fol-

lowed, and at least a probable connection can be established between the act and the instigation" (228n). In a broader context, he also acknowledges "it is one of the undisputed functions of government to take precautions against crime before it has been committed, as well as to detect and punish it afterwards" (294; cf. 295).

How, then, might all of this apply to the acts of publishing and disseminating hate literature, which is used to recruit members to hate groups, to feed and reinforce their hostility to visible minorities, and to encourage them to commit acts of violence against these minorities? How does it apply to Ernst Zundel? Is he merely circulating an opinion through the press (which falls within the protected domain of free discussion) or is he inciting or instigating others to commit hate crimes (which falls outside it)? How similar is he to the militant who hands out placards to the angry mob assembled before the house of the corn dealer? If hate groups are angry mobs—or if they fail to be such only because they are smaller and better disciplined, not because they are less angry or hostile—to what extent can someone like Zundel be held indirectly responsible for encouraging or counseling their violent acts? What sorts of restrictions on Zundel's activities would Mill countenance? Would he be satisfied with restrictions of time, place, and circumstance (which are suggested by his corn-dealer example) or would he go farther toward suggesting that, in a social context in which hate groups and hate crimes are proliferating, content restrictions on hate speech could also be justified?²⁴

These are, of course, the hard questions we all face about the limits of tolerance in a liberal society. Whether and to what extent legal restraints on hate speech can be justified will depend on the results of a number of calculations of social utility: (1) how much harm such speech is capable of inflicting on the groups it targets, either through its erosion of their self-esteem or through its incitement of hate crimes committed against them; (2) how effective the restraints will be in suppressing such speech; and (3) how much harm to legitimate expression will unavoidably be done by the restraints. My purpose here is not to suggest an answer to these questions, but merely to point out that they are hard questions for Mill as well, given the structure of his arguments and principles in *On Liberty*. Whether Mill would in the end have treated hate speech as protected speech is undecidable; it is entirely possible that he would have. What is certain is that the route to that conclusion would not have been as simple and direct for him as it might at first have seemed.

However, the implications of this interpretive exercise extend far beyond the text of *On Liberty* or Mill's version of classical liberalism. Not only is Mill's problem ours as well, but we have two important lessons to learn from the way he would need to deal with it. The first is not just the

wisdom but the inevitability of eschewing appeals to "abstract right" in favor of considerations of the social good. One need not travel all the way here to Mill's utilitarianism as a comprehensive moral theory, but the unavoidable balancing of conflicting social values—liberty and equality—can be captured only in a broadly consequentialist approach to the delineation of basic political rights.²⁵ The second lesson—the context-dependence of those basic rights—follows from the first: if the question every liberal society must ask is how to strike the optimal balance between two of its core values, then different circumstances may dictate different answers. Working out the right answer for any society will be a complex matter requiring evidence and argument and perpetually open to reexamination and revision; no one should ever be too sure they have got it right. Even if a particular balance turns out to be clearly indicated for a particular social structure, there will be no simple extrapolation of that result to other liberal jurisdictions. There may be a consequentialist case for certain universal human rights, but neither the right of hatemongers to public expression of their opinions nor the right of target groups to legal protection against that expression will be among them.

NOTES

1. L. W. Sumner, "Hate Propaganda and Charter Rights," in W. J. Waluchow, ed., *Free Expression: Essays in Law and Philosophy* (Oxford: Clarendon Press, 1994).
2. See, for example, David Dyzenhaus, "John Stuart Mill and the Harm of Pornography," 102 *Ethics* (April 1992); Robert Skipper, "Mill and Pornography," 103 *Ethics* (July 1993); and Richard Vernon, "John Stuart Mill and Pornography: Beyond the Harm Principle," 106 *Ethics* (April 1996).
3. But see Raphael Cohen-Almagor, *The Boundaries of Liberty and Tolerance: The Struggle against Kahanism in Israel* (Gainesville: University Press of Florida, 1994), chaps. 7–8; and Keith N. Hylton, "Implications of Mill's Theory of Liberty for the Regulation of Hate Speech and Hate Crimes," 3 *University of Chicago Law School Roundtable* (1996).
4. All page references in parentheses are to J. S. Mill, "On Liberty," in J. M. Robson, ed., *Essays on Politics and Society*, vol. 18 of *The Collected Works of John Stuart Mill* (Toronto: University of Toronto Press, 1977).
5. Vernon, "John Stuart Mill," 622–23.
6. See, for instance, Mill, "On Liberty," 227, and the title of chap. 2.
7. Cf. J. S. Mill, "Law of Libel and Liberty of the Press," in John M. Robson and Stefan Collini, eds., *Essays on Equality, Law, and Education*, vol. 21 of *The Collected Works of John Stuart Mill* (Toronto: University of Toronto Press, 1984), 15–17. Raphael Cohen-Almagor has pointed out to me that manner of expression may matter indirectly in particular contexts. In Mill's example of the excited mob

in front of the corn dealer's house (260), an inflammatory speech contending that corn dealers are starvers of the poor might incite the mob to violence, while reading an academic treatise defending the same opinion might put them to sleep. But in this case the more important factor for Mill is the occasion on which the opinion is expressed; it is the fact that it is delivered orally in front of the mob rather than merely circulated through the press that enables it to constitute instigation and thus qualify for suppression. I discuss the corn-dealer case and Mill's treatment of instigation below.

8. Raphael Cohen-Almagor has argued (*Boundaries of Liberty and Tolerance*, 126–27) that Mill intended the class of "offenses against decency," to which he gives passing mention (295–96), to include some instances of offensive expression, which would then be subject to legal regulation. However, I cannot follow him in this interpretation. Mill is here speaking of "acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners, and coming thus within the category of offenses against others, may rightfully be prohibited." It seems clear from the context that he has conduct rather than expression in mind here. In any case, the conditions stated would make no sense if applied to expression, since Mill considered it to be public by its very nature (see 8–9).

9. I have defended a similar consequentialist grounding for moral and legal rights in L. W. Sumner, *The Moral Foundation of Rights* (Oxford: Clarendon Press, 1987), chap. 6.

10. See, for example, C. L. Ten, *Mill on Liberty* (Oxford: Clarendon Press, 1980); John Gray, *Mill on Liberty: A Defence* (London: Routledge and Kegan Paul, 1983); and John C. Rees, *John Stuart Mill's "On Liberty"* (Oxford: Clarendon Press, 1985).

11. If by trade Mill means economic transactions between consenting adults, then it may be wondered why, given his own delineation of the personal realm, he regards it as social (I owe this query to Hillel Steiner). Presumably the answer is that sets of voluntary transactions may come to prejudicially affect the interests of third parties, such as vendors who are driven out of business by legitimate competition. These parties would have the same status for Mill as the "disappointed competitors" in an overcrowded profession or competitive examination (292–93). Because the harms suffered by such parties are real, the activities that cause them (including trade) are social. But Mill opposes restraint of these activities, on grounds of social utility, unless there is evidence of force or fraud.

12. On the other hand, it does not become possible to understand why Mill regarded liberty of thought and discussion as "a single branch" of his "general thesis" (227), since thought and discussion belong to two different "parts of life," the former personal and the latter social. Nor does it explain why he chose this liberty as the "first instance" to explore after announcing his general principle, since it is anomalous within his own scheme.

13. J. S. Mill, "Utilitarianism," in J. M. Robson, ed., *Essays on Ethics, Religion, and Society*, vol. 10 of *The Collected Works of John Stuart Mill* (Toronto: University of Toronto Press, 1969), 250.