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Mill's On Liberty*: Introduction*

C. L. Ten

FREE EXPRESSION AND INDIVIDUALITY

In a letter to his wife, Harriet, of January 15, 1855, Mill discussed the urgency of writing an essay on liberty. He claims that "opinion tends to encroach more and more on liberty, and almost all projects of social reformers are really *liberticide* – Comte, particularly so."[1] *On Liberty* was published in 1859, the year after Harriet's death, and it carried a lavish dedication to her. Mill believed that the essay was "likely to survive longer than anything else that I have written (with the possible exception of the *Logic*)."[2] *On Liberty* has not only survived, but it has also been the center of much discussion, most of it rather hostile. It has done so precisely because the tendency towards *liberticide*, to which Mill had alluded, remains a constant threat to individual liberty, as Mill conceived and cherished it.

But what is the nature of the liberty that Mill wanted to defend, and what are the sources of danger to it? First, Mill is very clear that the real danger to liberty comes from "a social tyranny," which is greater than any kind of political oppression because "it leaves fewer means of escape, penetrating more deeply into the details of life, and enslaving the soul itself" (*CW* XVIII, 220 [1, 5]).[3] He sees this tyranny as encroaching on both opinions and

[1] *The Later Letters of John Stuart Mill (1849–1873)*, vols. XIV–XVII of *The Collected Works of John Stuart Mill*, ed. Francis E. Mineka and Dwight N. Lindley (Toronto: University of Toronto Press; London: Routledge & Kegan Paul, 1972), vol. XIV, 294, Mill's emphasis.

Throughout the present volume, references to Mill's works are given by volume and page(s) to *The Collected Works of John Stuart Mill*, 33 vols., gen. ed. John M. Robson (Toronto: University of Toronto Press; London: Routledge & Kegan Paul, 1963–91), abbreviated as *CW*; and, where appropriate, to the chapter and paragraph number(s) of the relevant work.

[2] John Stuart Mill, *Autobiography* (1873), in *The Collected Works of John Stuart Mill*, vol. I: *Autobiography and Literary Essays*, ed. John M. Robson and Jack Stillinger, introduction by Lord Robbins (Toronto: University of Toronto Press; London: Routledge & Kegan Paul, 1981), 259.

[3] Throughout this volume, references to *On Liberty* are to *The Collected Works of John Stuart Mill*, vol. XVIII: *Essays on Politics and Society*, Part I, ed. John M. Robson, introduction by Alexander Brady (Toronto: University of Toronto Press; London: Routledge & Kegan Paul, 1977), 213–310, giving the page number(s) and the chapter and paragraph number(s).

It is not clear that this is Rawls's considered position (the footnote cited above does not appear in the crucial paragraph of his last work, *Justice as Fairness: A Restatement*). If it is his considered view, it seems far more plausible than the earlier claims about the oppressive use of state power. But if Rawls is right about Mill – or more precisely, if he is right about the likely course of a society united around Millian principles – it is again necessary to ask: just how would a Rawlsian society differ? Under political liberalism, there would also be groups that remained outside the dominant overlapping consensus. They would also need to be persuaded to obey the law through some combination of coercion and calculations of mutual advantage. To evaluate Rawls's argument, we need to know who they are, and how they would differ from the people who would object to living in a Millian society.

Rawls says very little about which groups or individuals would remain outside his overlapping consensus. At one point he mentions fundamentalist religions and people who hold "certain non-religious (secular) doctrines, such as those of autocracy and dictatorship."[16] Elsewhere he refers to conceptions of the good "requiring the repression or degradation of certain persons on, say, racial or ethnic, or perfectionist grounds," strongly implying that people who hold such views would remain outside (*PL*, 196). Apart from his reference to religious sects that oppose the culture of the modern world, he also does not tell us which groups would find it impossible to support a constitution based on Millian principles. I want to suggest that the people who could not willingly support a Millian constitution are essentially the same ones who could not be part of a Rawlsian consensus. People who reject the modern world, people who refuse to endorse certain basic precepts about human equality, religious fundamentalists of various sorts, people who rely on religious (or political) authorities for their ideas about what to believe and how to live their lives, people who deny that reasonable men and women can disagree on moral and philosophical questions – these people would object to living in a Millian society with its emphasis on choice, diversity, experimentalism, skepticism, and toleration. But could they endorse "the fundamental ideas within which justice as fairness is worked out"? Could they endorse the egalitarian assumptions underlying the original position, the veil of ignorance, the commitment to equal liberty, the notion that we have a fundamental interest in forming and revising our conceptions of the good? Could they even accept the idea of society as a fair system of social cooperation, which underlies the entire theory? For the overwhelming majority, I believe the answer would be no. Here once again, Rawls is closer to Mill than he realizes.

