

ARTICLE

# J. S. Mill on Artistic Freedom and Censorship

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## Abstract

This article aims to reconstruct a Millian argument for protecting a broad artistic freedom, as well as to delineate the exceptional cases in which censorship of works of art might be justified. Mill's *On Liberty* offers two lines of reasoning that might be used to defend the widest possible artistic freedom. The first is Mill's defense of freedom of speech in chapter 2, although this would apparently still allow for censoring art that serves to instigate harm. The second is his defense of "experiments in living" in chapter 3, but this might allow for censoring the exhibition or publication of artworks that constitute "offences against decency." While this Millian doctrine on artistic freedom provides guidelines for coping with difficult cases in arts management, its limitations highlight the peculiarities of the arts and literature in relation to freedom and censorship.

## 1. Introduction

The topic of censorship refers almost always to that of freedom of speech, not only within the utilitarian theory, but also in general.<sup>1</sup> This sort of freedom is largely of a political nature and involves political censorship. The issue dealt with here is whether the vigorous defense of freedom of speech devised by J. S. Mill for public life is also applicable to the arts and literature (hereinafter "arts"). However, the most difficult aspect to defend is not artistic freedom, as this particular liberty can be defended in several ways. The most difficult challenge is how to defend artistic censorship given that the real question, with the exception of fanatical opinions, is whether to censor some specific works of art. Since democratic societies are committed to a basic array of civil liberties, censorship in arts and culture is based on applied ethics that arises only in specific cases that are difficult to manage. In other words, the opposite of censorship is freedom of expression, yet neither is unrestricted in practice. Somehow or other, there is nearly always some degree of censorship (or self-censorship). As a result, the problem can be seen as how much censorship is admissible so that freedom of

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expression is still in force and, conversely, what restrictions should be imposed on censorship by freedom of expression.<sup>2</sup>

To address the balance between freedom and censorship in the arts, two lines of argumentation can be identified in *On Liberty*: that which refers to freedom of speech and that which refers to “experiments of living.” In both cases, Mill establishes some exceptions. In other words, he places some limits on “experiments of living” and highlights some occasions in which free speech must be restricted. Therefore, Mill effectively provides a justification for censorship in exceptional cases. As I shall explain, this defense can also be used to justify artistic censorship on specific occasions. Hence, my goal is to reconstruct a Millian rationale for artistic freedom and also for minimal artistic censorship. Section II deals with Mill’s argument for freedom of speech, viz. freedom to *express* opinions, and, in particular, exceptions to that freedom. These exceptions involve a doctrine of instigation used for censoring artworks deemed capable of instigating others to commit serious harmful actions. Section III looks into this possibility by expanding the rationale of freedom of speech to the arts. Thus, both a Millian defense of artistic freedom and a doctrine of appropriate artistic censorship are explained. Section IV deals with the aforementioned experiments of living. As in the previous section, first I shall discuss artistic freedom and then move on to its possible restrictions. To this effect, Mill’s rationale for the prohibition of indecent acts shall be analyzed. Finally, conclusions are drawn in Section V.

## 2. Mill’s doctrine of instigation

The so-called Harm Principle establishes that neither the state nor society has a right to interfere with individual decisions and behaviors when no one else but the perpetrator is concerned.<sup>3</sup> Consequently, it might seem that the arts fall into “that portion of a person’s life and conduct which affects only himself,” such that censoring the arts should never be permitted.<sup>4</sup> According to Mill, the “domain of consciousness” covers the most comprehensive liberty of conscience, including liberties of thought, feeling and opinion.<sup>5</sup> All these liberties seem essential for establishing the conditions needed for artistic creation, as well as the “liberty of tastes” that is also mentioned by Mill a little further on. However, works of art affect people in many ways. The public either enjoys or suffers them (think of a building or a melody). Moreover, works of art are artifacts that can influence people’s lives regardless of their artistic meaning (for example, a melody is a sound that can be perceived as noise). Two considerations result from this. First, given that it is not clear whether artistic activity is self-regarding, the aim is to verify whether Mill developed a theory of artistic expression that could support the idea of art within the “inward domain of consciousness.” In other words, self-regarding art in which society has only an indirect interest. Second, on the assumption that artistic activity is

<sup>2</sup>Tun-Jen J. Chiang and Richard A. Posner, *Censorship versus Freedom of Expression in the Arts*, in *Handbook of the Economics of Art and Culture*, ed. by Victor A. Ginsburg and David Throsby, 2 vols. (Amsterdam: North Holland, 2006), vol. 1, pp. 310–35.

<sup>3</sup>Joel Feinberg, *The Moral Limits of the Criminal Law*, 4 vols. (New York: Oxford University Press, 1986), vol. 3, p. xvi.

<sup>4</sup>John Stuart Mill, *On Liberty*, in *The Collected Works of J. S. Mill*, ed. by John M. Robson, 33 vols. (Toronto: University of Toronto Press, 1977), vol. 18, pp. 213–10 (p. 225).

