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Not surprisingly, Learned Hand said it best. Writing for the Second Circuit in *International Brotherhood of Electrical Workers, Local 501 v. NLRB*,[1] he captured beautifully the paradox I wish to explore here:

> The interest, which [the First Amendment] guards, and which gives it its importance, presupposes that there are no orthodoxies—religious, political, economic, or scientific—which are immune from debate and dispute. Back of that is the assumption—itself an orthodoxy, and the one permissible exception—that truth will be most likely to emerge, if no limitations are imposed upon utterances that can with any plausibility be regarded as efforts to present grounds for accepting or rejecting propositions whose truth the utterer asserts, or denies.[2]

I want to focus not on Hand's restatement of the standard marketplace-of-ideas principle that the value of freedom of speech lies in its instrumental value in (probabilistically) increasing the likelihood of identifying truth and rejecting falsehood. Much that I say here is not dependent on that theory, and is compatible with numerous different perspectives on the underlying rationale or rationales for freedom of speech and freedom of the press. Rather, I will train my attention on Hand's two-part claim that: first, the value of freedom of speech is itself an orthodoxy of the same type that the principles of free speech would otherwise refuse to countenance; and, second, that this orthodoxy is a permissible exception to the First Amendment's prohibition of orthodoxies. In what is to follow I will agree with the first part of Hand's claim and disagree with the second. I will argue that

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1. 181 F.2d 34 (2d Cir. 1950), *aff'd*, 341 U.S. 694 (1951).
2. *Id.* at 40.

the view that a broadly protective understanding of the First Amendment is taken as an orthodoxy—or ideology, as I prefer to call it—in a large number of academic and professional environments, but that that is a phenomenon to be bemoaned and resisted rather than accepted or celebrated.

This is not an exercise in legal doctrine. In referring to "the one permissible exception" in *International Brotherhood of Electrical Workers*, Hand was not claiming that the First Amendment does not protect arguments against freedom of speech, nor was he urging a change in that state of affairs. With few exceptions,[3] no one has argued that the otherwise applicable principles of freedom of speech should be modified merely because the speaker urges the constriction or elimination of the free speech system itself. Undoubtedly, one who urges partial or even complete elimination of freedom of speech as we know it is fully entitled to the support of the First Amendment to provide legal immunity in making that claim.

Still, we owe to Mill the first observation that social intolerance of divergent opinion may at times be as much a source of concern as legal intolerance.[4] If, as Mill argued, positive value results from challenging received opinions, then a social or cultural environment in which such challenge is de facto difficult or impossible is as much to be condemned as an environment in which challenge to received opinion is prohibited by law.

I am concerned here with this form of inhibition of opinion. To put it more precisely, I want to focus on the social rather than the legal manifestation of Hand's statement and consequently address the question of whether a certain view of freedom of speech, or at the extreme, free speech itself, has become an orthodoxy, or ideology, and, if so, whether such a state of affairs is desirable.

What do I mean by "ideology"? The term is notoriously slippery and has numerous definitions in various domains. Under one definition, an ideology is "a prescriptive doctrine that is not supported by national argument,"[5] but, at least at the outset,

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3. *See, e.g.*, Carl A. Auerbach, *The Communist Control Act of 1954: A Proposed Legal-Political Theory of Free Speech*, 23 U. CHI. L. REV. 173 (1956). Some qualified support for this view can be found in 1 KARL R. POPPER, THE OPEN SOCIETY AND ITS ENEMIES 265 n.4 (4th ed. 1963) and in JOHN RAWLS, A THEORY OF JUSTICE 216-21 (1971), both arguing that when the threat to political freedom is real, restricting those who would limit political freedom is permissible even as other forms of limitation of political activity are not.

4. JOHN STUART MILL, ON LIBERTY 31-34 (David Spitz ed. 1975) (1859).

5. D.D. RAPHAEL, PROBLEMS OF POLITICAL PHILOSOPHY 17 (Rev. ed. 1976).

this is not what I am referring to here. Nor do I use the term "ideology" to refer simply to "any system of ideas and norms directing political and social action,"[6] or not nearly so simply to the concept of ideology in Marxist thought.[7] And I do not use the term as it is most often pejoratively employed in contemporary discourse, pursuant to which an "ideology" is something supported by an "ideologue," who seems to be someone adhering to ideas we believe are wrong with about the same level of fervor we apply to the ideas we believe are right.

Still, I do intend to benefit from the word's pejorative connotations, such that for me an ideology is a prevailing idea existing within an environment in which adherence to the idea is more or less required, and challenge to the idea is more or less discouraged. In this sense I use "ideology" as something close to Hand's "orthodoxy," both of which are to be distinguished from "ideas" *simpliciter*, the latter suggesting nothing about the circumstances in which the idea is maintained. It is entirely consistent to say that freedom of speech is a very good idea, and at the same time to say that the idea that freedom of speech is a very good idea might be an ideology, a state of affairs that would not be nearly so good.