[16] John Rawls, "The Idea of Public Reason Revisited (1997)," in *Collected Papers*, 613.

CHAPTER 6

Mill on consensual domination

Frank Lovett

In his essay *On Liberty*, John Stuart Mill does not discuss at any length the meaning of political liberty or freedom. "The only freedom which deserves the name," he is content to assert, "is that of pursuing our own good in our own way, so long as we do not attempt to deprive others of theirs" (*CW* XVIII, 26 [I, 12]). This is a clear statement of the *negative* conception of liberty – roughly speaking, the view that one is free simply to the extent that one is not interfered with by others. It is not surprising that Mill subscribed to this conception, given that its strongest proponents included both his mentor Jeremy Bentham, and Bentham's widely read contemporary William Paley. Nevertheless, it is important to keep in mind that the negative conception of liberty was at the time relatively new: it had been introduced first by Thomas Hobbes in the seventeenth century, and it arguably remained the minority view well into the eighteenth century.[1]

Recently, some have argued that the widespread adoption of the negative conception of liberty since Bentham and Paley has come at some cost – in particular, at the cost of obscuring an older, and in many ways more attractive, conception of political liberty or freedom as a sort of independence from arbitrary power or domination.[2] My discussion here will support this view. I will argue that Mill's more or less uncritical acceptance of the negative conception of liberty does him, at times, a disservice.

The author would like to thank Philip Pettit, Larry Temkin, Paul Litton, Jack Knight, and Andrew Rehfeld for their helpful comments on an earlier version of this chapter.

[1] Philip Pettit, *Republicanism: A Theory of Freedom and Government* (Oxford: Clarendon Press, 1997); Quentin Skinner, *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998).

[2] In this connection, see especially Quentin Skinner, "The Idea of Negative Liberty," in Richard Rorty, J. B. Schneewind, and Quentin Skinner, eds., *Philosophy of History: Essays on the Historiography of Philosophy* (Cambridge: Cambridge University Press, 1984), 193–221; "The Paradoxes of Political Liberty," in David Miller, ed., *Liberty* (Oxford: Oxford University Press, 1991), 183–205; and *Liberty Before Liberalism* (Cambridge: Cambridge University Press, 1998); Pettit, *Republicanism*; and *A Theory of Freedom: From the Psychology to the Politics of Agency* (Oxford: Oxford University Press, 2001); and Maurizio Viroli, *Republicanism*, tr. Antony Shugaar (New York: Hill & Wang, 2002).

The particular difficulty I am interested in arises (apparently) only tangentially in *On Liberty*, and thus is not obvious on a casual reading. Suppose we accept the negative view of freedom as consisting simply in the absence of interference with one's choices. How far should this sphere of freedom extend? In one famous passage, Mill considers the question of whether the proper sphere of our negative freedoms should include the freedom to sell ourselves into slavery. Many libertarians have thought, at least in principle, that it should.[3] Mill, on the contrary, believed that it should not. He was by no means the first to argue this, but he was the first to try putting such an argument in strict negative liberty terms.[4] This, as we shall see, causes difficulties for him. Were the problem of voluntary slavery merely an isolated theoretical problem (few people, after all, volunteer to be slaves), these difficulties would not be very interesting. But in his later essay on *The Subjection of Women*, Mill must confront them more directly, and in doing so he is implicitly forced to set aside the negative liberty framework in order to make his point. A careful reading of both texts, therefore, provides insight into the disadvantages of embracing the negative conception of liberty.

I

Mill's argument against voluntary slavery appears in the fifth and last chapter of *On Liberty*, in the process of discussing a confusing tangle of questions relating to the social regulation of consensual agreements in general. That such questions arise at all, however, might seem puzzling. After all, is not the central aim of his essay precisely to argue, as Mill himself reiterates in the opening of chapter v, that "the individual is not accountable to society for his actions, in so far as these concern the interests of no person but himself" (*CW* xviii, 292 [v, 2])? Is it not obvious that if two persons, of their own free will, enter into a private agreement concerning only themselves, then (on Mill's own theory) society has no business interfering with them? What then is the issue here?

This confusion is due to a surprisingly common misunderstanding regarding the structure of Mill's argument in *On Liberty*. Mill is often thought to believe there exists some independently definable "private

[3] For example, Robert Nozick, *Anarchy, State, and Utopia* (New York: Basic Books, 1974), 331; although evasive, both Hillel Steiner, *An Essay on Rights* (Oxford: Blackwell, 1994), 231–6, and Jan Narveson, *The Libertarian Idea* (Calgary: Broadview Press, 2001), 66–8, apparently agree with him on this point.