<sup>5</sup>Mill, *On Liberty*, p. 225.

indeed other-regarding, it could be similar to “expressing and publishing opinions,” and so freedom of speech would include artistic freedom.<sup>6</sup>

The general rationale of Mill’s thesis on the broadest possible sense of freedom of expression is that a specific action could be other-regarding yet harmless and that this is normally the case as regards *speech*, viz. expressing opinions. Note that, in theory, society has no direct interest in others’ thoughts, tastes or pursuits. However, when it comes to *expressing* thoughts, tastes and pursuits, things are different. Fundamentally, expression is deemed harmful when it consists of defamation or invasions of privacy.<sup>7</sup> Because of this, Mill’s theory of freedom of expression refers only to speech that consists of “instances of expressing orally or in print opinions about matters of fact, and about historical, scientific, theological, philosophical, political and moral questions.”<sup>8</sup> As such, Mill’s reasoning focuses on the freedom to express general opinions. Based on this, society has a direct interest in the expression of this type of opinions because they might contribute to the general consensus of truth and thus to general utility. According to Mill “the truth of an opinion is part of its utility.”<sup>9</sup> However, he mentions two scenarios where this liberty should be restricted because the harm caused by it could offset the utility of establishing truth: tyrannicide and inciting an angry mob. Thus, the real issue is whether the application of those exceptional situations to the case of disputed works of art is legitimate.

In a footnote to the second chapter in *On Liberty*, Mill refers to the classic theoretical issue of tyrannicide in relation to the freedom of the press, and he declares that neither this topic, nor any other, should be censored. He points out that “there ought to exist the fullest liberty of professing and discussing, as a matter of ethical conviction, any doctrine, however immoral it may be considered.”<sup>10</sup> In this passage, Mill uses the word “doctrine,” and so “fullest liberty” alludes to expressing and discussing opinions or theories. Therefore, if freedom of speech should not be restricted with regard to content, then the only instant in which it should be restricted is when expressing a doctrine which is considered to have successfully instigated tyrannicide. Mill establishes two conditions for that to occur: (a) after a pro-tyrannicide speech “an overt act has followed” and (b) “at least a probable connection can be established between the act and the instigation.”<sup>11</sup> Therefore, there are two conditions that constitute an act of instigation: (1) an overt act executed by a third person follows the instigation, and (2) at least a probable

<sup>6</sup>Mill, *On Liberty*, p. 225.

<sup>7</sup>Joel Feinberg, *Freedom and Fulfillment* (Princeton: Princeton University Press, 1992); Jonathan Riley, J. S. Mill’s Doctrine of Freedom of Expression, in *Utilitas*, 17 (2005), 147–79. Although Mill never specified the meaning of “harm,” it must be something more serious than the subjective feeling of offense. According to the more restrictive interpretation, harm is a kind of socially defined setback to interest. See Feinberg, *Freedom and Fulfillment*; John Gray, *Mill on Liberty: A Defense* (London: Routledge, 1983); John Collwyn Rees, A Re-reading of Mill on Liberty, in *Political Studies*, 8 (1960), 113–29; Chin Liew Ten, *Mill on Liberty* (Oxford: Clarendon Press 1980). For my purposes, it is enough to conceive harm as an objective injury instead of mere dislike or psychological distress. Thus, “harm” shall be understood here as any type of perceptible damage that an impartial party would admit, such as physical injury, financial loss, physical confinement or loss of reputation (Riley, *J. S. Mill’s Doctrine of Freedom of Expression*, p. 160). Further, “offense” shall be understood as psychological discomfort which can be ascertained only from a subjective point of view. Therefore, I shall consider offense to be different from harm.

<sup>8</sup>Feinberg, *Freedom and Fulfillment*, p. 124.

<sup>9</sup>Mill, *On Liberty*, p. 233.

<sup>10</sup>Mill, *On Liberty*, p. 228 n. 1.

<sup>11</sup>Mill, *On Liberty*, p. 228 n. 1.

connection can be established between the overt act and the instigation. According to this, censorship could never be implemented because it would have to be determined beforehand that something (an opinion, and maybe a book or a picture) will cause damage, when instigation can only be ascertained *a posteriori*. Therefore, freedom of expression could only be controlled in a Miltonian way, at most, *ex-post*.

The question of instigating via speech reappears at the beginning of chapter 3 where it is stated that circumstances, not content, may lead to the restriction of freedom of speech. Specifically, Mill refers here to those circumstances that make the expression of some opinions “a positive instigation to some mischievous act,” adding that “acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled.”<sup>12</sup> To put it another way, speech is a type of act that, like any other, could do harm, therefore, it falls within the scope of the Harm Principle. In fact, this is a similar thesis to that stated in the tyrannicide passage. In this case, however, censorship would be possible because the necessary circumstances can be ascertained in advance. This is in line with Mill’s view that “it is the business of the law to prevent wrongdoing, and not simply to patch up the consequences of it when it has been committed.”<sup>13</sup> In this second passage no conditions are stated, but an example is given. Mill states that an opinion that maintains corn-dealers are starvers of the poor should be allowed except when that opinion is made public to an angry mob assembled before the house of a corn-dealer. It should be noted that intentionality is not needed for a speech to be considered instigation, given that the speaker may not intend for the mob to sack the corn dealer’s residence. However, both the aforementioned tyrannicide passage and the corn-dealer example lead us to infer that instigation always involves responsibility, either because the instigator consciously intends to cause harm or because they use their words recklessly. Indeed, freedom of speech exists for the sake of the listeners and so the speaker must act responsibly.<sup>14</sup>

