

THE FREEDOM OF THE PRESS IN JAMES MILL'S POLITICAL THOUGHT *

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ABSTRACT

This article examines the Scottish philosopher and historian James Mill's views on the freedom of the press, predominantly as they are expounded in his unpublished commonplace books, and argues that not only were these ideas very radical, they were critical to Mill's wider political thought and, by extension, to that of the early Philosophic Radicals. By virtue of the use of manuscript material, this article also presents evidence for various intellectual influences upon Mill, and argues that whilst Jeremy Bentham is of central importance to Mill's ideas, he takes inspiration from a wide range of other authors, both modern and ancient, in part as a way of normalizing his views in the context of the reactionary and conservative political climate that he was writing about them in: early nineteenth-century Britain.

Liberty by connivance! My good Sir, what sort of liberty is this? What, Sir, is liberty by connivance, but a temporary relaxation of slavery? Is this a sort of liberty calculated for the meridian of England? Montesquieu places liberty in an exemption from fear: are persons who enjoy it by connivance only, are they exempt from fear, and divested of apprehension?—To talk then, Sir, of a connivance, is to talk only of a temporary suspension of tyranny.¹

Draw a picture, in the most glowing colours, of a society in which freedom of the press had full scope; how virtue, how public spirit would flourish—what happiness, what peace would flow.—Draw another picture of the deplorable effects of restraining that liberty.—This well done would be striking in the highest possible degree.²

The intellectual history of James Mill (1773–1836) typically lies in shadows cast by the two major philosophical figures with whom he was intimately acquainted: his son John Stuart Mill, and his mentor Jeremy Bentham. The education that John received at the hands of his father, well-documented in the *Autobiography*, was extraordinary but highly controversial.³ The notion that James was one of Bentham’s earliest and most influential of disciples, meanwhile, stems in part from his authorship of twelve articles for the *Supplement to the Encyclopaedia Britannica* (hereafter *SupEB*), within which he elucidated the tenets of Utilitarianism across a range of topics, from governments to prison discipline.⁴ This article contends that whilst the history of Mill’s ideas may appear clouded by virtue of his closest associations, some of his ideas did not see the full light of day in his own time either. A primary reason for this was the precarious nature of the freedom of the press, which came

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¹ Edmund Burke, *Speech respecting the Penal Laws against the Dissenters*, 18 February 1773, quoted in James Mill, *Commonplace books* [hereafter *CPB*] (5 vols., I-IV at London Library, V at British Library of Political and Economic Science, n.d.), II, p. 8v.

² Mill, *CPB*, I, p. 105r.

³ See John Stuart Mill, *The collected works of John Stuart Mill*, ed. John M. Robson (33 vols., Toronto, 1963-1991), I.

⁴ Six of these essays have been collected in James Mill, *Political writings*, ed. Terence Ball (Cambridge, 1992).

under sustained attack in early-nineteenth century Britain. Indeed, Mill may even be considered as a rather late member of what Kenneth Johnston has termed the ‘unusual suspects’,⁵ that is to say as one of many radical commentators who operated under an ever-present threat of prosecution for seditious or blasphemous libel, during a period which ran from William Pitt’s so-called ‘Reign of Alarm’ in the 1790s until the era of the ‘Six Acts’, ushered in following the Peterloo massacre in 1819.

What makes the freedom of the press in Britain so important to Mill’s intellectual history is not just that threats to its existence led to very practical restraints on what could and could not be said in his published writings, but that the concept itself was the cornerstone of his wider political thought. The two epigraphs given at the start of this article constitute a broad summary of Mill’s position in this regard. Both are found within his commonplace books, a set of five handwritten ledger volumes that have hitherto received little scholarly attention, but within which can be found over a hundred pages of manuscript notes about the liberty of the press composed between the late 1800s and early 1820s. The first, a quotation from a speech by Edmund Burke, was useful for Mill because it crystallized in one phrase – ‘liberty by connivance’ – how he understood the current state of the freedom (or lack thereof) of the press. The second describes in Mill’s own words the alternative future that a truly free press would create, and the despotism that existed without it.

Part I of this article reflects on the political landscape of early nineteenth-century Britain within which Mill’s thought developed. Parts II and III examine the ideas formed within that context, noting in particular the contrasts between what Mill did and apparently did not intend to say publicly. The principal focus is on how Mill imagined the political utility of a free press that could freely censure, often in vitriolic language, both government institutions and so-called ‘public functionaries’. At first glance, writings of this kind – that

⁵ Kenneth R. Johnston, *Unusual suspects: Pitt’s Reign of Alarm and the lost generation of the 1790s* (Oxford, 2013).

defamed the character of men who wielded political power – would appear to fall under the domain of a civil as opposed to a criminal action under English tort law. In reality, any writing that brought public functionaries into what Bentham described, in reference to Lord Chief Justice Ellenborough’s ruling in Cobbett’s trial for libel in 1804, as ‘disesteem’ could also be regarded as a ‘transgression of the established standard of public behaviour’, hence a breach of the peace, and the originator could be prosecuted for seditious libel.⁶ Whilst Mill, especially in his political commentary, generally concentrated on criminal rather than civil libels, his interest in the free press as a method for establishing truth (of which more later) meant he often considered the actual effects of loss of character and breach of the peace jointly and, it must be stressed, with equal amounts of scepticism.

I.

The problem for nineteenth-century political writers such as Mill, who sought to uncover corruption and misgovernment within the British establishment, was that a press guaranteeing the freedom to publish such expositions simply did not exist. ‘No censure... of the government, or even of a public functionary, is safe in England’, surmised Mill in 1811.⁷ Whilst censorship in the form of an *imprimatur* – what Mill calls the ‘characteristic badge of slavery’⁸ – had not survived beyond the end of the seventeenth century, the press was subject to restraint by a law of libel that had its roots in the legal framework introduced in 1695 by Chief Justice John Holt, and which considered all forms of defamation, both personal attacks and those aimed towards the state, as national threats.⁹ As a burgeoning press began to criticise the government more openly in the mid-to-late eighteenth century – what Eckhart

⁶ Ibid.; William H. Wickwar, *The struggle for the freedom of the press, 1819-1832* (London, 1928), p. 20ff.

⁷ James Mill, ‘Liberty of the Press’, *Edinburgh Review*, XVIII (May 1811), pp. 98-123, at pp. 100-1. Mill is referring in this quotation to the prosecution for libel of William Cobbett in 1804.

⁸ Ibid., p. 100.

⁹ The history of the law of libel prior to the introduction of Holt’s framework can be traced to the legal traditions of the Roman and Byzantine Empires. See Wickwar, *The struggle for the freedom of the press*, p. 22.

Hellmuth describes as the dawn of the age of ‘political dilettantism’¹⁰ – this law of libel enabled the state to punish instances of so-called ‘intellectual licentiousness’ by prosecuting, especially during times of political crisis, those responsible for publications it deemed dangerous. In 1792, for example, amidst the climate of fear generated by the French Revolution, the Pitt ministry issued a warning against the epidemic of ‘wicked and seditious writings’ which sought to ‘excite tumult and disorder by endeavouring to raise groundless jealousies and suspicions’ in the King’s subjects, and, by way of one example, prosecuted Thomas Paine for insulting the constitution in *The rights of man*.¹¹ Paine was convicted *in absentia*.

