

Mill's Radical Liberal Feminism

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I. Introduction: Subjection and Liberty

Some leading modern feminists express admiration for John Stuart Mill's feminist thought and make clear that he seeks equal rights for all. For example, Mary Lyndon Shanley points out that he advocates "spousal equality" within marriage, that is, the full equality under both law and custom of husband and wife with the aim of promoting "true friendship" between the sexes.² A marriage of equals is seen by him as a crucial step on the road to what he calls in *The Subjection of Women* and elsewhere a whole "society of equals" in which equal justice, understood as general security for certain vital human interests that ought to be considered as individual rights, is maximized in the sense that equal and effective protection is extended to the equal rights of all. He goes so far as to say that "the moral regeneration of mankind will only really commence, when the most fundamental of the social relations is placed under the rule of equal justice, and when human beings learn to cultivate their strongest sympathy with an equal in rights and cultivation."³ Given that the family is a crucial institution for transmitting moral norms to younger generations, spousal equality serves as an engine as well as a model for the widespread cultivation and diffusion of norms of equal justice within society at large.

What has not been so clear is how radical Mill's liberal feminism is. Even Shanley and other progressive scholars such as Carole Pateman, Maria Morales and Martha Nussbaum, who recognize that his feminist thought is radical in its pursuit of equal justice, do not, in my view, fully appreciate the radical implications for sexual relations and gender

identity of his doctrine of individual liberty as outlined in *On Liberty*.⁴ A central feature of that doctrine is his claim that a competent adult member of any civil society has a moral right to absolute liberty with respect to what he labels “purely self-regarding” conduct. My main aim is to underscore the implications of this unusual right, which protects individuals’ vital interests in individuality or self-development and in living their lives in accord with their own desires and judgments as long as they do not directly cause non-consensual harm to others.⁵ At this preliminary stage, I emphasize two points.

First, this particular right is not necessarily included in a liberal system of equal justice: it is possible to advocate equal rights for all without defending a right to absolute self-regarding liberty. Mill’s defense of individuals’ rightful freedom to take self-regarding actions should be seen as a crucial supplement to his defense of equal justice insofar as he is insisting on a right that is not commonly regarded even by liberals as an ingredient of equal justice.

Second, by “liberty” Mill means “doing as we like” and “act[ing] according to [our] own inclination and judgment,” keeping in mind that a person cannot do as he or she likes unless protected by right from other people’s coercive interference, including their force, fraud, manipulation and credible threats of same.⁶ Threats are evidently present if unchecked power is concentrated in the hands of others such as state officials or husbands, allowing them to dominate over, respectively, citizens and wives as well as children even in the unlikely event that no visible interference actually occurs: the vulnerable may reasonably be expected to adapt their preferences to their oppressive conditions if they aim to survive.

Mill argues in *Subjection* that “freedom [or liberty] is the first and strongest want of human nature [...] after the primary necessities of food and raiment.”⁷ True, he speaks of a rational and moral kind of freedom that is strongly desired by rational and moral agents:

When they have learnt to understand the meaning of duty and the value of reason, [mankind] incline more

and more to be guided and restrained by these in the exercise of their freedom; but they do not therefore desire freedom less; they do not become disposed to accept the will of other people as the representative and interpreter of those guiding principles. On the contrary, the communities in which the reason has been most cultivated, and in which the idea of social duty has been most powerful, are those which have most strongly asserted the freedom of action of the individual—the liberty of each to govern his conduct by his own feelings of duty, and by such laws and social restraints as his own conscience can subscribe to.⁸

Notice that there is no inconsistency between rational freedom and his definition of liberty in the *Liberty*: rational moral agents still do as they like, but they like to fulfill their duties to others without being forced to do so by external sanctions. Among the duties they voluntarily fulfill in accord with their judgment and desire is the duty correlative to other competent individuals' right to make whatever self-regarding choices they please. In the meantime, until all individuals have developed rational and moral dispositions, society must employ legal penalties and public stigma where expedient to prevent narrowly selfish and irrational people from failing to fulfill their duties to others.

