

Durham Research Online

Deposited in DRO:

13 January 2015

Version of attached file:

Accepted Version

Peer-review status of attached file:

Peer-reviewed

Citation for published item:

McGlynn, C. and Ward, I. (2014) 'Would John Stuart Mill have regulated pornography?', *Journal of law and society.*, 41 (4). pp. 500-522.

Further information on publisher's website:

<http://dx.doi.org/10.1111/j.1467-6478.2014.00683.x>

Publisher's copyright statement:

This is the accepted version of the following article: McGlynn, C. and Ward, I. (2014), Would John Stuart Mill have Regulated Pornography?. *Journal of Law and Society*, 41 (4): 500–522, which has been published in final form at <http://dx.doi.org/10.1111/j.1467-6478.2014.00683.x>. This article may be used for non-commercial purposes in accordance With Wiley Terms and Conditions for self-archiving.

Additional information:

Use policy

The full-text may be used and/or reproduced, and given to third parties in any format or medium, without prior permission or charge, for personal research or study, educational, or not-for-profit purposes provided that:

- a full bibliographic reference is made to the original source
- a [link](#) is made to the metadata record in DRO
- the full-text is not changed in any way

The full-text must not be sold in any format or medium without the formal permission of the copyright holders.

Please consult the [full DRO policy](#) for further details.

Would John Stuart Mill have Regulated Pornography?

Clare McGlynn* & Ian Ward**

John Stuart Mill dominates contemporary pornography debates where he is routinely invoked as an authoritative defence against regulation. This article, by contrast, argues that a broader understanding of Mill's ethical liberalism, his utilitarianism and his feminism casts doubt over such an assumption. New insights into Mill's thinking on sex, sexual activity and on the regulation of prostitution, reveal an altogether more nuanced and activist approach. In this light, we argue that John Stuart Mill would almost certainly have recommended the regulation of some forms of pornography.

In discussions over the regulation of pornography, the name of John Stuart Mill is ubiquitous. As a figure, he loomed large in twentieth century debates, with his 'harm principle' taking centre stage in the British Report on Obscenity and Censorship published in 1979.¹ More than three decades on, with pornography again a contentious topic of public debate, his name continues to be deployed as an authoritative defence against regulation. However, his ubiquity is paradoxical. While Mill was a prolific writer on an extensive range of issues, including marriage, spousal abuse, parental neglect and prostitution, he published no work on pornography. This absence is all the more curious when we recall the contemporary debate surrounding the adoption in 1857 of the Obscene Publications Act. Why was Mill not moved to protest against this rather obvious statutory restriction on freedom of speech?

In the absence of any written views, we are left to infer what Mill might have recommended in relation to pornography regulation from his other published work and activities. And there has been no shortage of inferences, most of which suggest that Mill would have been against the regulation of pornography. In this article, we challenge such assumptions, arguing that there is a considerable amount of evidence to suggest that he would not only have countenanced, but may also have recommended, a necessary measure of regulation.²

*Professor of Law, Durham Law School, Durham University. Email: Clare.McGlynn@durham.ac.uk

**Professor of Law, Newcastle Law School, Newcastle University

Clare McGlynn gratefully acknowledges the support of a Leverhulme Trust Research Fellowship which enabled this research to be conducted. Thanks are also due to seminar participants at the Centre for Feminist Legal Studies, University of British Columbia, for their helpful comments on an earlier version of this paper, and to Judith Evans for her valuable research assistance.

¹*Report of the Committee on Obscenity and Film Censorship* (the 'Williams' Report') (Cmnd 7772, 1979).

² While the boundaries between 'adult' and 'child' pornography are not as marked as is often assumed, for pragmatic purposes, the focus of this article is on what is generally labelled as 'adult' pornography; namely material in which the participants are over eighteen. In relation to definitions of pornography, while always contentious, this article follows that offered in the Williams' Report on the basis that it is well known and

To make this argument, the first part of the article examines Mill's *On Liberty* and the legacy of his famous 'harm principle' in the context of current pornography debates. The second part situates Mill's approach to the regulation of sex and sexual activity within his broader moral and political philosophy. Moving beyond the specific consideration of 'key' texts, this part emphasises the role played by his ideas of 'moral character' and the 'higher pleasures'. The third section considers the extent to which his ideas and social activism were informed by his feminism; a feminism which was far more radical in its meanings and implications than has often been suggested. Mill's radical, liberal feminism sets the scene for section four which provides a fresh analysis of his approach to the regulation of prostitution; a surprisingly neglected area of his thinking. This analysis provides vital context when considering his possible approach to pornography in view of the experiences, discourses and regulatory context common to both pornography and prostitution. The final section contemplates the extent to which Mill might, accordingly, have supported current demands for the closer regulation of pornography. We conclude that Mill would almost certainly have accepted certain forms of pornography regulation. In this light, we argue that Mill can provide the foundation for new, liberal justifications of some forms of pornography regulation.

1. Mill, Harm and *On Liberty*

As we have already noted, the fact that Mill said nothing about pornography or obscenity has not stopped libertarians repeatedly recruiting him under the anti-regulation banner. According to John Gray, 'there can be little doubt that Mill would adopt an uncompromising libertarian stand on questions of censorship and pornography'.³ The problematic word here is 'uncompromising'. Similarly problematic is the assumption that 'there can be little doubt'. The same sentiment is expressed rather more crudely by Robert Skipper. Mill, Skipper assumes, would 'slam the door' on regulation.⁴ Such hyperbole caricatures Mill and does him little justice. A subtler understanding can be found in David Dyzenhaus's 1990 essay on Mill and pornography. Re-reading *The Subjection of Women*, Dyzenhaus suggested that Mill might have been 'surprisingly sympathetic' to 'censoring pornography'.⁵ Gerald Dworkin also expresses a more cautious tone, finding it 'surprising' that Mill's name should still be so regularly invoked in debates regarding the 'censorship of pornography', even by those who 'feel compelled to confront his views'.⁶

The 'anti-regulatory Mill' continues to hold sway, perhaps due to the dominant place given to his 'harm condition' in the Williams Committee's Report on Obscenity and Censorship.⁷ Embracing the 'harm condition', the Committee reported that 'almost without exception the evidence we received, insofar as it touched on these matters of principle, stated something like this condition or took it for granted'.⁸ Specifically, the Report noted that Mill and *On Liberty* had been cited several times before the Committee and that, even when Mill himself was not named, '[v]irtually everyone ... whatever their suggestions, used the

understood: first that the function or intention of the material is sexual arousal and, secondly, that the representation is sexually explicit (ibid, para 8.2).

³John Gray, *Liberalisms – Essays in Political Philosophy* (1989) at p. 3.

⁴Robert Skipper, 'Mill and Pornography' (1993) 103 *Ethics* 726, at p. 729.

⁵David Dyzenhaus, 'John Stuart Mill and the Harm of Pornography' (1992) 102 *Ethics* 534, at p. 537. See also Richard Vernon, 'John Stuart Mill and Pornography: Beyond the Harm Principle' (1996) 106 *Ethics* 534.

⁶Gerald Dworkin, 'Preface', in Gerald Dworkin (ed), *Mill's On Liberty – critical essays* (1997) at p. ix.

⁷The Williams' Report, op. cit., n. 1. There has also been extensive discussion of Mill's legacy in the debates following the Wolfenden Report: *Report of the Committee on Homosexual Offences and Prostitution* (Cmnd 247, 1957).

