

HEINONLINE

Citation: 14 First Amend. L. Rev. 159 2015



Content downloaded/printed from
HeinOnline (<http://heinonline.org>)
Fri Aug 5 12:38:45 2016

- Your use of this HeinOnline PDF indicates your acceptance of HeinOnline's Terms and Conditions of the license agreement available at <http://heinonline.org/HOL/License>
- The search text of this PDF is generated from uncorrected OCR text.

**THE EPISTEMIC NEUTRALITY OF THE
“MARKETPLACE OF IDEAS”:
MILTON, MILL, BRANDEIS, AND HOLMES ON
FALSEHOOD AND FREEDOM OF SPEECH**

CHRISTOPH BEZEMEK*

ABSTRACT

For quite some time it was far from certain that false statements of fact were to be considered protected speech. While “[u]nder the First Amendment, there is no such thing as a false idea,” Justice Powell wrote for a Supreme Court majority in 1974, “there is no constitutional value in false statements of fact. Neither the intentional lie nor the careless error materially advances society’s interest in ‘uninhibited, robust and wide-open’ debate on public issues.”

Numerous decisions relied and elaborated on that rationale. In 2012 it was altered significantly, when the Supreme Court overturned a conviction based on a statute prohibiting any false representation to have been awarded military decorations. “Our constitutional tradition stands against the idea that we need Oceania’s Ministry of Truth,” Justice Kennedy emphasized on behalf of the plurality, drawing on Brandeis and Holmes that “the remedy for speech that is false . . . is speech that is true.” Also, “a false statement (even if made deliberately to mislead),” Justice Breyer added in his concurrence, relying on positions originally developed by Mill, “can promote a form of thought that ultimately helps realize the truth.”

* Associate Professor of Law, IOER – WU, Welthandelsplatz 1, D3, 1020 Vienna christoph.bezemek@wu.ac.at. This Article was originally drafted as a contribution to “Law and Fictional Discourse,” a conference held at the Yale University Whitney Humanities Center on May 19–21, 2015. I am most grateful to Hans Lind for organizing this event and inviting me to participate as well as to audience for the lively discussion. Particular thanks to Michael Holoubek, Frederick Schauer, Michael Steven Green and Michael Potacs for their comments on an earlier draft of this Article and to Gisela Kristoferitsch and Tamara Schöndorfer for their support in finishing the manuscript.

The result is to be applauded: Speech not causing any legally cognizable harm, beyond being merely erroneous, is indeed entitled to comprehensive First Amendment protection. The reasoning, however, is not: Even if Mill, Brandeis, and Holmes are regularly lumped together when it comes to arguing in favor of a robust protection of falsehood, their positions as to whether and why false statements of fact ought to be shielded against government intervention are all too different to provide a single, coherent rationale. The following Article makes the argument that among the concepts of Mill, Brandeis, and Holmes, only the latter position advocates consistently in favor of true epistemic neutrality of the marketplace of discussion.

I. INTRODUCTION

A. *Meet Xavier Alvarez*

In 2007, Xavier Alvarez attended his first public meeting as a board member of the Three Valley Water District Board in Claremont, California.¹ At that time he was presumably not aware that he was about to make First Amendment history, introducing himself by stating: "I'm a retired marine of 25 years. I retired in the year 2001. Back in 1987, I was awarded the Congressional Medal of Honor. I got wounded many times by the same guy. I'm still around."² None of this was true (except for the evident fact that he was still around, of course).³ And yet, none of this was said in order to secure employment, financial benefits, or privileges.⁴ Mr. Alvarez had made it up to gain the respect of his peers.⁵

However, shortly thereafter, he was exposed and, making matters worse, indicted under the Stolen Valor Act, a federal statute making it a misdemeanor to falsely represent oneself as having re-

¹ *United States v. Alvarez*, 617 F.3d 1198, 1200 (9th Cir. 2010).

² *Id.*

³ *Id.* at 1201.

⁴ *Id.*

⁵ *Id.*

ceived any U.S. military decoration or medal.⁶ Subsequently, Mr. Alvarez was sentenced to three years' probation, 416 hours of community service, and a \$ 5000 fine.⁷ He appealed to the Court of Appeals for the Ninth Circuit on First Amendment grounds.⁸ The court declared the Act unconstitutional and reversed the conviction.⁹

The Supreme Court affirmed and, in doing so, surprised many commentators who assumed, based on the Court's prior case law,¹⁰ that "false facts . . . have limited or no constitutional value."¹¹ Indeed, *Alvarez* apparently foiled the rationale underlying numerous previous decisions which held that even though "[u]nder the First Amendment there is no such thing as a false idea . . . there is no constitutional value in false statements of fact Neither the intentional lie nor the careless error materially advances society's interest in 'uninhibited, robust, and wide-open debate' on public issues."¹² Ac-

⁶ 18 U.S.C. § 704 (b)-(c) (2005).

⁷ *Alvarez*, 617 F.3d at 1200.

⁸ *Id.*

⁹ *Id.*

¹⁰ *Gertz v. Robert Welch, Inc.* 418 U.S. 323 (1974).

¹¹ Ashutosh Bhagwat, *Details: Specific Facts and the First Amendment*, 86 S. CAL. L. R. 1, 38 (2012).

¹² 418 U.S. at 339-40. *See also*, *St. Amant v. Thompson*, 390 U.S. 727, 732 (1968) ("Neither lies nor false communications serve the ends of the First Amendment, and no one suggests their desirability or further proliferation.").

Of course, initially the Court's case law pointed in a different direction. *New York Times v. Sullivan* rather broadly granted First Amendment protection to incorrect factual speech: "[E]rroneous statement," Justice Brennan emphasized, "is inevitable in free debate, and . . . must be protected if the freedoms of expression are to have the 'breathing space' that they 'need . . . to survive'" 376 U.S. 254, 271-280 (1964) (referring to *NAACP v. Button*, 371 U. S. 415, 433 (1963)). Brennan did not stop at condoning such utterances as a necessary evil, *see* Mark Spottswood, *Falsity, Insincerity, and the Freedom of Expression*, 16 WM. & MARY BILL RTS. J. 1203 (2008), pointing to their intrinsic value in achieving the goals pursued by free speech, as, quoting John Stuart Mill, "Even a false statement may be deemed to make a valuable contribution to public debate, since it brings about 'the clearer perception and livelier impression of truth, produced by its collision with error.'" *Sullivan*, 376 U.S. 254, 279 n.19 (1964) (quoting JOHN STUART MILL, *ON LIBERTY*, Oxford: Blackwell 15 (1947)).