Taking into account both passages, Mill’s doctrine of instigation consists of the following elements: (1) an instigation is speech that can prompt others to harm third parties; (2) an act of instigation requires two necessary conditions, namely the occurrence of an overt harmful act that occurs after the instigation (first condition) and a probable connection between the act and the instigation (second condition); (3) a probable connection can be established before the act of instigation, so that the specific circumstances of the speech act in question must be considered in order to pass a judgment on the existence of instigation, and (4) the circumstances require that the agent be held responsible for the act of instigation, either because they deliberately pursue the commission of harmful acts by third parties or because they behave recklessly.

### 3. Censoring speech, censoring art

The question now is whether a work of art can be considered a special kind of “speech” capable of expressing a doctrine. If the answer is affirmative, then artistic freedom can be defended in the same way as freedom of speech. Moreover, we need to ask whether a

<sup>12</sup>Mill, *On Liberty*, p. 260.

<sup>13</sup>J. S. Mill, *Principles of Political Economy*, in *The Collected Works of J. S. Mill*, ed. by John M. Robson, 33 vols. (Toronto: University of Toronto Press 1965), vol. 3, pp. 453–974 (p. 908).

<sup>14</sup>See Kevin C. O’Rourke, *John Stuart Mill and Freedom of Expression: The Genesis of a Theory* (London: Routledge, 2001), p. 131.

work of art can be used to instigate harmful acts. Again, if the answer is affirmative, then a work of art may be censored on the same basis as harmful opinions. Regarding the former, visual and musical arts can only be considered as discourse or speech metaphorically. Be that as it may, artistic discourse is not referential. Even if a literary work is made up entirely of statements, it cannot be assumed that such a work, taken as a whole, is claiming something is literally true or false about the world. Accordingly, the powerful defense of freedom of expression that Mill purports through the epistemic utility of opinions does not seem to be applicable in the case of artistic discourse or in the case of images. This has been highlighted in relation to pornographic representations.<sup>15</sup>

Mill himself declared his position on the epistemic value of art in 1833 when he published *What is Poetry?*. The essay was reprinted together with *The Two kinds of Poetry* (also from 1833) under the title *Poetry and Its Varieties* in his *Dissertations and Discussions* in 1867. Both works arose through Mill's discovery of Romantic poetry, particularly that of Wordsworth and Coleridge, who exerted a strong influence on the young Mill.<sup>16</sup> However, Mill did not alter his view on the topic when he selected the text for the 1867 compilation. Furthermore, he reaffirmed the general thesis of the contrast between science and art in his *Inaugural Address* delivered at the University of St. Andrews in that same year.<sup>17</sup> Undoubtedly, Mill considered that poetry "proffers no assertions about reality" because it is the expression of emotions and not a series of true or false claims.<sup>18</sup> Although this is the main idea that needs to be understood for the purpose of artistic censorship, *Poetry and Its Varieties* (and especially *What is Poetry?*) contains a rather more elaborate, though tentative and unsatisfactory, theory of art.

To begin with, poetry is a variety of art, therefore Mill's doctrine is not only applicable to literature.<sup>19</sup> In turn, Mill establishes differentiations within art, specifically between poetry and other kinds of artistic expression, and these differentiations are relevant to the issue of censorship and artistic freedom. First, there is a contrast between poetry and narrative and, from a different perspective, between poetry and eloquence. Poetry is "thoughts and words in which emotion spontaneously embodies itself," hence poetry explores the human soul or the inner life of the mind. In contrast, narrative is about the external world.<sup>20</sup> However, narrative does not intend to portray the literal sense of external entities. For this reason, it is not a referential discourse. In fact,

<sup>15</sup>Catherine McKinnon, *New Developments in the Pornography Debate*, in *Freedom of Expression: Counting the Costs*, ed. by Glen Newey (Newcastle: Cambridge Scholars Publishing, 2007), pp. 30–53 (p. 32). Also Bernard Williams, *Obscenity and Film Censorship* (Cambridge: Cambridge University Press, 1979), p. 74.

<sup>16</sup>On the influence of Wordsworth, see Karen E. Whedbee, J. S. Mill on Poetry and Rhetoric, *Advances in the History of Rhetoric*, 7 (2004), 17–29, and Antis Loizides, Mill's Aesthetics, in *A Companion to Mill*, ed. Christopher MacLeod and D. E. Miller (Oxford: Blackwell, 2017), pp. 250–65. On Coleridge, see Stephen Leo Carr, The Ideology of Antithesis Science versus Literature and the Exemplary Case of J. S. Mill, *Modern Language Quarterly*, 42 (1981), 247–64.