[4] John Locke, for example, presents a sophisticated argument against voluntary slavery on natural law grounds. See John Locke, *Second Treatise of Government* (1690), ed. C. B. Macpherson (Indianapolis: Hackett Publishing, 1980), esp. sections 17, 23.

sphere" of human activity that, it turns out, is strictly self-regarding, in the sense that whatever a person does within this private sphere affects no one but herself. The argument is then thought to be, first, that private conduct cannot harm anyone but the actor herself; and second, because this is so, private conduct should not be regulated by formal law or social custom. Unfortunately, Mill often expresses his views in language that encourages this misunderstanding. He asserts, for example, that "the only part of the conduct of any one, for which he is amenable to society, is that which concerns others. In the part which merely concerns himself, his independence is, of right, absolute" (*CW* xviii, 224 [i, 9]). Somewhat later he explains that "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" (*CW* xviii, 225 [i, 12]). These passages, while certainly open to multiple interpretations, at least on a casual reading seem to encourage the common misunderstanding. Relying on this reading of the argument, critics routinely assail Mill for failing to define rigorously a genuinely private sphere of individual conduct, for, strictly speaking, it is not clear that any such sphere exists at all. That some persons engage in what others regard as immoral sexual behavior, for example, even if only in private, may seriously offend the latter, thus affecting their well-being. Arguably, the members of a community as a whole might have a material interest in maintaining their shared moral norms: if so, then private conduct in violation of those norms might injure other community members, even if that conduct is itself harmless in the first instance.[5] No man, says the cliché, is an island.

Fortunately for Mill, this reading puts his argument precisely backwards.[6] Correctly understood, the notion of a self-regarding or private sphere of conduct is merely a by-product of his argument, not its basis. Mill's starting point is to wonder what sorts of legitimate reasons there might be for the social regulation of individual conduct. The answer, he claims, is that there is *only one* legitimate reason, *and no others*. Specifically, "the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number," he writes,

[5] This is the so-called "social disintegration thesis," as discussed for example in Robert P. George, *Making Men Moral: Civil Liberties and Public Morality* (Oxford: Oxford University Press, 1993). The classic critique of Mill along these lines can be found in Patrick Devlin, *The Enforcement of Morals* (London: Oxford University Press, 1965).

[6] The discussion here is partially indebted to D. G. Brown, "Mill on Liberty and Morality," *Philosophical Review*, 81 (1972), 133–58; and David Dyzenhaus, "John Stuart Mill and the Harm of Pornography," *Ethics*, 102 (1992), 534–51.

"is self-protection." Or, in other words, "the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is *to prevent harm to others*. His own good," Mill adds for emphasis, "either physical or moral, is not a sufficient warrant" (*CW* XVIII, 223 [I, 9], emphasis added). This doctrine is usually referred to as the "harm principle," though technically "prevention-of-harm-to-others principle" is more accurate.[7] According to the harm principle, it is no argument for a social regulation that it discourages immorality. But *if* it could be shown that some conduct (which also happens, let us suppose, to be immoral) caused a "distinct and assignable" harm to others, then *this* fact (and not the fact of its immorality as such) *would* be an argument for social regulation (*CW* XVIII, 281 [IV, 10]).[8] Moreover, it would be *no* argument *against* social regulation (though there might, of course, be others) that the conduct in question happened to occur in private, on our everyday understanding of this term.[9] Mill's point is simply that harm prevention is the *only* legitimate reason for social regulation, and that the alleged morality or immorality of the conduct in question is neither here nor there.

It should immediately be clear that an implementation of the harm principle would create a sphere of conduct exempt from regulation on the grounds that it causes no distinct and assignable harms to others. This sphere of conduct, whatever it turns out to be – and Mill nowhere claims to have exhaustively determined it – we may term the "private sphere" in a somewhat technical sense. Conduct within the sphere is exempt from social regulation because it is harmless, not because it is (in some independently definable sense) private. Mill is thus not committed to any *a priori* claim concerning the shape or size of the private sphere; indeed, it is consistent with his argument, though unlikely, that the private sphere could turn out to be empty. Even assuming it is not, there is no reason to expect that the private sphere, so defined, will correspond precisely with that sphere of activities we ordinarily regard as "private" – though there is likely to be considerable overlap. (It likewise follows that some acts done "in public," again on our ordinary understanding of this term, might turn out to be

[7] "Harm-to-others" because harm to oneself does not warrant regulation, and "prevention" because regulation may in some cases anticipate harm and legitimately aim to prevent it from occurring. Mill maintains that regulating the sale of poisons, for example, is warranted on the grounds that it is likely to prevent future harms: "if a public authority ... sees any one evidently preparing to commit a crime, they are not bound to look on inactive until the crime is committed, but may interfere to prevent it" (*CW* XVIII, 294 [V, 5]).

[8] Cf. *CW* XVIII, 282 (IV, 11), where the language is a "perceptible hurt to any assignable individual."