Some months later, however, the Court put *Sullivan* in perspective. These arguments in favor of false statements of fact would not apply as far as intentional falsehood was concerned. *Garrison v. Louisiana*, 379 U.S. 64, 75 (1964) ("Although honest utterance, even if inaccurate, may further the fruitful exer-

cordingly, “[s]preading false information in and of itself carries no First Amendment credentials.”¹³ “[F]alse statements [were] not [considered to be] immunized by the First Amendment right to freedom of speech”¹⁴ because they “harm both the subject of the falsehood and the readers of the statement.”¹⁵ They were considered “particularly valueless; [as] they interfere with the truth-seeking function of the marketplace of ideas,”¹⁶ and thus “unprotected for their own sake.”¹⁷

B. *Oceania’s Ministry of Truth*

Even if not decided by a clear majority, *Alvarez* put things in perspective. While disagreeing about the general approach to be taken and the standard to be applied, the plurality opinion and the concurrence readily agree that false statements of fact are indeed protected by the First Amendment. They dismiss the quotations referred to before as mere “isolated statements,” which do not allow for the conclusion “that false statements, as a general rule, are beyond constitutional protection,”¹⁸ but rather are to be understood in light of their object and purpose: “These quotations all derive from cases discussing defamation, fraud, or some other legally cognizable harm associated with a false statement, such as an invasion of privacy or the costs of vexatious litigation.”¹⁹ They do not “mean ‘no protection

cise of the right of free speech, it does not follow that the lie . . . should enjoy a like immunity For the use of the known lie as a tool is at once at odds with the premises of democratic government and with the orderly manner in which economic, social, or political change is to be effected Hence [the Court stated] the knowingly false statement and the false statement made with reckless disregard of the truth, do not enjoy constitutional protection.”); *see also* *Time, Inc. v. Hill*, 385 U.S. 374, 390 (1967).

¹³ *Herbert v. Lando*, 441 U.S. 153, 171 (1979).

¹⁴ *Bill Johnson’s Rests., Inc. v. N.L.R.B.*, 461 U.S. 731, 743 (1983).

¹⁵ *Keeton v. Hustler Magazine, Inc.*, 465 U.S. 770, 776 (1984).

¹⁶ *Hustler Magazine, Inc. v. Falwell*, 485 U.S. 46, 52 (1988).

¹⁷ *BE & K Constr. Co. v. N.L.R.B.*, 536 U.S. 516, 531 (2002).

¹⁸ *United States v. Alvarez*, 132 S.Ct. 2537, 2544–45 (2012) (plurality opinion).

¹⁹ *Id.* at 2545.

at all,”²⁰ as, “[t]he Court has never endorsed the categorical rule . . . that false statements receive no First Amendment protection.”²¹ A position which per se could not be aligned with a:

constitutional tradition stand[ing] against the idea that we need Oceania’s Ministry of Truth Were the Court to hold that the interest in truthful discourse alone is sufficient to sustain a ban on speech, absent any evidence that the speech was used to gain a material advantage, it would give government a broad censorial power unprecedented in this Court’s cases or in our constitutional tradition.²²

Relying on Brandeis’s concurring opinion in *Whitney v. California*²³ and Holmes’s dissent in *Abrams v. United States*,²⁴ Kennedy pointed out that “[t]he remedy for speech that is false [has to be] speech that is true. This is the ordinary course in a free society. The response to the unreasoned is the rational; to the uninformed, the enlightened; to the straightout lie, the simple truth.”²⁵

Alvarez is a remarkable decision from the perspective of First Amendment doctrine,²⁶ yet even more so from the perspective of

²⁰ *Id.* at 2553 (2012) (Breyer, J., concurring). See generally Mark Tushnet, *Justice Breyer and the Partial DeDoctrinalization of Free Speech Law*, 128 HARV. L. REV. 508, 513–14 (2014) (discussing Breyer’s approach in *Alvarez*).

²¹ *Alvarez*, 132 S.Ct. at 2545 (plurality opinion).

²² *Id.* at 2547–48 referring to GEORGE ORWELL, 1984 (1949) (“Were this law to be sustained, there could be an endless list of subjects the National Government or the States could single out.”).

²³ 274 U. S. 357, 377 (1927) (Brandeis, J., concurring).

²⁴ 250 U. S. 616, 630 (1919) (Holmes, J., dissenting).

²⁵ *Alvarez*, 132 S.Ct. at 2550 (plurality opinion).

²⁶ See, e.g., Rodney A. Smolla, *Categories, Tiers of Review, and the Roiling Sea of Free Speech Doctrine and Principle: A Methodological Critique of United States v. Alvarez*, 76 ALB. L. REV. 499 (2012). Of course, quite a large number of eminent scholars previously postulated the idea that falsity per se was not bereft of any First Amendment protection. See, e.g., Charles Fried, *The New First Amendment Jurisprudence: A Threat to Liberty*, 59 U. CHI. L. REV. 225, 238 (1992); Paul Horwitz, *The First Amendment’s Epistemological Problem*, 87 WASH. L. REV. 445, 4630 (2012); Frederick Schauer, *Facts and the First Amendment*, 57 UCLA L. REV. 897 (2010); Jonathan Varat, *Deception and the First Amendment*, 53 UCLA L. REV. 1107 (2006); Mark Tushnet, “Telling Me Lies”: *The Constitutionality of Regulat-*

free speech theory, as the plurality and the concurrence address, rephrase, and (eventually) extend related, albeit not identical, arguments underlying the very concept of free speech. Justice Kennedy relies on Brandeis's concept of "more speech as the remedy to be applied . . . to expose falsehood and fallacies through discussion,"²⁷ and on Holmes's famed theory "that the best test of truth is the power of the thought to get itself accepted in the competition of the market."²⁸ Alternatively, Justice Breyer refers to John Stuart Mill's argument to protect false statements of fact as they allowed for "the clearer perception and livelier impression of truth, produced by its collision with error."²⁹

II. MILTON, MILL, HOLMES, AND BRANDEIS

Neither approach is self-explanatory. It is far from evident that "more speech" adequately remedies intentional falsehood, how "false statements of fact" are to be dealt with in "the marketplace of ideas,"³⁰ or whether the question at hand may be answered by relying on Mill's *On Liberty* in the first place. Indeed, some scholars emphasize that Mill's work was to be understood in the tradition of John Milton³¹ and was thus occupied with true ideas rather than factual truth.³²

ing False Statements of Fact, in HARVARD LAW SCHOOL PUBLIC LAW & LEGAL THEORY WORKING PAPER SERIES 2 (2011), <http://bit.ly/1KFSOqu>.

²⁷ *Alvarez*, 132 S.Ct. at 2550 (plurality opinion) (quoting *Whitney v. California*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring)).

²⁸ *Id.* (quoting *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting)).

²⁹ *Id.* at 2553 (Breyer, J., concurring) (quoting *New York Times v. Sullivan*, 376 U.S. 254, 279 (1964) (citation omitted)).

³⁰ See *Hustler Magazine v. Falwell*, 485 U.S. 46, 52 (1988) (describing false statements of fact as interference with the truth-seeking function of the marketplace of ideas).

³¹ It is well-established that Milton's argument served as a role-model for Mill's approach. See, e.g., C. EDWIN BAKER, *HUMAN LIBERTY AND FREEDOM OF SPEECH* 6 (1989); see also ALAN HAWORTH, *FREE SPEECH* 3 (1998).

³² Bhagwat, *supra* note 11 at 42 (2012).