<sup>17</sup>Edward Alexander, Mill's Theory of Culture: The Wedding of Literature and Democracy, *University of Toronto Quarterly*, 35 (1965), 75–88; John M. Robson, J. S. Mill's Theory of Poetry, *University of Toronto Quarterly*, 29 (1960), 420–38.

<sup>18</sup>Meyer Howard Abrams, *The Mirror and the Lamp: Romantic Theory and the Critical Tradition* (London: Oxford University Press, 1953), p. 320.

<sup>19</sup>Mill, *Thoughts on Poetry and Its Varieties*, pp. 350–51.

<sup>20</sup>Mill, *Thoughts on Poetry and Its Varieties*, p. 356.

narrative is also referred to as “*fictitious* narratives.”<sup>21</sup> In sum, narrative or fiction is a description of outward circumstances, but from a subjective perspective. Thus, both poetry and fiction stir emotions.

The real difference between poetry and fiction lies in “the source of the emotion excited,” which is a state of mind in the former and “a series of mere outward circumstances” in the latter.<sup>22</sup> In *What is Poetry?*, Mill states that both provide truth. Accordingly, they can be classed as non-assertoric speeches with epistemic relevance. In any case, the kind of truth offered by art is not of an empirical kind since “the truth of poetry is to paint the human soul truly; the truth of fiction to give a true picture of life.”<sup>23</sup> According to Loesberg, Mill was trying to build an intuitive theory of knowledge; a failed project that Mill abandoned as soon as *The Two kinds of Poetry* was published, just a few months after the previous essay.<sup>24</sup> In conclusion, a piece of art cannot be considered a special kind of “speech” able to express a doctrine, given that artistic discourse, both poetry and narrative, is not assertoric.

Nonetheless, let us accept Mill’s thesis about the truth of art for the sake of argument on the topic of artistic freedom. Therefore, if this were the case, the epistemic defense of freedom of expression based on the utility of truth could be extended to the arts. More precisely, Mill states that “poetry, when it is really such, is truth; and fiction also, if it is good for anything, is truth.”<sup>25</sup> In other words, the truth that a work of art conveys is proportional to its artistic merit. As no one can assert how true an opinion is, human fallibility is a strong argument in defense of freedom of opinion. Something similar could be said in the case of the arts. Human fallibility regarding *aesthetic judgments* is a definitive argument in favor of artistic freedom, given that declaring that a work of art is so bad that it warrants no aesthetic merit would mean taking an unacceptably high risk. The reason is that the subsequent condemnation of that work could prevent the public from understanding something true about the human soul or human life. In conclusion, artistic freedom might be defended using epistemological reasons in an analogous fashion similar to freedom of expression.

We now turn to the question of using a work of art to instigate harmful behavior. If that were possible, then the arguments for censoring freedom of opinion in such exceptional cases would also be valid for censoring art. Here, the difference between poetry and eloquence becomes relevant. As in the case of narrative, eloquence covers any kind of artistic work. Consequently, it can be said that poetry and eloquence “intersect the

<sup>21</sup>Mill, *Thoughts on Poetry and Its Varieties*, p. 341 (italics mine).

<sup>22</sup>Mill, *Thoughts on Poetry and Its Varieties*, p. 344.

<sup>23</sup>Mill, *Thoughts on Poetry and Its Varieties*, p. 346.

<sup>24</sup>Jonathan Loesberg, In Which a Poet is Frightened by a Lion: The Philosophical Context of Mill’s Poetic Theory, *The Victorian Newsletter*, 55 (1979), 26–31. In fact, Mill makes clear his acceptance of associationism at the beginning of the second work as he points out that “the wiser thinkers understand and acknowledge that poetic excellence is subject to the same necessary conditions with any other mental endowment” (Mill, *Thoughts on Poetry and Its Varieties*, p. 355). In *A System of Logic*, he turned back to the topic of knowledge through artistic work or, more precisely, to the psychology of artistic creation. He did it briefly and while discussing the applications of associationism to different realms of knowledge. Nevertheless, Mill refers to his proposal as “an interesting speculation” developed in a previous work, namely *Thoughts on Poetry and its Varieties*, which illustrates the scope that still exists for investigation in the “imperfect Science of Mind.” See John Stuart Mill, *A System of Logic*, in *The Collected Works of J. S. Mill*, ed. by John M. Robson, 33 vols. (Toronto: University of Toronto Press, 1974), vol. 7, pp. 3–638 (p. 481).

<sup>25</sup>Mill, *Thoughts on Poetry and Its Varieties*, p. 346.

whole domain of art.”<sup>26</sup> As mentioned previously, Mill sees poetry as the action of thoughts and images upon emotions.<sup>27</sup> As a result, there is no need for a receiver. In other words, poetry is any kind of work of art that is not designed specifically for the public but for self-expression. In contrast, “eloquence” is the name Mill gives to any sort of artistic activity designed for a potential public. Both poetry and eloquence are expressions of personal feelings. However, given that emotions are expressed with the intention of arousing feelings in others and thus of having an impact on the behavior of third parties, eloquence requires an audience. It is important to remember that instigation requires that the agent be held responsible for the act of harmful behavior. In theory, this is not possible in the case of poetry as the poet cannot reasonably determine who the recipient or public of their work might be. Put another way, the intention to harm a third party through artistic activity is not applicable in the case of poetry. Furthermore, reckless behavior can also be ignored because it requires substantial risk that is consciously and unreasonably assumed. Since “poetry is feeling confessing itself to itself in moments of solitude”<sup>28</sup> this is not feasible. Consequently, if we only take into account Mill’s theory of instigation, poetry is a type of art that should never be censored.