In the early 1790s, Mill was still an undergraduate in Scotland, and we know nothing about his initial reaction to the events in France. Dugald Stewart, Mill’s favourite tutor at Edinburgh, did however attract controversy by citing with approval Condorcet’s *Life of Turgot* in his *Elements of the philosophy of the human mind*.¹² Nevertheless the actions of the British establishment, where Tory ministers in fear of a French-style upheaval used the ‘mailed fist’ of the law of libel to break the emergent reform movement, clearly set the tone of the government agenda that would respond to the later revival of liberal and democratic opinions in the first fifteen years of the nineteenth century, and the subsequent explosion of radicalism that followed the end of the Napoleonic Wars.¹³ It was within this difficult, early nineteenth-century political context that Mill was to find himself writing after moving to London from Scotland in 1802. In 1794 the likes of Thomas Hardy, John Horne Tooke and John Thelwall were all prosecuted (albeit for lecturing rather than publishing) in what

¹⁰ Eckhart Hellmuth, ‘The ‘palladium of all other English liberties’: reflections on the liberty of the press in England during the 1760s and 1770s’, in idem., *The transformation of political culture. England and Germany in the late eighteenth century* (Oxford, 1990), p. 485.

¹¹ John Barrell, *The spirit of despotism: invasions of privacy in the 1790s* (Oxford, 2006), p. 2.

¹² Stefan Collini, Donald Winch, and John Burrow, *That noble science of politics: a study in nineteenth-century intellectual history* (Cambridge, 1983), p. 32. Mill’s admiration for Stewart is apparent in a letter he sent to Macvey Napier cited in Alexander Bain, *James Mill: a biography* (London, 1882), p. 16.

¹³ Phillip Harling, ‘The law of libel and the limits of repression, 1790-1832’, *Historical Journal*, 44 (2001), pp. 107-134, at p. 107; Barrell, *The spirit of despotism*, p. 59; Élie Halévy, *The growth of Philosophical Radicalism*, trans. Mary Morris (London, 1934), p. 245.

became known as the ‘treason trials’. Their acquittals, whilst celebrated by the radical cause, were quickly followed by the suspension of habeas corpus and the passing of the ‘Two Acts’, which infamously proscribed imagining the King’s death, in 1795.¹⁴ Indeed, between 1790 and 1832 there were seventy-three indictments and 166 ex officio informations for the crimes of seditious or blasphemous libel filed in the Court of King’s Bench.¹⁵ But whilst over 200 attempted prosecutions was a substantial increase over previous eras, Philip Harling has argued that the number tells us little about the enforcement of the law of libel by the state in this period, since prosecutions were concentrated at specific times (such as between 1808 and 1812) and the number actually sentenced remained low (in the same period, only 20 per cent of prosecutions resulted in sentences). One reason posited for this low sentencing rate were the reforms wrought by the Libel Act of 1792, which gave the jury the right to assert a libel’s tendency to provoke a breach of the peace, a power originally reserved for the judge.

Mill himself was sceptical of the effectiveness of the 1792 reforms and, writing in the commonplace books no later than 1812, argued that the judges were always controllers of the final decision and, in a clear allusion to Bentham’s *Elements of the art of packing*, stated that juries were ‘chosen by the master packer’.¹⁶ Packing of so-called ‘special’ juries could occur in prosecutions for misdemeanours brought by ex officio informations at the behest of the Attorney General, rather than by indictment from a grand jury.¹⁷ Thomas Wooler had attacked the practice of packing in his 1817 *An appeal to the citizens of London against the alledged (sic) lawful mode of packing special juries*, but actually escaped conviction in his own trial (complete with a packed jury) that took place the same year. Wooler’s experience suggests the unpredictability of the conduct of even a packed jury (as opposed to a judge)

¹⁴ James Epstein, *Radical expression: political language, ritual, and symbol in England, 1790-1850* (Oxford, 1994), p. 23; Barrell, *The spirit of despotism*, pp. 3-4.

¹⁵ Harling, ‘The law of libel and the limits of repression, 1790-1832’, p. 108.

¹⁶ Mill, *CPB*, II, pp. 81v, 83r; Bentham, *The elements of the art of packing as applied to special juries: particularly in cases of libel law* (London, 1821).

¹⁷ Epstein, *Radical expression*, p. 40; Wickwar, *The struggle for the freedom of the press*, p. 20.

meant the government could still not guarantee convictions in libel trials. Furthermore, whilst the Peterloo massacre of 1819 provided an occasion to prosecute those who used particularly strong anti-government language in its wake, with 79 such cases brought in total,¹⁸ it was apparent that the language employed by the ‘controlled radical platform’ of the likes of Henry ‘Orator’ Hunt and Major John Cartwright prior to 1819 lay outside the reach of a successful libel prosecution.¹⁹

The view from posterity, therefore, is that the law of libel as it stood in Britain in the early nineteenth century was a blunt legal instrument, with which the government often struggled to check the publication of seditious or treasonous words. It was out-of-step with emerging popular political opinion, was targeted against only a few offenders, and even then was only occasionally successful in securing convictions. As Harling rather succinctly notes, ‘the chances of getting away with published attacks on the king, his ministers, and the church were always very good’.²⁰ This assessment appears neglectful, however, of the timidity that was engendered in the press as a result of the arbitrary nature of the law’s application, and it was this effect which particularly motivated Mill’s criticisms of it. What animated Mill was not necessarily the prosecutions of writers and publishers that *did* occur (the punishment of only ‘one libeller in a thousand’ was, reputedly, ‘no great hardship’), but the publication of writings that *did not* occur because of the threat of a potentially ruinous trial (since the intimidation was ‘equal to an extinguisher on the liberty of the press’).²¹ It was in this subtle distinction that Mill perceived the real tyranny of a liberty of the press granted by connivance: ‘every man writes with fear and trembling; and no man dares to lift his voice against abuse’.²² Bentham concurred, stating that the existing law of libel kept the freedom of

¹⁸ Michael Lobban, ‘From seditious libel to unlawful assembly: Peterloo and the changing face of political crime c.1770-1820’, *Oxford Journal of Legal Studies*, 10 (1990), pp. 307-350, at pp. 327-8.

¹⁹ *Ibid.*, p. 329.

²⁰ Harling, ‘The law of libel and the limits of repression, 1790-1832’, pp. 108-9.

²¹ Mill, *CPB*, I, p. 94r.

²² Mill, *CPB*, I, p. 92v.

the press in ‘an abortive embryo state’, where authors continually asked themselves whether ‘[t]o write, or not to write?’²³ Indeed, nowhere does this bind seem more aptly demonstrated than in the case of Bentham’s own *Elements of the art of packing* – the work where these quotations can be found – which was printed in 1810 but, under the advice of Sir Samuel Romilly and John Bowring, withheld from publication. Both men felt that the Attorney General, Sir Vicary Gibbs, would prosecute Bentham for what was essentially ‘an attack upon the whole administration of justice’.²⁴ Bentham acquiesced until 1821.