⁸Williams' Report, op. cit., n. 1, para 5.1.

language of “harm” and accepted, so it seemed, the harm condition’.⁹ However, the Committee gave little consideration as to whether or not the ‘harm condition’ was in fact an appropriate basis for regulation, and still less whether their minimalist approach to ‘harm’ was one with which Mill would have concurred. In the end, the Williams’ Report recommended the abolition of the obscenity laws, with prohibitive regulation only being permissible where necessary to prevent ‘harm’, the existence of which was to be established ‘beyond reasonable doubt’. Restrictions on access to ‘offensive’ materials were also recommended. On publication, critics condemned the Report as a ‘pornographer’s charter’.¹⁰ Others, such as Ronald Dworkin, praised its ‘admirably clear recommendations’.¹¹

One major consequence of the Williams’ Report and the authority it accorded to Mill has been the easy elision that is now made between the Report’s limited concept of harm and Mill’s own approach. Thus, while it was Mill’s defence of free discussion which was the predominant focus of consideration in the Report, it is principally remembered for its interpretation and use of the harm principle.¹² In particular, the emphasis on the requirement for substantial, direct evidence, beyond reasonable doubt, has become enshrined as essential elements of the ‘harm principle’, routinely utilized in arguments against the regulation of pornography.¹³ A paradigmatic example of this can be found in Joel Feinberg’s influential re-interpretation of Mill’s work, which has itself become the commonly accepted conceptualisation of the ‘harm principle’.¹⁴ Indeed, it has been argued that the philosophical debate regarding criminalization remains ‘dominated by discussion of the harm principle as classically formulated by JS Mill’.¹⁵ It has become ‘the central criterion of criminalization’.¹⁶ As Lindsay Farmer suggests, most subsequent writings on criminalization ‘have not advanced substantially beyond these early insights’.¹⁷ Accordingly, critics concerned about ‘unjust criminalization’, and, more broadly, limiting the role and scope of the criminal law, invariably return to Mill.¹⁸ In this way, Mill is used to underpin ideas about *limiting* the role and scope of the criminal law.¹⁹

⁹Ibid.

¹⁰Leading anti-pornography campaigner Mary Whitehouse, quoted in AWB Simpson, *Pornography and Politics – A Look Back at the Williams Committee* (1983) at p. 45.

¹¹Note, however, that Dworkin argued that the Report should have justified its proposals on an alternative philosophical basis to the one chosen: Ronald Dworkin, ‘Is there a right to pornography?’ (1981) 1 *OJLS* 177, at p. 178. See, further, TRS Allan’s reply that the Report’s approach was, however, close to Dworkin’s own: ‘A Right to Pornography?’ (1983) 3 *OJLS* 376.

¹²Julian Petley notes the Millian legacy of the harm concept and suggests that since the Williams’ Report was published, ‘the notion of harm as a basis for censorship has been employed by government and by media regulators with increasing frequency’: ‘Setting the Censorship Standard’, *Index on Censorship*, 28 April 2009, at: <<http://www.indexoncensorship.org/2009/04/setting-the-censorship-standard/#more-2290>>.

¹³See, for example, LW Sumner ‘Criminalizing Expression: hate speech and obscenity’, in John Deigh and David Dolinko (eds) *The Oxford Handbook of the Philosophy of Criminal Law* (2011) and Bret Boyce, ‘Obscenity and Community Standards’ (2008) 33 *Yale Journal of International Law* 299.

¹⁴Feinberg himself coined the phrase ‘harm principle’ in his four volume work *The Moral Limits of the Criminal Law* (1984-88). Feinberg described his work as based on ‘traditional liberalism derived from Mill’s *On Liberty*’: see *Harm to Others (vol 1)*, at p. 15.

¹⁵Duff et al, ‘Introduction: The Boundaries of the Criminal Law’, in RA Duff, Lindsay Farmer, SE Marshall, Massimo Renzo and Victor Tadros (eds), *The Boundaries of the Criminal Law* (2010) at p. 15. See also Dennis Baker who refers to the centrality of Mill’s harm principle: *The Right not to be criminalized – demarcating criminal law’s authority* (2011) at p. 1.

¹⁶Duff et al., id. (2010) at p. 18.

¹⁷Lindsay Farmer, ‘Criminal Wrongs in Historical Perspective’, in Duff et al., op. cit., n. 15, at p. 214.

¹⁸For example, Dennis Baker has argued that the trend towards decriminalization (in relation to personal behaviours) ‘is so pronounced that anyone writing within the Millian tradition would of course feel substantial pride in the impetus that Mill provided for judicial conclusions along these lines’: op. cit., n.15, at p. 1.

¹⁹id. For a discussion of citations of Mill in US courts, including by Judge Easterbrook in the challenge against the Dworkin-MacKinnon pornography Ordinances (*American Booksellers v Hudnut* 771 F.2d), see John M

The problem is that just as Mill said frustratingly little about pornography, he also avoided being precise over what he understood as ‘harm’, in *On Liberty* or anywhere else. Along with his wife Harriet Taylor, Mill took great pains over the final drafting of *On Liberty*.²⁰ He did so precisely because it was intended to be a polemical essay, widely read and, most likely, just as widely criticised. It was never intended to be a substantive philosophical treatise. This should not detract from the critical attention paid to *On Liberty*. But it should serve as a caution. Richard Bellamy notes that ‘too frequently’ *On Liberty* ‘is read outside the context of Mill’s other works and the political language and preoccupations of the day’ and that a ‘more historical interpretative angle reveals a far more ambivalent message’.²¹ Jeremy Waldron agrees. There is much more to Mill than being ‘simply ... a theorist of limited Government’²² and much more to *On Liberty* than a banal ‘excoriation of moralism in all its forms’.²³ This point is reiterated by Richard Reeves, arguing that it is ‘dangerous to draw conclusions about Mill’s attitude to the role of the state from any single publication’ and ‘particularly from *On Liberty*’.²⁴ He continues that while ‘few doubt its status as a masterpiece, as a panegyric for individual liberty’, *On Liberty* is too often ‘read in isolation’ and consequently, and often consciously, ‘misunderstood and misappropriated’.²⁵

The principle in dispute was set out by Mill in the Introduction to *On Liberty*. This ‘very simple principle’ was designed to ‘govern absolutely the dealings of society with the individual’ whether the means used are ‘physical force in the form of legal penalties, or the moral coercion of public opinion’. The:

‘principle is, that the sole end for which mankind are warranted, individually or collectively, 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, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant.’²⁶

Where compulsion is to be used to deter particular acts, the conduct to be prevented ‘must be calculated to produce evil to someone else’. That is, the ‘only part of the conduct of any one, for which he is amenable to society, is that which concerns others’. This is Mill’s ‘simple principle’ and it is on this ‘slender foundation’, as Reeves puts it, comprising a mere three introductory pages of *On Liberty*, that ‘vast edifices of thought and argument have been built’.²⁷

Kang, ‘Taking Safety Seriously: Using Liberalism to Fight Pornography’ (2008) 15 *Michigan Journal of Gender and Law* 1, at pp. 35-36.

²⁰ Mill wrote that many of his works were ‘joint productions’ with Harriet Taylor. As regards *On Liberty*, Mill stated that: ‘[It was] more directly and literally our joint production than anything else which bears my name, for there was not a sentence of it that was not several times gone through by us together, turned over in many ways, and carefully weeded out of any faults, either in thought or expression, that we detected in it.’ Quoted in Alice Rossi, *John Stuart Mill and Harriet Taylor Mill – Essays on Sex Equality* (1970), at p. 40.

²¹ Richard Bellamy, *Liberalism and Modern Society – an historical argument* (1992) at p. 22.

²² Jeremy Waldron, ‘Mill as a Critic of Culture and Society’, in David Bromwich and George Kateb (eds), *On Liberty – John Stuart Mill* (2003) at p. 229.

²³ Jeremy Waldron, ‘Mill on Liberty and on the Contagious Diseases Acts’, in Nadia Urbanati and Alex Zakaras (eds) *JS Mill’s Political Thought – a bicentennial re-assessment* (2007), at p. 25.

²⁴ Richard Reeves, *John Stuart Mill – Victorian Firebrand* (2007) at p. 287.

²⁵ *id.*, at p. 263.

²⁶ *On Liberty*, in John Robson (ed) *Collected Works of John Stuart Mill* (1977), vol XVIII, at p. 22. All further direct quotations from Mill are taken from the *Collected Works* (CW).