[9] Thus, if the "social disintegration thesis" (see n. 5 above) turns out to be empirically correct, then the conditions of legitimate regulation might be satisfied in some cases of alleged private immorality.

protected from regulation, on the grounds that they cause no distinct and assignable harm to others.)

We are now in a much better position to appreciate the tangle of problems discussed in the fifth chapter of *On Liberty*. These all relate to what, following Joel Feinberg, we might call "voluntary two-party harms."[10] This expression can be explained as follows: harms may be either self-inflicted, or else inflicted by or with the aid of others. Additionally, harms may be inflicted either with the consent of the harmed party, or without. If a person burns her own money (say, in a political demonstration), she harms herself voluntarily; if she unwittingly ingests berries that turn out to be poisonous, or stumbles off a precipice she did not see into a river, she harms herself involuntarily. Roughly speaking, what is often called *soft paternalism* seeks to avert only involuntary self-inflicted harms, whereas *hard paternalism* seeks to avert both involuntary and voluntary self-inflicted harms. Mill's foremost aim is to discredit hard paternalism. His position on soft paternalism is less clear, but we need not address that question here.[11]

These are all single-party cases. When one person punches another in the face, or fraudulently sells him dangerous goods, the former is directly or indirectly responsible for the latter's suffering an involuntary harm. These are two-party cases. Involuntary two-party harms are easily covered by the harm principle, which permits (provided there are no further countervailing considerations) the social regulation of such conduct.

Not so clear, however, is what to do in the case of *voluntary* two-party harms. Mill considers several cases in the opening pages of chapter V. For example, suppose that a fully informed person *B* voluntarily purchases goods from *A* that are defective, overpriced, or dangerous. On the one hand, *B* is harmed, and *A* contributes to the infliction of this harm, but on the other hand (supposing there is no deception or fraud involved), any risk entailed by the purchase was voluntarily assumed by *B*. Alternatively, suppose that *A* operates a gambling-house or pub where *B* wastes away his livelihood. Again *B* is harmed, and again *A* aids in the infliction of this harm. Nevertheless, the harm inflicted on *B* is inflicted with his (informed) consent. Note that there is no question of regulating *B*'s conduct in such cases by prohibiting drinking, gambling, or the assumption of risk: assuming for the sake of argument that *B* has no dependants, his actions harm only

[10] Joel Feinberg, *The Moral Limits of the Criminal Law*, vol. III: *Harm to Self* (Oxford: Oxford University Press, 1986).

[11] *CW* XVIII, 294 (V, 5) seems to support soft paternalism: "liberty consists in doing what one desires," he writes, and one "does not desire to fall into the river," for example.

himself, and therefore the harm principle precludes any social regulation.[12] The issue is strictly one of regulating *A*. On a straightforward application of the harm principle, it would seem there is at least a *prima facie* warrant for the social regulation of *A*'s conduct, so as to prevent harm to *B*. Mill does not, however, draw this conclusion. The sale of goods should generally be left to the free market, subject perhaps to labeling requirements and a few other minor restrictions; and, although he admits that "the case is one of those which lie on the exact boundary line between two principles," he ultimately concludes that the operation of private gambling-houses should be allowed (*CW* XVIII, 296–7 [V, 8]).

Clearly, there is at work here some auxiliary principle modifying the application of the harm prevention doctrine. That Mill does intend there to be such limitations is evident when, for example, he notes that "it must by no means be supposed, because damage, or probability of damage, to the interests of others, can alone justify the interference of society, that therefore it always does justify such interference" (*CW* XVIII, 292 [V, 3]). But what is the auxiliary principle in question? In an earlier statement of the harm principle, Mill writes that society should not regulate "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 consent*" (*CW* XVIII, 225 [I, 12], emphasis added). There are two possible interpretations of this statement. On the one hand, we might take him to mean that conduct is not harmful if it is (genuinely) consented to. This interpretation has the unfortunate result, however, that we cannot determine whether something constitutes a harm without first determining whether it is consented to or not, and this is not always easy to do. It seems simpler to say that a punch in the face is a harm, whether asked for or not. On the other hand, we simply might take Mill to mean that the harm principle should recognize an exception in cases of (genuine) consent. For the reason indicated, this seems the more sensible route, but either interpretation amounts to the same thing, practically speaking. The harm prevention doctrine must include some auxiliary principle along the lines of the traditional common law maxim *volenti non fit injuria* – what is agreed to does not constitute an injury (or, agreed-to injuries will be ignored as a matter of policy). In principle at least, if a person wishes to suffer a harm, or assume the risk of being harmed, at the hands of or with the aid of another, he or she should be

[12] When dependants are involved, the harm principle may permit social regulation according to *CW* XVIII, 281 (IV, 10).

free to do so. Given Mill's overarching commitment to expanding the negative liberty of individuals, it is not surprising that he takes this view.