As should be clear from the foregoing definition, the notion of an ideology presupposes some population within which the relevant idea is treated as an ideology, and, as such, the idea of ideology is domain-dependent and domain-specific. It is thus incumbent upon me to specify the domain within which I believe an ideology exists and to specify as well the idea within which I believe that domain has assumed ideological status.

As to the first, the domain about which I wish to speak is, primarily, the domain I know best—the domain of American academic institutions in general and American law schools in particular. I will be making claims that I believe also apply with particular (and probably even greater) force to the world of journalism, including both practicing journalists and schools of communications and journalism, to the world of libraries, including both practicing librarians and schools of library and information studies, to the world of the arts, including artists and writers and their affiliated organizations and academic institutions, and to the world of publishing.

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6. ANTONY FLEW, A DICTIONARY OF PHILOSOPHY 150 (1979).

7. *See generally* DAVID MCCLELLAN, IDEOLOGY 10-20 (1986) (describing Marx's view of ideology as arising from rather than acting on the material, social, and economic relationships of the labor process).

What these institutions share in common is a particular devotion to (and, arguably, need for) freedom of thought, freedom of inquiry, freedom of speech, and freedom of the press. It is, perhaps not surprisingly, within these institutions that an ideological view appears to have developed about freedom of thought, freedom of inquiry, freedom of speech, and freedom of the press. That is, these seem to be the institutions within which, despite their particular devotion to these freedoms, those freedoms are treated as implicitly inapt to discussion of the freedoms themselves. To put it more simply, there seems to be, within these domains, little free thought about free thought, little free inquiry about free inquiry, and little free speech about free speech.

Let me be somewhat more specific. My claim is that within these institutions the view prevails in ideological fashion that the appropriate amount of freedom of speech and press is somewhat greater than that now existing in the United States, or that now protected by the Supreme Court of the United States, or that protected by the Supreme Court of the United States in its periods of greatest protection, and that this view prevails as an ideology even though under any of these measures the degree of freedom of speech and press in the United States is substantially greater than that prevailing in any other country on the face of the earth.

This last comparative claim is important, for without it little distinguishes what I say about freedom of speech from what could be said about the desirability of equality, the undesirability of rape and torture, or the propositions that the Holocaust happened, that the earth is not flat, and that no American president has been a woman. With respect to these propositions, their virtually unanimous acceptance makes it difficult to distinguish the possibility that they might be held as ideologies from the possibility that they exist largely unchallenged simply because of the widespread and justified acceptance of their truth. Standard free speech theory would still maintain, correctly, that it would be unfortunate if conceivable challenges were stifled in one way or another, and a variant on standard free speech theory, one to which I will return presently, would maintain that it might still be important to generate challenges to these widely accepted views, however implausible such challenges might at first seem or might in fact be, just in order to attain the positive benefits of the challenge. Nevertheless, if one wanted to support an empirical claim about the existence of an ideological environment surrounding some correct proposition, it would be difficult to do

so in a context in which the overwhelmingly accepted truth of the proposition made it empirically difficult to determine how much the lack of dissent was a function of truth and how much was a function of ideological pressure.

With respect to freedom of speech and press, this methodological difficulty is less severe. On almost every issue of free speech theory, doctrine, and practice, virtually every country on the face of the earth diverges from the United States, and diverges in the direction of lesser protection. No other country, for example, approaches American law in the extent to which factually untrue statements are protected against actions for defamation or their equivalent. To be more specific, I know of no country that would decide *Ocala Star-Banner Co. v. Damron*[8] or *Hustler Magazine v. Falwell*[9] the way in which they were decided here. So too with many other areas, including national security, in which *New York Times Co. v. United States*,[10] the case of the *Pentagon Papers*, represents a willingness to protect the publishers of arguably unlawfully obtained information in a way unreplicated anywhere else. And with respect to the operation of the judiciary, cases such as *Florida Star v. B.J.F.*,[11] *Smith v. Daily Mail Publishing Co.*,[12] *Nebraska Press Ass'n v. Stuart*,[13] and *Landmark Communications, Inc. v. Virginia*[14] are a few among many providing ample evidence of an approach that is uniquely American.