²⁷ Reeves, *op. cit.*, n. 24, at p. 265, 268.

Notably, Mill provided no definition as to what might constitute ‘harm’. Indeed, he uses a wide range of different words and phrases, often interchangeably with ‘harm’, including adverse influence on ‘interests’, as well as ‘injury’, ‘injurious’, ‘hurt’ or ‘hurtful’, ‘evil’ or ‘evils’, ‘mischief’, ‘wrong’ and ‘security’.²⁸ As Jean Bethke Elshtain suggests, this variability renders the entire principle one of ‘dubious clarity’.²⁹ Equally, whilst Mill sought to preserve for individuals the autonomy to make choices and decisions over their lives, this did not preclude the possibility that this autonomy might, under particular conditions, be constrained where such intervention, as Bellamy suggests, would be ‘acceptable and imperative’.³⁰ It is this point that Dyzenhaus deploys in his argument that Mill might have been ‘surprisingly sympathetic’ to censoring pornography, in view of Mill’s overarching aspiration for an ‘autonomous life of the kind that is achievable only under conditions of equality’.³¹

Bellamy highlights another limitation of Mill’s thinking regarding liberty which is of particular note in the context of pornography debates. Mill assigned priority to ‘increasing individual liberty’³² but left little guidance on how to decide between different sets of conflicting liberties so as to arrive at the ‘greatest possible liberty on balance’.³³ Thus, where there is a conflict of liberties - for example, between freedom of discussion and equality - prioritising liberty itself ‘proves indeterminate’.³⁴ Resolution is only possible where someone, somewhere makes a necessarily qualitative judgment regarding ‘certain liberties as being more intrinsic to human flourishing and well-being than others’.³⁵ Bellamy suggests that Mill simply failed to consider how to determine conflicts between liberties, nor did he adequately define ‘harm’, because he assumed that there would only be clashes between the lower pleasures.³⁶ In this way, so long as ‘individuals and society progressed in the manner Mill supposed, his liberalism was relatively straightforward, fitting with the traditional picture of him as an anti-paternalist keen to remove restraints on individual freedom’.³⁷ But, when there is a conflict, there appears to be little in his ‘simple principle’ to help determine the outcome. However, Mill, as an activist and politician, wanted to see his principles put into practice and so provided in *On Liberty* a number of ‘applications’ of his approach.

In view of the copious literature analysing *On Liberty*, it is perhaps surprising that so little has been written about these ‘applications’; with absolutely no discussion of them in contemporary analyses of pornography laws. The reason perhaps is that they are inconvenient. Take, for example, Mill’s endorsement of continental laws which proscribed marriage unless the couple had sufficient financial resources to provide for a family.³⁸ Or Mill’s belief in population control as necessary for the alleviation of child poverty, thereby justifying legislative restrictions on what, today, is commonly termed the right to marry and form a family. ‘Such laws’ he contended ‘are interferences of the State to prevent...an act injurious to others’, and as they ‘do not exceed the legitimate powers of the state’, such

²⁸Reeves, op. cit., n. 24, at pp. 265-266.

²⁹Jean Bethke Elshtain, ‘Mill’s Liberty and the Problem of Authority’, in Bromwich and Kateb, op. cit., n. 22, at p. 210.

³⁰Bellamy op. cit. n. 21, at p. 26.

³¹Dyzenhaus, op. cit., n. 5, at p. 550. Mill’s approach to equality is considered further below.

³²Bellamy, op. cit., n.21, at p. 2.

³³id.

³⁴id. See also John Gray who writes of the ‘crippling indeterminacies’ of the liberty principle: op. cit., n. 3, at p. 222.

³⁵Bellamy, op. cit., n. 21, at p. 2.

³⁶Bellamy, op. cit., n. 21, at p. 24.

³⁷id.

³⁸*On Liberty*, CW vol XVIII, at p. 304.

interferences are ‘not objectionable as violations of liberty’.³⁹ What is interesting here is that the ‘harm’ – the potential poverty of the children of the marriage - is prospective, a matter of risk. There is no demonstrable harm; no causal link between marriage and child poverty. Yet Mill deploys his harm principle to justify legislative intervention. The mere possibility of harm was sufficient to warrant limitation on an individual’s liberty to marry and form a family. Transplanting such a proposal into modern day western democracies would of course be unthinkable. But Mill ventured further prescriptions for family life. He argued that if either from idleness or ‘from any other avoidable cause’, a ‘man fails to perform his legal duties to others, as for instance to support his children’, then it is ‘no tyranny to force him to fulfil that obligation, by compulsory labour, if no other means available’.⁴⁰ He further recommended financial penalties against those fathers who were unable to demonstrate that their children were receiving what was deemed to be an effective education. It was a ‘moral crime’ against society to have a child and not to educate her or him to an appropriate standard.⁴¹

Another instructive example can be found in Mill’s treatment of alcohol-induced criminality. While Mill declared that simply being drunk was not a matter for legislative interference, he added: ‘I should deem it perfectly legitimate that a person, who had once been convicted of any act of violence to others under the influence of drink, should be placed under a special legal restriction.’ Thereafter, this person would be liable to a penalty for simply being drunk; and if the person was convicted again of a crime of violence while drunk, then the sentence should increase in severity *because of* the drunkenness. Mill justified this on the basis that ‘making himself drunk, in a person whom drunkenness excites to do harm to others, is a crime against others’.⁴² The very fact of being drunk constitutes the harm to others, even in the absence of proof of a crime being committed, due to the *risk* of further crimes of violence. The coercive power of the criminal law was being advocated in order to reduce the possible risk of any harm to others, and in circumstances where there is no direct causal link between the harm (violent crime) and the individual act of drinking alcohol. This precautionary approach was summed up by Mill elsewhere when he stated 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.’⁴³

2. Ethics, Sex and the Higher Pleasures

Mill was not just a philosopher: he was also a politician, an activist, a public intellectual. Victorian intellectuals were particularly aware of how their ideas were ‘parasitic upon a particular social and political context which rendered them morally and sociologically plausible’⁴⁴, and Mill was no exception. As Reeves observes, Mill was an ‘intensely autobiographical thinker’: for him ‘the political and personal were inseparable’.⁴⁵ Accordingly, in order to truly contemplate Mill’s approach to matters such as pornography regulation, we need to re-contextualise him. We need to place his ‘harm principle’ within its broader intellectual and personal context, whilst also contemplating Mill’s other writings and activities in regard to what was then referred to as the ‘question’ of women.

³⁹ *id.*, discussed in Bellamy, *op. cit.*, n. 21, at p. 31, and in Gail Tulloch, *Mill and Sexual Equality* (1989) at p. 159.

⁴⁰ *On Liberty*, CW vol XVIII, at p. 295.

⁴¹ *On Liberty*, CW vol XVIII, at p. 302.

⁴² *On Liberty*, CW vol XVIII, at p. 295.

⁴³ CW vol III, at p. 908.

⁴⁴ Bellamy, *op. cit.* n. 21, at p. 217.

⁴⁵ Reeves, *op. cit.* n. 24, at p. 8.

