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# John Stuart Mill and Pornography: Beyond the Harm Principle

*Richard Vernon*

For important reasons, liberals resist censorship or even reject it entirely. Suspicion of state power, a sense of the value of privacy, and the importance of open communication to their ideal of transparency—these are perhaps the most basic considerations that incline liberals against censorship. But at the same time, violent and degrading pornography is an affront to many of the other values that liberals are likely to hold. They will not see pornography as a feature of a society in which self-respect flourishes, in which relationships are consensual and not coercive, or in which individual dignity is strongly protected by a scheme of rights. The topic is, then, one especially likely to engage liberals in painful self-reflection, and as an aid to such self-reflection, it is natural that they should turn to the classical writings of their tradition as a way of trying to get clear about the values and priorities essential to it.

*On Liberty* is of course a natural choice for this purpose: not because it has anything explicit to say about pornography but because it deals prominently with the “silencing” of expression, because it is centrally concerned with the drawing of boundaries, and perhaps, too, because—given the nature of the critique of pornography—it is important that our exemplary liberal text be a consequentialist one. Whatever the underlying reason, two recent contributions to this journal have undertaken to reassess *On Liberty* in the light of the problem of pornography, and they have reached diametrically opposed conclusions. David Dyzenhaus reads *On Liberty* through the lens of *The Subjection of Women*.<sup>1</sup> In the latter text he finds a critique of women’s “false consciousness” (to use a shorthand term) and a demand that the “real

1. David Dyzenhaus, “John Stuart Mill and the Harm of Pornography,” *Ethics* 102 (1992): 534–51.

interest" of women, an interest in achieving autonomy, be pursued by the state, and he finds this demand consistent with Mill's liberalism if we agree to read *On Liberty* in a certain way—essentially, as an argument for protecting people's real interests from harm. Robert Skipper, on the other hand, sees in Dyzenhaus's article a classic slippery-slope problem and argues that the Mill of *On Liberty* would have a shorter way with feminist demands for censorship—he would "slam the door" on them.<sup>2</sup>

This article offers a case for thinking that the arguments of *On Liberty* do permit, or even require, the censorship of violent and degrading pornography. However, it argues that the approaches taken by Dyzenhaus and Skipper are flawed. Despite their conflicting conclusions, their two articles are in agreement on three basic points: that Mill believed in freedom of expression, that he believed in a harm principle as the basis for legislation, and that these two beliefs are in conflict when it comes to the issue of pornography. The difference is that Dyzenhaus thinks that when freedom of expression and the harm principle conflict, the harm principle (subtly interpreted) wins, while Skipper thinks that freedom of expression trumps the harm principle—for if it does not, it is nugatory.

The three points which are shared by these discussions are, I believe, false. Mill did not believe in freedom of expression, he did not employ a "harm principle" in the way in which these (and many other interpreters) suggest, and the issue of pornography is not usefully approached in terms of a collision between expression and harm. Nevertheless, there is a Millian critique of pornography which draws upon other elements in *On Liberty* and in other essays: it draws upon the background features which Mill requires to sustain his principle of liberty.

## I

The title of *On Liberty's* second chapter is "Of the Liberty of Thought and Discussion." The word 'discussion' is frequently used in the chapter, as is the word 'opinion'. Mill also speaks of "free discussion," "freedom of opinion," and "liberty of the press." Nowhere does he speak of freedom of expression, and he uses the word 'expression' only in the phrase "expression of opinion." 'Discussion' and 'opinion' are words much narrower than 'expression' in their scope of reference. (They are narrower, even, than 'speech'.) A discussion is a process in which discursive or normative views are advanced and assessed in relation to other views and to evidence. An opinion is a discursive or normative belief which the holder is prepared (if the costs are not too

2. Robert Skipper, "Mill and Pornography," *Ethics* 103 (1993): 726–30.

high) to state and defend. 'Expression' embraces both discussion and the stating of opinions, and much else too. It embraces, for example, singing, praying, swearing, insulting, advertising, begging, and making puns—to limit oneself to cases of verbal expression alone. Now, surely it is clear that not all arguments in favor of freedom of discussion or opinion are also going to support verbal (or pictorial) expression in general.