In contrast, the proviso of responsibility is perfectly met in the case of eloquent art because “eloquence is feeling pouring itself out to other minds, courting their sympathy, or endeavouring to influence their belief, or move them to passion or to action.”<sup>29</sup> Therefore, the emotions that make up the artwork are used “for the purpose of voluntary communication.”<sup>30</sup> Yet it must be remembered that for a work of art to be regarded as instigating behavior (and thus potentially censurable) three other elements need to be taken into account. Predominantly, instigation is speech that can prompt others to harm third parties. An example of this is *Spiritual America*, a controversial photographic work by Richard Prince that was censored by the Tate Gallery in 2009.<sup>31</sup> In reality, a work such as this shows the limits of Mill’s defense of freedom of expression when it is applied to the arts. Basically, to consider this particular work of art a piece of speech, even in a metaphorical sense, is incorrect.

Like many other cases in contemporary art, *Spiritual America* is better understood as an *action* rather than a kind of visual sentence. The photograph is a nude image of actress Brooke Shields when she was ten years old. However, Richard Prince did not take the photograph. The original photograph was taken by Gary Gross, and was “rephotographed” by Prince, who then put it in a golden frame, chose the title and exhibited it in a New York art gallery. He did this the same year Shields sued Gross in an attempt to suppress the image.<sup>32</sup> To visit the original *Spiritual America* exhibition

<sup>26</sup>Mill, *Thoughts on Poetry and Its Varieties*, p. 350.

<sup>27</sup>Mill, *Thoughts on Poetry and Its Varieties*, p. 344.

<sup>28</sup>Mill, *Thoughts on Poetry and Its Varieties*, p. 348. On the concept of reckless behavior, see Feinberg, *Freedom and Fulfillment*, p. 138.

<sup>29</sup>Mill, *Thoughts on Poetry and Its Varieties*, p. 348.

<sup>30</sup>Mill, *Thoughts on Poetry and Its Varieties*, p. 352.

<sup>31</sup>Mihail Evans, Art in a Frame: *Spiritual America* and the Ethics of Images, *Journal of Aesthetics and Phenomenology*, 2 (2015), 143–70.

<sup>32</sup>The picture was taken with the authorization of Shields’ mother who was paid \$450 by Gross. Shields lost the lawsuit. In fact, the main ethical problem concerning Gross’ photograph is whether Shields’ legitimate right to her own privacy was damaged by the photographer. This issue is independent of the alleged artistic nature of the picture. As said before, Mill’s doctrine of freedom of expression does not authorize the invasion of another’s privacy. See Riley, J. S. *Mill’s Doctrine of Freedom of Expression*.



at the New York gallery, a personal invitation was needed. Once there, visitors discovered that *Spiritual America* was the only work on display. As a result, Prince made the public metaphorically complicit in the exploitation of the ten-year-old Shields. In sum, *Spiritual America* is not just a photograph, it is a complex set of actions. This performative dimension is less clear in other artistic works, but even a novel is not just a series of sentences but rather a specific speech act. In other words, a work of art could be considered equivalent to speech only if the context of the work is ignored, even though the context is integral to it.

Furthermore, the importance of context in the production and reception of a work of art makes the distinction between poetry and eloquence almost redundant. In particular, Mill's aesthetics are unable to explain that contemporary art may consist in choosing pre-existing materials that are transformed into art by the artist's willingness.<sup>33</sup> As different meanings can be given to the same materials, the same work of art can be used for both poetic and eloquent purposes. In the case of *Spiritual America*, it is evident that Prince considered his work as a piece of eloquence. However, this is not relevant to the issue of censoring his work given that any piece of art can be used for persuasion regardless of the author's intention. To put it another way, the kind of art that Mill conceived as poetry (whatever that may be) is not immune to producing an impact on an audience.

Acknowledging that a work of art is better described as an action rather than speech, and assuming that Mill's difference between eloquence and poetry is redundant when applied to censorship, we now look at the second and third elements of Mill's definition of instigation. The second element states that an overt harmful act must occur after the release of a particular artwork. The third element states that there must be a probable connection between the harmful act and the artwork in question, so that the connection can be established in advance owing to the specific circumstances of the case. The question now is whether a work of art can incite a harmful reaction toward a third party. A distinction between incitement and advocacy has been suggested by Monro to explain Mill's position on incitement in the corn-dealer example. Quoting *Yates v. United States*, Monro states that "the essential distinction is that those to whom the incitement is addressed must be urged to *do* something now or in the future, rather than to merely believe in something."<sup>34</sup> Opinions are generally used for advocacy, but there are exceptional circumstances in which opinions are used to incite. Mill's position is that restrictions should be placed on incitement but not on advocacy, and only then when third parties are at risk of harm. Thus, actions that seriously harm others may be prohibited, but people should be free to express their opinion that such actions are desirable.<sup>35</sup> Since art is not a referential speech, and so not a collection of opinions or doctrines, it can hardly be used for urging one to do something. Nevertheless, it can be used for advocacy because a work of art is intended to modify the beliefs of the public, though in a rather unpredictable and subjective way. It is doubtful that works as harsh as Pasolini's *Salò o le 120 giornate di Sodoma*, or even works that *profess* to incitement, such as Fumai's performance of the *SCUM manifesto*, could be understood as a call to action. Alternatively, these works advocate changing the public's mind in some way.