I shall begin by outlining Nussbaum's helpful argument that Mill's feminist thought anticipates the central insights of modern radical feminisms without their serious defects. Her discussion provides a cogent summary of many of the reasons for admiring his radical liberal feminism. At the same time, she reiterates some common objections to his thought that need to be reconsidered.

II. Nussbaum's Analysis

Nussbaum claims that "Mill is the first great radical feminist in the Western philosophical tradition."⁹ She argues that "Mill's feminist

thought [...] is radical thought, both then and now, and it has deep affinities with the best in contemporary radical feminist thought.”¹⁰

According to Nussbaum, although Mill is in some sense a liberal, he should not be read as subscribing to “that dreary pabulum popularly known as ‘liberal feminism.’”¹¹ That pabulum is “a kind of formalism that mandates sameness of treatment no matter what the underlying realities are like” and that “focuses on public legal remedies, eschewing all interference with the so-called ‘private sphere,’ where desire and emotion are pervasively shaped.”¹² Such a liberal feminism is open to devastating objections since sameness of treatment under the law may perpetuate injustice when “entrenched hierarchies of domination and subordination” are already in place: “Even when laws treat people the same, one should not conclude that there is no injustice: for there may be a hierarchy in place, and sameness of treatment may perpetuate it.”¹³ If he were a liberal feminist of this legal-formalist sort, Mill would have to accept, for example, that laws forbidding marriage between people of different races or between people of different religions are duly ‘liberal’ since blacks and whites are treated the same in the one case just as Muslims and Christians are treated the same in the other.

But Nussbaum insists that it is a mistake to saddle him with such a legal-formalist view, which is a mis-characterization of genuine liberalism in any case. She argues that “Mill’s feminist thought [instead] [...] has close affinities with the central positive claims of radical feminist thought” as represented by Catharine MacKinnon and Andrea Dworkin.¹⁴ This may seem paradoxical since these modern radical feminists draw a sharp contrast between their radicalism and liberalism. But the paradox vanishes once we see that they wrongly depict liberalism in legal-formalist terms and tend to promote confusion to the extent that they misread Mill as a ‘liberal’ of this fake sort.¹⁵

Nussbaum makes a persuasive case that the legal-formalist view is a shallow popular doctrine that misreads genuine philosophical liberalism. After expressing her opinion that “Mill never endorses, or even comes close to endorsing, the key contentions of the legal-formalist view,” she

complains that the legal-formalist interpretation "goes wrong at the start by thinking of liberalism as a view that is in its nature and fundamental motivation insensitive to hierarchies of power."¹⁶ But, she continues, liberalism in fact has always acknowledged such hierarchies and made proposals to undo them.¹⁷ The real problem, acute in the patriarchy of Mill's day and still lingering even in our own day, is that "men who think they are liberals, and in some ways are so, refuse to carry their insights into the domain of gender." As she elaborates:

They are quick to see hierarchy in relationships based on class, caste, inherited wealth, even race, and to propose remedies for these traditional asymmetries. Gender, however, seems to them profoundly '*natural*,' and they are often unable to see conventional male-female relationships as characterized by unreasonable hierarchies.¹⁸

Her remarks capture Mill's view that even competent people can fall prey to the magical spell of custom such that, desiring nothing so much as to conform with prevailing public opinion, they identify what is uncustomary as unnatural: "The subjection of women to men being a universal custom, any departure from it quite naturally appears unnatural."¹⁹

Nussbaum claims that "Mill reveals the radical potential inherent in liberalism."²⁰ His liberal feminism is radical because he extends genuine liberalism's critique of unreasonable hierarchies into "the sphere of gender relations, asking for the full recognition of human rights and human dignity in these relations."²¹ Unlike people who consider themselves liberals but are blind to the despotism of custom in gender relations, "he asks liberal thought to be thoroughgoing and consistent, where it has been half-hearted and inconsistent." In her view, he is committed "above all" to the idea that "each person [is] an end in himself or herself," which is at the core of genuine liberalism: "The idea that the individual, not the group, is the locus of moral worth, and that all individuals are of equal and independent worth, not simply deriving their

worth from relationships to others, can be said to be liberalism's core normative insight."²²