A. Let Her and Falsehood Grapple

Evaluating Milton's position, it is safe to assume that his famed statement, "[S]o Truth be in the field, we do injuriously, by licensing and prohibiting to misdoubt her strength. Let her and Falsehood grapple; who ever knew Truth put to the worse, in a free and open encounter,"³³ is not directed at differing factual statements, but rather at competing ideological convictions. Eventually, according to Milton's argument, truth will prevail "though all the windes of doctrin were let loose to play upon the earth."³⁴ The *Areopagitica* is a plea for extensive freedom of political and theological discussion and against prior restriction of those arguments:³⁵ "Where there is much desire to learn, there of necessity will be much arguing, much writing, many opinions; for opinion in good men is but knowledge in the making."³⁶

It is this dialectical process Milton aims to promote,³⁷ which is why he takes a stand against censorship as "the stop of Truth . . . by hindering and cropping the discovery that might bee yet further made both in religious and Civill Wisdome."³⁸ Mere factual statements were not the subject of his "Speech . . . for the Liberty of Unlicens'd Printing."³⁹ And thus, "although Milton and others believed that their religious and political views reflected something true about the world, those truths were sufficiently elusive and controversial that even using the words 'true' and 'false' in that context, let alone 'fact,' seems somewhat dissonant."⁴⁰ It is this background

³³ JOHN MILTON, *AREOPAGITICA* 58 (Richard C. Jebb ed., Cambridge University Press 1918) (1644) (*sic*) (hereinafter *AREOPAGITICA*).

³⁴ *Id.*; see also *Ephesians* 4:14 (King James) ("That we henceforth be no more children, tossed to and fro, and carried about with every wind of doctrine, by the sleight of men, and cunning craftiness, whereby they lie in wait to deceive.").

³⁵ See Vincent Blasi, *John Milton's Areopagitica and the Modern First Amendment*, 13 *COMMS. LAWYER* 1, 15 (1995) (demonstrating that Milton is not eager to include catholic doctrine).

³⁶ Milton, *supra* note 33, at 52.

³⁷ See Donald Guss, *Enlightenment as Process: Milton and Habermas*, *PUBS. MOD. LANG. ASS'N AM.* 1156, 1159-60 (1991).

³⁸ Milton, *supra* note 33, at 6.

³⁹ The subtitle of Milton's *AREOPAGITICA*.

⁴⁰ Schauer, *supra* note 26, at 903.

against which we have to understand his proposition that falsehood "as the dust and cinders of our feet . . . may yet serve to polish and brighten the armoury of Truth,"⁴¹ not to prove the factual accuracy but rather to demonstrate the intellectual rigor of a statement.

B. Always Some Other Explanation Possible

True ideas, rather than factual truth, are also at the center of John Stuart Mill's defense of free speech. Even if differing from Milton in perceiving the advantage of truth over falsehood rather in its persistence than in its vigor,⁴² Mill also saw the latter as a necessary touchstone of the former which "if . . . not fully, frequently, and fearlessly discussed . . . will be held as a dead dogma, not a living truth."⁴³

Following Milton, he refers to ideological debate, the restriction of which not only may suppress "true" arguments, but also, irrespective of this attribution, may obstruct rational discourse.⁴⁴ In Mill's perception, therefore, such arguments are mainly focused on

⁴¹ Milton, *supra* note 33, at 62–63. Additionally, consider the remark concerning "bad books, that . . . to a discreet and judicious reader serve in many respects to discover, to confute, to forewarn, and to illustrate." *Id.* This thought, however, is already to be found in Pliny's writings: "Nullus est liber tam malus, ut non aliqua parte prosit." *DICTIONARY OF LATIN QUOTATIONS* 295 (H.T. Rile ed., 1866).

⁴² JOHN STUART MILL, *ON LIBERTY* 52–54 (2d ed. 1859) ("But, indeed, the dictum that truth always triumphs over persecution, is one of those pleasant falsehoods which men repeat after one another till they pass into commonplaces, but which all experience refutes It is a piece of idle sentimentality that truth, merely as truth, has any inherent power denied to error, of prevailing against the dungeon and the stake. Men are not more zealous for truth than they often are for error, and a sufficient application of legal or even of social penalties will generally succeed in stopping the propagation of either. The real advantage which truth has, consists in this, that when an opinion is true, it may be extinguished once, twice, or many times, but in the course of ages there will generally be found persons to rediscover it, until some one of its reappearances falls on a time when from favourable circumstances it escapes persecution until it has made such head as to withstand all subsequent attempts to suppress it").

⁴³ Mill, *supra* note 42, at 64; cf. David O. Brink, *Millian Principles, Freedom of Expression, and Hate Speech*, 7 *LEGAL THEORY* 119, 123 (2001).

⁴⁴ Cf. C. L. Ten, *Introduction to Mill's On Liberty*, 30 *JOURNAL OF THE HISTORY OF IDEAS* 47, XX (2008); see also D.H. Monro, *Liberty of expression: its grounds and limits (II)*, 13 *INQUIRY: AN INTERDISCIPLINARY JOURNAL OF PHILOSOPHY* 238, XX (1970).

“morals, religion, politics, social relations, and the business of life,”⁴⁵ with one most fascinating exception: “[O]n a subject like mathematics,” Mill stated, “there is nothing at all to be said on the wrong side of the question. The peculiarity of the evidence of mathematical truths is, that all the argument is on one side. There are no objections, and no answers to objections.”⁴⁶

Yet it is questionable whether this qualification justifies to presuppose that factual statements are generally excluded from Mill’s approach.⁴⁷ Drawing on the teachings of Logical Positivism, we may assume that mathematical propositions, being necessarily true because of their analytical (tautological) character,⁴⁸ “[do not] provide any information about any matter of fact.”⁴⁹ Thus, excluding mathematics may only serve to clarify that Mill’s argument applies solely to synthetic propositions to be empirically validated.

Such an objection, however, again seems beside the point when it comes to somebody like Mill who, as his writings amply demonstrate, epistemologically rejects the validity of *à priori* propositions.⁵⁰ To him, “[t]here is no knowledge *à priori*; no truths cognizable by the mind’s inward light, and grounded on intuitive evidence. Sensation and the mind’s consciousness of its own acts, are not only the exclusive sources, but the sole materials of our knowledge.”⁵¹

⁴⁵ See Schauer, *supra* note 26, at 905 (citation omitted).

⁴⁶ Mill, *supra* note 42 at 66.

⁴⁷ See KEVIN O’ROURKE, JOHN STUART MILL AND FREEDOM OF EXPRESSION – THE GENESIS OF A THEORY 85 (2001).

⁴⁸ See RUDOLF CARNAP, THE LOGICAL SYNTAX OF LANGUAGE 7 (1934); see also Peter Koellner, Carnap on the Foundations of Logic and Mathematics 3 (2009).

⁴⁹ See ALFRED AYER, LANGUAGE, TRUTH AND LOGIC 73 (Reprint ed., 1971) (1936). See also Carnap, *supra* note 48, at 41; Peter Koellner, *Truth in Mathematics: The Question of Pluralism*, in NEW WAVES OF PHILOSOPHY OF MATHEMATICS 80, 86 (Otávio Bueno and Øystein Linnebo ed., 2009).