The same phenomenon exists in other areas as well. Many other countries, including most Western democracies, have laws prohibiting the incitement of racial hatred, and both *Brandenburg*

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8. 401 U.S. 295 (1971). I pick this case because, from among all of the Supreme Court defamation cases after New York Times Co. v. Sullivan, 376 U.S. 254 (1964), this one appears to have protected the greatest degree of journalistic negligence at the greatest apparent harm to the victim. I have discussed the case more extensively in Frederick Schauer, *Public Figures*, 25 WM. & MARY L. REV. 905, 910-13 (1984) (denying public figure's emotional distress claim arising from a satire).

9. 485 U.S. 46 (1988).

10. 403 U.S. 713 (1971) (per curiam).

11. 491 U.S. 524 (1989) (declaring unconstitutional an imposition of damages on a newspaper for publishing the lawfully obtained name of a rape victim).

12. 443 U.S. 97 (1979) (holding unconstitutional a West Virginia statute prohibiting newspapers from printing, without permission of juvenile court, the names of juvenile offenders).

13. 427 U.S. 539 (1976) (reversing a trial court order forbidding the press from publishing accounts of defendant's confessions prior to a highly publicized mass-murder trial).

14. 435 U.S. 829 (1978) (holding that a Virginia statute may not constitutionally bar the press from publishing truthful information from confidential proceedings of the Judicial Inquiry and Review Commission).

v. Ohio[15] and the *Skokie* cases[16] are far more exceptional than they are exemplary of international understandings, the best evidence being that some international human rights documents, such as the Universal Declaration of Human Rights[17] and the 1965 Convention on the Elimination of All Forms of Racial Discrimination,[18] which would *require* its signatories to have the kinds of laws against racist speech that are *prohibited* under current American constitutional law.[19] Similarly, the commercial speech cases[20] are a continuing source of astonishment to non-Americans and so too are many, many other cases.

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15. 395 U.S. 444 (1969) (per curiam) (reversing the conviction of a Ku Klux Klan leader prosecuted under an Ohio statute that punished mere advocacy of lawless action rather than actual incitement).

16. Collin v. Smith, 578 F.2d 1197 (7th Cir.) (holding unconstitutional city ordinances that (1) prohibited the dissemination of materials promoting hatred towards persons based on their heritage; (2) prohibited the wearing of military uniforms during an assembly by members of a political party; and (3) required $300,000 in liability insurance before obtaining a parade permit when this requirement was used selectively to prevent certain parties from marching), *stay denied*, 436 U.S. 953, *and cert. denied*, 439 U.S. 916 (1978); National Socialist Party v. Village of Skokie, 434 U.S. 1327 (1977) (Stevens, J., as Circuit Justice, denying stay); National Socialist Party v. Village of Skokie, 432 U.S. 43 (1977) (per curiam) (declaring unconstitutional the denial of a stay of an injunction prohibiting the Nazi party from parading and displaying the swastika in the absence of strict procedural safeguards including immediate appellate review). The Skokie litigation is usefully contrasted with a series of recent Canadian cases denying freedom of expression protection under the Canadian Charter of Rights and Freedoms to a range of neo-Nazis, antisemites, and Holocaust-deniers. The most prominent of these cases is Regina v. Keegstra, 3 S.C.R. 697 (1990) (denying constitutional protection to teacher prosecuted for expressing anitsemitic beliefs to his students). To more or less the same effect are: Regina v. Andrews, 3 S.C.R. 870 (1990) (refusing to extend constitutional protection to leaders of a white supremacist group prosecuted for publishing a newspaper that expressed anitsemitic beliefs, including the proposition that the Holocaust was a Zionist hoax); Canadian Human Rights Comm'n v. Taylor, 3 S.C.R. 892 (1990) (denying constitutional protection to a group and its leader prosecuted for operating a telephone service which played prerecorded messages denigrating the Jewish race and religion); Regina v. Zundel, 31 C.C.C.3d 97, 111-28 (1987) (ruling on appeal of a convicted Holocaust-denier, and refusing to hold unconstitutional a statute criminalizing the willful and knowing publication of a false statement that is likely to cause injury to a public interest). For a discussion of the relevant German law, also substantially less speech-protective than that of the United States, see Eric Stein, *History Against Free Speech: The New German Law Against the "Auschwitz"—And Other—"Lies"*, 85 MICH. L. REV. 277 (1986) (discussing additions to the German Criminal Code dealing with rising antisemitism).

17. Universal Declaration of Human Rights, *adopted* Dec. 10, 1948, *reprinted in* 43 AM. J. INT'L L. SUPP. 127 (1949).

18. Dec. 21, 1965, 660 U.N.T.S. 195.

19. *See* Jordan J. Paust, *Rereading the First Amendment in Light of Treaties Proscribing Incitement to Racial Discrimination or Hostility*, 43 RUTGERS L. REV. 565 (1991); *see also* Mari J. Matsuda, *Public Response to Racist Speech: Considering the Victim's Story*, 87 MICH. L. REV. 2320, 2345-48 (1989) (discussing various international and multinational acts that ban speech aimed at inciting racial hatred).