Curiously, Mill did not seem to share these concerns about *Elements of the art of packing*. He had been enthusiastic about its publication as early as 1809, when he wrote to Bentham stating his hope to place an article about it in the *Edinburgh Review*, and also seems to have assisted it through the press.²⁵ This uncompromising attitude towards Bentham’s work contrasts with the received view of Mill as very reticent in his own writings. Terence Ball, for example, has argued that in the famous essay on ‘Government’, published in the *SupEB* in 1820, Mill undoubtedly had to ‘pull his punches and downplay arguments in favour of radically extending the franchise’.²⁶ William Thomas has described Mill in the *History of British India (HBI)* as a ‘circumspect writer’ whose ‘dislikes [were] safe ones’.²⁷ Even John Stuart Mill acknowledged that men who held strong opinions like his father, such as on religion, had to practise the ‘withholding of them from the world’.²⁸ However a significant practical reason for Mill to refrain from publicly stating expressly what he thought on controversial subjects perhaps explains why he felt the independently wealthy Bentham *should* publish *Elements of the art of packing*. Mill lived a precarious financial existence that,

²³ Bentham, *Elements of the art of packing*, pp. 97-8, 113.

²⁴ Letter to John Bowring from Sir Samuel Romilly quoted by Bain in *James Mill*, p. 102.

²⁵ See the letter to Bentham from Mill in Stephen Conway, ed., *The correspondence of Jeremy Bentham* (Oxford, 1988), VIII, pp. 37-9. What appear to be notes for a review by Mill of *Elements of the art of packing* are found at *CPB*, II, p. 8v, although it is unclear if these form the basis of the piece Mill intended to publish in the *Edinburgh Review*.

²⁶ Terence Ball, ‘Introduction’, in James Mill, *Political writings* (Cambridge, 1992), p. xxxii.

²⁷ William Thomas, ‘Introduction’, in James Mill, *The History of British India* (Chicago, 1975), pp. xxxiv-xxxv.

²⁸ John Stuart Mill, *Collected works*, I, p. 46.

until his employment at the British East India Company in 1819, was enormously reliant on Bentham's generosity.²⁹ He was exactly the type of writer that was threatened by a potentially ruinous libel trial, whilst Bentham was perhaps one of the few who could absorb it. Mill's appointment as an Assistant Examiner in Leadenhall Street following the success of the *HBI* rescued him from pecuniary dependence and eventually made him rich. But it seems doubtful he would have sought to jeopardise this new-found, hard-fought security by publishing anything that could have brought the Company into disrepute by association. That Mill was distinctly concerned about the extent to which he could publish also finds traction in a curious section of the commonplace books which contains fragments of a speech to be given at a trial – his own trial, no less – for libel. It cannot be stated with any certainty that Mill was preparing for what he thought was an inevitable prosecution, although the acquittals of the likes of Hardy, Tooke and Thelwall in 1795 were regarded as spectacular coups for the radical cause (bringing toasts to “Trial by an English Jury” at radical dinners),³⁰ and may have led Mill to consider the propaganda value of a libel trial. But if these fragments are not a rehearsal for a trial, then neither are they drafts for Mill's published articles, since he articulated his argument in those pieces in a very different form to what exists here. Such difficulties of reading authorial intention aside, Mill's courtroom speech is nevertheless useful for framing his critique of the pre-existing law of libel. It is also delivered in particularly heated language that is devoid of any attempt at moderation, and which belies an eloquence not normally associated with Mill's published writings.³¹ As Mill would go on to

²⁹ Bentham let Mill a house, No. 1 Queen Square, near to his own in Westminster at a reduced annual rate. He also invited the Mill family to his country residences at Barrow Green and, later, at Ford (now Forde) Abbey.

³⁰ Epstein, *Radical expression*, p. 23.

³¹ This statement rather concurs with the sentiment of John Black, editor of the *Morning Chronicle*, who, on the occasion of Mill's death in 1836, remarked on his eloquence, stating that if Mill's conversation had been 'reported as uttered, his colloquial observations or arguments would have been perfect compositions.' For the full quotation see Ball, 'Introduction', p. xvii.

note elsewhere, such candidness was his privilege: unlike in the press, the courtroom setting was one of the few places where a liberty of speech existed.³²

II.

Near the beginning of the second volume of the commonplace books, Mill's rhetorical request to the jury at this fictional trial to '[o]pen the book of the law, and shew me the enactment I have violated' encapsulates a key theme of his defence from prosecution for libel in nineteenth-century Britain: such a law had no statutory definition.³³ 'To what illegal act have I incited? What law have I broken?' Mill asks, '[n]one gentlemen; absolutely none'.³⁴ The law was 'still unwritten, still vague' and, though it was in that sense 'imaginary', it was capable of producing 'real tyranny'.³⁵ Without definition in statutory law, Mill believed that a libel effectively amounted to 'any writing of any man whatever' that 'any body should file an information against'. Since distinguishing between what was and was not a libel was seemingly impossible, it was left to judges to fashion the law as they pleased, with every decision 'fabricated for each individual occasion'.³⁶ This criticism was derived from the wider Benthamite concern about the need for codification of the English legal system and the abandonment of the common law.³⁷ In practice, it meant the freedom of the press was illusory, achieved by 'breach of the law': '[b]y the law, there is not a book, about men, and their actions, the publication of which is free.' However, those who published were 'not always punished, and for that reason there is freedom'.³⁸ A judge could let '[nine] of those who offend [his] law of libel, pass unpunished,' and then fall 'like a hungry dog, upon the

³² See Mill's comments about the ability of lawyers to freely libel witnesses at *CPB*, I, p. 86r.

³³ Mill, *CPB*, II, p. 4r.

³⁴ *Ibid.*

³⁵ Mill, *CPB*, I, pp. 81v, 98v.

³⁶ Mill, *CPB*, I, p. 8v. These passages are found within Mill's review of Bentham's *Elements of the art of packing*.

³⁷ See Jeremy Bentham, *A comment on the Commentaries and a fragment on government*, ed. J.H. Burns and H.L.A. Hart (London, 1977).

³⁸ Mill, *CPB*, II, p. 8v.

tenth'. This was, in Mill's view, 'a horrid way of shewing zeal for the commonwealth', and betrayed 'the pestilent hideous fountain from which it flows.'³⁹

The consequence of this 'most cruel kind of tyranny over the press', Mill argued, was that 'all men who write are placed in the condition of men under arbitrary power.'⁴⁰ Mill's allusion to the language of Thomas Hobbes is made concrete by a subsequent citation of *Leviathan*, which states that examples of impunity in the law (that is to say, of not prosecuting consistently) actually invite crime, since 'he which furnishes a man with such a hope and presumption of mercy as encourageth him to offend, hath this part in the offence'.⁴¹ Following Hobbes's *De cive*, meanwhile, was Mill's assertion that, according to the presumption that a libel is any writing which tends to a breach of the peace, there was thus 'no writing which is not a libel':

There is scarce any principle, neither in the worship of God, nor human sciences, but whence there may not spring dissensions, discords, reproaches, and by degrees war itself. Neither doth this happen by reason of the falsehood of the principle, but of the disposition of men, who, seeming wise to themselves, will needs appear such to all others.⁴²

Mill's own choice of words to emphasise this point were much more satirical: 'the selling of gin is the worst of libels, for it has ten times the tendency to produce breach of the peace that almost any writing has.'⁴³ Moreover, Mill felt there was a cynical and implicit admission by the actions of ministers, judges, and lawyers that keeping libel undefined was in their interests: '[t]hey know they dare not deny, that libel is without a definition, therefore without a law.'⁴⁴ Indeed, were a definition made which 'included all which they wish included,

³⁹ Mill, *CPB*, II, p. 3r.

