

FREEDOM OF EXPRESSION FROM THE STANDPOINT OF J. S. MILL'S *ON LIBERTY*¹

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RESUMEN

La primera parte del trabajo examina los argumentos a favor de la libertad de expresión que John Stuart Mill desarrolla en *Sobre la libertad* [*On Liberty*], señalando tanto los méritos como el carácter problemático de sus fundamentos utilitaristas. La segunda parte explora cómo podría aplicarse el razonamiento de Mill para resolver algunos dilemas de las sociedades pluralistas de nuestro propio tiempo, tales como encontrar un tratamiento legal adecuado para el discurso del odio o la negación del Holocausto.

Palabras clave: Mill, Libertad de expresión, Utilitarismo, Discurso del odio

ABSTRACT

The first part of the paper examines the arguments for freedom of expression that John Stuart Mill develops in *On Liberty*, pointing out both the merits and the problematic nature of their utilitarian foundations. The second part explores how Mill's reasoning could be applied to solve some dilemmas of the pluralistic societies of our own time, such as finding a suitable legal treatment for hate speech or Holocaust denial.

Keywords: Mill, Freedom of expression, Utilitarianism, Hate speech.

INTRODUCTION

John Stuart Mill's approach to freedom of expression was not consistent throughout his life. In 1823, when he was not yet seventeen, he had some letters published in the press arguing for free discussion; but a decade

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later, in a number of letters and published works, he showed some doubts regarding the worth of promoting quantity of discussion rather than quality (García Añón 1997: 12, 31; Bisbal Torres 2006: 30). In any case, Mill's mature views on the subject, as stated clearly in *On Liberty*, show great confidence in the utility –hence in the moral value– of granting everyone the freedom of expressing and publishing their own ideas and opinions, as well as unrestricted liberty of conscience.

Mill's *On Liberty* is a remarkable achievement in its defence of a pluralistic society where confrontation and dissidence in matters of ideology, morality or religion are not taken as threats which must be avoided and suppressed, but as a precious treasure which must be preserved, and even encouraged. A free flow of conflicting opinions is, according to Mill, less dangerous than useful, and it is therefore desirable. In this respect, *On Liberty* is a book very well suited to our own current pluralistic societies, where we are used to hearing and reading about extremely diverse points of view on every important subject, and where one can expect to find a written controversy on virtually any subject. *On Liberty* reassures us of the value of our present practices of tolerance with diversity, and warns us about the appeal of uniformity and consensus, which is also very much alive in our societies. It is precisely this ambiguity of our own time which makes *On Liberty* still useful and explains its place in reading lists of legal and political studies, as well as in philosophical or historical ones. We value and accept social diversity as richness, and we do not need Mill to realize that our dislike of others' ideas is not a reason to censor them. But in many ways we also value and desire social uniformity, and we are often ready to impose our standard views on whoever dissents, even at the expense of liberty of expression. We tolerate diversity in religious creeds and rituals, but we are not keen on people scorning religious beliefs or symbols, neither on sects propagating alienating behaviour in the name of religion. We stand for political and philosophical diversity, but we would rather not have people arguing against democracy or in favour of racial discrimination. Most of us acknowledge moral pluralism, and some even embrace moral relativism, but we see fit to forbid conducts or speeches that we reckon immoral, indecent or obscene. We promote inquiry and discussion to make sense of our empirical world, but we are not sure whether we should allow people to spread unscientific accounts of the zodiac or of historical events. Our perplexity on these matters is what makes Mill's pledge for freedom of expression in *On Liberty* still worth reading.

Nevertheless, we should not expect *On Liberty* to provide definite solutions for the dilemmas that liberty of expression poses to us, because Mill's arguments are appealing but not entirely sound or convincing. Besides,

Mill was arguing for liberty of expression and pluralism in a society not nearly as pluralist as our own, and his warnings against the tyranny of the majority must be seen under that light. Still, *On Liberty* can provide us with tools for tackling difficult and pressing problems regarding the extension and depth of liberty of expression we are ready to secure. For one thing, we want to decide whether our open, democratic and tolerant society should or should not protect itself from its enemies by restricting writings and speeches which it senses as threatening. It has often been shown that Mill's *On Liberty* helps us to reason through this dilemma. But liberty of expression is a complex issue which leaves plenty of room for yet another approach. In the following pages, I will examine the arguments for freedom of expression that Mill develops in *On Liberty*, and then I will explore how his reasoning could be applied to solve some dilemmas of the pluralistic societies of our own time, such as finding a suitable legal treatment for hate speech or Holocaust denial.

1. MILL'S REASONING FOR FREEDOM OF EXPRESSION IN *ON LIBERTY*

In *On Liberty* Mill argues for liberty of expression developing several arguments against censorship of opinions and speech, regardless of whether the authority who aims to censor is the government or the bulk of society. He argues forcefully and eloquently, but not always consistently. He offers an initial general argument for liberty of expression trying to bring together a defence of rights and justice with the principle of utility (*OL*: 16)²; and then he dedicates the second chapter of the book to deploy four utilitarian reasons which he sums up towards the end of chapter (*OL*: 59). Let us review briefly those five arguments and some of their problems.