Although he might not agree with Nussbaum's Kantian depiction of "liberalism's core normative insight," there is no doubt that, for Mill, liberalism and the promotion of general happiness both demand the removal of unjust hierarchies in gender relations.²³ He certainly believes that men's oppressive treatment of women as mere "means to male comfort and reproduction" is immoral and unjust as well as generally inexpedient. He argues that nothing but biased male intuition supports the view that women are legitimately subject to the power of men, or that women are domestic slaves by nature and not deserving of equal rights with men. But "nobody ever perceived a scientific law of nature by intuition, nor arrived at a general rule of duty or prudence by it."²⁴ The question of the place of women should be "open to discussion on its merits, as a question of justice and expediency" instead of being "prejudged by existing fact and existing opinion."²⁵ When decided on its merits using available scientific evidence, the subjection of women by men should be abolished: "legal subordination of one sex to the other [...] ought to be replaced by a principle of perfect equality".²⁶ Perfect equality is the general rule called for by justice and expediency: "The main foundations of the moral life of modern times must be justice and prudence, the respect of each for the rights of every other, and the ability of each to take care of himself [or herself]."²⁷

Nussbaum goes on to claim that Mill anticipates the best insights not only of MacKinnon–Dworkin "radical feminism" but also of two other main varieties of modern feminism, without buying into the "worst excesses" of any of them. The two other varieties are "difference feminism" as proposed by Carol Gilligan and Nel Noddings, and "queer feminism" as defended by Michel Foucault and his acolytes.

When discussing MacKinnon–Dworkin, for example, she points out that Mill rejects the traditional public–private distinction that long predates liberalism ("we can find it in Aristotle") and that holds that the public "realm of law and justice" is duly run by men whereas the private

realm of family and home is properly left to women to manage on behalf of the man using standards of love and care.²⁸ He is well aware that desire and emotion are shaped within the family and that their traditional shape supports and perpetuates male domination of women. As Nussbaum puts it: "Just as men have learned over time, and through the transmission of social norms, to eroticize domination, so women have learn[ed] to eroticize submission."²⁹

Indeed, as she emphasizes, Mill sees that men want women to be "willing" slaves and so have "turned the whole force of education" to that end, bringing women up "from the very earliest years" to believe that "their ideal of character is [...] submission" and that "resignation of all individual will into the hands of a man, [is] an essential part of sexual attractiveness."³⁰ This manipulation of women's "inner life of fantasy and desire" is a key insight of the radical feminists, she maintains, and his "astonishing" appreciation of it qualifies Mill as a great radical feminist, although she apparently remains puzzled how he could have gained such insight long before MacKinnon and Dworkin. She almost seems shocked that there can be brilliant and imaginative men who, being passionate for equal justice, repudiate the unjust social customs and practices of their day. In any case, a suitable national system of education is needed in practice to erode the culture of patriarchy and to promote sexual equality. In the meantime, and for a long time to come, law and justice must penetrate into the traditional private sphere to prevent or punish abuses of spouses and children.

Nussbaum leaves ambiguous whether the radical MacKinnon–Dworkin view makes blatantly excessive claims or, if it does, what those claims might be. She remarks that their radical view involves "a detailed critique of pornography" that Mill never pursues, for instance, but she is silent about the issue of a clash between freedom of expression and censorship of porn. Instead, she intimates that Mill fails to grasp that porn can contribute to "fantasies of domination and subordination, deep in the mental lives of both men and women, [which] conduce to the abuse of women."³¹ Yet she also maintains that

both Mill and the modern radicals lack an adequate “psychology of the emotions and desires” to back up assertions that pornography is a significant causal factor in the production of violence and other wrongs against women or men.