⁵⁰ See, e.g., GEOFFREY SCARRE, LOGIC AND REALITY IN THE PHILOSOPHY OF JOHN STUART MILL 90 (1989), C. S. Jenkins, *A Priori Knowledge: Debates and Developments*, Philosophy Compass, 436, 439–40 (2008) or ALBERT CASULLO, ESSAYS ON A PRIORI KNOWLEDGE AND JUSTIFICATION 137–140 (2012); For a general introduction see JOHN R. FITZPATRICK, STARTING WITH MILL 22–25 (2010).

⁵¹ John Stuart Mill, *Coleridge* (1840), reprinted in THE COLLECTED WORKS OF JOHN STUART MILL, VOLUME X – ESSAYS ON ETHICS, RELIGION, AND SOCIETY 119, 125 (John M Robson ed., 1969).

Consistently, according to Mill, "the truths of mathematics, and . . . the peculiar certainty attributed to them [are but] an illusion,"⁵² relying on the abstraction of natural objects and thus eventually on empirical hypothesis.⁵³ This is why the validity of mathematical assumptions rests on preconditions that may only be understood as approximation to reality but not redeemed.⁵⁴ Therefore, it may be accepted "that the peculiar certainty ascribed to it, on account of which its propositions are called Necessary Truths, is fictitious and hypothetical, being true in no other sense than that those propositions legitimately follow from the hypothesis of the truth of premises which are avowedly mere approximations to truth."⁵⁵

However, even this qualification does not object to the consistency of propositions within the system of general arithmetic.⁵⁶ As it is certain, "that 1 is always equal in number to 1 and . . . where the mere number of objects . . . is all that is material, the conclusions of arithmetic so far as they go to that alone, are true without mixture of hypothesis."⁵⁷

In that light, the exception of mathematics from free debate is to be understood: "[O]n a subject like mathematics . . . there is nothing at all to be said on the wrong side of the question."⁵⁸ This is not because arithmetic as a subject was detracted from discourse, but because the propositions made within its system cannot serve an antithetic function in the dialectic process of truth-seeking postulated in the second chapter of Mill's *On Liberty*.⁵⁹ When it comes to

⁵² JOHN STUART MILL, *A SYSTEM OF LOGIC* 279 (8th ed. 1882).

⁵³ See Ayer, *supra* note 49, at 67.

⁵⁴ MILL, *supra* note 52, at 312.

⁵⁵ *Id.*

⁵⁶ See generally GOTTLOB FREGE, *GRUNDLAGEN DER ARITHMETIK* 19 (ed. Felix Meiner Verlag 1988) (1884) (discussing Mill's arithmetic concept in depth).

⁵⁷ MILL, *supra* note 52, at 320.

⁵⁸ MILL, *supra* note 42, at 66.

⁵⁹ It has to be emphasized that this departs from Mill's earlier thoughts on the topic as evidenced by his correspondence with the Scottish writer Thomas Carlyle in which Mill underlines: "I have not any great notion of the advantage of what the 'free discussion' men, call the 'collision of opinions,' it being my creed that Truth is sown and germinates in the mind itself, and is not to be struck out suddenly like fire from a flint by knocking another hard body against it." Letter from John Stuart Mill to Thomas Carlyle (May 18, 1833), in *Collected Works* XII 153 (1963).

arithmetic, there are no false statements but only incorrect propositions.

The exclusion of mathematics from the rationale of free debate thus does not allow for the conclusion that Mill's argument would not apply to statements of fact in the first place. Mill, consistently following an empiricist-inductive method,⁶⁰ openly embraces to leave questions of fact to public deliberation: "Even in natural philosophy,⁶¹ there is always some other explanation possible of the same facts; some geocentric theory instead of heliocentric, some phlogiston instead of oxygen; and it has to be shown why that other theory cannot be the true one: and until this is shown, and until we know how it is shown, we do not understand the grounds of our opinion."⁶²

The differences between the canonical foundations of a free-speech principle offered by Milton and Mill respectively, in addressing whether or not statements of fact are to be included, therefore, are evident. Still, Mill's argument is concerned with questions of science and, even if incidentally, the ideological implications of their answers. It is their open discussion that shall serve the cathartic function of open intellectual encounter to combat the apathy feared as a consequence of its suppression.

Following a utilitarian approach,⁶³ Mill argues not only in favor of the freedom of the individual to speak her mind in order to gain knowledge, but also to develop and deepen her moral faculties. He also recalls the functions of free debate for society as a whole.⁶⁴ The second chapter of *On Liberty* is not a mere plea for liberty of speech but for liberty of thought and discussion. Right from the very

⁶⁰ James Zappen, *The Logic and Rhetoric of John Stuart Mill*, 26 *PHILOSOPHY & RHETORIC* 191, 198 (1993). It has to be added, however, that Mill proclaimed himself not an "empiricist" but an adherent of the "School of Experience." For a more detailed account, see R.P. Anschutz, *The Logic of J. S. Mill*, 58 *MIND* 277, 287 (1949).

⁶¹ I.e. natural science.

⁶² MILL *supra*, note 42, at 66.

⁶³ See generally, Christopher Miles Coope, *Was Mill a Utilitarian?*, 10 *Utilitas* 33 (1998) (pointing out that the extent to which Mill is considered a utilitarian is subject to continuous academic debate).

⁶⁴ See Frederick Schauer, *On the Relation between Chapters One and Two of John Stuart Mill's On Liberty*, 39 *CAP. U. L. REV.* 571, 584 (2011).

beginning it recognizes "the peculiar evil of silencing the expression of an opinion [in the fact] that it is robbing the human race; posterity as well as the existing generation; those who dissent from the opinion, still more than those who hold it."⁶⁵

For Mill, knowledge is "not only something possessed by individuals, but is also something possessed by societies."⁶⁶ This knowledge, however, is to be achieved, defended and affirmed in the common effort of a dialectic process of speech and counter-speech.⁶⁷ Mill's argument, as he emphasizes himself, applies to "every subject on which difference of opinion is possible."⁶⁸

Therefore, it is dubious whether reliance on Mill is adequate in light of the facts in *Alvarez*. If truth depends on "a balance to be struck between two sets of conflicting reasons,"⁶⁹ Frederick Schauer surely is correct: "Mill was not to any appreciable extent addressing issues of demonstrable and verifiable fact."⁷⁰

C. Civic Courage

Focusing on the function Mill ascribes to free speech for society as a whole, his argument has strikingly close ties to Brandeis's exposition of a free speech principle in *Whitney v. California*,⁷¹ which Kennedy uses to support the plurality opinion in *Alvarez*.⁷²

Also, Brandeis was convinced "that the greatest menace to freedom is an inert people."⁷³ Consistently, he perceived public discussion as a political duty, as "discussion affords ordinarily adequate protection against the dissemination of noxious doctrine."⁷⁴ According to Brandeis's theory, free speech serves as the image of an ideal

⁶⁵ MILL, *supra* note 42, at 33.