1.1. Immunity of the individual sphere

Mill's first and general argument for liberty of expression stems from a broad defence of individuality and personal autonomy, very much along the lines of the liberal thought tradition which according to I. Berlin (1958) focuses on "negative liberty".

"There is a sphere of action in which society, as distinguished from the individual, has, if any, only an indirect interest; comprehending all that portion of a person's life and conduct which affects only himself, or if it also affects others, only with their free, voluntary, and undeceived

2 References to Mill's *On Liberty* will be identified by the abbreviation *OL* and cited from J. Gray's edition of J.S. Mill, *On Liberty and Other Essays*, Oxford: Oxford University Press, 2008 (first ed. 1991).

consent and participation. (...) This, then, is the appropriate region of human liberty. It comprises, first, the inward domain of consciousness (....). The liberty of expressing and publishing opinions may seem to fall under a different principle, since it belongs to that part of the conduct of an individual which concerns other people; but, being almost of as much importance as the liberty of thought itself, and resting in great part on the same reasons, is practically inseparable from it.” (*OL* 16-17).

This first argument has all the appearance and structure of the standard vindication of individual rights as requirements of abstract justice. It seems to argue for liberty of expression as a logical implication of liberty of conscience, itself depicted as a sort of natural right which provides individuals with a “sphere” of immunity from unwanted intervention, either from public bodies or from other countrymen. Such an impression is also conveyed and reinforced later, at the beginning of Chapter II, where Mill stops short of defending freedom of expression as a right which “trumps” over any number of opposing preferences or interests.

“If all mankind minus one, were of one opinion, and only one person were of the contrary opinion, mankind would be no more justified in silencing that one person, than he, if he had the power, would be justified in silencing mankind.” (*OL*: 21).

However, despite all appearances, Mill does not ground his vindication of liberty of expression in a commitment to rights and justice, but in the principle of utility. Surely Mill can be taken at some points as an advocate for rights and justice, even at the expense of utility; but he expressly discourages any temptation to doing so when reading *On Liberty*:

“It is proper to state that I forgo any advantage which could be derived to my argument from the idea of abstract right, as a thing independent of utility. I regard utility as the ultimate appeal of all ethical questions; but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being.” (*OL*: 15).

Therefore, Mill’s whole reasoning for freedom of expression in *On Liberty*, even the apparently liberal argument we started with, is not to be understood as the vindication of an abstract right, but rather as the consequence of weighing the advantages and disadvantages of censorship when aiming for the utility—that is, the happiness—of enlightened humankind. In fact, this interpretation is stressed by Mill himself when he adds to the lines on silencing mankind quoted above:

“Were an opinion a personal possession of no value except to the owner; if to be obstructed in the enjoyment of it were simply a private injury, it would make some difference whether the injury was inflicted only on a few persons or many. But the peculiar evil of silencing the expression of an opinion is, that is robbing the human race.” (*OL*: 21)

Numbers matter, after all. Mill does not intend to defend liberty of expression for the sake of each entitled individual, but he does so instead for the sake of the large numbers who will benefit from a society where liberty of expression is granted. In Mill’s view, what censorship “robs” is not properly personal autonomy, but the expectative of happiness for human race as a whole. Thus, on a closer look, Mill’s argument is not an individualist one of the “rights as trumps” fashion, but a collectivistic one on the line explored in our time by Joseph Raz (1992: 135).

Grounding his reasoning on the principle of utility, Mill gives liberty of expression some force but at the same time he exposes it to undermining objections. The principle of utility reinforces the defence of liberty of expression because it rests on empirical data (on facts about the causes of increased education and happiness), rather than on intuitions or received ideas about what is right or wrong. No doubt good data are more convincing than good intuitions when trying to argue a point of view. The weakness of grounding liberty of expression on utility, on the other hand, is twofold. Firstly, arguing for liberty of expression as a result of empirical utilitarian calculation requires support on an amount of data which is very difficult to gather, and which Mill certainly does not put forward. Mill’s conclusions on the advantages of liberty of expression over censorship from the point of view of utility are no more than an educated guess. Secondly, arguing for liberty of expression on utilitarian grounds is a risky business, since it could be the case that in most or some situations is censorship rather than liberty which produces more utility. In short, the argument for liberty of expression from utility does not work without empirical data which is impossible to obtain. Unfortunately, if we are persuaded by Mill and his reasoning it is not because of the evidence he produces, but because he touches the right chords appealing quietly to our intuitions and received ideas about what is right and wrong.

1.2. The pursuit of truth

The main utilitarian justification for liberty of expression, according to the thread of reasoning Mill develops in *On Liberty*, is its contribution to the pursuit of truth. And such contribution comes in the first place from the straightforward possibility that what is to be expressed is the truth.

Not everything the government or the majority of society holds is true (we are not infallible); and when it is wrong, restricting expression to whoever is right amounts to putting obstacles in the way of the truth.

“First: the opinion which is attempted to suppress by authority may possible be true. Those who desire to suppress it, of course deny its truth; but they are not infallible.” (*OL*: 22).