20. *E.g.*, Bates v. State Bar, 433 U.S. 350 (1977); Linmark Assocs., Inc. v. Township of Willingboro, 431 U.S. 85 (1977); Virginia State Bd. of Pharmacy v. Virginia Citizens Consumer Council, Inc., 425 U.S. 748 (1976).

All of this is possibly but an example of the unenlightened state in which the rest of the world exists, waiting for Americans to carry the white man's burden by introducing advanced American ideas to an unadvanced and largely uncivilized planet. But even if a uniquely American view about freedom of speech and freedom of the press is indeed the superior view despite its current uniqueness, the existence of such divergent views throughout the world, especially in politically stable, economically successful, and socially advanced societies, suggests at the least that, unlike some of the views I noted above, these are real issues, leading to genuinely plausible disagreements with existing American understandings.

The evidence from abroad, therefore, to say nothing of the evidence from other segments of current American society and from American understandings of as recently as thirty years ago, suggests that there are genuine sources of rational disagreement among reasonable people, areas of legitimate difference of not-presumptively preposterous opinion. If that is so, then the absence within some domains, especially within domains otherwise specially devoted to openness of thought, inquiry, discussion, and publication, of these nonpreposterous views might be reasonably strong evidence of the existence of an ideological environment preventing those views from being taken as seriously as they are in so many other environments.

Now that I have engaged in all of these clarifying preliminaries, it is time to turn to the evidence. Is there empirical support for the proposition that, within the domains I have specified, a broadly protective understanding of free speech and free press, generally broader than that espoused by the Supreme Court of the United States in even its most protective moments, functions as a prevailing ideology and exists within an environment such that a challenge to it is far more difficult than support of it?

Let me start with some anecdotal evidence. First, consider the experience that led to the writing of Leonard Levy's *Legacy of Suppression*.[21] As recounted in the Preface to the revised edition,[22] Levy, already in 1957 a distinguished historian, was commissioned by The Fund for the Republic Inc., later called The Center for Democratic Institutions, to prepare a study of the original meaning of the First Amendment.[23] The study was to be used at a

21. LEONARD LEVY, LEGACY OF SUPPRESSION: FREEDOM OF SPEECH AND PRESS IN EARLY AMERICAN HISTORY (1960).

22. LEONARD LEVY, EMERGENCE OF A FREE PRESS (1985).

23. *Id.* at vii.

series of conferences and published by The Fund. When Levy consulted the evidence, however, he came to believe, contrary to his prior beliefs, that the Framers had had a far narrower conception of the scope of the First Amendment's Speech and Press Clauses than was commonly understood. In particular, he came to believe that the Framers did not intend to eliminate the law of seditious libel and may not have intended to eliminate anything other than prior restraints on political speech.[24] When these conclusions (the truth of which I have neither reason nor expertise to affirm or deny) were incorporated into the study, The Fund's director, Robert M. Hutchins, among the most distinguished intellectuals of the time, refused to publish them, although he and The Fund were quite willing to publish Levy's considerably more politically sympathetic portions relating to the religion clauses. Levy wrote *Legacy of Suppression* as the indignant response of an author censored for daring to depart from the prevailing view about the history of censorship.

More recently, academics have found themselves accused of acting irresponsibly or unprofessionally (which is far different from and worse than being accused of being wrong) when they espouse a certain view about freedom of speech. Consider the following by Floyd Abrams, appearing in the *Harvard Law Review*:

> Although courts have thus far struck down those attempts [to pass laws restricting sexually oriented but non-obscene speech in cities, and regulations forbidding racist and sexist speech on college campuses], it is troubling that law professors actually have led the efforts to involve the government in limiting speech they deem to be offensive.[25]

Following the quotation was a footnote referring specifically to Catharine MacKinnon's *Feminism Unmodified: Discourses on Life and Law*[26] and to Charles Lawrence's Article, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*.[27] Now why is this "troubling"? Certainly not because as law professors MacKinnon

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24. *Id.* at x-xix. On this possibility, see also Patterson v. Colorado, 205 U.S. 454 (1907) (Holmes, J.).

25. Floyd Abrams, *A Worthy Tradition: The Scholar and the First Amendment*, 103 HARV. L. REV. 1162, 1171 (1990) (footnote omitted) (reviewing HARRY KALVEN, JR., A WORTHY TRADITION: FREEDOM OF SPEECH IN AMERICA (Jamie Kalven ed. 1988)).