⁶⁶ Schauer, *supra* note 64, at 589.

⁶⁷ See also Irene Ten Cate, *Speech, Truth, and Freedom: An Examination of John Stuart Mill's and Justice Oliver Wendell Holmes's Free Speech Defenses*, 22 YALE J. L. & HUMAN. 35, 62 (2010).

⁶⁸ MILL, *supra* note 42, at 66.

⁶⁹ *Id.*

⁷⁰ Schauer, *supra* note 26, at 905.

⁷¹ *Whitney*, 274 U.S. 357, 372 (1927) (Brandeis, J., concurring).

⁷² *United States v. Alvarez*, 132 S.Ct. 2537, 2550-2551 (2012).

⁷³ *Whitney*, 274 U.S. at 372 (Brandeis, J., concurring).

⁷⁴ *Id.*

of "civic courage,"⁷⁵ influenced essentially by conceptions of attic democracy.⁷⁶ For him, the formation of the individual's potential and its unfolding in society were more than just an end in itself. Liberty for Brandeis is "both . . . an end[,] and . . . a means."⁷⁷ It therefore is always in service of "the power of reason as applied through public discussion."⁷⁸ In accordance with Mill,⁷⁹ in Brandeis's perception, liberty is privilege as well as duty;⁸⁰ a necessary precondition to counter the "occasional tyrannies of governing majorities."⁸¹

Free and open debate according to his theory ensures the cathartic capability of society; a capability not to be undermined by an orthodoxy in thought and discussion imposed by the majority. Even if not to intervene meant not to confront phenomena perceived as dangerous for society: "Men feared witches and burnt women. It is the function of speech to free men from the bondage of irrational fears."⁸²

Only when "speech may blend into and become action"⁸³ is it the responsibility of the state to step in: "If there be time to expose through discussion the falsehood and fallacies, to avert the evil by the processes of education, the remedy to be applied is more speech, not enforced silence."⁸⁴

Brandeis used these phrases in order to refer to political discussion between citizens thereby fulfilling their duty towards the community, not to point to fact related demonstrations. Free speech in his view is an instrument of the common struggle to further the

⁷⁵ Vincent Blasi, *The First Amendment and the Ideal of Civic Courage: The Brandeis Opinion in Whitney v. California*, 29 WM. & M. L. REV. 653, 682 (1988).

⁷⁶ See Paul Freund, *Mr. Justice Brandeis: A Centennial Memoir*, 70 HARV. L. REV. 769, 780 (1957).

⁷⁷ *Whitney*, 274 U.S. at 372 (Brandeis, J., concurring).

⁷⁸ *Id.*

⁷⁹ MILL, *supra* note 42, at 32. For a more detailed account see C.L. Ten, *Mill and Liberty*, 30 JOURNAL OF THE HISTORY OF IDEAS 47, 52 (1969).

⁸⁰ See, e.g., Daniel Farber, *Reinventing Brandeis: Legal Pragmatism for the Twenty-First Century*, U. ILL. L. REV. 163, 182-83 (1995).

⁸¹ *Whitney*, 274 U.S. at 376 (1927) (Brandeis, J., concurring).

⁸² *Id.*

⁸³ Louis Henkin, *Morals and the Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 396 (1963).

⁸⁴ *Whitney*, 274 U.S. at 377 (1927) (Brandeis, J., concurring).

public good,⁸⁵ as “freedom to think as you will and to speak as you think are means indispensable to the discovery and spread of political truth.”⁸⁶

The optimistic Brandeis, it may be concluded with Steven Gey, “really seems to have believed that truth existed and could be realized by normal mortals.”⁸⁷ In this regard his approach differs, just as the other theories discussed so far, from the picture of free speech as a marketplace of ideas painted by Oliver Wendell Holmes.⁸⁸

D. *The Competition of the Market*

Prior to elaborating on this, however, one clarification is necessary. Neither Holmes’s writings, nor his dissent in *Abrams v. United States*,⁸⁹ to which Justice Kennedy refers in the plurality opinion in *Alvarez*, used the phrase “marketplace of ideas.”⁹⁰ As late as 1953, far more than thirty years after *Abrams*, Douglas was the first on the Supreme Court to make use of it, even if only in a concurring opinion.⁹¹ It took nearly fifteen more years until it finally made its way into a majority opinion, when in *Keyishian v. Board of Regents*,⁹² Brennan referred to “[t]he classroom . . . [as a] ‘marketplace of ideas’” and

⁸⁵ See, e.g., Pnina Lahav, *Holmes and Brandeis: Libertarian and Republican Justifications for Free Speech*, 4 J. L. & POL. 451, 466–67 (1988).

⁸⁶ *Whitney*, 274 U.S. at 375 (Brandeis, J., concurring).

⁸⁷ Steven G. Gey, *The First Amendment and the Dissemination of Socially Worthless Untruths*, 36 FLA. ST. U. L. REV. 1, 8 (2008); see also Edward L. Glaeser & Cass R. Sunstein, *Does More Speech Correct Falsehoods?*, 43 J. LEGAL STUD. 65 (2014); Cass R. Sunstein, *The Law of Group Polarization*, 10 J. POL. PHIL. 175 (2002).

⁸⁸ However, apart from the question at hand, Holmes and Brandeis differed significantly particularly with regard to social reform, which, for Brandeis, was directly tied to the position of a self-determined and active citizenry. See Sheldon Novick, *The Unrevised Holmes and Freedom of Expression*, SUP. CT. REV. 303, 370–71 (1991).

⁸⁹ 250 U.S. 616 (1919) (Holmes, J., dissenting).

⁹⁰ Evidently the phrase “marketplace of ideas” was used for the first time in a letter David Newbold wrote to the *New York Times* in 1935. See Vincent Blasi, *Holmes and the Marketplace of Ideas*, SUP. CT. REV. 1, 13 n.41 (2004).

⁹¹ *United States v. Rumely*, 345 U.S. 41, 56 (1953) (Douglas, J., concurring).

⁹² 385 U.S. 589 (1967).

highlighted that “[t]he Nation’s future depends upon leaders trained through wide exposure to that robust exchange of ideas.”⁹³

Still, the extent to which Holmes’s words in *Abrams* shaped the concept and thus helped to shape the phrase of a “marketplace of ideas” is evident:⁹⁴

[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out. That at any rate is the theory of our Constitution. It is an experiment, as all life is an experiment.⁹⁵

The influence Milton and Mill had on Holmes’s thought cannot be denied,⁹⁶ which is why in scholarship it is oftentimes assumed⁹⁷ that Holmes was united with Milton and Mill (and Brandeis, as is sometimes argued)⁹⁸ in “confidence that truth will not be bested in a fair fight, to competition in the marketplace of ideas.”⁹⁹

At second glance, however, such a position proves to be untenable. Not only because the image of a marketplace¹⁰⁰ hardly

⁹³ *Id.* at 603.

⁹⁴ See Thomas W. Joo, *The Worst Test of Truth: The “Marketplace of Ideas” as Faulty Metaphor*, 89 TUL. L. REV. 383 (2014) (discussing how the phrase was introduced into the Court’s case law).