“Yet it is as evident in itself, (...), that ages are no more infallible than individuals; every age having held may opinions which subsequent ages have deemed not only false but absurd; and it is as certain that many opinions, now general, will be rejected by future ages, as it is that many, once general, are rejected by the present.” (*OL*: 23)

Mill goes on to elaborate this point by insisting on the fallibility of our beliefs and ideas, and therefore on the rationality and advantages of exposing them to open criticism. He outlines an approach to human knowledge which anticipates “fallibilism”. He invites us to submit our views to “negative criticism” “as a means to attaining any positive knowledge or conviction worthy the name” (*OL*: 51). We should put our ideas to the test, even when we are so confident of them that we think it dangerous to allow opposing doctrines, because that is the only way to maintain that confidence.

“The beliefs which we have most warrant for, have no safeguard to rest on, but a standing invitation to the whole world to prove them unfounded.” (*OL*: 26).

“There is the greatest difference between presuming an opinion to be true, because, with every opportunity for contesting it, it has not been refuted, and assuming its truth for the purpose of not permitting its refutation. Complete liberty of contradicting and disproving our opinion, is the very condition which justifies us in assuming its truth for purposes of action; and on no other terms can a being with human faculties have any rational assurance of being right.” (*OL*: 24)

Now, we have seen that Mill’s deep motivation is utility, and he argues for whatever is valuable because of the balance of utility it brings. One should think, then, that Mill places truth second to utility as the real justification of liberty of expression, and therefore he would justify silencing doctrines whenever utility advises so, even when the forbidden doctrines are plausible or simply true. No doubt this is a serious objection to Mill’s argumentation, which he anticipates but puts aside too harshly:

“The truth of an opinion is part of its utility. If we would know whether or not it is desirable that a proposition should be believed, is it possible to exclude the consideration of whether or not it is true? In the opinion, not of bad men, but of the best men, no belief which is contrary to truth can be really useful: (...)” (OL: 27).

Cannot a false belief really be useful? To begin with, Mill did not exactly mean what he wrote in the paragraph just quoted, since a fair amount of his reasoning in defence of liberty of expression involves the thesis that false beliefs are useful to keep the true ones healthy, as will soon be considered. What Mill actually meant was that it is not useful *to impose* a false belief (and so utility requires authorities and social majorities not to be dogmatic, but to allow criticism instead). Besides, Mill himself suggests that whereas it is permissible to hold and transmit a doctrine because one sincerely believes in its truth or utility, it is not permissible to impose that doctrine on others thereby preventing discussion (OL: 28). Still, can it never be useful to impose a false belief? Since we have no way of resting our answer on empirical data about what is useful and how useful some beliefs are, we have to settle the matter through reasoning. But, as Mill is ready to admit, the result is uncertain.

“The usefulness of an opinion is itself a matter of opinion: as disputable, as open to discussion, and requiring discussion as much, as the opinion itself.” (OL: 27).

So there is no justification to assume beforehand, as Mill does, that (imposing) false beliefs cannot be useful. Putting forward false ideas using some force does not necessarily go against utility, however exceptional the case may be. For instance, some philosophers think that the belief in moral human rights is a false one, as false as the belief in unicorns; but it is surely a useful belief to be imposed. On the other hand, Mill rightly dismisses a different and quite cynical objection to liberty of expression, which suggests that “persecution is an ordeal through which truth ought to pass” (OL: 32). Mill complains that this view trivializes martyrdom and denies the very premise “that truth, merely as truth, has any inherent power denied to error, of prevailing against the dungeon and the stake.” (OL: 34).

“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.” (OL: 33).

In sum, Mill reminds us that we are fallible and that we should not expect truth to flourish by its own merits or by repeating dogmas, but it must be pursued instead by means of questioning and discussion, through “free and daring speculation on the highest subjects” (*OL*: 38).

“Truth gains more even by the errors of one who, with due study and preparation, thinks for himself, than by the true opinions of those who only hold them because they do not suffer themselves to think.” (*OL*: 39).

1.3. The foundations of truth

We should expose our opinions and beliefs to criticism in case they are wrong, but what if they are right? Mill finds some reasons for tolerating dissent even when it opposes the truth. The main argument is that for truth to be secure, its foundations must be examined. It is not enough for a doctrine to be true, it must also be tested against other doctrines in order to be properly understood, accepted and taught. Those who do not pay attention to criticisms “do not, in the proper sense of the word, know the doctrine which they themselves profess” (*OL*: 43).

“If the cultivation of the understanding consists in one thing more than in another, it is surely in learning the grounds of one’s own opinion.” (*OL*: 41).

To be sure, rooting firmly the truths we hold is presumably a good thing on utilitarian evaluation. However, from the principle of utility comes again an undermining objection to these arguments, one which Mill once more anticipates.

“To abate the force of these considerations, an enemy of free discussion may be supposed to say, that there is no necessity for mankind in general to know and understand all that can be said against or for their opinions by philosophers and theologians. That it is not needful for common men to be able to expose all the misstatements or fallacies of an ingenious opponent. That it is enough if there is always somebody capable of answering them, so that nothing likely to mislead uninstructed persons remains unrefuted.” (*OL*: 43).