II

Our introduction of the *volenti* maxim, however, leads directly to the voluntary slavery problem. Mill apparently realized this. Immediately after the discussion of voluntary two-party harms, he concedes that "in this and most other civilized countries ... an engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void; neither enforced by law nor by opinion" (*CW* XVIII, 299 [V, 11]). Strict libertarians aside, most have felt there must be something deeply wrong with slavery – voluntary or not. But if we accept the *volenti* maxim as a modification of the harm principle, together with the negative conception of liberty, it is not clear why we should.

This is where things get interesting. As is well known, Mill supports the judgment of law and opinion. From the point of view of the harm principle, then, voluntary slavery constitutes an exception to an exception: it is permissible to regulate conduct that it harms others, except when the harm is consented to, unless the consented-to harm is a contract for slavery. But how does Mill make the case for this exception to the exception? The argument opens as follows:

> The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at the least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it.

In other words, we respect the choices that people make – even when those choices seem to us seriously harmful to their interests – because we place value on the enjoyment of individual liberty (understood here, we must presume by Mill's assertion at the opening of *On Liberty*, as the freedom to pursue one's own good in one's own way, as liberty in the negative sense). Fair enough. Mill continues:

> But by selling himself for a slave, he abdicates his liberty; he forgoes any future use of it beyond that single act. He therefore defeats, in his own case, the very purpose which is the justification of allowing him to dispose of himself. He is no longer free; but is thenceforth in a position which has no longer the presumption in its favour, that would be afforded by his voluntarily remaining in it. The principle of freedom cannot require that he should be free not to be free. It is not freedom, to be allowed to alienate his freedom. (*CW* XVIII, 299–300 [V, 11])

The argument here seems straightforward: it would be inconsistent with the normative principle underlying the *volenti* maxim to adhere to the latter so far as to undermine the former. In other words, since it is individual liberty that we are interested in promoting, it makes sense to discourage people from throwing their liberty away.[13]

It is easy to understand the attractiveness of this argument. It purports to avoid paternalistically second-guessing people's choices by showing that anyone who agrees to be a slave commits a sort of performative contradiction, undermining by that act the very principle that would otherwise render it legitimate. Jean-Jacques Rousseau may have intended to argue something similar when he wrote that "renouncing one's liberty is renouncing one's dignity as a man, the rights of humanity and even its duties ... Such a renunciation is incompatible with the nature of man. Taking away all liberty from his will is tantamount to removing all morality from his actions."[14] In other words, by renouncing one's freedom, one destroys the very human dignity or moral self-worth that might have supplied a basis for the right to do so. Voluntary slavery is (at least morally speaking) a contradiction at terms.[15]

Unfortunately, despite its attractiveness, Mill's argument does not go through. To begin with, it is worth observing that his argument relies on the assumption that the condition of slavery entails a severe reduction of liberty. Now on the negative conception of liberty as non-interference, this can be only a contingent truth. While slaves are, of course, usually subject to many unwelcome interferences, this is not necessarily a part of the condition of slavery as such. A benevolent or kindly master might interfere with his slaves relatively little, such that any reduction in their negative freedom turns out to be relatively small; indeed, if one happened to face particularly dismal alternatives, it might turn out that agreeing to be the slave of a kindly master would actually amount to a net *gain* in negative freedom.[16] It is far from obvious, in such cases, that voluntary slavery would constitute a performative contradiction. Let us, however, ignore this possibility, and assume that

[13] For an excellent extended discussion, see David Archard, "Freedom Not to Be Free: The Case of the Slavery Contract in J. S. Mill's *On Liberty*," *Philosophical Quarterly*, 40 (1990), 453–65.

[14] Jean-Jacques Rousseau, "The Social Contract" (1762), in Donald A. Cress, tr., *The Basic Political Writings* (Indianapolis: Hackett Publishing, 1987), 144–5.

[15] Alternatively, Rousseau might simply mean that the capacity to act morally is what gives human life its dignity and worth, and thus, since slavery destroys this, no reasonable person would agree to be a slave of his or her own free will. If so, however, Rousseau's argument is thereby vulnerable to a paternalism objection, whereas Mill's is not. I am grateful to Larry Temkin for pointing out this alternative interpretation of Rousseau.

[16] For further discussion, see Pettit, *Republicanism*, 63–4.

agreeing to be a slave would in fact entail a substantial reduction in one's negative freedom. In the usual course of things, this is a safe assumption, though as we shall see later, the "kindly master" problem in another guise poses a serious challenge for Mill.