⁹⁵ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

⁹⁶ See Lahav, *supra* note 85, at 455–57.

⁹⁷ See Blasi, *supra* note 90 at 19 (noting that Holmes had read Mill’s essay, *On Liberty*, in 1919 before writing his dissent in *Abrams*).

⁹⁸ See C. EDWIN BAKER, HUMAN LIBERTY AND FREEDOM OF SPEECH 7 (1989); Bernard Schwartz, *Holmes v. Hand: Clear and Present Danger or Advocacy of Unlawful Action?*, SUP. CT. REV. 209, 220 (1994).

⁹⁹ Harry Kalven, Jr., *A Commemorative Case Note: Scopes v. State*, 27 U. CHI. L. REV. 505, 516 (1960).

¹⁰⁰ See JAMES BOYD WHITE, LIVING SPEECH: RESISTING THE EMPIRE OF FORCE 35–36 (2006) (arguing that the “marketplace of ideas” allowing for the highest level of

matches Milton's approach:¹⁰¹ Milton believed that "[t]ruth and understanding . . . [explicitly were] not such wares as to be monopoliz'd and traded in by tickets and statutes, and standards."¹⁰² Far more important is to see that, despite all differences and theoretical peculiarities, Milton, Mill, and Brandeis perceived knowledge and understanding at the same time as the objective and the presupposition of free and open debate. To them, truth, irrespective of the vagueness inherent to the concept, is an ideal to be pursued in a dialectical process of free debate as well as a promise to be carried through by its means.

Holmes's approach differs significantly from this understanding of free speech as a vehicle in a process of truth-seeking: If "the best test of truth is the power of the thought to get itself accepted in the competition of the market," truth is neither presupposition nor ideal of such a process but rather its arbitrary result.¹⁰³ To insinuate that this argument is based on the assumption "that a process of robust debate, if uninhibited by governmental interference, will lead to the discovery of truth,"¹⁰⁴ or "that truth will emerge from free competition in the marketplace of ideas,"¹⁰⁵ is not convincing. The apocryphal dictum "*magna est veritas et praevalet*,"¹⁰⁶ which clearly did shape Milton's thought and influenced Mill's and Brandeis's approach, does not apply to Holmes's.

individual rational choice does not always necessarily lead to truth, justice, or even an optimum rational outcome).

¹⁰¹ For a deeper analysis of the image of a battle between true and false in Milton's thought, see HAIG BOSMAJIAN, *METAPHOR AND REASON IN JUDICIAL OPINIONS* 55-56 (1992).

¹⁰² MILTON, *AREOPAGITICA* *supra* note 33, at 37 ("We must not think to make a staple commodity of all the knowledge in the land, to mark and license it like our broad-cloth, and our woolpacks.").

¹⁰³ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹⁰⁴ Stanley Ingber, *The Marketplace of Ideas: A Legitimizing Myth*, *DUKE L.J.* 1, 3 (1984).

¹⁰⁵ Steven D. Smith, *Skepticism, Tolerance, and Truth in the Theory of Free Expression*, 60 *S. CAL. L. REV.* 649, 667 (1987).

¹⁰⁶ III Esdras 4, 41 ("Great is truth, and it prevails."). The version prevalent today, *magna est veritas et praevalebit* obviously goes back to a distorted account in Thomas Brooks, *The Crown and Glory of Christianity* (1662). SIR JAMES GEORGE FRAZER, *THE GOLDEN BOUGH: A STUDY IN MAGIC AND RELIGION* 837 (Robert Fraser, ed., Oxford University Press 1994) (1890).

Holmes, the Social-Darwinist skeptic¹⁰⁷ who pointed out in his academic writings that “truth may be defined as the system of my (intellectual) limitations” manifesting itself in “the majority vote of that nation that could lick all others,”¹⁰⁸ does not expect that truth will prevail, but that whatever prevails has to be considered the truth.¹⁰⁹ Truth, however, which has no claim to finality,¹¹⁰ as it is the ever-temporary result of a permanent struggle not perpetuated for the reason to tolerate falsehood out of functional considerations but as an open competition of equitable elements, denied to ever reach a final result; an antithesis to the claim of final truth.

Drawing on Friedrich Nietzsche, who is sometimes considered to be Holmes’s intellectual counterpart,¹¹¹ we may say for Holmes that “the claim that truth exists, setting an end to ignorance and error [is] among the greatest of temptations. If it was believed, our determination to scrutiny, research, caution and experiment was paralyzed; considered outrageous by putting the truth in doubt.”¹¹²

“Certitude,” as Holmes stated shortly before drafting his dissent in *Abrams*, “is not the test of certainty. We have been cock-sure of many things that were not so.”¹¹³ Truth, we may complement, again referring to Friedrich Nietzsche, “therefore is even more fatal

¹⁰⁷ Holmes may have accepted the attribution *skeptic* while rejecting to have his thinking referred to as *pragmatic*. ALBERT W. ALSCHULER, *LAW WITHOUT VALUES – THE LIFE, WORK, AND LEGACY OF JUSTICE HOLMES* 18 (2000). For further discussion of Holmes’s skepticism, see ANTHONY J. SEBOK, *LEGAL POSITIVISM IN AMERICAN JURISPRUDENCE* 60 (1998).

¹⁰⁸ Oliver Wendell Holmes, *Natural Law*, 32 *HARV. L. REV.* 40 (1918).

¹⁰⁹ See, e.g., Richard A. Posner, *What has Pragmatism to Offer Law?*, 63 *S. CAL. L. REV.* 1653, 1656 (1990).

¹¹⁰ See Vincent Blasi, *Reading Holmes Through the Lens of Schauer: The Abrams Dissent*, 72 *NOTRE DAME L. REV.* 1343, 1345 (1997).

¹¹¹ See Richard Posner, *Introduction*, in *THE ESSENTIAL HOLMES* ix, xviii (Richard Posner ed., 1992); David Luban, *Justice Holmes and the Metaphysics of Judicial Restraint*, 44 *DUKE L. J.* 449, 464 (1994) (“Holmes’s philosophical views were, with a few instructive divergences, strikingly similar to those of Nietzsche.”). Holmes himself once asserted that he would find in Nietzsche’s work “much that I long have believed, after or independently of him.” OLIVER WENDELL HOLMES, *Letter from Oliver Wendell Holmes to Morris Cohen (August 28, 1924)*, in 9, *THE HOLMES-COHEN CORRESPONDENCE* 3, 41 (1948).

¹¹² FRIEDRICH NIETZSCHE, *AUS DEM NACHLAß DER ACHTZIGERJAHRE 814* (Karl Schlechta ed., *Werke III* 1954) (own translation).