We might argue, for instance, that utility justifies preventing people from giving away unscientific statements about the Holocaust or ethnical differences to the general people as long as those statements can be quietly submitted to scholars equipped to test and eventually refute them. But

Mill has a different view on where it lies utility in this matter. He thinks wrong to rest the responsibility of researching and testing ideas in some *élite* rather than in mankind as a whole:

“mankind ought to have a rational assurance that all objections have been satisfactorily answered; and how are they to be answered if that which it requires to be answered is not spoken? or how can the answer be known to be satisfactory, if the objectors have no opportunity of showing that it is unsatisfactory? (*OL*: 43-44).

However, neither Mill’s rhetorical questions dispel the objection (since universal “rational assurance”, were it attainable, could cause less utility than intellectual division of labour), nor is Mill fully committed with this rejection of a cultural *élite*, as we shall see later.

1.4. The vitality of truth

A further reason for subjecting even true beliefs and doctrines to open criticism is, according to Mill, that truth only thrives when exposed.

Any opinion, “however true it may be, if it is not fully, frequently, and fearlessly discussed, it will be held as a dead dogma, not a living truth.” (*OL*: 40).

Perhaps forgetting his scepticism towards who praised martyrdom as an historical instrument for achieving truth (*OL*: 33), Mill repeats here and there that the vitality of truth needs confrontation. It is not a good idea to confide discussion to an *élite* and let the majority of people have only tested doctrines, as suggested, because “the price paid for this sort of intellectual pacification, is the sacrifice of the entire moral courage of the human mind.” (*OL*: 38). Moreover “not only the grounds of the opinion are forgotten in the absence of discussion, but too often the meaning of the opinion itself.” (*OL*: 45). Of course, the reasons why nurturing the vitality of truth is important are, again, utilitarian. One of them is simply that being alert prevents errors. In Mill’s words: “The fatal tendency of mankind to leave off thinking about a thing when it is not longer doubtful, is the cause of half their errors.” (*OL*: 49). However, the main reason is that human beings need to exercise practical deliberation in order to develop their capacities and live a happy life. This “deliberative rationale” is behind Mill’s best efforts to defend liberty of expression, and yet it provides important clues for justifying exceptions and restrictions to that liberty to protect those very deliberative values (Brink 2007, 2001).

But, once more, utilitarian reasoning can lead to different places, and Mill considers some arguments that could oppose his own. Firstly, there is no obvious gain in tirelessly questioning everything, and Mill himself concedes that “well-being of mankind may almost be measured by the number and gravity of the truths which have reached the point of being uncontested” (*OL*: 49). Indeed, Mill seems to waver before this objection when he admits that questioning truths, however useful, is not better than having established truths.

“The loss of so important an aid to the intelligent and living apprehension of a truth, as is afforded by the necessity of explaining it to, or defending it against, opponents, though not sufficient to outweigh, is no trifling drawback from, the benefit of its universal recognition.” (*OL*: 50).

At this point, Mill can only wish that discussion could be carried on at least within the limited field of the “teachers of mankind” (*OL*: 50), forgetting now his scepticism towards the *élite* of knowledge. In fact, here we could find a second utilitarian objection to Mill’s original argument for the vitality of truth. For it could be worthwhile to substitute widespread scepticism and discussion by a more limited inquiry carried out by experts who would apply order and rigour and summarize the debate for the general public. Mill has little to say against this scheme: “A person who derives all his instruction from teachers or books, (...) is under no compulsion to hear both sides” (*OL*: 51); and besides those teachers and books are not always well-informed and fair-minded. He seems torn between his wish for a free society of enlightened people where knowledge and ideas run unfiltered, and a down-to-earth awareness that most people are not able or even concerned to carefully examine their beliefs so they can benefit from intellectual authorities. Indeed, Mill has been charged with elitism (see Bisbal Torres 2006: 29), despite the fact that he constantly argues for education and participation open to all.

1.5. The combination of truths

Mill’s final argument for liberty of expression simply extends the rationale of the pursuit of truth from the case where the dissenting opinion is right to the case where it is partly right; that is, to the “commoner case (...) when the conflicting doctrines, instead of being one true and the other false, share the truth between them; and the nonconforming opinion is needed to supply the remainder of the truth” (*OL*: 52). Mill’s point is that we should not only admit that our beliefs can be wrong (and therefore we must keep looking for their weakness), but that we should assume that

many of them can be improved, so that we must be ready to learn from any source of correction. This is so, according to Mill, particularly where opinions, rather than mathematics or sensible facts, are involved. In these matters, the wise attitude is letting people voice their views for them to clash and mix, hoping to have eventually the best of each. At this point, Mill makes some remarks about the struggle for the truth that bring to mind a parallelism with the struggle for life theorized by Darwin's *On the Origin of Species*, published also in 1859.³

“The peculiarity of the evidence of mathematical truths is, that all the argument is on one side. (...). But on every subject on which difference of opinion is possible, the truth depends on a balance to be struck between two sets of conflicting reasons.” (*OL*: 41).