Even granting the assumption, the problem is that many perfectly ordinary choices which Mill would certainly refuse to subject to social regulation entail reductions in a person's negative liberty. For example, when *B* signs an ordinary employment contract to work for *A*, this clearly reduces *B*'s negative freedom; when *B* accepts a car loan from *A*, this clearly reduces *B*'s negative freedom. Both constrain *B* subsequently to perform particular actions at particular times on pain of legal sanction, but *B*'s conduct should not therefore be subject to social regulation on the grounds that "it is not freedom to be allowed to alienate his freedom."

Now perhaps Mill would reply that the freedom reductions entailed by such agreements are at least reversible or temporally limited in scope, whereas the slave contract is not. The peculiar objection to slavery might then seem to be the fact that it entails an *irreversible* reduction in one's negative freedom. But there are other cases. If *B* sells a valuable painting to *A*, he cannot simply reclaim the painting later on: his freedom to dispose of the painting is permanently alienated to *A* by the sale. Of course, this is a small reduction in one's negative freedom, compared with the extensive (by our prior assumption) reduction entailed by the condition of slavery. Perhaps the issue is instead (or in addition) that some freedom reductions are unacceptably large – that individuals should not be permitted, even by voluntary choice, to fall below some minimum threshold of negative liberty.[17] But deciding to have children is both a considerable and an irreversible reduction in one's negative freedom (even if, one hopes, this reduction is more than compensated for in other respects). Now suppose we add to this the decision to purchase a large house; then to accept a high-paying job with long hours to support the children and pay the mortgage; then to buy expensive cars so as to get from the house to the job; and so on, and on. A person might in many relatively small steps accumulate considerable freedom-reducing obligations, each perfectly reasonable and legitimate considered individually, to the point where he enjoys no more

[17] Feinberg, *Moral Limits of the Criminal Law*, vol. III: *Harm to Self*, chs. 18–19, argues that individual freedom should not be allowed to fall below some minimum threshold, and that since slavery would certainly cross that line, voluntary slavery should not be permitted. But he apparently does not notice the problem discussed next.

negative freedom than a slave. Henry David Thoreau believed many people do precisely this, without quite realizing it:

> Our life is frittered away by detail ... In the midst of this chopping sea of civilized life, such are the clouds and storms and quicksands and thousand-and-one items to be allowed for, that a man has to live, if he would not founder and go to the bottom and not make his port at all, by dead reckoning, and he must be a great calculator indeed who succeeds. Simplify, simplify. Instead of three meals a day, if it be necessary eat but one; instead of a hundred dishes, five; and reduce other things in proportion.[18]

If the problem with voluntary slavery is simply that the aggregate reduction in one's freedom from interference crosses some unacceptable threshold, why should all these smaller choices not also be socially regulated so as to prevent people from crossing it in many smaller steps? After all, it is far more probable that a person will unintentionally throw away his liberty in many small choices than in a single big one. Should people not be required to demonstrate publicly, before taking on each new freedom-reducing obligation, that it will not (added to those already accepted) cross the threshold into *de facto* slavery? Clearly, even if it were feasible, such a program of detailed social regulation would be anathema to Mill.

Mill's argument would work, of course, on the assumption that some core set of individual freedoms are qualitatively (and not merely quantitatively) special, and therefore unalienable under any circumstances. Freedom-reducing choices would then be legitimate so long as they did not touch on this core. But the existence of unalienable freedoms is precisely what is at issue. The performative contradiction argument does not itself supply any grounds for regarding some freedoms and not others as alienable. An independent argument to this effect would be needed, and Mill does not supply one. His commitment to the negative conception of liberty does him a disservice here. There seems to be something wrong with slavery as such, and Mill knows it. But its special wrongness cannot easily be explained in strict negative liberty terms. The slave of a reasonably benevolent master might enjoy a greater degree of non-interference than others who, while not being slaves themselves, have nevertheless accumulated extensive and even irreversible freedom-reducing obligations. On the negative conception of liberty, it seems, the former must be regarded as enjoying greater freedom. This does not seem right.

[18] Henry David Thoreau, "Walden; or, Life in the Woods," in Robert F. Sayre, ed., *A Week on the Concord and Merrimack Rivers; Walden, or, Life in the Woods; The Maine Woods; Cape Cod* (New York: Library of America, 1985), 395.

III

Voluntary slavery is largely a theoretical puzzle. Few people volunteer to be slaves, and in any case slave contracts are already condemned in both law and custom. But slavery is only one instance (albeit an extreme one) of domination, and so voluntary slavery is merely one example of the general problem of consensual domination. Other examples are not merely hypothetical, and present very real difficulties.