26. CATHARINE A. MACKINNON, FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW (1987).

27. Charles Lawrence, *If He Hollers Let Him Go: Regulating Racist Speech on Campus*, 1990 DUKE L.J. 431.

and Lawrence urged legal results inconsistent with existing doctrine. If that were the standard for condemnation, ninety percent of the legal professoriate would be at risk. Urging legal results at odds with the prevailing case law is much of (and in my view too much of, but that is for another day) what law professors do, and certainly Abrams could not be troubled by the fact that MacKinnon and Lawrence's proposals were not supported by existing doctrine.

If that is so, then the source of the concern must be that their prescriptions for law reform go in one direction rather than another. If it is not troubling that law professors have "actually" suggested legal results inconsistent with, say, *Branzburg v. Hayes*,[28] *Hazelwood School District v. Kuhlmeier*,[29] or *Paris Adult Theatre I v. Slaton*,[30] then the only thing that "actually" makes it "troubling" that law professors such as Lawrence or MacKinnon have suggested legal results inconsistent with *Brandenburg v. Ohio*,[31] *Collin v. Smith*[32] or *Miller v. California*[33] is that they have been on the side of lesser First Amendment protection rather than greater. This is not to say that MacKinnon and Lawrence are correct in their normative prescriptions, or that their normative prescriptions are not open to published attack. It is to say only that there is no evidence to indicate they have acted in any way less faithfully to the role of law professor than those whose views differ from theirs, and to so indicate seems some evidence of an ideology at work.

Similarly, and again Professor Lawrence is the target, Nadine Strossen has suggested that it is in some way specially incumbent upon the academic to avoid arguments of a certain kind:

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28. 408 U.S. 665 (1972) (holding that the First Amendment does not prohibit requiring newsmen to testify as to the criminal activities of confidential sources before state or federal grand juries); *see, e.g.*, Archibald Cox, *Freedom of Expression in the Burger Court*, 94 HARV. L. REV. 1, 52-53 (1980) (arguing that perhaps the burden should be on the press when it claims First Amendment privilege not to reveal its confidential sources).

29. 484 U.S. 260 (1988) (holding that school officials could constitutionally exercise reasonable restrictions on content of speech in student paper).

30. 413 U.S. 49 (1973) (holding that state may constitutionally regulate obscene conduct on commercial premises in order to further legitimate state interests); *see, e.g.*, David A. J. Richards, *Free Speech and Obscenity Law: Toward a Moral Theory of the First Amendment*, 123 U. PA. L. REV. 45, 72-73 (1974) (arguing that the underlying contractual philosophy of liberty of the First Amendment renders all obscenity constitutionally protected).

31. 395 U.S. 444 (1969) (per curiam); *see supra* note 15.

32. 578 F.2d 1197 (7th Cir.), *stay denied*, 436 U.S. 953, *and cert. denied*, 439 U.S. 916 (1978); *see supra* note 16.

33. 413 U.S. 15 (1973) (adopting a three-part test to determine whether a particular work is obscene and therefore subject to state regulation).

> However, Professor Lawrence and other members of the academic community who advocate [restrictions on racist speech because the restrictions would make a symbolic contribution to racial equality] must recognize that educators have a special responsibility to avoid the danger posed by focusing on symbols that obscure the real underlying issues.[34]

This I am sure would be a surprise to those who have argued that one of the virtues of freedom of speech consists of the symbolic advantages a strong free speech system brings.[35] But if it is a violation of the special responsibility of the educator to focus on restrictions of speech for symbolic purposes, then presumably it is just as much a violation of that special responsibility to focus on protection of free speech for symbolic purposes. Because neither Dean Bollinger nor any other legal academic seems ever to have been accused of betraying the special responsibility of the educator in urging reliance on symbols in the service of greater freedom of speech, then it appears that the charge of violation of professional duty is deployed depending only on the viewpoint espoused.

Again, the mere fact of harsh criticism of the views of Lawrence or others would be no evidence of the presence of an ideology. But when the criticism takes the form of suggestions of violation of professional responsibility, and when the criticism is directed only against people who hold certain views, then it is beginning to appear that part of that professional responsibility is to have a certain view about freedom of speech.

My own observations and experiences lead me to believe that these three examples are far more typical than epiphenomenal, being but a few instances of many in which both the discourse used against and the treatment of those with restrictive views about freedom of speech is different in kind from that used with respect to those otherwise similarly situated, but whose views are protective rather than restrictive. Of course I certainly do not suggest that the phenomenon is universal. There are counterexamples to be sure (and I may be one of them). Still, I believe these examples represent rather than contradict a trend or tilt, and just as the presence of a bottle of dry German wine does not defeat the validity of the probabilistic generalization that

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34. Nadine Strossen, *Regulating Racist Speech on Campus: A Modest Proposal?*, 1990 DUKE L.J. 484.