“Popular opinions, on subjects not palpable to sense, are often true, but seldom or never the whole truth.” (*OL*: 52).

“Truth, in the great practical concerns of life, is so much a question of the reconciling and combining of opposites, that few have minds sufficiently capacious and impartial to make the adjustment with an approach to correctness, and it has to be made by the rough process of a struggle between combatants fighting under hostile banners.” (*OL*: 54).

Now, a conviction which holds that any conviction is bound to need correction, although not entirely self-refuting, is certainly not reassuring (it is not self-refuting because correction is neither logically necessary nor has to be substantial). Indeed, while Mill argues firmly his points, he does so also looking for errors and occasionally showing some doubts, as we have seen. He looks for errors again when he reconsiders the possibility that some principles are absolute truths, as opposite to half-truths, so that no improvement is to be expected from letting people discuss them freely (*OL*: 54). He could insist on the arguments about the foundation and the vitality of truth, but yet he chooses to downplay the objection arguing that what is generally taken as an absolute truth may not be so (as he holds it is the case with Christian theological morality), perhaps forgetting what he had said before about mathematical truths having all argument on one side.

1.6. The utilitarian balance and the harm principle

We have seen how Mill rests his defence of freedom of speech on utilitarian grounds (namely on the benefits of attaining truth *and* fulfilling

3 Interestingly, Darwin's description of the evolution of species as resulting from natural selection of random variations among competing individuals, is itself inspired by Adam Smith's description of economic order as the result of free competition among self-interested individuals (see Schweber, 1977: 282).

human deliberative capabilities), and how he also explores those very utilitarian grounds looking for plausible justifications for censorship worth answering. Towards the end of Chapter II, Mill comes with a further utilitarian objection to liberty of expression: it can cause radicalism and eventually violence and unhappiness.

“I acknowledge that the tendency of all opinions to become sectarian is not cured by the freest of discussion, but is often heightened and exacerbated thereby;” (*OL*: 58).

Since he lacks empirical evidence to refute the objection, Mill’s answer incurs once more in some wishful thinking: the risk of increased violence by “the impassioned partisan” will be outweighed by the benefits of calmer people listening to all points of view.

“Not the violent conflict between parts of the truth, but the quiet suppression of half of it, is the formidable evil; there is always hope when people are forced to listen to both sides; it is when they attend only to one that errors harden into prejudices, and truth itself ceases to have the effect of truth, by being exaggerated into falsehood.” (*OL*: 58).

Finally and surprisingly, Mill suggests that what can be defended and should be encouraged is not free expression for anyone, fair-minded or otherwise, but “to every one, whatever opinion he may hold, who has calmness to see and honesty to state what his opponents and their opinions really are” (*OL*: 61). He is far from approving legal censorship based on the speaker’s dishonesty or vehemence, but he does argue that public opinion (as opposed to the law) is entitled to condemn whoever shows “want of candour, or malignity, bigotry, or intolerance” (*OL*: 61).

Of course, Mill’s stance on liberty of expression in *On Liberty* has to be understood under the light of the harm principle, which famously justifies restricting individual liberty of action (only) “to prevent harm to others” (*OL*: 14). Mill states clearly that the prevention of harm can justify restricting the liberty of expression, like in cases of instigation of harmful actions, such as telling “that corn dealers are starvers of the poor (...) to an excited mob assembled before the house of a corn dealer” (*OL*: 63). But the extent of Mill’s harm principle is unclear; and it has been argued that “his defence of speech rights is not limited to harmless speech”, and “he permits interference with acts that are harmless” (Jacobson 2000: 278). Indeed, Mill’s interpretation of utility allows for some forms of censorship beyond the scope of the harm principle. For example, he is in favour of legal prohibitions of indecent conduct performed in public, which he sees as “a

violation of good manners, and coming thus within the category of offences against others” (*OL*: 109), despite his reluctance to identify offence with harm. Indeed, it is debatable whether here Mill appeals inconsistently to the harm principle (Ten 1980: 106); or this principle is rightly invoked since it can be extended to prevent offences (Cohen-Almagor 2001); or the legal prevention of offences is justified by Mill on utilitarian grounds other than the harm principle. The value of public deliberation would certainly count among these utilitarian reasons, so that Mill could justify censorship whenever it advances public debate better than liberty of expression does.

2. APPLICATIONS: SOME DILEMMAS OF THE LIBERTY OF EXPRESSION

Let us turn now to examine briefly an application of Mill’s reasoning for liberty of expression in *On Liberty*. Out of the many dilemmas that our current democratic societies must confront regarding freedom of speech, I will focus on the response to hate speech and Holocaust denial, because they raise issues which are central to Mill’s argumentation. We could focus instead on other forms of speech which are deeply offensive for many, and yet they arguably do not cause enough harm to others so as to justify their restriction under Mill’s harm principle. We could examine, for instance, the problems of how law should treat blasphemy or virtual child pornography.⁴

2.1. Hate speech

Article 4 of the UN *International Convention on the Elimination of All Forms of Racial Discrimination* (1969) directs that States Parties

“a) Shall declare an offence punishable by law all dissemination of ideas based on racial superiority or hatred, incitement to racial discrimination, as well as all acts of violence or incitement to such acts against any race or group of persons of another colour or ethnic origin, and also the provision of any assistance to racist activities, including the financing thereof.”