<sup>33</sup>Arthur C. Danto, *The Transfiguration of the Commonplace* (Cambridge, MA: Harvard University Press, 1981); Nelson Goodman, *Ways of Worldmaking* (Indianapolis: Hackett, 1978).

<sup>34</sup>David Hector Monro, Liberty of Expression: Its Grounds and Limits II, *Inquiry: An Interdisciplinary Journal of Philosophy*, 13 (1970), 238–53 (p. 239).

<sup>35</sup>O'Rourke, *John Stuart Mill and Freedom of Expression*, p. 131.



Nonetheless, it is possible to conceive a hypothetical scenario in which nearly all the elements of an instigation are present. For instance, Feinberg mentions the case of *Schenck v. United States*, in which the U.S. Supreme Court ruled that freedom of speech could be restricted if the words spoken or printed amounted to a clear danger for society. He quotes Judge Oliver Wendell Holmes' opinion that "the most stringent protection of free speech would not protect a man in falsely shouting fire in a theatre and causing a panic."<sup>36</sup> However, someone yelling "fire" could very well be part of an artistic performance. This hypothetical work of art could include all the elements of Mill's doctrine of instigation (except that it would not be speech). It is possible to imagine that instead of a speaker criticizing corn-dealers, a work of eloquent art (like a play) is performed in front of a starving angry mob, and that a character in this play shouts "down with the corn-dealers!" Therefore, a work of art could be censored for quite similar reasons to those of Mill's doctrine of instigation. In conclusion, Mill's epistemic defense of freedom of speech can be applied to artistic freedom, though the argument is weaker since it depends on a rather schematic aesthetic theory that Mill himself considered unfinished. Still, the circumstances under which a work of art could be an instigation are very uncommon, so art should be censored solely on exceptional occasions. It is reasonable to assume that such occasions are less common than those in which freedom of speech should be limited.

#### 4. Censorship of experiments of living

So far, I have analyzed an argument in favor of art censorship, namely that artworks might instigate harmful acts toward third parties. However, a more frequent argument for censoring a work of art is that it might *offend* third parties, and this is not covered by Mill's doctrine of instigation. In other words, opinions and works of art can be offensive to someone but this does not transform them into instigations against someone. Accordingly, a work such as *Spiritual America* might be taken down not because it could harm someone, but because it is considered offensive (actually, that was what really happened). Nevertheless, Mill's idea of "experiments of living" provides an argument against prohibiting allegedly offensive opinions and actions.

The point of departure is that Mill's advocacy of the general good entails the defense of individual improvement. In this regard, Mill considered that the arts can broaden our horizons and present new objects of value. In his *Autobiography* he states, "the internal culture of the individual" is an essential component of human wellbeing that can be achieved through "poetry and art as instruments of culture."<sup>37</sup> Thus, Mill adhered to the romantic conception of art and artists according to which an artistic work is a way of fulfilling and expressing the inner self.<sup>38</sup> In this vein, his defense of the "experiments of living" in chapter 3 of *On Liberty* could be read as an argument for artistic freedom. Mill affirms that "as it is useful that while mankind are imperfect there should be different opinions, so is it that there should be different experiments of living."<sup>39</sup> Though he refers in that passage to the individual's freedom "to carry his opinion into practice" and also to

<sup>36</sup>Feinberg, *Freedom and Fulfillment*, p. 136.

<sup>37</sup>John Stuart Mill, *Autobiography*, in *The Collected Works of J. S. Mill*, ed. by John M. Robson, 33 vols. (Toronto: University of Toronto Press, 1981), vol. 1, pp. 1–289 (p. 146).

<sup>38</sup>Loizides, *Mill's Aesthetics*, p. 255; Colin Heydt, *Rethinking Mill's Ethics: Character and Aesthetic Education* (London: Continuum, 2006).

<sup>39</sup>Mill, *On Liberty*, p. 260.

“different modes of life” and “modes of action,” it seems admissible to include here works of art given that they are specific modes of action and the result of different modes of life. In sum, I shall now explore the possibility of considering art as an “experiment of living” in order to justify the widest possible freedom.