¹¹³ Holmes, *supra* note 108, at 40.

than error and ignorance, inhibiting the forces working on knowledge and enlightenment."¹¹⁴

The key notion in Holmes's metaphor is, therefore, competition.¹¹⁵ The various elements facing each other in public debate have no specific value of their own,¹¹⁶ but draw their potency from the acceptance of those taking part in the discourse.¹¹⁷ Constitutional protection of free speech—in perfect accordance with the classical image of the marketplace as space for public deliberation—provides the forum to decide on that potency and thus to decide between true and false.¹¹⁸ The result of this competition, "[that] truth,"¹¹⁹ according to Holmes is, "the only ground upon which their wishes safely can be carried out."¹²⁰

¹¹⁴ Nietzsche, *supra* note 112, at 813 (own translation).

¹¹⁵ See Blasi, *supra* note 90, at 24; see also, Cate, *supra* note 67 at 58–59; Oliver Wendell Holmes, *Law in Science and Science in Law*, 12 HARV. L. REV. 443, 449 (1899) (demonstrating the image Holmes used already two decades before *Abrams* of a "struggle for life among competing ideas, and of the ultimate victory and survival of the strongest").

¹¹⁶ See *mutatis mutandis* CARL SCHMITT, ZUR GEISTESGESCHICHTLICHEN LAGE DES HEUTIGEN PARLAMENTARISMUS 45–46 (2d ed. 1926) ("It is quite the same that truth is derived from the free struggle of opinions, as self-unfolded harmony catalyzed by competition. Here is the intellectual core of such thinking, its specific relation to truth which becomes a mere function of an eternal competition of opinions. From the perspective of truth this means to renounce a definitive result.") (own translation).

¹¹⁷ See R.H. Coase, *The Market for Goods and the Market for Ideas*, 64 AM. ECON. REV. 384, 389–90 (1974) (providing an economic assessment).

¹¹⁸ See Stanley Fish, *Fraught with Death: Skepticism, Progressivism, and the First Amendment*, 64 U. COLO. L. REV. 1061, 1076 (1993).

¹¹⁹ See Blasi *supra* note 110, at 1346 (1997); see also Vincent Blasi, *Shouting "Fire!" in a Theatre and Vilifying Corn Dealers*, 39 CAP. U. L. REV. 535, 565 (2011); see generally Cate, *supra* note 67, at 70–71 (2010) (providing additional context surrounding the Holmes quote).

¹²⁰ *Abrams v. United States*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting). The relationship between the last part of the sentence and its prior parts is disputed in scholarship. Vincent Blasi assumes it has distinct significance for Holmes's concept of truth, as "the case for protecting speech in the face of the harms it might cause depends on the further proposition that knowing the truth is a value of overriding importance." Blasi, *supra* note 90, at 16.

Thus, free speech, also according to Holmes's perception, serves the pursuit of truth. Blasi bases his hypothesis on Holmes's sometimes, it has to be admitted, quite enigmatic style. *Cf. Abrams*, 250 U.S. at 629 (Holmes, J., dissenting)

Such a theory may have considerable costs if realized. Costs, however, that Holmes is ready to bear:¹²¹ "If in the long run the be-

("[W]hen men have realized that time has upset many fighting faiths, they may come to believe even more than they believe the very foundations of their own conduct that the ultimate good desired is better reached by free trade in ideas—that the best test of truth is the power of the thought to get itself accepted in the competition of the market, and that truth is the only ground upon which their wishes safely can be carried out.").

In the given context this syntactically allows for several interpretations: in particular, to view the word *that* in the last part of the sentence as a conditional instead of demonstrative pronoun. As *internal evidence* of his reading, Blasi offers, "that earlier in the same sentence, in clauses structurally parallel to the clause at issue, Holmes twice used the word 'that' as a conjunction rather than an adjective: 'they may come to believe . . . that the ultimate good desired . . . that the best test of truth.'" Blasi, *supra* note 90, at 16 (quoting *Abrams*, 250 U.S. at 630 (Holmes, J., dissenting)).

This structural exegesis, however, is not convincing. On the one hand, because Holmes, whom even his critics praised for his brilliant style, see Josal Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion - The Speech Cases*, 36 STAN. L. REV. 1349, 1388 (1984), obviously did not seek to attract by diversification. Particularly in *Abrams*, Holmes uses the word "that" in an outright inflationary manner: 87 overall, alternating conditional and demonstrative pronoun (by way of comparison, Holmes made use of the pronouns "which" and "this" 8 and 9 times respectively). The passage in the text which structurally comes closest to the one discussed here, is one where he uses the second *that* as a demonstrative pronoun: "[One of the leaflets in question] says that there is only one enemy of the workers of the world, and that is capitalism." *Abrams*, 250 U.S. at 625 (Holmes, J., dissenting).

However, such arguments are more closely related to speculation than to stringent demonstration. It is far more important to see that Blasi's effort to find flaws in the design of Holmes's metaphor in order to avoid the alternative of attributing epistemological and moral nihilism to Holmes's thought. See Luban, *supra* note 111, at 475. Because even if it is to be assumed that Holmes was "for all his brilliance and eloquence . . . simply . . . not a systematic thinker" it would be quite remarkable had Holmes not been able to arrange his language in a coherent manner over two lines and was to directly contrast his concept of truth, defined as the result of open competition with another, significantly different, concept of truth. Blasi, *supra* note 90, at 23. Not only according to the argumentative structure, but also against the backdrop of Holmes's skeptical position, such a result is in need of a more compelling reasoning.

¹²¹ Which is not to imply that this position had in any way been capable of winning a majority inside or outside the Supreme Court at the time judgment was delivered. See John Wigmore, *Abrams v. U. S. Freedom of Speech and Freedom of*

liefs expressed in proletarian dictatorship are destined to be accepted by the dominant forces of the community, the only meaning of free speech is that they should be given their chance and have their way."¹²² Or, as he once remarked to his friend Laski: "[I]f my fellow citizens want to go to Hell I will help them. It's my job."¹²³

III. CONCLUSION: THE EPISTEMIC NEUTRALITY OF THE MARKETPLACE

Similar to the theories of Milton, Mill, and Brandeis, it may be objected that Holmes's perception of the "power of the thought to get itself accepted in the competition of the market,"¹²⁴ all along with its characteristics, sometimes marked as cynical,¹²⁵ does not possess the capacity ascribed to it by Kennedy's plurality opinion in *Alvarez*.¹²⁶ After all, Holmes himself underlines in *Abrams* that he was "speaking only of expressions of opinion and exhortations, which were all that were uttered here."¹²⁷

Still, this objection would miss the point: Even if the specific legal argument was confined by the subject matter of the case, the potential of Holmes's approach is not exhausted by that.¹²⁸ A con-

Thuggery in Wartime and Peace-time, 14 ILL. L. REV. 539, 561 (1920) ("In the transcendental realms of philosophic and historical discussion by closet jurists, these expressions might pass. But when found publicly recorded in an opinion of the Supreme Guardians of that Constitution, licensing propaganda which in the next case before the court may be directed against that Constitution itself, this language is ominous indeed.")

¹²² *Gitlow v. New York*, 268 U.S. 652, 673 (1925) (Holmes, J., dissenting).

¹²³ Oliver Wendell Holmes, *Letter from Oliver Wendell Holmes to Harold Laski (March 4, 1920)*, in 1 HOLMES-LASKI LETTERS THE CORRESPONDENCE OF MR. JUSTICE HOLMES AND HAROLD J. LASKI 1916-1935 248, 249 (Mark deWolfe Howe ed., 1953).