⁴⁰ Mill, *CPB*, II, pp. 4r, 8v.

⁴¹ Mill, *CPB*, II, p. 8v; Thomas Hobbes, *Leviathan*, ed. Richard Tuck (Cambridge, 1996), p. 210.

⁴² Thomas Hobbes, *De cive*, ed. Howard Warrender (Oxford, 1983), p. 96. Mill's quotation is in Latin, and cited at *CPB*, II, p. 11r.

⁴³ Mill, *CPB*, I, p. 100r.

⁴⁴ Mill, *CPB*, II, p. 1v.

common feeling would be shocked; neither they, nor other men would bear to look at it'.⁴⁵ Tyranny, allied with conspiracy, only granted liberty by connivance.

A further aspect of the law's arbitrariness lay in the inconsistency of its application in other domains. Mill noted that within the houses of parliament, for example, libelling was permissible under the privilege of free speech. Indeed, the questioning of the fitness of men in office, and the bringing of them into disrespect owing to their actions, was the 'business of every opposition'. The opposition were allowed to say all they pleased, and this was then written down and published. 'That other men would be punished for printing similar sentiments', argued Mill, was strange.⁴⁶ Within the courts, too, was free speech. Lawyers could defame witnesses, and the 'reputations of men, and the still more delicate ones of women, are treated with the most wanton, and unnecessary cruelty in courts of justice.'⁴⁷ Indeed for Mill the 'lawyer class' was perhaps the most acute example of hypocrisy. Standing 'if not the foremost, nearly the foremost, of the ruling classes', lawyers targeted the press because it had a tendency to reduce their share of power to its 'narrowest limits', even though they obviously benefitted from a liberty of speech in the courts.⁴⁸ Meanwhile the vituperation of men 'obnoxious to the administration', such as Francis Burdett, himself imprisoned in 1810 for libelling the House of Commons, could be carried out unchallenged in all 'ministerial newspapers'. Similarly, libels written *amongst* the press, where 'every opprobrious epithet' was used to insult other authors, went unpunished. This was because judges minded not 'the abuse that is bestowed upon authors'. Mill understood these inconsistencies as clear evidence not only of the law's futility, but of coalescing interests amongst the politically powerful: 'authors is not the class, to which judges belong – judges feel no horror for

⁴⁵ Mill, *CPB*, I, p. 16v.

⁴⁶ Mill, *CPB*, I, p. 98v. At *CPB* II, p. 8v, Mill wryly noted that when the newspapers published the letters of two government ministers, Lord Castlereagh and George Canning, in which they accused one another of 'incapacity and unprobity [*sic*]', both men were by definition 'guilty of libels', as was 'every one who read them aloud in any body's hearing—or who repeated any of their contents to any body'.

⁴⁷ Mill, *CPB*, I, p. 86r.

⁴⁸ Mill, *CPB*, II, p. 5r.

themselves when authors are abused’, although they were ‘burning hot to punish’ when these authors criticised institutions they did favour, such as the monarchy, the military, or the law.⁴⁹ In making this opinion explicit – and, in a word, controversial – Mill stated that the Attorney General sought not ‘the execution of the law... but the gratification of men in power.’⁵⁰

Taken together, the fragments of Mill’s courtroom speech within the commonplace books constitute an erudite demolition of the abuse of the law of libel by the early nineteenth-century British establishment. Some major elements of Mill’s argument presented here, however, can readily be found within his published writings on the liberty of the press. The notion that special juries were often packed, for example, was unambiguously implied in Mill’s 1811 article for the *Edinburgh Review* (although he conceded that any such occurrences were ‘exceedingly few’). In the same article is found the idea that a judge made up the law of libel according to his own preferences, and this opinion was repeated in Mill’s 1821 essay for the *SupEB*.⁵¹ Mill’s reference to the fact that the law only ever applied one way, that is to say that ministers were free to libel their enemies but those who responded in kind were punished, is also mentioned in the 1811 piece, as was his criticism of the law’s undefined nature, which Mill even suggested a remedy for, in the shape of a statutory act akin to that which had been applied to the problematic law of treason in 1351.⁵² The language Mill used to convey his ideas privately was, however, often incendiary, and targeted towards specific authority figures such as the Attorney General. It is not without a hint of irony that this is probably the reason why Mill’s argument was never published in this form, given that

⁴⁹ Mill, *CPB*, I, p. 102r.

⁵⁰ Mill, *CPB*, I, p. 88r. Comparing this quotation concerning the Attorney General with the one Mill gives in his 1811 article for the *SupEB* highlights the difference in language and tone between the published and unpublished instances. In the article, Mill states (with tongue-in-cheek) that ‘Attorney-Generals... in the very act of arraigning some unfortunate man for a libel, never fail to declare themselves friends of the liberty of the press.’ See ‘Liberty of the Press’ (1811), p. 109.

⁵¹ Mill, ‘Liberty of the Press’ (1811), pp. 102ff; James Mill, ‘Liberty of the Press’, in *James Mill: political writings*, ed. Terence Ball (Cambridge, 1992), p. 131.

⁵² Mill, ‘Liberty of the Press’ (1811), pp. 115, 106. In his manuscripts, Mill asks ‘If English legislation merits praise for defining treason—what does it merit for not defining libel?’ See *CPB*, II, p. 6r.

much of it fell under the contemporary understanding of seditious libel. The ideas themselves, however, do not appear radical enough to warrant particular cautiousness. As we will see, in the reformed system envisaged by Mill, such an attack on a public functionary would not need to be moderated.

The major point of departure between Mill's argument against the law of libel in this rehearsal of his defence against prosecution, and his wider political thought which concerned the liberty of the press, is that for all his criticism of the existing law as arbitrary and contradictory, Mill's overarching concern was that it egregiously overlooked whether a published libel was actually true or not, and was therefore founded on an entirely incorrect premise. Sir Samuel Shepherd had explained this very point to Wooler at his trial for seditious libel in 1817: in a civil action, that is to say one concerned with defamation, the truth mattered, but in criminal actions, where the offence was breaching the peace, it had no relevance, even if the writing in question attacked a specific individual.⁵³ In political matters at least, Mill believed that knowing what was true – about legislation, about the workings of institutions, and especially about the behaviour of public functionaries – was of paramount importance to effecting good government. From this very practical condemnation of the existing law of libel as 'altogether unfit for execution' and symptomatic of bad government,⁵⁴ therefore, Mill's thought quickly moved towards a more abstract field of enquiry, which cast the liberty of the press as the only pathway to obtaining truth, and shaped a fundamental uncertainty about the necessity of a law of libel preoccupied with damage to reputation and breach of the peace.

III.

At the intersection, therefore, between Mill's practical concerns about the law of libel, and his more theoretical considerations about the political utility of a truly free press lay his belief

⁵³ Epstein, *Radical expression*, p. 46.