The Harm Principle functions as a proviso to the freedom to pursue experiments of living. In this regard, Mill states that “acts, of whatever kind, which, without justifiable cause, do harm to others, may be, and in the more important cases absolutely require to be, controlled. [. . .] The liberty of the individual must be thus far limited.”<sup>40</sup> Given that he refers to *acts of whatever kind*, it can be assumed that artistic works can also be included. Therefore, even performances as shocking as *Shoot*, in which artist Chris Burden was voluntarily injured by a bullet, are within the protection of self-regarding experiments of living since no one else was harmed. In sum, an experiment of living can be an other-regarding or a self-regarding action. If the experiment of living is a series of actions that affects other people, the Harm Principle is applicable in much the same way as it is for the expression of opinions. Furthermore, if the experiment of living affects only the experimenter (for example the artist), then they must be allowed to perform it. Even though the experiment might put the safety or health of the artist at risk, as in Burden’s *Shoot* or in Marina Abramović’s *Rhythm 10* (in which the artist rapidly jabs a knife between the splayed fingers of her hand), the experiments must be allowed. It could be argued that both Burden and Abramović’s performances are negative models of behavior for reckless mimics. This is a real risk, but it is not a sufficient enough reason for censoring according to Mill because “whatever it is permitted to do, it must be permitted to advise to do.”<sup>41</sup>

Nevertheless, returning to the case of *Spiritual America*, even though the photograph may not have harmed anyone, the Tate Modern curators still faced the problem of the work’s potential to offend. In fact, the police met the museum management and advised them to take it down “to ensure that they [did] not inadvertently break the law or cause any offence to their visitors.”<sup>42</sup> Thus, the offense was not prompted by the work’s mere existence (there was no call for its destruction), but by the possibility of its *public* exhibition. Rather surprisingly, *On Liberty* provides an argument in favor of censoring self-regarding experiments of living in some circumstances. In particular, some works of art could be seen as *public* experiments of living and so they could be considered as a “violation of good manners.” Mill prohibits this sort of transgression as an *offense* against others. However, he refers to the issue only once and he does so in rather an obscure way, even in contrast to the rest of his theory according to some scholars.<sup>43</sup> The entire paragraph is quoted below:

Again, there are many acts which, being directly injurious only to the agents themselves, ought not to be legally interdicted, but which, if done publicly, are a violation of good manners, and coming thus within the category of offences against others, may rightly be prohibited. Of this kind are offences against decency; on

<sup>40</sup>Mill, *On Liberty*, p. 260.

<sup>41</sup>Mill, *On Liberty*, p. 296.

<sup>42</sup>Evans, *Art in a Frame: Spiritual America and the Ethics of Images*, p. 145.

<sup>43</sup>Henry John McCloskey, Liberty of Expression: Its Grounds and Limits (I), *Inquiry: An Interdisciplinary Journal of Philosophy*, 13 (1970), 219–37; O’Rourke, *John Stuart Mill and Freedom of Expression*; Jeremy Waldron, Mill and the Value of Moral Distress, *Political Studies*, 35 (1987), 410–23; Jonathan Wolff, Mill, Indecency and the Liberty Principle, *Utilitas*, 10 (1998), 1–16.

which it is unnecessary to dwell, the rather as they are only connected indirectly with our subject, the objection to publicity being equally strong in the case of many actions not in themselves condemnable, nor supposed to be so.<sup>44</sup>

Therefore, an act can be performed privately or in public, the most difficult case being the latter. Violations of good manners transform a non-harmful public act into a harmful one or, at least, make it deserving of the same consideration as if it were harmful. In turn, violations of good manners are labeled as offenses, but no exact definition of “offense” is given by Mill. It is clear from the text that an offense is a non-injurious yet negative act against others. Thus, an offense is an act which gives rise to dislike or psychological distress. However, an offense could also be the feeling associated with the belief that a group right has been violated. This meaning is particularly relevant in the arts. For example, Serrano’s *Piss Christ* is offensive for many people in the sense that it offends Christians as a group. Unfortunately, this is not Mill’s understanding as shown in his discussion on the Muslim condemnation of pork. Mill states that for Muslims eating pork is “an offence against their religion,” which is exactly the way many Christians feel about *Piss Christ*.<sup>45</sup> However, Mill does not take the premise of a collective right seriously.<sup>46</sup> Proof of this can be seen in his immediate rejection of the notion of “social right” embraced by the temperance movement.<sup>47</sup>

In addition, Mill does not specify which acts are a violation of good manners, only that offenses against decency fall within this category. For example, it would have to be determined whether or not *Spiritual America* violates good manners. It would seem that this was not an issue for Mill given that he dedicates very little space to the indecency problem. This was probably because the indecency passage was exactly in line with the legislation of the time. The Theatres Act of 1843 had no problem in categorizing what constituted a violation of good manners as the Lord Chamberlain’s judgment was deemed sufficient to clarify the issue and prohibit a performance accordingly.<sup>48</sup> However, it is not clear how to solve the “indecency policy” problem, that is, “the asymmetry between public and private performance – whether or not it harms the participants.”<sup>49</sup> To reconcile the conservative stance in the indecency passage with Mill’s defense of freedom of opinion, O’Rourke suggests that Mill would allow any content while restricting its mode of expression to accommodate prevalent public opinions about appropriateness and politeness.<sup>50</sup> Although O’Rourke links the indecency passage with the issue of freedom of speech, Mill is actually discussing actions, not opinions, both in this paragraph and in the previous ones. Other than that, the solution would not be adequate for the arts because the form of expression is as important as the content. In fact, Tate Modern censored *Spiritual America* in this way, since the original photograph of Brooke Shields was substituted for another of Shields as an adult. This

<sup>44</sup>Mill, *On Liberty*, p. 295.