First, it is important to recall that Mill was an ‘ethical liberal’⁴⁶ with a very particular vision of what constitutes the ‘good’ life and the steps which society should take to promote such ideals. He was a ‘public moralist’, who promoted a ‘moral doctrine’⁴⁷; a thinker who believed that ‘genuine social reform must be premised on the reformation of the moral world’.⁴⁸ The key to this ethical liberalism and moral perfectionism was Mill’s strong sense of ‘character’, a variety of ‘conventional Victorian middle-class virtues’ such as ‘self-culture, self-control, energy, industry, frugality, thrift, prudence, patience, perseverance, honesty, integrity, temperance, sobriety, independence, manliness and duty’.⁴⁹ This ‘Millian virtue’ of ‘good character’⁵⁰ was a foundational concept and impacted on all areas of life, law and politics, fusing together the economic, moral and political.⁵¹ For Mill, ‘liberty was only vital to self-realization and social progress when linked to character’ and, without character, Mill considered that ‘personal liberty degenerated into mere animal licence’.⁵² Mill’s pursuit of liberty was intrinsically aligned to his idea of the individual as a progressive, morally and intellectually improvable, being: ‘only a person of confirmed virtue is completely free’.⁵³ Liberty was the means to achieve self-improvement; and it was self-improvement that he believed people ultimately craved.⁵⁴

Second, like many of his contemporaries, Mill was troubled by the meaning and role of sexual activity in society. Here his attitude was at variance with the views espoused by fundamental utilitarians. According to Mill, it was only the pursuit of *certain* pleasures, those that promoted good character, that would bring (the right kind of) happiness. It was this idea of utility that caused Mill to reject a pure form of negative liberalism.⁵⁵ Mill wanted to improve people and believed that happiness came from the pursuit of self-development and the higher pleasures, not the satisfaction of immediate wants; and – crucially - that people needed to be encouraged towards this form of personal development. Accordingly, the state could never, and should never, be neutral in its promotion of those particular forms of the good life which are necessary to promote happiness.⁵⁶

Applying this tempered idea of the pleasure principle to the matter of sex, Mill concluded that a ‘beast’s pleasures do not satisfy a human being’s conception of happiness. Human beings have faculties more elevated than the animal appetites, and when once made conscious of them, do not regard anything as happiness which does not include their gratification’.⁵⁷ The animal appetites, for Mill, constituted a ‘lower’ pleasure, contrasted with the ‘higher’ pleasures ‘of the intellect, of the feelings and imagination, and of the moral

⁴⁶Bellamy, op. cit., n. 21, at p. 2.

⁴⁷ Stefan Collini, ‘Introduction’, John Robson (ed) *Essays on Equality, Law and Education by John Stuart Mill* (CW vol XXI) at p. viii.

⁴⁸ Maria Morales, ‘The Corrupting Influence of Power’, in Maria Morales (ed) *Mill’s The Subjection of Women – Critical Essays* (2005) at p. 101. See also John Gray who criticises Millian philosophy as being based on ‘disputable moral doctrines’: op. cit. n. 3, at p. 230, and more recently still Reeves, op. cit. n. 24, at p. 6-7, emphasising that for Mill the promotion of liberty was only ever of value insofar as it promoted the ‘good’.

⁴⁹Bellamy, op. cit., n. 21, at p. 10.

⁵⁰Vernon, op. cit., n. 5, at p. 632.

⁵¹Bellamy, op. cit., n. 21, at p.10.

⁵²id., at p. 22.

⁵³*A System of Logic*, CW vol VIII, 841, discussed in Richard Bellamy, ‘T H Green and the morality of Victorian liberalism’, in Richard Bellamy (ed), *Victorian Liberalism – nineteenth century political thought and practice* (1990) at p. 135.

⁵⁴Susan Moller Okin, ‘John Stuart Mill’s Feminism – *The Subjection of Women* and the Improvement of Mankind’, in Morales op. cit. n. 48, 32.

⁵⁵John Gibbins, ‘J S Mill, liberalism and progress’, in Bellamy, op. cit., n. 53, at p. 106.

⁵⁶Gibbins, id., at p. 107.

⁵⁷*Utilitarianism*, CW vol X, at pp. 210-211, discussed in Tulloch, op. cit. n. 39, at pp. 142-145.

sentiments'.⁵⁸ Mill also considered that the higher pleasures are preferred by those who have experienced both, summing this up with his now infamous phrasing: 'It is better to be a human being dissatisfied than a pig satisfied; better to be Socrates dissatisfied than a fool satisfied.'⁵⁹

Mill's approach, therefore, clearly discounts an individual's expressed preferences and he justified this on the basis that: 'It is quite compatible with the principle of utility to recognise the fact that some *kinds* of pleasures are more desirable and more valuable than others.'⁶⁰ In essence, Mill connected an increase in human happiness to the development of character, particularly the higher pleasures.⁶¹ He recognised that this was no easy task, writing that the '[c]apacity for the nobler feelings is in most natures a very tender plant, easily killed, not only by hostile influences, but by mere want of sustenance'.⁶² Further, he declared that 'any great improvement in human life is not to be looked for so long as the animal instinct of sex occupies the absurdly disproportionate place it does therein'.⁶³

There was nothing unusual in this approach. Indeed, as Alice Rossi has commented, 'in the area of human sexuality', Mill was 'very much' the product of his Victorian era.⁶⁴ Susan Mendus reaches the same conclusion.⁶⁵ Similarly, Susan Moller Okin detected in Mill an overarching 'sexual asceticism'.⁶⁶ It seems entirely probable, therefore, that Mill did not wish to liberate sexuality. Indeed, quite the reverse is more likely. Mill once commented: 'I think it is most probable that this particular passion will become with men, as it is already with a large number of women, completely under the control of reason'.⁶⁷ However, in encouraging men to 'control' their sexuality in this way, Mill's approach differed in important ways to that preferred by many of his contemporaries. As Judith Walkowitz has noted, an 'unthinking acceptance of male sexual licence' set the 'tone' for public debate regarding sex and sexual activity during much of the nineteenth century.⁶⁸ But Mill argued that men were not biologically predisposed to such a 'propensity'.⁶⁹ Male sexuality, he argued, was 'fostered' by the 'tendencies of civilisation (which has been a civilisation left mainly to the influence of men)'.⁷⁰ It was these 'tendencies' which the state could, and indeed should, seek to redress.⁷¹

3. Mill's (Radical) Liberal Feminism

Throughout his life, in practice as on paper, Mill proved himself to be an 'ardent and active' feminist.⁷² In 1850 he commented that women's equality was 'of all practical subjects the most important'⁷³, and by the 1860s he was closely associated with the campaign for

⁵⁸*Utilitarianism*, CW vol X, at p. 211.

⁵⁹*Utilitarianism*, CW vol X, at p. 212.

⁶⁰Emphasis in original. *Utilitarianism*, CW vol X, at pp. 211.

⁶¹Bellamy, op. cit., n. 21, at p. 16.

⁶²*Utilitarianism*, CW vol X, at p. 261, discussed in Susan Mendus, 'The Marriage of True Minds – the Ideal of Marriage in the Philosophy of John Stuart Mill', in Morales, op. cit., n. 48, at p. 141.

⁶³CW vol XXVII, at p. 664.

⁶⁴Rossi, op. cit. n. 20, at p. 50.

⁶⁵Mendus, op. cit., n. 62, at pp. 135-156.

⁶⁶Moller Okin, op. cit., n. 54, at p. 45.

⁶⁷CW vol XVII, at p. 1693.

⁶⁸Judith Walkowitz, *Prostitution and Victorian Society: Women, Class, and the State* (1980) at p. 70.

⁶⁹CW vol XVII, at p. 1693.

⁷⁰id., at p. 1692.

⁷¹Susan Kingsley Kent, *Sex and Suffrage in Britain 1860-1914* (1987).

⁷²See Moller Okin, op. cit., n. 54, at p. 25. See also Martha Nussbaum claiming that Mill was the 'first great radical feminist in the Western philosophical tradition', quoted in Reeves, op. cit. n. 24, at p. 414.

⁷³CW vol XIV, at p. 49.

women's suffrage, initiating the first substantial parliamentary debate on the subject in 1867. Two years later, he published *The Subjection of Women*, a defining text which has shaped modern feminist politics.

It is again noticeable that those who regularly deploy Mill against the idea of pornography regulation, prefer not to dwell too long on *The Subjection of Women*.⁷⁴ Of course it might be argued that Mill's writings on women are of only historical interest; except that the injustices they address are in many cases no less pertinent today. Julia Annas's comment remains as true today as it did in the 1970s: 'It will be a good day when *The Subjection of Women* is outdated, but it is not yet.'⁷⁵ Strikingly, in *The Subjection of Women*, Mill argued that the 'existing social relation between the sexes', namely the 'legal subordination of one sex to the other', should be replaced by a 'principle of perfect equality'.⁷⁶ The focus on law is significant. 'If ever any system of privilege and enforced subjection had its yoke tightly riveted on the necks of those who are kept down by it', Mill argued, 'this has.'⁷⁷ The law reinforced a socially constructed inequality that was accordingly one of the 'chief hindrances to human improvement'.⁷⁸ The rationale, therefore, was simple; at least in theory. If law was the problem, reform of the law was the solution.