On a similar vein, Recommendation 1805 (2007) by the Parliamentary Assembly of the Council of Europe, states at paragraph § 12: “[...] National

4 In virtual child pornography no child is involved or directly harmed. The issue was considered by U.S. Supreme Court, concluding that whereas the First Amendment of U.S. Constitution does not protect distribution of pornography made with actual children (*New York v. Ferber*, 1982), virtual child pornography cannot be prohibited because it is considered indecent, it communicates immoral messages or it can be misused (*Ashcroft v. Free Speech Coalition*, 2002).

law should penalise statements that call for a person or a group of persons to be subjected to hatred, discrimination or violence on grounds of their religion.” Many legal systems comply with those instructions, and for example article 510 of Spanish Criminal Code (1995) punishes with prison the incitement to discrimination, hatred or violence against groups or associations because of racism, anti-Semitism or other motives regarding ideology, religion or beliefs, family situation, ethnicity or race, national origin, sex, sexual drive, illness or disability. In the United Kingdom, the Public Order Act 1989 says in section 18: “A person who uses threatening, abusive or insulting words or behaviour, or displays any written material which is threatening, abusive or insulting, is guilty of an offence if (a) he intends thereby to stir up racial hatred, or (b) having regard to all the circumstances racial hatred is likely to be stirred up thereby.”

Are these provisions consistent with Mill’s reasoning in *On Liberty*? We can safely say that Mill’s harm principle allows for legal restriction and prosecution of hate speech which is directly conducive to violence or discrimination against individuals or groups, as in the corn dealer example. However, there may be cases of hate speech where incitement is only indirect or entirely dependent on the listeners’ disposition. In those cases it is offence, rather than harm, which is prevented by restricting the speech, and therefore Mill’s arguments could work against censorship. At first glance, “Mill’s argument against censorship may seem to imply that all content-specific restrictions on speech, including the regulation of hate speech, are impermissible”, because “Mill is very clear that mere offensiveness does not constitute harm” (Brink 2001: 120-121). But, as I have advanced, Mill’s stress on the importance and utility of public debate could justify censorship whenever it improves the conditions for such debate. According to Brink (2001: 138), this is precisely what happens with hate speech, because it actually restricts public deliberation, and therefore it cannot benefit from the main rationale of granting liberty of expression. However, Alexander (2001: 59) points out that if the government suppresses some speech on the ground that the speech is misleading and will impair rational deliberation, we would consider the government to be in violation of the right of freedom of expression. On the other hand, according to Simpson (2006), censoring hate speech that offends but does not harm is wrong in a liberal society that promotes citizen’s “epistemic responsibility” for their beliefs.

Now, there is no need to look beyond the harm principle for reasons to restrict hate speech if we think that hate speech is harmful. Indeed, there are very good reasons to include hate speech among harmful actions, as argued by Brink (2001) himself, Cohen-Almagor (2001), or many others.

But the penal statutes that prosecute hate speech are not always narrow enough to exclude all expressions that are harmless in a Millian sense. How those provisions are to be understood depend obviously on the courts' interpretation, but it is not difficult to conceive conducts which are legally punished but only indirectly harmful. Mill wrote that "an opinion that corn-dealers are starvers of the poor, or that private property is robbery, ought to be unmolested when simply circulated through the press" (*OL*: 62). But no doubt laws against hate speech would not let publication of an opinion of that kind about a historically threatened racial or religious group. In a Millian perspective, any speech that causes the production of a harmful action is obviously harmful, and hate speech often qualifies in this respect. But in order to keep the Millian perspective, the link between restricted speech and harmful action has to be very tight. However, to mention just an example, it is not clear that "dissemination of ideas based on racial superiority or hatred", which must be legally punished by participants in the *International Convention on the Elimination of All Forms of Racial Discrimination*, can be taken as *causing* the harmful actions that those ideas may inspire.⁵ On this matter, Scanlon (1972) argued for a "Millian Principle" to this effect:

"There are certain harms which, although they would not occur but for certain acts of expression, nonetheless cannot be taken as part of a justification for legal restrictions on these acts. These harms are: (a) harms to certain individuals which consist in their coming to have false beliefs as a result of those acts of expression; (b) harmful consequences performed as a result of those acts of expression, where the connection between the acts of expression and the subsequent harmful acts consists merely in the fact that the act of expression led the agents to believe (or increased their tendency to believe) these acts to be worth performing."