35. See especially LEE BOLLINGER, THE TOLERANT SOCIETY: FREEDOM OF SPEECH AND EXTREMIST SPEECH IN AMERICA 248 (1986).

German wine is sweet, and just as the presence of a stupid philosopher does not negate the probabilistic generalization that philosophers are clever, so too do I feel confident in the similarly probabilistic generalization that standards of evaluation and criticism are higher for those with less protective rather than more protective views about speech and press, and that the degree of social intolerance, to use Mill's term,[36] is considerably higher for those within the institutions of which I speak who have less protective rather than more protective views about freedom of speech and press, all other things being equal.

Some further support for this proposition appears to come from the periodical literature. Over the last ten years approximately 200 articles and student notes on free speech and free press have appeared in American law reviews each year. My own survey of titles, supported by randomly checking the articles themselves, indicates that in excess of ninety percent of these articles are prescriptive, urging certain doctrinal or theoretical approaches upon the courts (or sometimes legislatures), as opposed to those articles, generally historical or comparative, that are largely descriptive. Of this ninety percent, at least ninety-five percent of the prescriptions are in the direction of urging on courts or legislatures greater protection of the free speech or free press interests than the objects of the prescription currently recognize.

This casual empirical survey is potentially flawed, because a question about the baseline remains. Criticism of the Supreme Court is the generally prevailing mode of constitutional scholarship, and concluding that the Court was correct is not generally the way to fame, fortune, and tenure. Moreover, it is unlikely that American constitutionalists are representative of the political makeup of the country as a whole, and thus an appropriately controlled analysis would have to look at, for example, criminal procedure, due process, and equal protection doctrine in order to separate the question of speech protective bias from liberal bias generally. Still, it does appear that this is the case, confirming not only what I believe to be the case about law journals, but also with respect to the journals in the other fields that are part of the relevant environment and with respect to symposia and other events that are also part of the activities of the environment.[37]

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36. MILL, *supra* note 4, at 32.

37. Note, for example, the contrast between the Supreme Court's unanimous decision

I may of course be wrong about all of this. Nevertheless, I want to proceed on the assumption that I am right, and that there exists an environment in which a range of seemingly plausible, even if not ultimately correct, nonprotective views about freedom of speech and press are stigmatized within the academy, within the world of journalism, within the world of the arts, within the world of libraries, and within the world of publishing, such that many sociological and psychological forces provide impediments to the articulation of those views—similar in effect to the impediments imposed by various more formal restrictions.

But is this state of affairs troubling? Here we might return to Mill, who argued in his treatment "Of the Liberty of Thought and Discussion"[38] that governmental or social restriction of ideas on the grounds of the supposed falsity of the ideas was unwise for three reasons. First, the suppressed opinion might be true. No matter how sure we are that it is false, such assertions of infallibility, Mill argued, are unwarranted, and without the assumption of infallibility we cannot conclude that there is no possibility that the opinion we believe false might not be true.[39]

In the context of freedom of speech and press, the arrogance of an assumption of infallibility can be exacerbated by an equally troubling assumption of American superiority. When the received opinion resembles the American view and the rejected opinion resembles the view held in many (or in this case all) other countries, tendencies towards nationalism may reinforce the belief that the rejected opinion cannot possibly turn out to be true.

Recognition of Mill's point, therefore, would counsel in the direction of caution before assuming too easily that a degree of freedom of speech greater than that now prevalent in the United States would be preferable, and a lesser degree would be dangerous. Moreover, because the rejected opinion, that less freedom of speech (or, conversely, more respect for other interests coming into conflict with freedom of speech) might be a good thing, could conceivably, according to Mill, be true, then it might be important

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in University of Pennsylvania v. EEOC, 493 U.S. 182 (1990), rejecting an academic freedom claim of privilege from disclosing information to an EEOC investigation, and the equivalently unanimous, but in the opposite direction, views articulated in Symposium, *Freedom and Tenure in the Academy: The Fiftieth Anniversary of the 1940 Statement of Principles*, 53 LAW & CONTEMP. PROB. 1 (Winter 1990).

38. MILL, *supra* note 4, at 17-52.

39. *Id.* at 18-19.

to guard affirmatively and actively against the tendencies toward its suppression. If, as Holmes observed, "[p]ersecution for the expression of opinions seems ... perfectly logical,"[40] then there is likely to be created an environment in which those with "no doubt of [their] premises or [their] power"[41] will employ what power they have to prevent articulation of the opposing opinion. If that power is the power to criticize as unprofessional, or the power to select participants for a symposium, or the power to choose articles for an academic journal, then there may very well be a use of that power to suppress the currently rejected opinion that less freedom of speech and freedom of the press might be a good thing.