Most immediately, Mill recommended fundamental reform of the institution of marriage, not just in terms of the public nature of the contract, but also in regard to the private relations between husband and wife.⁷⁹ For Mill, the institution of marriage was of considerable importance in view of 'women's entire dependence on the husband'.⁸⁰ Mill observed that marriage was a species of 'slavery', deploying a metaphor of particular resonance in mid-nineteenth century England. He had already inferred as much in *On Liberty*, which noted that the 'almost despotic power of husbands over wives need not be enlarged upon here, because nothing is more needed for the complete removal of the evil, than that wives should have the same rights, and should receive the protection of law in the same manner as all other persons'.⁸¹

Accordingly, far from being absolutist in his protection of individual privacy, Mill was in fact a dedicated critic of the public-private divide, repeatedly underlining, as Maria Morales has pointed out, the 'incompatibility of domination in the "private" realm with equality, justice and democratic rule in the "public"'.⁸² One of Mill's major concerns was that marriages of 'inequality' might exacerbate a tendency towards violence, and that protection of the 'private' realm led to such harms being hidden from public view and debate. Mill repeatedly observed this in his many and various writings on such issues as marital rape, domestic violence, prostitution and child abuse, describing the 'habitual abuse of brute

⁷⁴ Maria Morales contends, more generally, that the 'systematic philosophical reflection of Mill's significant body of work on matters concerning women's social condition has come relatively slowly and continues to suffer from considerable gaps': 'Rational Freedom and John Stuart Mill's feminism', in Nadia Urbanati and Alex Zakaras (eds) *JS Mill's Political Thought – a bicentennial re-assessment* (2007) at p. 43. See also Keith Burgess-Jackson, 'John Stuart Mill, Radical Feminist', in Morales, op. cit., n. 48, at p. 78, and Dyzenhaus, op. cit., n. 5, at p. 537 who refers to *The Subjection of Women* as being 'curiously neglected'.

⁷⁵ Julie Annas, 'Mill and the Subjection of Women' in Morales, op cit., n.48, p. 53.

⁷⁶ CW vol XXI, at p. 261.

⁷⁷ *The Subjection of Women* CW vol XXI, at p. 268. It is not difficult to discern resonances here with contemporary radical feminist thinker Catharine MacKinnon and her well-known challenge: 'Take the foot off our necks, then we will hear in what tongue women speak.' Catharine Mackinnon, *Feminism Unmodified* (1987) at p. 45.

⁷⁸ id.

⁷⁹ CW vol XXI, pp. 259-340.

⁸⁰ CW vol XXI, at pp. 271-272.

⁸¹ *On Liberty*, CW vol XVIII, at p. 301.

⁸² Morales 'Rational Freedom', op. cit., n. 74, at p. 46.

strength' against women and children as amongst 'the worst order of crimes and violence'.⁸³ He condemned men who were 'impressed with the belief of their having a *right* to inflict almost any amount of corporal violence upon *their* wife and *their* children' which manifest itself in a belief that 'they have the same right, in their own opinion, over their human as over their inanimate property'.⁸⁴ As a Member of Parliament, moreover, he pressured successive governments for statistics on the numbers of women murdered and the sentences handed down to the men who killed them compared with those meted out for offences against property.⁸⁵ In this context, as Keith Burgess-Jackson has suggested, 'Mill's views on the social and legal status of women are more closely aligned with those of contemporary *radical* feminists than with those of contemporary liberal feminists'.⁸⁶

This is the less familiar Mill: the advocate of 'perfect equality', condemning male dominance and challenging many forms of violence against women. It is the Mill to whom Susan Moller Okin refers when she writes of the richness of Mill's liberal conception of equality.⁸⁷ Okin suggested that Mill had more in common with modern day radical feminists than the suffragists of his time, in view of his challenge not just to formal, legal exclusions of women, but to the more general social and economic inequality in which women lived.⁸⁸ This feminism does not, of course, preclude critical concern. In relation to his arguments on marriage and sexual relations, Susan Mendus comments that Mill's 'profoundly moral' view is 'deeply depressing and distorted'.⁸⁹ There is also a question of naivety: the assumption that access to the suffrage, to property, to education and to public occupations would itself secure greater equality.⁹⁰

Nonetheless, Mill was irrefutably a determined activist for feminist causes and had a profound impact on the emergence of women's rights. Mill pierced the public veil drawn around the family, dramatically challenging contemporary values and assumptions about male sexuality and dominance. In the face of ridicule and contempt, he publicly raised questions about what we now call domestic violence, child abuse and marital rape. He saw sexual equality as fundamental to utilitarianism; it was the means by which to ensure the greatest happiness for the greatest number. He championed women's suffrage, seeing it as key to delivering the political pressure necessary to challenge the social evils all too evident in Victorian society. It was this radical, liberal feminist Mill who wrote *On Liberty*; and it was this Mill who turned his attention to an issue which, perhaps more than any other, agitated Victorian sexual sensibilities.

4. Mill and the 'Evil' of Prostitution

While producing no written work on pornography, Mill did engage in the contentious debates on prostitution and its regulation.⁹¹ An analysis of his contributions to these discussions sheds important light on his possible approach to the regulation of pornography, as both phenomena raise significant questions about the interplay between law, morality, sexuality and commerce. Once again, however, analysis of Mill's thinking on this subject matter is

⁸³Quoted in Morales 'Rational Freedom', op. cit., n. 74, at p. 51.

⁸⁴CW vol XXV, at p. 1173, italics in original. Discussed in Morales, op. cit. n. 74, at p. 52

⁸⁵Tulloch, op. cit., n. 39, at p. 106.

⁸⁶Burgess-Jackson, op. cit. n. 74, at p. p 72, italics in original.

⁸⁷Moller Okin, op. cit., n. 54.

⁸⁸Moller Okin, id., at p. 47. This point is also made by Rossi, op. cit., n. 20, at p. 62.

⁸⁹Mendus, op. cit., n. 62, at p. 137.

⁹⁰Tulloch, op. cit., n. 39, at p. 65.

⁹¹This section draws on Clare McGlynn, 'John Stuart Mill on Prostitution: radical sentiments, liberal proscriptions' (2012) 8(2) *Nineteenth Century Gender Studies* available at <http://www.ncgsjournal.com/issue82/mcglynn.htm>.

notably rare. Jeremy Waldron points out that ‘none of the copious literature on Mill’s essay *On Liberty* so much as mentions the relation between that essay and [Mill’s] evidence against the Contagious Diseases Acts’.⁹² Again, on closer inspection, it becomes apparent why this might be so. Mill’s writings on prostitution do not fit comfortably with those dominant critical voices which prefer a libertarian Mill.