If Scanlon is right in relating this theory of liberty of expression to Mill, we will have to admit that hate-speech restrictions are not always consistent with Millian principles, because those restrictions extend to speech that simply leads people to have dangerous or wicked beliefs.⁶ Even

5 In fact, the U.S.A., France, Italy and other countries signed the *Convention* with reservations regarding article 4, because its eventual conflict with the right of free expression. In particular, the U.S. Supreme Court has been quite strict in requiring a "clear and present danger" of causing a severe harm for an act of speech to be lawfully restricted (see *Brandenburg v. Ohio*, 1969, which granted free expression to a Ku-Klux-Klan militant).

6 For instance, in a sentence of 12 January 2004 a Penal Court of Barcelona found in violation of article 510 of Spanish Criminal Code (and condemned to prison for a year and three months, and other punishments) an imam who had wrote a book detailing the

if we narrow Scanlon's formulation to accommodate common-sense legal restrictions to intentional misrepresentations (e.g. in commercial adverts) or to defamatory assertion of facts, as argued by Alexander (2001), we still have a principle of freedom of expression that seems to tolerate the dissemination of racist or discriminatory opinions.

There is no easy solution to the dilemma posed by hate speech. On a theoretical level, we have two main sources of reasons to consider. First, the individual rights that persons have to protect their autonomy *and* dignity, which create an sphere of individual immunity but also a liability regarding others' interests. Second, the promotion of utility and happiness by any means suitable, including the protection of harmless forms of liberty of expression. Scanlon (1972) points out that a complete theory of liberty of expression needs to rest both on rights and on the balancing of competing goals. To be sure, both sources of reasons will probably have to converge for us to accept any of them. In order to accept freedom of speech as an absolute right, one expects it to be construed and defined in clear-cut rules that leave every speech that is harmful in a utilitarian way outside the scope of the right. This is clearer in some cases (like Holmes' example of someone shouting 'Fire' in a crowded theatre or Scanlon's example of someone explaining how to make nerve gas at home), and less clear in other cases (like insult, hate speech or virtual child pornography), but it seems to me that there is no better way to harmonize individual autonomy and responsibility towards others than having in mind the promotion of happiness. On the other hand, application of the principle of utility requires a complex weighing of elements (the value we attach to our autonomy, the social impact of free public deliberation, the distress suffered by victims of offensive speech, and so on). But we lack the empirical knowledge needed to make an accurate balancing of utility, so we end up —like Mill does— relying on our predictions, which include the expectation that it is worthwhile protecting freedom of speech as a trump-right that shields harmless expressions from the censorship of contingent majorities that dislike them. Finally, for formulations of rights and utility to be accepted as sources of solutions to free expression dilemmas, they must converge not only with our intuitions and expectations, but also to some extent with the case-law on the subject. For liberty of expression is no longer a political or philosophical issue that can be discussed in terms of abstract rights or

occasions and manner in which husbands are justified in punish physically their wives according to his understanding of the Koran (he wrote, for instance, that hits must not be strong and hard, because the aim is to make suffer psychologically but not humiliate and maltreat physically).

predicted utility, but it is a legal issue that must be examined taking into account the courts' interpretation, albeit in a philosophical and political light.

2.2. Holocaust denial

Related to hate speech, but in some aspects different, is the speech that denies or diminishes historical events, like the Holocaust or other genocides, and is deeply offensive to some people and despised by many. When Holocaust denial is intended to stir action or promote hate, it amounts to hate speech and should be treated like it. But Holocaust denial poses a singular dilemma when the incitement aspect is not present. For instance, article 607.2 of the Spanish Criminal Code (1995), punished "the dissemination by any means of ideas or doctrines that deny or justify the crimes" of genocide typified in the previous paragraph.⁷ Many legal scholars objected that this formulation was too broad to comply with the requirements of certainty and minimal intervention inherent to criminal law. In 1999 an Appellate Court in Barcelona asked the Constitutional Court whether penalizing the denial of genocide in those terms was consistent with the right of free speech granted by the Spanish Constitution. The Constitutional Court decided the case in 2007, by sentence 235/2007, of 7 November, concluding that the words "deny or" in article 607.2 quoted above are against Spanish Constitution. The Constitutional Court had previously stated in sentence 214/1991 that liberty of ideology and expression do not guarantee the right to express and propagate some particular understanding of history or world vision with the deliberate aim of deriding or discriminating people or groups because of any personal, ethnic or social condition. But in sentence 235/2007, the Court clarified that the dissemination of negations ideas is covered by the liberty of expression unless it is made with the deliberate aim of deriding and discriminating in that way. Surely the Court took into consideration the constitutional problems of criminalizing the denial of any genocide, without further specification (as opposed to criminalize the denial of the Holocaust, as other countries do); but it made clear that negations is not punishable in itself, but only when it is intended in a way that makes it a form of hate speech.⁸

7 "La difusión por cualquier medio de ideas o doctrinas que *nieguen* o justifiquen los delitos tipificados en el apartado anterior de este artículo [genocidio], o pretendan la rehabilitación de regímenes o instituciones que amparen prácticas generadoras de los mismos, se castigará con la pena de prisión de uno a dos años."