Even if the received opinion is not false, Mill further argued, and even if the rejected opinion is not true, still in most cases the question of truth or falsity will be more complex. Even that which we are convinced is true is likely false in some respects, and even that which appears false may still contain a "portion of truth."[42] By allowing the challenge to that which we are certain is true, we have the tools available to refine that truth, discovering and eliminating partial errors and incorporating the best from views that are largely but not completely false.

Mill's argument was couched largely in terms of truth or falsity, but when social policies are concerned, the question is more likely to be one of soundness or unsoundness. Again, free speech itself provides a perfect example because a system of free speech is, first of all, highly complex, encompassing numerous legal doctrines, political and social institutions, popular understandings, and official practices. The more complex this array of practices, the more likely that some segment of this array might be in need of modification even while most of it is highly satisfactory, or that some doctrines will go "too far" while others might not go far enough. Moreover, most of these doctrines, practices, and institutions rest on empirical suppositions such as that embodied in ideas like the "chilling effect," the belief that suppression makes the suppressed idea seem more attractive, the belief that an act of suppression makes further and more dangerous acts of suppression especially likely, the belief that allowing the expression of hostile words has a cathartic effect, such that the expresser is consequently less likely to engage in hostile acts, and so on.

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40. Abrams v. United States, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).
41. *Id.*
42. MILL, *supra* note 4, at 50.

Again, it seems highly plausible that the basic ideas behind these and other empirical underpinnings of the idea of free speech are sound. But the more these ideas are empirical rather than logical in any technical sense, the more likely it is that any current understanding is somewhat, even if only slightly, off the mark. As a result, the more the ideas of free speech and free press are based on highly complex practices and contingent empirical understandings, the more likely it seems that the soundest ideas about free speech and free press will vary at least slightly from what we now think correct and incorporate at least some of what we now reject as false. If Mill is right in this part of his argument, then we approach the sounder understanding only by fostering an environment for discussion *of* free speech and free press that resembles the environment that the ideas of free speech and free press create for discussion of everything else.

Mill's third argument is perhaps the most intriguing. Even if the received opinion is completely true, he maintained, and even if the rejected opinion is completely false, challenges to the received opinion must be allowed or else the received opinion will turn into "dead dogma," learned by rote and not understood, and consequently over time impossible to defend against attacks upon it.[43]

Were Mill alive today and looking for just such a reflexively defended but rarely thought through principle, he would be hard pressed to find a better example than the principle of freedom of thought and discussion itself. With numbing frequency, the same platitudes and slogans substitute for argument whenever the subject of free speech arises within those institutions dependent on free speech for their existence. "The chilling effect." "Don't blame the messenger." "It's the first step on the slippery slope." "Suppression of opinion is what Stalin and Hitler did." "Speech is a symptom and not a cause." Some of these slogans may contain some truth. Still, the frequency with which they are used in place of argument, in place of analysis, and especially in place of empirical assessment of the empirical presuppositions on which they rest, may be a perfect example of the very "dead dogma" that Mill warned against.

If Mill is right that an unchallenged idea is at risk of being accepted only as dead dogma, and if he is right that an idea so

43. *Id.* at 35.

accepted is less hardy in the long term than one that benefits from deeper understanding, then his insight provides much more than an argument against censorship. It provides an argument for furnishing a challenge to the received opinion even if none is "naturally" available. An argument against censorship is an argument against restricting an opinion that someone wants to offer. Arguments against censorship are classically liberal arguments, concerned with eliminating governmental intervention into the antecedently generated products of individual and social existence. Consequently, if it turns out that no one wants to offer such an opinion, then an argument against censorship has exhausted its utility. If, by contrast, an argument against censorship is but a component of a more encompassing argument for the positive virtues of even unsound opinions, and Mill's warning about dead dogma seems of just this sort, then the lack of an opinion to censor is still problematic, for the positive virtues remain unserved. If a challenge to received opinion is necessary in order that the received opinion not become dead dogma, then the absence of that challenge is troubling even if the absence is not attributable to an act of censorship.

Thus, even were the current unanimity of voice about freedom of speech and press (within the environments I am discussing) not the product of the very social censorship that Mill castigated, it would still be cause for concern, because it could still help to lessen serious understanding of the values of freedom of speech and freedom of the press; but here solutions seem at hand. First, those with the power to select, whether for journal articles, conference presentations, or projects to be funded, could engage in a form of affirmative action, taking the fact of a view's being currently underrepresented as a reason for selecting it. That reason need not be conclusive, but it could be a factor, such that the very challenge to the prevailing understanding would provide an additional argument in favor of the article, paper, presentation, or project.