Like most of his contemporaries, Mill viewed prostitution as a great ‘social evil’, stating that:

‘with the exception of sheer brutal violence, there is no greater evil than this propensity [male sexuality] can produce than prostitution. Of all the modes of sexual indulgence ... I regard prostitution as the very worst; not only on account of the wretched women whose sole existence it sacrifices, but because no other is anything like so corrupting to the men’.⁹³

Debate focussed on the controversial Contagious Diseases Acts which permitted the medical inspection of women suspected of being prostitutes and, if they were found to be suffering from venereal disease, their detention for up to nine months.⁹⁴ Dismissing the justification of prostitution as a necessary ‘safety-valve’ for men, Mill condemned the Acts for what he perceived to be the state sanctioning of prostitution.⁹⁵ He continued: ‘I do not think that prostitution should be classed and recognized as such by the State.’⁹⁶ The Acts gave ‘some degree of encouragement’⁹⁷ to prostitution which Mill considered to be ‘completely wrong in principle and mistaken as to the practical benefits which seem to arise from such a plan’.⁹⁸

Rather than controlling the activities of prostitutes, Mill recommended the closer regulation of those who paid for their services. If disease prevention was the actual aim of the legislation, Mill argued, then the target should be men: for a ‘woman cannot communicate the disease but to a person who seeks it, and who knowingly places himself in the way of it’.⁹⁹ If the police were to engage in ‘espionage’ to identify prostitutes, as the Acts provided, then the ‘same degree of espionage’ should ‘detect the men who go with’ prostitutes and the men can ‘be obliged to give an account why they are there’.¹⁰⁰ He further recommended ‘very severe damages in case a man is proved to have communicated this disease to a modest woman’.¹⁰¹ Unsurprisingly, contemporaries met Mill’s focus on the actions of men with little short of incredulity.¹⁰²

⁹² Waldron, op. cit. n. 23, at p. 22. Waldron’s discussion of Mill’s views on prostitution is in the service of more general points regarding the interpretation of *On Liberty*, rather than it being a specific discussion of prostitution regulation per se. The only other paper to engage in any detail on Mill and prostitution is a response to Waldron’s essay by Jim Jose and Kcasey-Renea McLoughlin which is, by its nature, similarly constrained in its focus: see ‘In Harm’s Way: JS Mill’s Feminist Opposition to the Contagious Diseases Acts’, paper presented at the Australasian Political Studies Annual Conference, 27-30 September 2009: available at <http://hdl.handle.net/1959.13/920122>.

⁹³ CW vol XVII, at p. 1693.

⁹⁴ See, generally, Walkowitz, op cit n 68.

⁹⁵ CW vol, XVII, at p. 1692.

⁹⁶ CW vol XXI, at p. 359.

⁹⁷ id., at p. 355.

⁹⁸ CW vol XVI, at p. 1524.

⁹⁹ CW vol XXI, at p. 354.

¹⁰⁰ id.

¹⁰¹ CW vol XXI, at pp. 354.

¹⁰² In response to this particular recommendation by Mill, one Royal Commissioner investigating the Acts asked: ‘Am I to understand you seriously propose that in this country we should adopt a system of espionage over every man seen going into a brothel, and that men seen to go into a brothel should be subject all alike to personal examination?’: CW vol XXI, at p. 362.

Mill was more equivocal where the individual liberty of pimps and brothel-keepers came into question. He first canvassed such issues in *On Liberty*, querying that whilst ‘fornication, for example, must be tolerated... should a person be free to be a pimp?’ The general principle, he admitted, was that: ‘Whatever it is permitted to do, it must be permitted to advise to do’.¹⁰³ Thus, if fornication was lawful, so must be its promotion or instigation. However, this general principle may be doubted when the instigator ‘derives a personal benefit from his advice; when he makes it his occupation, for subsistence or pecuniary gain, to promote what society and the state consider to be an evil’.¹⁰⁴ In such situations, there are a ‘class of persons with an interest opposed to what is considered as the public weal and whose mode of living is grounded on the counteraction of it’.¹⁰⁵

Such a situation, he averred, lay on the ‘exact boundary line between two principles, and it is not at once apparent to which of the two it properly belongs. There are arguments on both sides’.¹⁰⁶ On the side of ‘toleration’, merely following an occupation ‘cannot make that criminal which would otherwise be admissible’ and ‘society has no business, *as* society, to decide anything to be wrong which concerns only the individual’.¹⁰⁷ On the other hand, although the state is not warranted in authoritatively deciding that a specific conduct affecting only the interests of the individual is good or bad, it is nonetheless ‘fully justified in assuming, as they regard it as bad, that it being so or not is at least a disputable question’.¹⁰⁸ In such circumstances, the state ‘cannot be acting wrongly in endeavouring to exclude the influence of solicitations which are not disinterested’.¹⁰⁹ There can ‘surely ... be nothing lost, no sacrifice of good’ by ensuring that individuals ‘either wisely or foolishly’ act on their own prompting, as ‘free as possible from the arts of persons who stimulate their inclinations for interested purposes of their own’.¹¹⁰ In such arguments, Mill held that there is ‘considerable force’; but he declined to decide whether they were sufficient to justify the ‘moral anomaly of punishing the accessory’, of ‘fining or imprisoning the procurer, but not the fornicator’.¹¹¹

Once again, in regard to the regulation of brothels, Mill admitted that it was an ‘extremely difficult question’, one upon which he would prefer not to give an opinion ‘because so many pros and cons have occurred to me when I have thought about it that I have found it very difficult to make up my mind’.¹¹² Nevertheless, he inferred the need for an appropriate measure of statutory regulation, posing the question as one of whether brothels ‘should be systematically put down, or let alone to a certain degree’. This ambivalence resulted from the ‘very wide reaching considerations as to the degree to which the law should interfere in questions of simple morality and also how far it should attack one portion of the persons who conspire to do a particular act while it tolerates others’.¹¹³

In the case of prostitution, therefore, an area of commercial sexual activity closely aligned to that of pornography, Mill neither provides a resolute defence of individual liberty, nor resounding arguments in favour of specific forms of regulation. Most importantly perhaps, he was evidently uncertain as to whether mere individual choice, whether to sell or buy sex, should always be the determining factor. Indeed, his analysis of prostitution, its

¹⁰³CW vol XVIII, at p. 296.

¹⁰⁴*id.*

¹⁰⁵*id.*

¹⁰⁶*id.*

¹⁰⁷*id.*

¹⁰⁸*id.*, at pp. 296-297.

¹⁰⁹*id.*, at p. 297.

¹¹⁰*id.*

¹¹¹*id.*

¹¹²CW vol XXI, at p. 369.

¹¹³*id.*, at p. 360.

harms and causes, bears similarity to the standpoints of today's radical feminists: conceptualising prostitution as harmful to women and society and seeking its eradication by focussing on the male demand for prostitution.¹¹⁴ Nonetheless, it must be admitted that while he may have shared the sentiments of radical feminists, Mill would likely have departed from their proscriptions for law reform.¹¹⁵ This is simply because Mill envisaged that a consequence of 'perfect equality' within marriage would be the eradication of prostitution. Nonetheless, it is evident that Mill was most troubled by exploitation and solicitation for profit in respect of which he countenanced regulation. Above all, Mill was certainly ready to recommend legislative intervention in pursuit of the public 'weal'.

5. Mill and the Possibilities of Pornography Regulation

This Mill, one who nurtured an 'activist vision for the state'¹¹⁶, is rarely seen in contemporary discussions of pornography regulation. Take, for example, the contentious debates over 2008 legislation which criminalized, for the first time, the possession of 'extreme pornography' in England and Wales.¹¹⁷ During Government consultations on the proposed legislation, Mill was commonly invoked by those opposed to pornography regulation, and more particularly its criminalization.¹¹⁸ Moreover, as the Williams' Committee found, Mill is also frequently deployed by those more supportive of regulation, who appear tacitly to accept that, for good or bad, it is impossible to debate pornography without first paying due deference to the 'harm principle'.¹¹⁹ Current debate, focussing on prosecutorial policy and possible reform, commonly deploys Mill in similar fashion.¹²⁰ He may not have expressed a view himself on

¹¹⁴See, for example: Melissa Farley, "'Bad for the Body, Bad for the Heart": Prostitution Harms Women even if Legalised or Decriminalised' (2004) 10 *Violence Against Women* 1087 and Sheila Jeffreys, *The Idea of Prostitution* (1997).

¹¹⁵See further McGlynn, *op. cit.* n. 91.

¹¹⁶Reeves, *op. cit.* n. 24, at p. 293.