Some years later, in his essay on *The Subjection of Women*,[19] Mill again considers the problem of consensual domination, in a different context. "The existing social relations between the two sexes" in Mill's time were governed by "the legal subordination of one sex to the other." On the one hand, given the limitations on careers open to women, options outside marriage were few; this, together with the legal and social obstacles to divorce, rendered married women dependent on their husbands to a considerable degree. On the other hand, family law was designed so as to place few effective restrictions on the arbitrary power a husband could exercise over his spouse. In short, under the traditional regime of gender relations, married women arguably suffered under domination at the hands of their husbands. Mill firmly (and rightly) believed this situation "wrong in itself, and now one of the chief hindrances to human improvement" (*CW* XXI, 261 [I, 1]). But he also recognized that a great many prejudices stand in the way of this truth being recognized. Among the most serious of these is the prejudice that, in contrast with involuntary slavery, autocratic government, feudalism, and many other institutionalized forms of domination, "the rule of men over women differs from all these others in not being a rule of force: it is accepted voluntarily; women make no complaint, and are consenting parties to it" (*CW* XXI, 270 [I, 10]). In other words, the issue Mill confronts here is precisely the problem of whether domination should be permitted even when consensual; it is the same as the puzzle of voluntary slavery, but now applied to a very real problem.

Interestingly, Mill had already discussed marriage in *On Liberty*. Just after presenting his brief against voluntary slavery, he hesitates, suddenly recognizing that his arguments are "evidently of far wider application" than might at first be apparent. Rather than extend those arguments to additional cases, he concedes that "a limit is everywhere set to them by the necessities

[19] John Stuart Mill, *The Subjection of Women* (1869), in *The Collected Works of John Stuart Mill*, vol. XXI: *Essays on Equality, Law, and Education*, ed. John M. Robson, introduction by Stefan Collini (Toronto: University of Toronto Press, London: Routledge & Kegan Paul, 1984), 259–340.

of life, which continually require, not indeed that we should resign our freedom, but that we should consent to this and the other limitation of it." Agreeing to marriage – or, indeed, to any binding commitment – represents an abdication of one's negative freedom to some extent, as we have seen. Realistically speaking, we cannot, even in the interest of liberty, prohibit people from entering into such agreements. The best we can do, he thinks, is require "that engagements which involve personal relations of services, should never be legally binding beyond a limited duration of time," and that accordingly (once due consideration is given to the interests of any children), "the most important of these engagements, marriage ... should require nothing more than the declared will of either party to dissolve it" (*CW* XVIII, 300 [V, 11]). In relations of marriage, then, the significant concern seems to be irrevocability. But for this fact, Mill evidently has no objection to the institution of marriage as such. Indeed, he goes to far as to advocate toleration of Mormon polygamy. "Far from being in any way countenanced by the principle of liberty," he writes, polygamous marriage

> is a direct infraction of that principle, being a mere riveting of the chains of one-half of the community, and the emancipation of the other from reciprocity of obligation towards them. Still, it must be remembered that this relation is as much voluntary on the part of the women concerned in it, and who may be deemed the sufferers by it, as is the case with any other form of the marriage institution. (*CW* XVIII, 290 [IV, 21])

Therefore, provided that women are permitted the freedom to leave their community if they so choose, he would not interfere with Mormon marriage customs. Excepting the peculiar and largely hypothetical case of voluntary slavery, then, Mill consistently maintains in *On Liberty* that consensual domination is permissible, or at least so long as the consent is genuine and not irrevocable.

Mill does not take this line in *The Subjection of Women*. According to his earlier position, the correct response to the unjust subordination of women in marriage would be simply to remove the legal and social obstacles to divorce. Naturally, he does not change his mind on the need for this reform, but he no longer regards this as sufficient. Against the claim that women are consenting parties to existing marital institutions, Mill now advances two arguments. The first is that women do *not* always consent, but that this fact is generally concealed. "All causes, social and natural," Mill points out, "combine to make it unlikely that women should be collectively rebellious to the power of men" – in particular, the fact that each married woman is placed directly under the unrestrained physical power of her husband, who

can easily punish complaint with abuse (*CW* XXI, 271 [I, 11]). Thus most women who do complain, complain not of their husbands' power as such, but only of its excessive uses; and most do not complain at all.

While certainly correct, this first argument is less important for our purposes. His second argument is more so. It is hardly surprising, Mill says, that women generally consent to the domination entailed by marriage. First, "women are brought up from the very earliest years in the belief that ... it is their nature, to live for others; to make complete abnegation of themselves, and to have no life but in their affections." Second, the married woman lives in "entire dependence on the husband, every privilege or pleasure she has being either his gift, or depending entirely on his will." Third, "all objects of social ambition, can in general be sought or obtained" by women only through marriage (*CW* XXI, 271–2 [I, 11]). In short, having so few alternatives, and those alternatives being what they are, it is perfectly reasonable for women to choose marriage, even if this means subjecting themselves to domination. Must it follow that this domination is not a bad thing? No. On the contrary, these considerations "afford not only no presumption in favour of this system of inequality of rights, but a strong one against it" (*CW* XXI, 272 [I, 12]). It is necessary to close all doors to women other than marriage precisely because, as things are, marriage itself entails subjection to the arbitrary will of another person (i.e., domination). As Mill says, those men who defend the traditional regime of gender relations