⁵⁴ Mill, *CPB*, II, p. 4r.

that the existing law was fundamentally mistaken. If the ultimate objective of the press was to uncover the truth, this could only be obtained by permitting the publication of all opinions, and thus the offences typically associated with the law of libel had to be summarily discounted. Writing in 1815, Mill argued that:

There is no possible means of obtaining truth, but through permission of error. That method is infallible; because it is a fact, confirmed by the experience of all ages, that when truth combats with error on even ground, it is sure of victory.⁵⁵

In his manuscripts, Mill was unequivocal: '[f]reedom of the press means freedom of censure'. But since in the Britain of his time 'all censure is breach of the law', truth often fell by the wayside:

If people are not allowed to say that the House of Commons is not a true representative of the people; and answers not the purposes of such a representation, when the accusation is untrue, neither will or can they be so allowed, when it is true.⁵⁶

When considered alongside his dismantling of the existing law of libel, Mill's ideas about truth point to an extremely liberal interpretation of press freedom which precludes the need to restrict such a liberty altogether. In Mill's manuscripts can be found strong evidence that he was close to such a position. In the public arguments Mill was willing to make on this subject, however, he held back from making such a case emphatically.

In Mill's 1811 article for the *Edinburgh Review*, for example, in what appears to be a classic case of wilful concealment, he claims to have been prevented from investigating what the proper restrictions of a free press should be due to a lack of requisite writing space.⁵⁷ In the later 1815 piece for the same journal, Mill appears at his most radical, willing to state that he favoured permitting all opinions about public matters – that is to say opinions against both

⁵⁵ James Mill, 'Liberty of the Continental Press', *Edinburgh Review*, XXV (June 1815), pp. 112-134, at p. 131.

⁵⁶ Mill, *CPB*, II, p. 9r.

⁵⁷ Mill, 'Liberty of the Press' (1811), p. 123.

institutions and functionaries, the latter of whom were ‘instruments of government’ and received ‘compensation in the pleasures and other advantages of [their] high situation’ – but is circumspect when it came to discussing what ‘defalcations’ could be enforced with respect to the private rights of individuals.⁵⁸ Finally, in the 1821 article for the *SupEB*, Mill retreated to a more moderate position, whereby he affirmed that censure of the government should be curtailed in two cases: where ‘[e]xhortations to obstruct the operations’ of it were given ‘*in detail*’,⁵⁹ and where the publication of unfavourable opinions was based on ‘false facts’.⁶⁰ In the first case, Mill appears to be condoning a restriction of the press when it promoted specific resistance or violence against the government. In the more perplexing second case, it is not at all clear how Mill’s view that the press must be free to publish all opinions is squared with punishing the use of falsehoods. If by ‘false facts’ Mill means something akin to deliberately making libellous statements mischievously or underhandedly as part of a conspiracy, he does not develop how these might be differentiated from apparently innocuous errors of opinion.

Some (albeit not much) light upon this issue of so-called false facts may be shed by a short two-folio section of Mill’s manuscripts. Under the heading ‘General View of what should be allowed or disallowed in vituperation’, Mill states unequivocally that ‘[d]efamation of public or of private men should, if false, be punished.’ However, Mill distinguishes between three types of defamation, with a descending level of appropriate punishment apportioned for each. The first, defamation where there is ‘consciousness of blame’, refers cryptically to ‘Major Hogan’s lady’ as the only illustrative example. Major Denis Hogan had been prosecuted for libel in 1808 for publishing *An appeal to the public, and a farewell address to the army*, in which he had alleged corruption in the British Army whilst stating

⁵⁸ Mill, ‘Liberty of the Continental Press’, p. 133.

⁵⁹ Mill, ‘Liberty of the Press’ (1992), p. 111. My emphasis.

⁶⁰ *Ibid.*, 130.

that he himself had refused ‘to kiss the petticoat’ in order to receive promotion.⁶¹ Mary Anne Clarke, mistress of Frederick, Duke of York, was both the ‘lady’ at the heart of the scandal and the owner of the ‘petticoat’. She had used her romantic influence over the duke, then commander-in-chief, to secure promotions for her clients, and revealed the details at a parliamentary inquiry led by Gwyllym Wardle in 1809 which eventually forced Frederick’s resignation. Clarke was herself prosecuted for libel in 1813 for publishing an extraordinary diatribe against William Vesey-FitzGerald, then the newly-appointed chancellor of the Irish exchequer, which alleged his complicity in the Duke of York scandal, his procurement of an abortion for his mistress, and his problematic gambling, for which she was sentenced to nine months in prison.⁶² Mill appears to be thinking about this latter case when he speaks of ‘consciousness of blame’, that is to say of the wilful use of falsehoods in a publication, although at the time of Clarke’s prosecution many believed her assertions about Fitzgerald contained more than a grain of truth.⁶³ Nevertheless, even for transgressions of this kind Mill professed that the ‘punishment [was] not apt to be excessive’.⁶⁴

The two further subcategories of defamation that Mill defines relate to ‘misconception’, that is to say the publication of a libellous statement based on faulty thinking or understanding, separated into two forms. ‘Blameable misconception’ could occur when a libeller had ‘not any propensity to do wrong; only a want of care’, and the demand for punishment in this case was less than for libels published with consciousness of blame. Where the offence was ‘blameless misconception’, however, Mill felt any punishment would be both ‘useless’ and ‘mischievous’, given that it removed or weakened ‘the necessary check

⁶¹ Bentham had referred to the Hogan case, which at one point saw 26 separate publishers under prosecution for slandering the British army, as the inspiration for his *Elements of the art of packing*, pp. 1-2.

⁶² Mary Anne Clarke, *A letter addressed to the Right Honourable William Fitzgerald* (London, 1813).

⁶³ H.M. Stephens, ‘Fitzgerald, William Vesey-, second Baron Fitzgerald and Veysey, and Baron Fitzgerald (1783?-1843)’, rev. Peter Gray, *ODNB*.

⁶⁴ Mill, *CPB*, II, p. 6v.

on public men', a subject which he would go on to considerably develop.⁶⁵ What is perhaps most significant about the terms Mill uses to describe the different types of defamation in his manuscripts is that they are strikingly reminiscent of the language used by Bentham in two of his works, the five-volume *Rationale of judicial evidence* and the *Book of fallacies*.⁶⁶ Although the former work was only published in 1827 under the editorship of John Stuart Mill, James Mill was editing Bentham's vast series of manuscripts on evidence as early as 1809.⁶⁷ The *Book of fallacies*, meanwhile, was first published in French in 1816, but Bentham had been working on material for it since 1809.⁶⁸ It is possible, therefore, that Mill's reading of Bentham's then unpublished work was influential to how he believed true statements could be distinguished from false ones.

Elsewhere in the commonplace books there is little to suggest, however, that Mill was that interested in solving the problem of false facts by legal punishment. At the plainest level, Mill held the view that the freedom of the press was 'the Cure for its own Evils'. 'False accusations can never be dangerous,' he reasoned, 'except where freedom of speech is first annulled.'⁶⁹ Mill believed that the only necessary response to the publication of a false fact was to assert the true one in response. Such a remedy was entirely adequate because, as Aristotle had stated in the *Art of rhetoric*, '[t]hat which is true and better is always easier to prove and more likely to persuade.'⁷⁰ The contesting of a libel deemed to be untrue was not to be carried out in the courts as a matter of law, therefore, but in the same domain from

⁶⁵ Mill, *CPB*, II, p. 6v. See also *CPB*, II, p. 8v.