¹¹⁷For a detailed analysis of the legislation and discussion of the definition of 'extreme pornography', see Clare McGlynn and Erika Rackley, 'Criminalising Extreme Pornography: A lost opportunity' (2009) *Criminal Law Review* 245. For a comment on the ubiquity of Mill in these debates, see Paul Johnson referring to the 'common rendering of Mill's harm principle', in 'Law, Morality and Disgust: The Regulation of "Extreme Pornography" in England and Wales' (2010) 19 *Social and Legal Studies*, 147, at p.150 (reference omitted).

¹¹⁸The organisation Backlash was formed by a coalition of sexual freedom organisations to campaign against the proposed legislation. Its submission to the Government's pre-legislative consultation cited Mill's harm principle, available at <www.melonfarmers.co.uk/pdfs/backlash.doc>. Backlash also extracts various chapters of the Williams' Report on their website on the basis that the 'analysis is still of great relevance today': available at <http://www.backlash-uk.org.uk/wp/?page_id=174>. The Liberal Democrats, currently part of the Coalition Government, cite Mill in their policy papers. See, for example: *Censorship and Freedom of Expression—policy paper 63* (2004) at p. 4, available at <www.melonfarmers.co.uk/pdfs/libdem04.pdf> citing Mill as the basis for resisting regulation and a letter from Liberal Democrat MP Charles Kennedy of 23 October 2005 which draws on Mill and the harm principle as the basis for rejecting the proposals to criminalise possession of extreme pornography: available at <<http://www.melonfarmers.co.uk/argch05.htm>>.

¹¹⁹For example, many radical feminist respondents to the Government consultation implicitly accepted the dominance of both the harm principle and its standard interpretation as requiring evidence of direct, causal links between pornography use and sexual violence before any legislation could be justified. These submissions, therefore, sought to provide the empirical evidence of causal links by which to justify regulation. For an analysis of the responses to the Government consultation, see Clare McGlynn and Erika Rackley, 'Striking a Balance: Arguments for the Criminal Regulation of Extreme Pornography' (2007) *Criminal Law Review* 677.

¹²⁰For another recent invocation of Mill, to support an argument against an extreme pornography prosecution, see Nick Cohen, 'A Vindictive Persecution of an Innocent Man', *The Observer*, 12 August 2012, available at <<http://www.guardian.co.uk/commentisfree/2012/aug/12/nick-cohen-simon-walsh-cps-pornography-prosecution>>. On this particular prosecution, and the complex issues raised, see further Erika Rackley and Clare McGlynn, 'Prosecuting the Possession of Extreme Pornography: a misunderstood and misused law' (2013) 5 *Criminal Law Review* 400.

pornography, but in the continuing debate regarding the validity of pornography regulation, few people's opinions seem to matter more than Mill's.

Yet the curiosity remains that Mill declined to comment on, still less condemn, the 1867 Obscene Publications Act. Gertrude Himmelfarb ventures a reason why: Mill 'had no great liking for the more serious forms of social or sexual deviancy'.¹²¹ He did not approve of 'libertinism or sensualism' and, while greater sexual liberties and tolerance may have been implied by his 'harm principle', 'it is hard to believe... that it was for the sake of these liberties that he felt his doctrine to be urgently required'.¹²² Referring specifically to Mill's views on prostitution, Himmelfarb suggests that it may even be 'in spite of such sexual liberties, rather than because of them, that he advanced his doctrine'.¹²³ From a philosophical point of view, as we have already noted, Mill only ever imagined the freedom to pursue 'one's own good in one's way' as applying to the pursuit of higher pleasures; and sexual freedom was not included amongst these.¹²⁴ Likewise, when he advised the merit of 'experiments in living', Mill again imagined himself to be recommending the development of moral virtue and good character; not prescribing a charter for sexual libertinism.¹²⁵ Indeed, Mill lamented the 'perversion of the imagination and feelings' which resulted from 'dwelling' on sex. He shared the dismay of many contemporaries who imagined the development of their society to be hindered by an 'absurdly disproportionate' focus on the 'animal instinct of sex'.¹²⁶

It does not seem unreasonable to suggest, therefore, that Mill would have looked unfavourably on the emergent pornographic industry. Mill recognised that his valued pursuit of the higher pleasures was a 'tender plant', easily killed, and he might well have placed some blame for this on the increasing availability of pornographic materials. It is difficult to conceive that Mill would have seen pornography as contributing positively towards the development of society, or indeed as a necessary safety-valve to relieve male sexuality. He is more likely to have seen it as an unwarranted diversion from the higher pleasures and the development of good character. The predominant use and promotion of pornography by men may well have supported Mill's contention that sexuality is socially constructed by the dominant class. It may also have confirmed his view that men were able to pursue their sexual pleasures because of the dominant position they held in society. Finally, the fact that Mill drew close parallels between the dominance of men in society, and the prevalence and acceptance of prostitution, may have offered obvious parallels for a critique of pornography.

In this light, it likewise seems reasonable to suppose that Mill would have been as critical of pornography as he was of prostitution. The simple deployment of Mill, the quintessential 'liberal feminist'¹²⁷, into pornography debates can accordingly lead to the problematic assumption that his thinking is aligned to that of contemporary liberal feminists who either positively promote pornography or at least condemn its regulation.¹²⁸ In reality, it is highly unlikely that he would have shared such perspectives. As we have seen regarding prostitution, Mill's sentiments are far more closely aligned with what is today characterised as radical feminism. His criticism of men for feeding the demand for prostitution, his

¹²¹Gertrude Himmelfarb, *On Liberty and Liberalism* (1974) at p. 152. Himmelfarb is one of the few writers on Mill who examines the relationship between his personal life and philosophy as they relate to issues involving sexual liberties.

¹²²id.

¹²³id., at pp. 152-153.

¹²⁴*On Liberty*, CW vol XVIII, at p. 226.

¹²⁵Reeves, op. cit., n. 24, at p. 282.

¹²⁶Quoted in Mendus, op. cit. n. 62, at p 143.

¹²⁷Gray, op. cit. n. 3.

¹²⁸See, for example: Wendy McElroy, *XXX – a woman's right to pornography* (1995); Nadine Strossen, *Defending Pornography - free Speech, sex and the fight for women's rights* (1995).

promotion of abolition and his perception of women engaged in prostitution as exploited, all parallel radical feminist rather than liberal feminist perspectives on prostitution. For this reason, it is quite possible that he would be sympathetic to a more radical, feminist analysis of pornography which focuses its critical attention on the broad, societal consequences that flow from the glorification of sexual violence.¹²⁹

Equally, the argument that pornography might harm the autonomy interests of women may well have attracted his support. Dyzenhaus argues that the harm which might be inflicted on the liberty of some to enjoy pornography may be countered by the harm that this enjoyment inflicts on others whose interests are thereby diminished. Taking Mill's principle to be normative in that it concerns harms to autonomy interests, Dyzenhaus argues that 'governments must not coerce individuals unless their conduct is harmful in the broad sense that it includes prejudice to fundamental interests'. He concludes that 'all the arguments' written into *On Liberty* are, therefore, 'directed towards supporting the conclusion that among the fundamental interests of "man as a progressive being" is the interest in autonomy'.¹³⁰ This is a 'rich conception of harm' and one which moves to 'centre stage' the supporting principles of 'substantive equality and individual autonomy'.¹³¹

Accordingly, if pornography can be said to harm autonomy interests, then regulation is justified 'when the limitation is in the service of, and controlled by, the value of autonomy'.¹³² Such a reading of Mill can indeed 'justify considerable intervention and provision on the part of the state or well-placed individuals in order to give people the capacity for autonomy'.¹³³ Accordingly, if as Mill maintained, legislation intended to address alcohol abuse, spousal violence and the solicitation and pimping of prostitutes might be justified, there is no intrinsic reason why similar legislation intended to regulate pornography should not be as well. At this juncture, it is perhaps pertinent to recall that Mill's 'harm principle' was never intended to preclude regulation. He plainly stated that 'liberty is often granted where it should be withheld, as well as withheld where it should be granted'.¹³⁴

But what form might such regulation take? As in the case of prostitution, he is likely to have shared more radical feminist sentiments about pornography, in particular it being contrary to the public interest. A focus on curbing exploitation and, particularly, on the creation and distribution of pornographic materials for profit would have been likely. His condemnation of male violence towards women is also likely to have provided a particular focus on specific forms of material, such as violent pornography. In considering regulation, it is also important to recall the lessons which can be drawn from the 'applications' of Mill's 'harm principle', particularly his willingness to recommend the regulation of behaviour and activity which raise 'only' the risk of future harm. This suggests that far from the current prerequisite that there should be direct, physical evidence connecting pornography and sexual violence before any legislative intervention, Mill would have been amenable to the contention that preventative action should be taken now, so as to counter the risk of considerable future harm to society and to individuals.¹³⁵ Further, any precautionary action can be justified as being necessary to promote and protect the public interest, with the aim of preventing and deterring harm.