There are several reasons why one cannot take discussion or the stating of opinions as proxies, in Mill's argument, for other kinds of expression. The most important is the nature of the familiar extended argument that occupies most of chapter 2. It is an argument about the relation between received opinion and truth. Whether we assume that received opinions are true, false, or partly true, we stand to gain, Mill argues, by permitting them to be criticized without reserve. His argument is plausible only if we suppose that the items exchanged in the critical process are propositions about actual or desirable states of affairs in the world, propositions capable of being accumulated into larger bodies of knowledge. A discussion about pornography might be a useful example. People make assertions about its effects, trying to support these assertions with reference to statistical evidence and to relate the predicted effects to goals, such as equality and security, which they recommend to others; other people criticize the way the statistical evidence is gathered and make claims about the priority of other goals such as privacy or autonomy. All that is a process that could fit Mill's model well, but by no stretch of imagination does pornography itself fit it.

Second, if one takes Mill to be advancing a theory of negative liberty, we might see other forms of expression as protected by Mill's critical model, for it is true that his model does not require the restriction of forms of expression other than opinion. But Mill is not advancing a theory of negative liberty. When he says "All restraint, *qua* restraint, is an evil,"<sup>3</sup> he cannot mean that it is evil to employ coercion (a position wholly incompatible with utilitarianism); he must mean that restraint, insofar as it is restraint, involves inflicting pain rather than pleasure on people—that we punish people by fining them, not by giving them money. More important, a negative-freedom position is ruled out by the general structure of Mill's argument. What chapter 2 proposes is a general exemption from the process of weighing and balancing gains and losses which normally precedes legislation; that is what Mill means by calling the liberty of thought and discussion

3. John Stuart Mill, *On Liberty*, in *Collected Works of John Stuart Mill*, ed. John M. Robson (Toronto: University of Toronto Press, 1981–), vol. 18, p. 293. All subsequent references to Mill's work are from this edition.

“absolute”—it is not to be put in the balance with other liberties. To justify such an exemption, clearly, positive considerations are required, and, as we have seen, the considerations which Mill gives us support only a limited range of forms of expression. What he offers is not a negative freedom of expression but a positive freedom to discuss.

Third, Mill himself directly indicates that the freedom protected by his main argument falls short of protecting expression in general. Assertions—even true ones—may be made in ways which “justly incur severe censure.” Mill mentions two kinds of example: one is “to argue sophistically, to suppress facts or arguments, to misstate the elements of the case, or misrepresent the opposite opinion” and the other is to employ “invective, sarcasm, personality and the like.”<sup>4</sup> Mill’s case against the legislative prohibition of these two classes of things is interesting and revealing. Sophistical argument is “mostly impossible . . . to bring home to conviction” and is often made “in perfect good faith.” Of invective, Mill says that “it is obvious” that law has no business trying to restrain it and that its only effective restraint is the “morality of public discussion.”<sup>5</sup> So, it is clear that Mill’s model of critical discussion does not even protect all forms of discussion: it does not protect sophistical discussion or the unduly aggressive assertion of opinions, for such things detract from, rather than promote, the accumulation of truth. Both things are, of course, protected, but only by side arguments about the impossibility of fair conviction. There is, as it were, a penumbra around truth-promoting discussion, and this penumbra covers forms of discussion which are not truth promoting. But this penumbra does not extend to forms of expression which are not discussion at all—which are not even bad discussion.

## II

The second problematic area comprises issues raised by the “harm principle.” “Harm principle” is not Mill’s coinage, but Joel Feinberg’s.<sup>6</sup> Of course, no one could miss what Feinberg had in mind in coining his famous phrase. Mill mentions “harm” prominently near the beginning of *On Liberty*, at the point at which he announces the “principle” that the essay is to defend, and the notion also plays an important role in chapter 4, where Mill discusses the limits of legislation. But if the harm principle is taken to be the principle which Mill uses to determine the scope of legislation—and this is how it is taken by theorists of Mill on pornography, as well as by many other interpreters—then it is a profoundly misleading coinage. Mill does not say that acts which

4. *Ibid.*, p. 258.