¹²⁴ *Abrams*, 250 U.S. 616, 630 (1919) (Holmes, J., dissenting).

¹²⁵ See Blasi, *supra* note 75, at 694.

¹²⁶ See Daniel E. Ho & Frederick Schauer, *Testing the Marketplace of Ideas*, 90 NYU L. REV. 1160, 1166 and 1173 (2015).

¹²⁷ *Abrams*, 250 U.S. at 631 (Holmes, J., dissenting).

¹²⁸ In particular, Holmes subsequently did not perceive statements of fact as excluded from First Amendment protection. See *Leach v. Carlile*, 258 U.S. 138, 140-41 (1922) (Holmes, J., dissenting). In *Leach*, Holmes considered the ban on advertisement for pharmaceutical products "recommended and prescribed by leading physicians throughout the civilized world for nervous weakness, general debility, sexual decline, or weakened manhood and urinary disorders . . .

sistent perception of the marketplace theory not only stands against authoritative valuation on moral or ideological grounds but also on an epistemic level.¹²⁹

As stated above, Holmes's approach distinctly is not designed to uncover truth by free debate. Consequently, Holmes does not offer a foundation of free speech by an "argument from truth,"¹³⁰ as we may conclude for Milton, Mill, and Brandeis: They value free speech as dialectical process of finding truth and exclude questions of fact from this process from the very outset, as the truth of these statements may only be a datum of the discourse, not its result.¹³¹

Quite the contrary, Holmes's perception of a "competition of the market" rather has to be regarded as an argument against truth.¹³² According to his theory, free speech does not serve any function in an open process of truth-seeking. For Holmes, the discourse as such has to be isolated from interference by public authorities.

sleeplessness and rundown system" to be in violation of the First Amendment. *Id.* at 139, 141 ("Usually private swindling does not depend upon the post office. If the execution of this law does not abridge freedom of speech, I do not quite see what could be said to do so.").

¹²⁹ See Gey, *supra* note 87, at 20.

¹³⁰ See FREDERICK SCHAUER, *FREE SPEECH: A PHILOSOPHICAL ENQUIRY* 20 (Reprnt. ed., 1984); see also ERIC BARENDT, *FREEDOM OF SPEECH* 7 (2d. ed. 2005).

¹³¹ Only in this context phrases like "[t]o misrepresent fact is to corrupt the source of opinion" become comprehensible. Felix Frankfurter, *Mr. Justice Brandeis and the Constitution*, 45 HARV. L. REV. 33, 92 (1931-1932).

¹³² It may be objected that some academics perceive Holmes in close vicinity to the consensus theory of truth; and equation which is correct as far as discursive redemption of the claim to validity of the statement in question and its inherent infinite moment are concerned. See Schauer, *supra* note 26, at 908; see also Jürgen Habermas, *Wahrheitstheorien*, in *VORSTUDIEN UND ERGÄNZUNGEN ZUR THEORIE DES KOMMUNIKATIVEN HANDELNS* 127, 137 (1984).

However, both approaches differ far too significantly from one another regarding what is to be considered true and what comes along with that to make a comparison useful. If one defines with RAYMOND GEUSS, *THE IDEA OF A CRITICAL THEORY - HABERMAS AND THE FRANKFURT SCHOOL* 65 (1981) the truth of the statement according to the consensus theory "that it would be the one on which all agents would agree if they were to discuss all of human experience in absolutely free and uncoerced circumstances for an indefinite period of time," it is to be countered by referring to RICHARD POSNER, *THE PROBLEMS OF JURISPRUDENCE* 221 (Reprnt. ed., 1993) (1990) ("Holmes's metaphor for freedom of speech . . . rests on skepticism about the possibility of settling disputes by reason.").

Protection of the marketplace as an end in itself thus consistently transposes the epistemic humility of a man¹³³ who said of himself "I don't believe or know anything about absolute truth,"¹³⁴ and who was supposed to have difficulties "even with the 'truth' of the sum of two and two"¹³⁵ into a coherent normative model.

If free speech is to provide a forum for the exchange of propositions which are to be considered true if accepted,¹³⁶ this model, according to its very structure, does not allow for a hierarchy of statements, as presupposed by the approaches discussed before.¹³⁷ If truth is the, if ever, temporary¹³⁸ result of a process, the process itself, being supplied by allegedly untrue statements (*i.e.*, statements that have not proven to be successful so far) is not consonant with such prior attributions. Quite the opposite: To disallow a statement to enter this process while only the result of the process may serve as an indicator of its valuation and thus of its admission, perverts the process as such.

Thus, Holmes's metaphor of free speech as forum of an open competition of statements on equal footing¹³⁹ shapes the perception of a morally, ideologically, and epistemically neutral state:¹⁴⁰ a state in which "no such thing as a false idea" exists.¹⁴¹ Consistently, the

¹³³ I have to thank Andreas Th. Müller for a more amiable phrasing instead of describing Holmes as "epistemological agnostic," *See, e.g.*, Gey, *supra* note 87, at 8.

¹³⁴ OLIVER WENDELL HOLMES, *Letter from Justice Holmes to John Wu* (June 16, 1923), in JUSTICE OLIVER WENDELL HOLMES: HIS BOOK NOTICES AND UNCOLLECTED LETTERS AND PAPERS 164, 165 (Harry C. Shriver ed. 1936).

¹³⁵ Josal Rogat & James M. O'Fallon, *Mr. Justice Holmes: A Dissenting Opinion - The Speech Cases*, 36 STAN. L. REV. 1349, 1372 (1984).

¹³⁶ *See* BERNARD WILLIAMS, TRUTH AND TRUTHFULNESS 214 (2002).

¹³⁷ *See* Gey, *supra* note 87, at 21-22.

¹³⁸ *See* Thomas Emerson, *Toward a General Theory of the First Amendment*, 72 YALE L.J. 877, 881-882 (1963).

¹³⁹ *See, e.g.*, Robert Cover, *The Left, the Right and the First Amendment: 1918-1928*, 40 MD. L. REV. 349, 373 (1981).

¹⁴⁰ Arnold Loewy, *Freedom of Speech as a Product of Democracy*, 27 U. RICH. L. REV. 427, 429 (1993).

¹⁴¹ *But cf.*, *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 339-40 (1974) ("We begin with the common ground. Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.").

central tenet of free expression is not only “that the government must remain neutral in the marketplace of ideas,”¹⁴² but to postulate the epistemic neutrality of the marketplace of discussion, where “the intellect is free as long as it deceives without causing any harm.”¹⁴³

Alvarez showed the way to achieve this goal.

¹⁴² FCC v. Pacifica Foundation, 438 U.S. 726, 745–46 (1978).

¹⁴³ FRIEDRICH NIETZSCHE, ÜBER WAHRHEIT UND LÜGE IM AUßERMORALISCHEN SINN 321 (Karl Schlechta ed., Werke III 1954) (own translation).