⁶⁶ See for example Bentham's assertion that 'mis-conceptions and consequent mis-statements on the part of the plaintiff (unblameable as well as blameable) are apt very frequently to arise' in *Rationale of judicial evidence: specially applied to English practice*, ed. John Stuart Mill (5 vols., London, 1827), IV, p. 262, and his comment that when 'false facts are alledged, the act of him by whom such false allegations are made, not only ought to be regarded as pernicious, but, consistently, as with justice and utility, as punishable: punishable even when, through temerity, advanced without consciousness of the falsity, much more when accompanied with such dishonest consciousness' in *Book of fallacies*, ed. Philip Schofield (Oxford, 2015), p. 105.

⁶⁷ A.D.E. Lewis, 'The background to Bentham on evidence', *Utilitas*, 2 (1990), pp. 195-219.

⁶⁸ Philip Schofield, 'Editorial introduction', in Jeremy Bentham, *Book of fallacies* (Oxford, 2015), p. xix.

⁶⁹ Mill, *CPB*, I, p. 98v.

⁷⁰ Mill, *CPB*, I, p. 98v; Aristotle, *Art of rhetoric*, Loeb Classical Library, trans. John Henry Freese (Cambridge MA, 1926), pp. 11-13.

which it had emanated: the press. Mill is thus demonstrably keen when writing in his commonplace books to rally against *any* restrictions of the press. His thought is much less concerned with false facts, which may or may not injure the reputation or damage the operations of the government, and much more about ensuring the publication of so-called ‘unfavourable truths’, which the political establishment sought to ‘restrain all declarations’ of in order to uphold ‘conspiracy.’⁷¹ A silenced press was as good as relinquishing this ‘operation of the popular sanction’,⁷² and Mill felt a campaign portraying the population as treacherous was being waged which used this alleged untrustworthiness as the basis for refusing the freedom of the press. ‘When things are truly propounded, and made reasonable, and intelligible,’ Mill quotes from the seventeenth-century cleric Jeremy Taylor, ‘we cannot but assent.’⁷³ Restraining the truth, therefore, was just ‘another term’ for oppression:

Ah, merciless defamers! Your grand complaint is, that the people speak truth against the few who exercise power over them. You think you ought to have perfect liberty to speak all manner of lies against the people. What you have now taken for your ground, is the old, stale pretence, the never failing resource of despotism: that upon which every noxious institution of government, every machination to lay the many under the feet, of the few, has in all ages been established; the unfitness of the people, either to think, or to act for themselves.⁷⁴

It was essential to Mill’s position that he argued the express contrary. When a people were able to express themselves freely against those in power, the path to good government was in fact secure:

⁷¹ Mill, *CPB*, I, p. 16v.

⁷² Mill, *CPB*, I, pp. 6r-v.

⁷³ Jeremy Taylor, *A discourse of the liberty of prophesying: shewing the unreasonableness of prescribing to other men’s faith; and the iniquity of persecuting differing opinions* (London, 1836), p. 239.

⁷⁴ Mill, *CPB*, I, p. 18r.

The very laws of society and of human nature must be held up to view, to shew the irrefragable dependence of the blessings of government upon the freedom of pointing out where it fails to produce the blessings it ought to produce.⁷⁵

This approach, reminiscent of Bentham's mature political belief that government business should be conducted transparently,⁷⁶ can also be seen in Mill's coining of a maxim, derived from François de La Rochefoucauld, that spoke particularly to the public functionaries whom Mill believed should be subjected to criticism of their political actions: '[t]o be truly an honourable man, a man should be ready to be laid open not only to the view of honourable men, but the view of all the world'.⁷⁷

To be sure, Mill understood that his contemporaries would have found this concept intolerable, not least because it might 'injure the peace and happiness of the nation'.⁷⁸ It seemed to Mill, however, that since one could not point out a fault in the government (or those who 'carry it on') without apparently insulting it (or them), no fault ought ever to be pointed out. This he reduced to 'Bonaparte's doctrine', which had spurred a political culture where the population could either praise, or 'hold [their] tongue'.⁷⁹ Mill's concern was that whilst a freedom to extol the virtues of public figures without limit did exist in Britain, a correspondent 'liberty of blame' permitting criticism of their vices did not. In his manuscripts, Mill took his cue from Burke's speech at the trial of Warren Hastings, citing with agreement that 'false praise of public men' was the 'most dangerous tendency of the press'. For Burke, this venality of the press eclipsed any concerns he had about its licentiousness.⁸⁰ Mill, who was not concerned about licentiousness, went much further,

⁷⁵ Mill, *CPB*, I, p. 92r.

⁷⁶ See for example Jeremy Bentham, *Securities against misrule and other constitutional writings for Tripoli and Greece*, ed. Philip Schofield (Oxford, 1990), p. 23; and *idem.*, *Political tactics*, ed. Michael James, Cyprian Blamires, and Catherine Pease-Watkin (Oxford, 1999), p. 37.

⁷⁷ Mill, *CPB*, I, p. 9v.

⁷⁸ Mill, *CPB*, I, p. 99r.

⁷⁹ Mill, *CPB*, I, p. 98v.

⁸⁰ Mill, *CPB*, II, p. 1r. For the report of Burke's speech, see *The speeches of the Right Honourable Edmund Burke: in the House of Commons, and in Westminster-Hall* (4 vols., London, 1816), III, p. 503.

arguing that since disapprobation of the people towards public men was a very powerful thing, this power could ‘make them act in the light – let them not work in the dark’, ensuring that functionaries fear ‘the consequence of that disapprobation if carried to a great height’. These securities of transparency and accountability could only be provided by a truly free press; other types of checks on political power struggled for effectiveness.⁸¹

A principal justification Mill advances in his commonplace books for subjecting public men to vituperation was his belief that the compensation offered by the ‘sweets of [public] office’ allayed the damage such censure inflicted on their reputations.⁸² A related point was made in one of his articles for the *Edinburgh Review*, where he argued that false libels about ministers, when disproved, typically improved the standing and reputation of the individual targeted.⁸³ In the manuscripts, the radical extent of Mill’s position is revealed. He expresses deep ambivalence, for example, about whether legal redress was even necessary, since to be attacked was a ‘benefit to a man whose character can stand the test’.⁸⁴ The subsequent reference to Plutarch’s *Life of pericles* underlined Mill’s point. Pericles had instructed his servant to take a torch and light the way home of a man who had spent the whole day loading him with ‘reproaches and abuse’ which he had borne ‘with patience and silence’.⁸⁵ ‘Those whose actions can bear criticism’, reasoned Mill, ‘have no reason to be angry with the critic, who in reality is their benefactor, and helps most effectually to force their merits into the light.’⁸⁶ In a quotation from Francis North we see a glimpse of what Mill feels was the suitable response to false libels, clearly predicated on the belief that truth superseded all considerations about reputation:

⁸¹ Mill, *CPB*, II, p. 8v. Gerald Postema ascribes a similar view to Bentham in ‘The soul of justice: Bentham on publicity, law, and the rule of law’, in *Bentham’s theory of law and public opinion*, ed. Xiaobo Zhai and Michael Quinn (Cambridge, 2014), p. 45.

⁸² Mill, *CPB*, I, p. 6v.

⁸³ Mill, ‘Liberty of the Continental Press’, p. 121.

⁸⁴ Mill, *CPB*, I, p. 5r.

⁸⁵ Mill, *CPB*, I, p. 101r; Plutarch, *Lives, Vol. III, Pericles and Fabius Maximus. Nicias and Crassus*, Loeb Classical Library, trans. Bernadotte Perrin (Cambridge MA, 1916), p. 13.