5. *Ibid.*, p. 259.

6. See Joel Feinberg, *Social Philosophy* (Englewood Cliffs, N.J.: Prentice Hall, 1973), p. 25.

harm others may be prohibited while harmless acts may not be, and so his argument is not advanced by elucidations of the meaning of 'harm'.

The principle which Mill defends is, he says, "that the sole end for which mankind are warranted . . . in interfering with the liberty of action of any of their number, is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilised community, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant."<sup>7</sup> There are two ways of reading this. The standard way, apparently, is to take it to be announcing a criterion for deciding whether legislation is proper or not. The revised way, proposed here, involves noting that Mill's stress falls heavily on the exclusive aspect of his statement—we cannot impose legislation on you for your own good—and that, as for the inclusive aspect, he speaks of the "end" or "purpose" of the use of power, not of a criterion for it.

The disadvantage of the standard reading is manifest. First of all, immediately after announcing his principle, Mill goes on to devote *On Liberty's* longest chapter to defending an "absolute" liberty to which the issue of harm is irrelevant. It would be entirely consistent with his defense of "the liberty of thought and discussion" to admit that discussion (or even the knowledge that people had certain thoughts) caused terrible harm to others, in some sense of harm which we agree to be significant: perhaps what is said or thought by some makes others incapable of self-respect and, hence, of enjoying meaningful lives. That would not matter, given Mill's argument: there is an overriding argument, in terms of larger social utility, for protecting thought and discussion. Second, if we expect a harm principle to tell us what Mill thinks should and should not be prohibited, we will be bitterly disappointed by what follows in his essay, for no known definition of 'harm' captures and excludes the cases which Mill apparently wants to capture and exclude. To take just one example, the English language leaves it open whether we should or should not regard offensiveness as harmful (a point which is, of course, in contention at the moment, given the politics of intercultural relations): does anything in Mill's argument depend on how we resolve this question? It does not, for in the case of some kinds of offensiveness—that caused to one religious group by the practices of another, for example—he refuses to approve of legislation, while in the case of others—such as breaches of "manners"—he supports intervention.

The advantage of the revised reading supported here is that it encompasses much more of the subsequent text of *On Liberty*. It takes

7. Mill, vol. 18, p. 223.

the well-known “principle” passage to be stipulating terms of legitimacy for political argument, namely, the kinds of reasons that can properly be given in support of restrictive legislation. Paternalist reasons are excluded, reasons based on harm to others are admitted but are not conclusive without further argument, and the exclusion of limits to discussion becomes intelligible, as part of the background conditions for the process of reasoning itself. The standard reading, in short, makes the text of *On Liberty* largely unintelligible. The revised reading does not.

But that is not the end of the problems for the standard reading. Given the expansive meaning of ‘harm’, the standard reading encounters difficulty in accommodating Mill’s liberalism. In some sense, every act or word of mine could harm someone, so how can I enjoy the freedom to act or speak at all? The response to this is the myth of Mill’s narrow construal of harm—an inevitable myth, given the need to accommodate both a harm principle and Mill’s evident liberalism. Given that Mill wanted to restrict the scope of state action and that he believed that the state should prevent harm, what could be more natural than the conclusion that he wanted to restrict the range of the idea of harm? But what displays the mythical basis of this reading is that Mill did not restrict the range of harm. In chapter 5 of *On Liberty*, he notices several ways in which some people harm others without there being a case for legislative intervention. In trade, people harm each other all the time—they raise people’s rents, cut their profit margins, or drive them out of business. Mill also mentions competitive examinations, in which those who win diminish the life chances of those who lose.<sup>8</sup> He unmistakably places these matters within the scope of legislation. If our best economic theory told us that the regulation of trade would make it more efficient, we should regulate. If there were a strong public interest in awarding places in law school to candidates other than those with the highest score, then that is what we should do, on Mill’s argument. The reason for not doing either of those things is that, Mill believes, the balance of gains and losses is against them. Whatever we make of Mill’s examples and of his conclusions about them, it is plainly not a narrow conception of harm that he is using; it is, if anything, too capacious, for we do not normally think that to deprive someone of an opportunity to which they have no entitlement is to harm them.<sup>9</sup>

### III

The third common error (arising from the former two) is to suppose that in the argument of *On Liberty*, expression is to be limited by the

8. *Ibid.*, pp. 292–93.