<sup>45</sup>Mill, *On Liberty*, p. 284.

<sup>46</sup>See Peter A. French, *Collective and Corporate Responsibility* (New York: Columbia University Press, 1984); Michael Freeman, Are there Collective Human Rights?, *Political Studies*, 43 (1995), 25–40; Michael McDonald, Should Communities have Rights? Reflections on Liberal Individualism, *Canadian Journal of Law and Jurisprudence*, 4 (1991), 217–37; Paul Sheehy, *The Reality of Social Groups* (Aldershot: Ashgate, 2006).

<sup>47</sup>Mill, *On Liberty*, p. 288.

<sup>48</sup>O’Rourke, *John Stuart Mill and Freedom of Expression*, p. 139.

<sup>49</sup>Wolff, Mill, Indecency and the Liberty Principle, p. 4.

<sup>50</sup>O’Rourke, *John Stuart Mill and Freedom of Expression*, p. 138.

work was titled *Spiritual America IV*, so the replacement was a disguised way of bowdlerizing the initial proposal.

Another way to justify indecency policies on the basis of *On Liberty* is to consider whether it is possible to avoid the offensive act, *ceteris paribus*.<sup>51</sup> The idea is that harmless offenses should not be prohibited because only harm is a sufficiently objective reason to justify social intervention. Nevertheless, the feeling of offense involves discomfort and thus disutility. Therefore, utility is greater if that feeling is absent. This becomes possible if the offensive act is performed privately with no loss of utility. In other words, it is legitimate to prohibit an offensive, harmless public act if it can be performed in private at no additional cost. Consequently, an act can be prohibited not only if it is offensive, but also if it constitutes an “offensive nuisance.” In this case, the offensiveness depends on the public nature of the offensive act, that is, it would be difficult not to be aware of it.<sup>52</sup> This notion seems to open the door to censoring the exhibition of supposedly offensive works, thus Tate Modern’s decision to take down *Spiritual America* would be considered legitimate according to Mill’s theory. Given that viewing that particular work of art is considered offensive to many people, exhibiting it involves an offensive nuisance. Nonetheless, the great majority of artworks are easily avoidable by those who might be offended, so censorship is not needed to prevent the offensive nuisance. However, this alternative to censorship is not applicable in specific cases where artwork is necessarily placed in a public space (e.g., Orson Welles’ version of *The War of the Worlds*) or when it deliberately seeks to disturb the public (e.g., Deborah De Robertis’ unexpected nude in the Musée d’Orsay).

## 5. Conclusions

According to Mill, artistic freedom must be guaranteed on the basis of general utility because the arts provide irreplaceable knowledge about the emotional dimension of human life. Therefore, Mill’s epistemological arguments in favor of freedom of opinion are also applicable to the arts. The real issue here is whether Mill’s sketchy aesthetic theory is enough to ensure that the arts do in fact provide knowledge. Moreover, Mill’s ideas offer a rather different line of reasoning to justify the broadest possible sense of artistic freedom. Artworks are part of “experiments of living” that make it possible for individuals to improve, so the prospect of varied artistic activity is an essential step toward general progress.

As part of Mill’s theory on freedom of expression, there is also a doctrine of censorship or admissible restrictions to that freedom. Specifically, Mill elaborates on freedom of speech as freedom to express general opinions or doctrines, only restricting that freedom in extraordinary cases where there is a true risk of serious harm. Consequently, if speech instigates harm to others, then censorship could be justified. However, it is quite uncommon that works of art or literature with a general message instigate harmful deeds. Although Mill’s distinction between poetry and eloquence is unable to clarify the capacity of artworks to instigate harmful actions, this eventuality is very uncommon and artistic censorship would therefore only be justified in very few cases. Furthermore, a different reason for censoring the arts is implied in Mill’s remarks on “indecency,”

<sup>51</sup>Monro, *Liberty of Expression: Its Grounds and Limits II*; Riley, *J. S. Mill’s Doctrine of Freedom of Expression*; Waldron, *Mill and the Value of Moral Distress*; Wolff, *Mill, Indecency and the Liberty Principle*.

<sup>52</sup>Herbert Lionel Adolphus Hart, *Law, Liberty and Morality* (Oxford: Oxford University Press, 1963), p. 41; Ten, *Mill on Liberty*, p. 103.

since art as an experiment of living would be limited by the possibility of offending others with an artwork that violates good manners. As in the case of his aesthetic theory, Mill did not discuss the issue of harmless but offensive public acts thoroughly. Therefore, he did not take into account that offensive artworks could be understood as violations of group rights and not merely as grounds for dislike or psychological distress. If anything, the Millian solution would be to suggest that the concerned audience circumvent the offensive artwork except in those cases where it is not possible. Only in such exceptional cases would censorship be justified.