8 There are several analysis of sentence 235/2007 of the Spanish Constitutional Court. Torres Pérez (2007) suggests that it must be understood as a consequence of the doctrine of over breadth, which requires that every legal provision contrary to constitutional freedom of expression is null on its face, and it explains that the Court did not try

The decision of Spanish Constitutional Court seems to conform to Mill's defence of the liberty of expressing any harmless opinions or beliefs, no matter how false or unconventional they are; although Mill certainly focuses on expression of ideas rather than of statements of fact.⁹ However, the criminalization of Holocaust denial is alive and well in Germany, France, and other European countries. Moreover, it has been declared by the European Court of Human Rights (ECHR) in conformity with the freedom of expression granted by the European Convention of Human Rights. The ECHR has pronounced on this issue in a number of cases, carefully reviewed by Bilbao Ubillos (2007). The clearer one is probably *Garaudy v. France*, an inadmissibility decision of 24 June 2003, where the Court did not estimate Garaudy's appeal after being convicted in France for the denial of crimes against humanity in a book. The ECHR wrote:

[...]There can be no doubt that denying the reality of clearly established historical facts, such as the Holocaust, as the applicant does in his book, does not constitute historical research akin to a quest for the truth. The aim and the result of that approach are completely different, the real purpose being to rehabilitate the National-Socialist regime and, as a consequence, accuse the victims themselves of falsifying history. Denying crimes against humanity is therefore one of the most serious forms of racial defamation of Jews and of incitement to hatred of them. The denial or rewriting of this type of historical fact undermines the values on which the fight against racism and anti-Semitism are based and constitutes a serious threat to public order. Such acts are incompatible with democracy and human rights because they infringe the rights of others. Its proponents indisputably have designs that fall into the category of aims prohibited by Article 17 of the Convention. [...]

On the light of this quote, this ECHR decision is not opposed to Millian principles either. The Court does not deny the importance of pursuing the truth through public deliberation supported by free speech. In fact, the ECHR has stressed this point to ground other decisions, as *Lehidoux and*

9 to maintain the punishment of genocide denial producing an interpretation of the type consistent with the Constitution, as the Court does (inconsistently, on Torres' view) regarding the punishment of justifying genocide. See also Coderch and Rubi Puig, 2008. Coderch and Rubi Puig (2008: 21) point out that the ruling of the Spanish Constitutional Court departs from the freedom of speech tradition, including Mill, that protects opinions but not lies. However, Mill's principles do protect the free discussion of facts, even against all evidence. Lies may not be protected as such by Millian principles, but the law cannot presume that all false statements about Holocaust are intentional lies. On the other hand, it is debatable whether lies are always excluded of the protection of constitutional rights of free speech. Bilbao Ubillos (2008:52) suggests the negative with the example of a doctor who intentionally uses false statistics to promote vaccination.

Isorni v. France, of 23 September 1998, when the questioned facts concerned Petain's collaboration with the Nazi regime. The reasoning of the ECHR agrees with Mill in the value of protecting the quest for truth with freedom of speech, but it does not include Holocaust denial in that effort, and therefore such denial is excepted from Mill's argument and from the protection of the free speech clause. On a more general perspective, the ECHR also agrees with Mill's reasoning in the value it gives to public deliberation and democratic process.

What should be said about Holocaust denial from the standpoint of Mill's *On Liberty*? As we have already seen, Mill's arguments often direct in different ways. To begin with, they justify restricting freedom of speech to prevent harm to others, but it is contentious whether Holocaust denial is always harmful in the relevant sense. According to Cohen-Almagor (2008: 219), "Holocaust denial involves more than a challenge to all we know about history and truth. It does more than question well-known facts and historical data. It also involves hate, harm, and offense"; and therefore it is a form of hate speech. However, there is also room for the possibility of negationist doubts or opinions without racist or discriminatory connotations, as the Spanish Constitutional Court suggested in Sentence 214/1991. In that case, the harm principle does not identify clearly the answer to our question; so we must turn to the five arguments for liberty of expression. On a first reading, the argument for immunity and autonomy seems to side with the negationists, provided that their denial is a matter of opinion about facts and it does not carry justification of genocide, severe offences or incitement to hatred, violence or discrimination. But on a different reading, the same argument calls for the defence of human capacities, which implies the defence of the people who are or feel attacked by the negationists. The argument for the pursuing of truth is of limited use here, since there is hardly doubt that tolerating negationism does not help to find the truth. But Mill's point was that we are fallible and should keep our convictions on permanent test. Mill's argument for the vitality of truth speaks more clearly in favour of tolerating Holocaust denial for the sake of the Holocaust memory. But we have seen that Mill himself was uncertain on the value of letting false ideas or beliefs to propagate. The argument for the combination of truths could be relevant, because the crime of Holocaust denial may include works that have some point, however minimal this is. But, again, the possibility of such a gain could be so remote that toleration of denial is not worth the damage it causes. In conclusion, Mill's arguments help us to think about how the law should treat Holocaust denial, but they do not solve the problem. Besides, Mill's reasoning invites us, in

the end, to conform our view on the issue by predicting what opinion better promotes utility, and Mill is quite right in that the usefulness of an opinion is itself a matter of opinion.

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