9. Mill himself seems to agree with this objection in his *Utilitarianism* (Mill, vol. 10, p. 250).

harm it causes. This supposition, of course, opens up many difficult questions about what counts as being harmed, kinds of expression, and so on, which Mill leaves unanswered. But they are unanswered because they are not Mill's questions. Even with regard to the expression that he does defend—the expression of opinion—he avoids submitting it to a harm test. In the corn dealer passage, in which he distinguishes between writing an article about the price of corn and inciting a mob with a placard, Mill conceives of incitement as a kind of action. (After describing his example, he goes on at once: “Acts, of whatever kind, which . . . do harm to others.”)<sup>10</sup> This seems entirely reasonable. Surely we would count giving a verbal order to a firing squad as an action, and expression which likewise is linked intentionally and causally to an occurrence counts as an action too. However, Mill does not discuss with much discrimination the harms caused by protected expression. Since he has protected it, it no longer matters to his case whether or in what sense it causes harm.

The question, then, is not whether a form of expression causes harm, but whether it is protected by Mill's argument. J. C. Rees drew attention to the important role here of Mill's idea of rights.<sup>11</sup> In discussing the “limits to the authority of society” in chapter 4, Mill states that we can be called to account for conduct which “consists in injuring the interests of one another; or rather certain interests, which . . . ought to be considered as rights.”<sup>12</sup> An explanation of rights is offered in *Utilitarianism*: “To have a right, then, is, I conceive, to have something which society ought to defend me in the possession of. If the objector goes on to ask why it ought, I can give him no other reason than general utility.”<sup>13</sup> This is consistent with Mill's justification of the right to express opinion, which is derived from the benefits that it brings to “mankind” and the loss that society in general suffers if the right is denied.

But Mill also indicates that there are liberties other than rights. There are two relevant kinds of “acts injurious to others,” one being “encroachment on their rights” and the other “infliction on them of any loss or damage not justified by [one's] own rights.”<sup>14</sup> It is important to know, then, when someone suffers loss or injury, whether or not the loss is avoidable without infringing on the actor's rights. If it is avoidable, it should be avoided, and one will have an area of liberty additional to the sphere protected by one's own rights.

10. *Ibid.*, vol. 18, p. 260, emphasis added.

11. John C. Rees, *John Stuart Mill's "On Liberty"* (Oxford: Clarendon, 1985), pp. 173–74.

12. Mill, vol. 18, p. 276.

13. *Ibid.*, vol. 10, p. 250.

14. *Ibid.*, vol. 18, p. 279.



These considerations put us in a position, at last, to raise the question of the regulation of pornography in the justifying scheme as Mill structures it. Answering the question requires three steps. The first is to ask whether a strong right is in play—to ask, that is, whether pornography should be protected by considerations of general utility. The second is to ask whether the production and consumption of pornography, if not protected by rights, are inseparably connected with the exercise of some other right. Only then would it be relevant to ask the third question, about the harm that the practice causes. The following sections offer one possible “application,” in Mill’s term, along these lines.

#### IV

The first step is easy to accomplish. If there is a serious positive argument for pornography in terms of general utility, it has yet to be constructed. A Bataille-like case built on the liberating power of transgression is all that comes to mind, but that case needs a lot of work before it becomes a serious one. Besides, if successful, it would open the door to much more than the toleration of pornography, since the whole body of criminal law expresses the belief that some transgressions are intolerable. So let us move on at once to the second step, which is more problematic. If there is no positive argument for a right to pornography, is it protected by the exercise of other rights?

We can imagine several possibilities here. There could be a covering right—a right to privacy, for example—which has the effect of embracing various practices not themselves directly protected by rights. Or there could be a slippery-slope problem, arising from the fact (or the fear) that it is too difficult to separate the practice in question from other practices that one would not want to punish.