⁸⁶ Mill, *CPB*, I, p. 5r.

Let them lie, and accuse, till they are weary; while we declare at the same time, as may be done with demonstration, that all they say is false and unjust; and all the better sort of people, whom truth sways when laid before them, will be with us.⁸⁷

Whilst Mill therefore appears to think that the press, *if free*, was actually incapable of causing injuries to reputation (since ‘open, public charges... may be met, and refuted’),⁸⁸ he was also concerned that reputation itself was overstated. This was Mill’s opinion of the spirit of the age, and of a society ‘led by poets, and romancers’, where the ‘affectation of sentimentality’ was in vogue, and thus damage to character estimated too high.⁸⁹ Yet Mill did not deny damage to reputation could exist, and he acknowledged that ‘persons in the situation of public functionaries’ were ‘liable to be spoken ill of unjustly.’ Although there might be ‘measures which may be taken to lessen the evil’, at the crux of the matter Mill could not depart from his ideas about truth: it was impossible to ‘open the door to the pointing out of real faults, without letting in some false ones’. Mill squared his argument by positing that defamation was ‘one of the taxes which they must pay to the good of the state’,⁹⁰ but he also felt that misrepresentation caused no lasting injury, provided a man’s character was good, as his quotations from Joseph Addison in *The Freeholder* appear to attest:

a man must either be insignificant, or able to bear an undeserved reproach. ... A statesman, who is possessed of real merit, should look upon his political censurers with the same neglect that a good writer regards his critics.⁹¹

Any person [...] who is zealous for promoting the interest of his country must conquer all that tenderness and delicacy which may make him afraid of being spoken ill of; or his endeavours will often produce no less uneasiness to himself, than benefit to the public.⁹²

⁸⁷ Mill, *CPB*, I, pp. 11v-12r; Roger North, *The life of the Right Honourable Francis North, Baron of Guilford, Lord Keeper of the Great Seal* (London, 1808), pp. 299ff.

⁸⁸ Mill, *CPB*, I, p. 103r.

⁸⁹ Mill, *CPB*, I, p. 88r.

⁹⁰ Mill, *CPB*, I, pp. 93r-v.

⁹¹ Mill, *CPB*, I, p. 102r.

For Mill, the price of admission to public life was a thick skin: '[a] true patriot may comfort himself under the attacks of falsehood and obloquy, from several motives and reflections.'⁹³

The result, meanwhile, was good governors, and thus good government.

Mill's arguments downplaying the injury inflicted on the characters of public men represents some of the most radical thought in his commonplace books. It contrasts in particular with his assertion, in his article for the *SupEB*, that the press was in fact 'an instrument peculiarity adapted for the commission of injuries against reputation, and for effecting disturbance to the operations of government.'⁹⁴ Mill was similarly dismissive in private about the second offence outlined in this statement – that of breaching the peace – which was the purported motivation of criminal actions for seditious libel. In Mill's view, it was an aphorism that libels against institutions or political functionaries encouraged insurrection. Writing earlier in the *Edinburgh Review*, he had stated that such censure was more likely to improve government than destroy it, since a state without means to accept criticism and reform itself was destined to undergo revolution.⁹⁵ In the commonplace books, Mill expands upon such ideas in some detail:

The grand doctrine of Attorneys General and Lord Chief Justices, [is] that all representation of misgovernment has a tendency to excite revolt. This the grand burthen of their song—but not a word do they say of the misgovernment itself, of its tendency to cause revolt. It is not the thing, but the description of it that does the mischief. Ill usage will never make any body your enemy; but let any one tell him of your ill usage, and not till then will he hate you, and seek to be revenged. The people of England will be as quiet as lambs under misgovernment—no uneasiness will they ever feel from its pressure—but let only a word in description of it be

⁹² Mill, *CPB*, I, p. 13v.

⁹³ Mill, *CPB*, I, p. 14v.

⁹⁴ Mill, 'Liberty of the Press' (1992), p. 98.

⁹⁵ Mill, 'Liberty of the Press' (1811), p. 117. Mill's words are strikingly similar in sentiment to those of Burke's in *Reflections on the Revolution in France*, ed. J.G.A. Pocock (Indianapolis, 1987), p. 19.

given to their eye, they will flame out immediately. Well done, crown lawyers! You are admirable judges of human nature! You are well known to be such!⁹⁶

Mill was able to confront the perceived threat of political revolt instigated by a free press by referring to two eighteenth-century cases of insurrection: the American and French Revolutions. In his wider manuscript material, Mill often returned to the case of France, casting events there as a ‘true gift from heaven’ for conservative enemies of political reform, precisely because of the damage they did to the reputation of philosophy.⁹⁷ Mill lamented this opposition towards philosophy because the excesses of the French Revolution were the consequence of a warning missed by the state’s political leadership: the long-running refusal to give consent to reform, and the subsequent giving of it with so many conditions attached, was part of the reason why the revolution itself was so unsuccessful and unfortunate.⁹⁸ The wanting of the freedom of the press in France made a tangible contribution to ‘the causes of the atrocities’ because the revolutionaries suffered from a lack of instruction. Their opinions were not refuted but simply punished. If they had been forced by the dynamism inherent in a free press to answer objections, their writings would have ‘been fully canvassed’, their ideas sharpened and ‘obliged to go much deeper’.⁹⁹ The collapse of the existing order in 1789 therefore brought brittle and untested radical political philosophy to the fore with disastrous ramifications. Furthermore, it was not just the *ancien régime* that was guilty of refusing to give the press its all-important liberty: ‘against no set of men’ did Maximilien de Robespierre’s ‘lust of extermination, his hydrophobia, rage more furiously, than against men of letters.’¹⁰⁰ Here, then, was Mill’s central political point writ large: the lack of a free press meant revolutionary excess was doomed to repeat itself: ‘[t]here was never a moment’s

⁹⁶ Mill, *CPB*, I, p. 89r.

⁹⁷ Mill, *CPB*, I, p. 45r.

⁹⁸ Mill, *CPB*, I, p. 43r.

⁹⁹ Mill, *CPB*, II, pp. 7-8.

¹⁰⁰ Mill, *CPB*, I, p. 85v.

freedom to the press, during the French revolution'.¹⁰¹ An *enslaved* press was 'at all times the exclusive instrument of the domineering faction, who made use of it to calumniate their enemies and agitate the people.'¹⁰² Mill's position on press freedom was always designed to bring stability to the social order, not overthrow it. At a stroke, the outlook of his position shifts from radical to liberal.

The American Revolution, on the other hand, had delivered a stable republican government which, by 1791, amended the constitution to protect the freedom of the press. Mill used the example of a 'flourishing' United States to cement his idea that press freedom was the consummate antidote to political violence. Chiding the diametrically-opposed view of the British establishment, Mill mocked that 'talk of a free press having a dangerous tendency to excite insurrection among the people' led one to 'suppose pandemonium to exist wherever there is a free press'.¹⁰³ In his 1811 article for the *Edinburgh Review*, Mill had used the United States, along with a 'few of the Protestant countries of modern times—England, Holland, Switzerland' as examples of the only places 'in which any tolerable degree of the liberty of the press has ever been enjoyed.' '[S]o far from showing the greatest tendency to anarchy,' these countries had in fact 'been the farthest removed from that tendency.'¹⁰⁴ Within the manuscripts, Mill describes the United States as the case-in-point for a free press effecting good government, and his opinion finds notable concordance with the views on free speech that Bentham expressed in the first of his four letters to the Spanish people, first published in 1820:

In the Anglo-American United States ... No prosecution can there have place, for anything written against the government, or any of its functionaries as such. ... [I]n that country, in which, ever since *that* good government was established; in which, for the forty years since

¹⁰¹ Mill, *CPB*, II, p. 2v.