In addition, a similar kind of affirmative action could pervade the scholarship of those who do endorse the received view. I take it as virtually self-evident that one earmark of intellectual honesty is confrontation of the best arguments for the opposing position. If this is so, then the absence of people actually making those arguments, or the fact of the arguments being made less persuasively than they could, is insufficient reason to relax the standards of intellectual honesty. Arguments in favor of strong free speech protection, therefore, must to be honest confront the

best arguments for a lesser degree of protection. All too often, however, the confrontation is with the arguments that Senator Helms uses to attract votes or contributions, or with the silliest statements made by angry citizens at public meetings, or with a range of Orwellian caricatures. With spectacular frequency, the arguments for freedom of speech and freedom of press are, when not couched in the platitudes and slogans I mentioned above, contrasted only with some blend of Hitler, Mao, Stalin, the Ayatollah Khomeni, and the Cincinnati District Attorney's office, with the argument consisting of the proposition that the choice is only between American-style free speech and free press protection and the political programs of those I have just mentioned. Rarely do we see acknowledgment, let alone serious confrontation, of James FitzJames Stephen,[44] Willmoore Kendall,[45] Herbert Marcuse,[46] and many others whose arguments, whether sound or not, rise far above those of the most common targets.

Thus, if arguments for freedom of speech or arguments for some particular area in which free speech or free press could be greater are to satisfy this standard of intellectual honesty, they have an obligation either to find, or if necessary to create, the strongest argument for the contrary position. If the strongest argument is not strong enough, then what emerges does so because of its power as an argument, and will likely survive because of that very same power. If only weak arguments are dealt with, then there is no reason to believe that what emerges can defeat the best arguments, or will have the power to do so when they are actually made in the arena of public debate.

In the preceding section, and indeed in this entire Article, I have been assuming that a broadly Millian argument about freedom of speech was sound, and I have been assuming as well that, if sound, it was fully applicable to freedom of speech itself. To be faithful to my own message, I must acknowledge that these assumptions themselves must be open to challenge. That is, it

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44. JAMES F. STEPHEN, LIBERTY, EQUALITY, FRATERNITY 74-90 (R.J. White ed., 1967) (arguing that Mill mistakenly believes removal of restraints invigorates rather than softens character by providing comfort rather that obstacles; also arguing that liberty, like fire, is only "good" or "bad" because of the time and place of its existence).

45. Willmoore Kendall, *The "Open Society" and Its Fallacies*, 54 AM. POL. SCI. REV. 972 (1960) (postulating that Mill's formula for the uninhibited exchange of ideas erroneously presumes that all people value the truth above all else, and will result in as much intolerance as tolerance).

46. Herbert Marcuse, *Repressive Tolerance*, *in* ROBERT PAUL WOLFF ET AL., A CRITIQUE OF PURE TOLERANCE 81 (1969) (arguing that what passes for tolerance today is as much a "subversive" and oppressive practice as it was in the past).

might be the case that Millian arguments about freedom of speech are false, and that as a result, there is no reason to apply them to free speech thinking. Or, more plausibly, it might be the case that good arguments for treating freedom of speech and freedom of the press as ideologies exist. Perhaps Learned Hand was right, and the orthodoxy of the First Amendment, contrary to what I have maintained here, is a permissible or even a necessary orthodoxy. That argument does not seem wholly implausible, although I remain doubtful, and I remain doubtful whether it can be accepted by someone purporting to be a scholar *of* the First Amendment. To deal with that question, however, would require dealing with the entire question of just what it is to be a scholar, and that inquiry is best left to others, or at least to other times.

Thus, I will conclude with the observation that the increasing presence of some number of genuinely repressive political forces is doubly unfortunate—first, because of the effects of those repressive actions; and, second, because the presence of Senator Helms and numerous others fuels the tendency of free speech scholars to think that because actual or potential censors are out there, the appropriate response is a call to arms rather than a concern about dealing with the best arguments that might be made for less free speech protection rather than more. Adopting this course might be more effective advocacy, but it is a course of action increasingly likely to be unfaithful to the very principles it seeks to defend. Without allowing as much free speech about free speech as free speech advocates urge about everything else, those advocates risk creating the impression that they are themselves unwilling to confront the close hand assaults on their own belief systems that they demand be confronted by others. Even putting aside the question of the extent to which scholarship and advocacy are compatible, advocates whose own actions betray the very cause they advocate are likely in the long run to be less effective. When the environments that depend on free speech allow free speech about free speech within those environments, they then can with greater credibility urge the benefits of free speech on others.