Privacy is, in fact, the only relevant example of a covering right that comes to mind—one can exclude another candidate, a libertarian property right, because it is inconsistent with Mill’s whole approach and indeed rules out Mill’s line of inquiry. It is certainly dubious that a right to privacy could be extracted from *On Liberty*. As Dyzenhaus points out, Mill treats what is private as the conclusion of an argument rather than a premise for it.<sup>15</sup> There are particular kinds of intrusion by the state that one would want to restrict severely, and some of these might inhibit legislation against the possession of pornography. But it is hard to see how they could inhibit legislation against the production and sale of pornography, which, like all trade, is a social act.

The slippery-slope problem is harder and resists summary treatment. The argument suffers from a general defect, which is that it

15. Dyzenhaus, p. 547.

both asserts and denies that a discrimination can be made. It asserts that we can see a moral difference between A and B, because we know that we want to suppress A but not B; yet, at the same time it denies that the discrimination can be made, since suppressing A will entail suppressing B, too. If we can tell the difference, why can we not express it in legislation? Schauer points out that while we can make the discrimination, it may be that they cannot:<sup>16</sup> that the police and the courts will not reliably separate A from B or that future legislators will wrongly take laws against A as precedents for laws against B. Such considerations would lead us to overprotect or to avoid legislation close to disputed boundaries. It is hard to say in general terms where this leaves the argument for and against the restriction of pornography. The most obvious boundary problem concerns work of artistic merit, the overprotection of which may be the most common basis for the case against antipornography legislation. But surely the boundary cannot be disputed to the extent that all pornography gets to be protected. We can at least draw boundaries with more confidence than we can in, say, proposing to censor literature containing sexist attitudes.<sup>17</sup>

Anxiety about precedential force is harder to assess. To state this potential anxiety as strongly as possible, we may be worried about what happens when states become moralistic and act to suppress anything but the most clearly demonstrable of harms. What else will come within their reach? Worse still, we may be worried about the reflexive impact on citizens as they become accustomed to a state which takes their moral lives in hand. Mill, like Tocqueville, was concerned not only about legislative decisions but also about the kind of people who make them and the ways in which character is shaped by politics; it is legitimate to wonder if a state which undertook to suppress pornography would be one which embodied the attitude to government which Mill admired.

## V

Those, then, are some of the reservations that one might have. Against these, in the third stage of Mill's decision process, we do have to introduce considerations about harm. Let us assume that the harm arising from pornography is diffuse and that our model of causation contains speculative elements. If we could show direct harm to assignable persons arising from specifiable pornographic items, or even if we could reliably demonstrate harms arising from the pornography industry diffusely, the case would be too easy, and it is doubtful that

16. Frederick Schauer, "Slippery Slopes," *Harvard Law Review* 99 (1985): 361–83, p. 373.

17. This provides a partial answer to a question raised in Skipper (p. 727).

there would be much debate. At any rate, the assumption made here is that there is a reasonable guess that at least some kinds of pornography play a role in creating a general climate which diminishes the lives of women. What sort of weight can we give this, and what aspect of Mill's argument, in *On Liberty* or elsewhere, can we draw upon?

Mill warns us that the principle of liberty can apply successfully only in certain contexts. It does not apply in the case of children, for example; it did not apply in military societies such as the Greek cities, constantly on the edge of survival and unable to wait for the long-term benefits of freedom; it cannot apply to "barbarians," or, as he alternatively puts it, it requires the context of "a civilized society." What he means by civilization may repay some inquiry. In his essay on that subject, Mill—following many eighteenth-century theorists of civil society—identifies civilization with the division of labor and, hence, with increasing interdependence. As civilization advances, it is increasingly the case that individuals must take satisfaction from collective rather than personal projects and take as their "ideal object" the project of collective self-improvement. However, this process is accompanied by a frightening increase in personal vulnerability. In barbaric or "savage" societies "each person shifts for himself" and "trusts to his own strength and cunning," whereas in a civilized community we depend constantly on each others' self-restraint and conscientiousness.<sup>18</sup> Hence, Mill places enormous weight on personal security, against violations of which, he says, we must be in a state of constant protest.