¹²⁹ See, for example: Julia Long, *Anti-Porn – the resurgence of anti-pornography feminism* (2012).

¹³⁰ Dyzenhaus, op.cit., n. 5, at p. 546.

¹³¹ Dyzenhaus, op. cit., n. 5, at p. 545, 550.

¹³² Dyzenhaus, op. cit., n. 5, at p. 549. For a similar argument, see Susan Easton, 'Taking Women's Rights Seriously: Integrity and the "Right" to Consume Pornography' (1995) 1 *Res Publica* 183.

¹³³ Bellamy, op. cit., n. 21, at p. 25.

¹³⁴ CW vol XVIII, at p. 302.

¹³⁵ For an argument justifying regulation on the basis of the 'cultural harm' of some forms of pornography, see McGlynn and Rackley, op. cit., n. 117.

6. Conclusions

In 1870, Mill advised an audience of campaigners for women's suffrage that the 'favourite sins' of government 'are indolence and indifference'. The responsibility of government is to address 'the great moral evils of society'; to aspire to 'raising the standards of morality' prevalent across society. Engaging the concerns of those who feared a 'general increase in meddling', he argued that 'there is wise as well as unwise meddling; well-directed as well as ill-directed benevolence; and there is a tendency in the present day to confound the two'.¹³⁶

In this light, the question of whether Mill would have recommended the regulation of pornography is perhaps not the correct question to ask. It would have been remarkable if he had suggested anything other. The more pertinent question is where he might have drawn the line. The new analysis presented in this article, drawing together Mill's ethical liberalism, his feminism and his views on sexual activity, does not reveal someone who advanced an abstract 'harm principle' which might be used to defend an absolute and untrammelled right to publish and peruse pornographic material. It may well be that current norms of sexual freedom promote neutrality; but, categorically, this was not Mill's approach. For Mill, the 'administration of criminal justice is one of the chief instruments of moral education of the people'.¹³⁷ As Mill confirmed:

'It would be a great misunderstanding of this doctrine to suppose that it is one of selfish indifference which pretends that human beings have no business with each other's conduct in life and that they should not concern themselves about the well-doing or well-being of one another, unless their own interest is involved. Instead of diminution, there is a need of a great increase of disinterested exertion to promote the good of others.'¹³⁸

Any reading of Mill which chooses to ignore such sentiments fails to do justice to the complexity of his thinking. Moreover, to admit a more multifaceted Mill is not to deny his liberalism. A liberalism which is more open to the complexity of human responses to pornography can be both pragmatic and progressive in offering a way forward when considering regulation. Indeed, as we have argued elsewhere, a liberal humanist approach founded on ideals of equality, humanism and pragmatism can provide a suitable foundation in cases such as this where the competing demands of liberty and wider social interest appear to collide.¹³⁹ Building on the ideas of Martha Nussbaum and liberal pragmatist Richard Rorty, this liberalism is driven primarily by a desire to craft a political morality that is both ethical in its conception and pragmatic in its application. Rorty urged a focus on real instances of injustice and suffering: justice as a 'practical goal', rather than based on 'abstract rights'.¹⁴⁰ This is why a liberal humanist approach, drawing on pragmatism, recognises, as a matter of practice, the need for a line to be drawn, whilst also appreciating that it is not one that should be traced in accordance with any 'comprehensive' theories.

For Nussbaum, ethics lie at the heart of her intellectual enterprise. In considering 'objectification', she argues that the instrumental 'treatment of human beings as tools of the purposes of another, is always morally problematic; if it does not take place in a larger context of regard for humanity, it is a central form of the morally objectionable'.¹⁴¹ Context,

¹³⁶ CW vol. XXIX, at p. 387.

¹³⁷ CW vol XXI at pp 104-105.

¹³⁸ CW vol XVII at pp. 276-277, discussed in Waldron, *op. cit.*, n. 4, at p. 25.

¹³⁹ Clare McGlynn and Ian Ward, 'Pornography, Pragmatism, and Proscription' (2009) 36 *Journal of Law and Society* 327-351.

¹⁴⁰ Discussed in McGlynn and Ward, *op. cit.* n. 139, at pp. 337-344.

¹⁴¹ Martha Nussbaum, *Sex and Social Justice* (1999) at p. 238.

therefore, is vital and may indeed differentiate various forms of objectification. The context, nonetheless, is that much pornography depicts ‘sexuality in a way designed to reinforce misogynistic stereotypes, portraying women as base and deserving of abuse, as wanting and asking for abuse’.¹⁴² Such pornography ‘threaten[s] core elements of a liberal society, elements on which citizens who otherwise differ in religion or comprehensive vision of life can agree’. In essence, much pornography, with its focus on ‘subordination, humiliation, and associated harms’, ‘directly conflicts with the ideas of equal worth and equal protection that are basic to a liberal social order’.¹⁴³

We suggest, therefore, that there is a strong, liberal basis for pornography regulation which, as well as drawing on the liberal humanism of Nussbaum and Rorty, can be founded on the thinking of John Stuart Mill. Far from him being the authoritative voice against regulation, we put Mill forward as the basis for developing liberal justifications for some forms of pornography regulation. We endorse, therefore, Rae Langton’s call for a renewed alliance between feminists and liberals in combating the proliferation of pornography, especially in its more violent and extreme forms.¹⁴⁴ As John Kang has observed, liberalism ‘need not be pornography’s indifferent observer or spineless sycophant: liberalism can be used to fight pornography’.¹⁴⁵

Ultimately, however, there is no trump card in debates over pornography regulation, Millian or otherwise. The debate remains one of competing values; about who has the power to define what is harmful, what is valued expression and what should be the role of the state. But even if not a trump card, for or against regulation, we can still learn from Mill. We can, for a start, learn not to be dogmatic. Mill was never dogmatic in his thinking; he embraced complexity and compromise. Among his reasons for supporting freedom of discussion was his view that ‘conflicting doctrines, instead of one being true and the other false, share the truth between them’.¹⁴⁶ He warned that ‘the general or prevailing opinion on any subject is rarely or never the whole truth’.¹⁴⁷ Nowhere is this advice more prescient than in the context of contemporary debates regarding the scope and limits of pornography regulation. The case for turning to Mill in order to resolve some of the sharper divisions which characterise this debate remains as compelling as ever. But it is to the subtle, accommodating and pragmatic Mill to whom we should turn, not the Mill whose caricature is commonly discerned in so much libertarian thought.

¹⁴²Martha Nussbaum, *Hiding from Humanity – Disgust, Shame and the Law* (2004) at p. 139.

¹⁴³ Id.

¹⁴⁴ Rae Langton, *Sexual Solipsism – philosophical essays on pornography and objectification* (2009) at p. 22.

¹⁴⁵John Kang, ‘Taking Safety Seriously: Using Liberalism to Fight Pornography’ (2008) 15 *Michigan Journal of Gender and Law* 1, at p. 2.

¹⁴⁶ *On Liberty*, in CW, XVIII, p. 252, discussed in Richard Reeves, *John Stuart Mill – Victorian Firebrand* Atlantic Books 2007, at 269-270.

¹⁴⁷ *On Liberty*, in CW, XVIII, p. 258.