¹⁰² Mill, 'Liberty of the Press' (1811), p. 119.

¹⁰³ Mill, *CPB*, I, pp. 89r-v.

¹⁰⁴ Mill, 'Liberty of the Press' (1811), pp. 117-8.

that it has been in existence, public tranquillity has not known what disturbance is: there is no more restriction upon men's speaking together in public, than upon their eating together in private.¹⁰⁵

Indeed, in Bentham's mature political thought, which found particular expression in his magisterial *Constitutional code* and related works, the free press was the major component of the so-called 'Public Opinion Tribunal', a 'harmless and useful fiction'¹⁰⁶ which, Bentham argued, could regulate political behaviour by subjecting the actions of government institutions and functionaries to the court of public opinion. Mill's ideas on the political application of a free press clearly echoed the importance of this type of scrutiny of government conduct.

IV.

In the course of this article, it has been suggested that Bentham was a significant intellectual influence upon Mill's ideas about press freedom. This point is, of course, not altogether surprising. Bentham and Mill lived and worked in close proximity, especially during the early years of their relationship, and this intimacy spurred ideological affinity. Many of Mill's manuscripts on the liberty of the press are written upon used envelopes addressed to various Bentham residences, such as Ford Abbey, implying that Mill may have composed them during the times his family vacationed with Bentham between 1811 and 1814.¹⁰⁷ At this time, Bentham would have been completing *Elements of the art of packing*, as well as working on the manuscripts that would eventually become *Rationale of judicial evidence* and *Book of fallacies*. Like Bentham, Mill held the view that the licentiousness of the press and its liberty were indistinguishable. In this, both were clearly opposed to the opinion of William

¹⁰⁵ Jeremy Bentham, *On the liberty of the press, and public discussion, and other writings for Spain and Portugal*, ed. Philip Schofield and Catherine Pease-Watkin (Oxford, 2012), pp. 7-8.

¹⁰⁶ Postema, 'The soul of justice: Bentham on publicity, law, and the rule of law', p. 47.

¹⁰⁷ See for example *CPB*, II, pp. 2^{vb5}, 3^{rb6}, 4^{rb4}, 4^{v1}, 5^{rb3}, 5^{rb4}, 5^{rb5}, 5^{vb1}, 10^{r2}.

Blackstone.¹⁰⁸ Mill also clearly takes on Bentham's views with regard to the vagaries surrounding the definition of the law of libel, around the issue of jury packing in cases of libel law and the associated corrupt practices of judges and lawyers, and on the fact that the existing law operated as an unacceptable restraint upon the press. Whilst Mill appears to make some use of Bentham's ideas when attempting to define subordinate instances of defamation, his opinions about the utility of truth that could be established by a free press are unequivocally shared by his mentor. When Mill sought to develop his critique of the pre-existing law of libel into a political case for preventing attempts to control the press so that it could freely censure the conduct of government and its functionaries, he was advancing an argument compatible with Bentham's own ideas about the role of the press in the Public Opinion Tribunal, where it acted as the most substantial check on state power.

But whilst Bentham is undoubtedly influential, Mill often went much further than his mentor, such as in regards to his disdain for reputation. Bentham seemed to at least acknowledge reputation as fairly valuable in his published works such as *Elements of the art of packing*. Mill, on the other hand, thought that '[t]o torture the feelings of men, may in the opinion of the wisest and best, be an eminently good thing'.¹⁰⁹ Beyond the influence of Bentham, Mill often cited in his commonplace books authors who, though they historically had written in opposition to the government of the day, were more often classed as moderates rather than radicals. By showing the similarities of their ideas with his own, Mill effectively tempers aspects of his views that may have proved controversial if made public:

Why was not Ld. Erskine punished for his pamphlet on the war—Burke for his *Thoughts on the cause of the present discontents*, etc.? Did these men mean to raise sedition? Was Ld.

Erskine a Jacobin—Did Mr. Burke mean anarchy—was Chatham an enemy of social order, legitimate government and holy religion—Was Mr. Locke an incendiary? No—Gentlemen—

¹⁰⁸ William Blackstone, *Commentaries on the laws of England* (4 vols., Oxford, 1765), IV, p. 153.

¹⁰⁹ Mill, *CPB*, I, p. 100v.

these great, and ever venerable *patriotes*, did not believe with the lawyers that censorial writings on government had no tendency but to make men seditious.¹¹⁰

On the one hand, Mill was making the substantive point that criticism of the government and its functionaries was not an act that required punishment. History, after all, was littered with examples of censorial political writings which did not incite sedition:

All our best writers have not scrupled, by condemning many of our laws, to declare themselves wiser than the laws; Locke, Adam Smith, Malthus, Blackstone, Price, Priestley, Bishop [Richard] Watson (Llandaff), Paley, Burke, Fielding, [Patrick] Colquhoun, [John] Howard, [James] Neild.¹¹¹

But at the same time, it seems Mill was keen to show that his own arguments, rather than being radical, held much in common with those he deemed ‘*patriotes*’, and he normalised his views by presenting them in tandem.

Mill’s attempts to associate himself with these ‘*patriotes*’ does not necessarily take him out of the other group he was identified in at the start of this article, Johnstone’s ‘unusual suspects’. The threat of prosecution for seditious libel at the time he was writing was real, and he clearly moderated his published ideas about the press accordingly. But it does call into question the assessment that these views are best described as radical or subversive. Mill presented within his manuscript writings a case for emasculating – to the point of completely undermining – the pre-existing law of libel of nineteenth-century Britain. In this guise, his ideas can be seen as a product of two particular circumstances of his time: the abuse of the legal apparatus he witnessed as a political writer by the British establishment, which meant that the press only had its liberty under connivance; and the overestimation, in his eyes, of the ability of the press to injure character or breach the peace, by a governing elite who were themselves corrupt beneficiaries of the current practice. In Mill’s view, both these

¹¹⁰ Mill, *CPB*, I, p. 82r. Mill’s emphasis.

¹¹¹ Mill, *CPB*, I, p. 101v.

circumstances were dangerous, and likely to foment the kind of political violence which conservatives or reactionaries mistakenly believed would be the result of giving the press its liberty. It was obvious to Mill, however, that it was only in the securing of such a freedom, which would enable the defects in both government and its functionaries to be pointed out, that the antidote to political upheaval could be found. This ability to highlight defects in the political establishment was the central plank from which further Utilitarian reforms such as extension of the franchise or support of the secret ballot, not discussed in this article, could flow. The logical endpoint of Mill's reasoning within the commonplace books was the promotion of a much stronger freedom of the press than existed in the context within which he was writing. But whilst his eschewal of the traditional view that libels against the government and its functionaries damaged reputations and caused breaches of the peace was undoubtedly a controversial statement to make in his own time, Mill was adamant in his contestation that the lack of a free press, in contradistinction, was the surest route not just to bad government, but to revolution.