> are afraid, not lest women should be unwilling to marry ... but lest they should insist that marriage should be on equal conditions; lest all women of spirit and capacity should prefer doing almost anything else ... rather than marry, when marrying is giving themselves to a master, and a master too of all their earthly possessions. And truly, if this consequence were necessarily incident to marriage, I think that the apprehension would be very well founded. (*CW* XXI, 281–2 [I, 25])

In other words, it is *because* there is something wrong with the subjection of women – even when consented to – that we should seek to ameliorate those circumstances compelling reasonable women to accept it of their own free will. Mill does not lack respect for the choices that women make: on the contrary, he advocates greater equality between the sexes precisely so that women need not voluntarily submit themselves to the injustice of marital domination. If what is freely consented to by a reasonable person does not (by that fact alone) count as an injury, we would demand no such reform.

Notice that, since Mill does not (as in the case of slavery) advocate abolishing marriage, he is not open to the charge of paternalism here.

Perhaps it *would* be a failure to respect women's choices if we prohibited the option of marriage, simply on the grounds that, as it stands, the condition entails domination. Indeed, not letting people do the best they can for themselves under hard and unfair circumstances merely adds insult to injury. But Mill does not suggest we do this. On the contrary, he aims to eliminate the necessity that a woman accept marriage on any terms by making sure that "all honourable employments" are "as freely open to her as to men." Once this is done, then "like a man when he chooses a profession, so, when a woman marries, it may in general be understood that she makes the choice of the management of a household, and the bringing up of a family, as the first call upon her exertions, during as many years of her life as may be required for the purpose" (*CW* xxi, 298 [II, 16]). Now of course things did not quite work out this way. Far from becoming a mere occupation like any other, marriage has retained in social custom some of its obligatory status. Thus it has proved necessary, in the interests of gender equality, to transform the nature of marriage itself, a process still under way. That Mill did not foresee this eventuality is not, I think, an objection to his argument, or at least not with respect to its usefulness for our purposes here. What is significant is that, in his view, the subjection of women, like slavery, is wrong in itself, regardless of whether it is consented to or not.

Mill's conclusion here is the right one, but he cannot arrive at it starting from the negative conception of freedom as non-interference. Here the "kindly master" problem arises again, this time with greater force: it is by no means certain that a woman in the nineteenth century would increase the scope of her negative freedoms by refusing marriage. After all, conjugal feelings in "many men exclude, and in most greatly temper, the impulses and propensities which lead to tyranny" over their spouses, and so many married women might in fact be largely free from unwelcome interference. It would thus seem, on the negative conception of liberty as non-interference, that the case against the legal subordination of women is correspondingly weak. Mill, of course, rejects this view, as he must. Merely "because men in general do not inflict, nor women suffer, all the misery which could be inflicted and suffered if the full power of tyranny with which the man is legally invested were acted on," he complains,

> the defenders of the existing form of institution think that all its iniquity is justified, and that any complaint is merely quarrelling with the evil which is the price paid for every great good. But the mitigations in practice, which are compatible with maintaining in full force this or any other kind of tyranny, instead of being any apology for despotism, only serve to prove what power human nature possesses of reacting against the vilest institutions. (*CW* xxi, 286 [II, 2])

As in the case of slavery, there is something clearly wrong with the legal and social subordination of women as such – even when consented to, and even if we cannot explain that wrongness with reference to negative liberty.

When Mill goes on, in a later chapter, to present his positive arguments in favor of ending the legal and social subordination of women, he presents strictly instrumental utilitarian arguments. The education of children is distorted and corrupted by the inequality of their parents. Society will gain by doubling the pool of available talent. The happiness of women will increase. And so on. These are perfectly good arguments, so far as they go, but one cannot help feeling that something is missing. Were it to turn out that the sum total of happiness, once all possible factors are taken into consideration, would actually be served by continuing, not overturning, the legal and social subordination of women, should we change our minds? We should not. Certainly, we hope and (reasonably) expect equality to bring about greater overall happiness, but this cannot be the only reason we have struggled to achieve it.

Mill's uncritical adoption of the negative conception of liberty does him a disservice. Institutionalized domination, like slavery and the subjection of women in traditional family law and custom, is the negation of freedom if anything is, and this is not merely because we contingently expect that those subject to such domination will experience more unwelcome interferences with their choices than they otherwise would. It makes more sense to say that freedom consists in the absence of domination, and thus that we struggled to end slavery and achieve greater equality for women first and foremost in the interest of freedom. This was the usual view of political liberty or freedom before Bentham and Paley; had this conception been available to Mill, he might more easily have stated his arguments in such terms.