Security is at risk, of course, from direct and willful (or at least foreseeable) injuries by others, hence, the criminal law. But Mill is clear that civilized society depends on a more diffusely focused responsibility as well, requiring mutual consideration in the most ordinary circumstances of life. We cannot depend on one another without strong expectations about the conduct of others or unless those expectations are generally met. Mill's civilized society is not like Adam Smith's civil (or "great") society, in which strangers are united not by benevolence but by reciprocal interest; nor, on the other hand, is it a face-to-face community in which people have intimate knowledge of one another's needs. It is based on reciprocal trust and concern among strangers. That is why we save the man on the unsafe bridge.<sup>19</sup>

It is *The Subjection of Women* that shows the importance of this theme, for its central theme is that sexual inequality is a relic of, precisely, barbarism or of the regime of "strength" which civilization

18. Mill, vol. 18, p. 120.

19. For an illuminating discussion, see Samuel V. La Selva, "'A Single Truth': Mill on Harm, Paternalism, and Good Samaritanism," *Political Studies* 36 (1988): 486–96.

has in general superseded. It is one of "the barbarisms to which men cling longest," which "has not lost the taint of its brutal origin."<sup>20</sup> In one department of life after another, progress has abolished the law of the strongest, leaving the status of women as "a solitary breach" of civilization's "fundamental law." It is "as if a gigantic dolmen, or a vast temple of Jupiter Olympius, occupied the site of St. Paul's and received daily worship."<sup>21</sup> To this relic of barbarism Mill opposes a conception of civilized virtue: "The true virtue of human beings is fitness to live together as equals; claiming nothing for themselves but what they as freely concede to everyone else; regarding command of any kind as an exceptional necessity, and in all cases a temporary one; and preferring, whenever possible, the society of those with whom leading and following can be alternate and reciprocal."<sup>22</sup>

The application of this to the case of pornography is not hard to see. Suppose it were a reasonable guess that pornography is among those things that shore up barbaric inequality and impede the cultivation of the civilized virtues of reciprocity? That would create a powerful case against it, since, as we have seen, those virtues are no mere ideals but actually are preconditions of the principle of liberty itself. The grounds for legislating against pornography would not, in that case, be moralistic ones, but political. Although one might rightly balk at the idea that the state advocated in *On Liberty* had the cultivation of virtue as its direct object, nothing in Mill's discussion prevents that state from defending the moral basis on which its own institutions and practices ultimately rest.

## VI

To the claim that pornography is objectionable because it "eroticizes inequality," Skipper objects that there are many other ways of reinforcing inequality, not all of them proper subjects for legislation. "One must wonder about the many other approaches that are at least as effective. Inequality can and has been romanticized, glorified, celebrated, patriotized, totemized, sacralized, proselytized, and aestheticized."<sup>23</sup> Must all such things be banned? That is a good objection. Many of the processes mentioned in this quote would receive protection, as noted above, by covering rights: it does not seem that a liberal state could prosecute a church which sacralized inequality or a Nietzsche interest group which proselytized it. Depending on the kind of inequality in question, the manner and place in which it was celebrated, and so on, perhaps some of these ways of reinforcing inequality

20. Mill, vol. 21, pp. 262, 264.

21. *Ibid.*, p. 275.

22. *Ibid.*, p. 294.

23. Skipper, p. 728.

might be prohibited too—we need more detail. But one should respond to Skipper's objection on its own terms. There may be special reasons which apply in the erotic case but not in others. As is well known, erotic attraction is peculiarly inseparable from other drives, generally in ways that are obscure to the subject, and is often associated with feelings of power, powerlessness, or (typically) both at once. The consequence is that equality and transparency in sexual relations are especially elusive goals, so that vulnerability is at its peak. Mill shows little sign of any such concern, favoring sociological rather than psychological explanations of inequality and trusting in institutional solutions. But it would be continuous with his argument to raise the question not just of reciprocity between the sexes but also of sexual reciprocity. If we were persuaded that some kinds of pornography tended diffusely to make such reciprocity even more difficult than it is, the case for its elimination would be attractive. There can be little doubt that modes and sites of emotion resist compartmentalization and that the achievement of Millian virtue involves the whole person.