With respect to difference feminism, Nussbaum is clear that for Mill “there may indeed be innate gender differences, but we know nothing reliable about them.”³² Given that women are brought up in environments where their very desires are artificially molded by social norms that serve powerful male interests, we cannot soundly infer that men and women are inherently different creatures such that women typically think in terms of love, care and particular relationships whereas men focus on justice, rights, and universal moral rules. Indeed, Mill seems to believe that we can *never* soundly infer such a thing, although we might eventually have to accept it as an ultimate fact that psychology cannot explain. He holds that we have no way of getting behind appearances to discover any essential natures that might produce our attitudes, emotions, and behaviors. Talk of essences and innate differences is a delusion of metaphysics, he argues in *A System of Logic*. For him, words of this sort have no connotation.

Nussbaum presents a savage critique of difference feminism and holds that Mill would endorse such a critique. Innate differences would play no role in his radical liberal feminism except as a last resort in the face of the ultimate fact (if it turns out to be a fact) that men and women continue to display different kinds of moral sentiments and different ways of moral thinking when they “live on a basis of true social and legal equality.” But she also remarks that he “picks out the pearl of insight in the mire” by offering in his *Autobiography* “at least the beginning of an argument [based on his own case] that emotional development, of a sort that many men do not get, is a crucial element in human flourishing.”³³ According to her, “modern psychology” strongly supports his insight, “suggesting that male development is often emotionally stunted and that the consequences of this emotional illiteracy are quite bad both for the women these men love and for the men themselves.”³⁴

It might also be maintained that the emotional development of many women is stunted in certain ways, notably, in the cultivation of the moral sentiment of justice in the sense of equal protection for the equal rights of all, where protection demands due punishment of anyone (including a family member) who violates the rights of others. Mill actually suggests as much when he holds that married women tend to be preoccupied with protecting the particular interests of their families and rarely encourage disinterested conduct: "the consequence is that women's influence is anything but favourable to public virtue."³⁵

In any case, it is plausible to argue, contrary to difference feminism, that the flourishing of both men and women requires the cultivation of emotions of love and care together with the sentiment of justice. As Nussbaum stresses:

Mill is not a "difference feminist." He is something much better, a philosopher who knows how to think evaluatively about the contribution of emotions to life.³⁶

So while it duly appreciates the cultivation of moral and aesthetic sentiments in harmony with the development of reason and analysis, Mill's radical liberal feminism generally repudiates the essentialist claims of difference feminism.

Turning to "queer feminism," Nussbaum points out that Foucault, like Mill, attacks customary notions of "normal" or "natural" as pernicious sources of oppression:

Foucault shows how, time and time again, notions of the normal and the proper tyrannize over people, creating orthodoxies and banishing people who live and think differently. In the sexual domain, the tyranny of the normal has been particularly harsh toward gays and lesbians [and transgender people] [...].³⁷

But Foucault, in "the works for which he is most known [...]" is so suspicious of all norms that he typically advocates only acts of resistance to break their grip." By contrast, "Mill does not articulate his critique of the 'normal' in its rather extreme Foucauldian form, in which all norms

whatsoever are to be eschewed, even ethical norms, such as fairness, justice, friendship and love.”³⁸ Instead, although “he recognizes that such words can often prove the masks of a desire for domination,” he remains committed to “some definite norms” including “liberty, self-development and flourishing.” So, again, “Mill has the valuable insight without the regrettable excess.”³⁹ Indeed, according to Nussbaum even Foucault “seemed to move in a more Millian direction” in his “last works,” most of them published only after his death, “praising ancient Greek notions of self-cultivation and self-fashioning and condemning as repressive norms that prevent this sort of autonomous activity from taking place.”⁴⁰

However, despite her admiration for his anticipation of the valuable insights of leading varieties of modern feminism free of their defects, Nussbaum also registers some serious complaints about Mill’s feminist thought. One complaint is that he says things that cast doubt on his radical liberal credentials. She repeats the familiar charge that he is really concerned only to reform monogamous heterosexual marriage and is wedded to the traditional division of labor in marriage, where the husband earns the family income and the wife runs the household while looking after their children on his behalf. As she points out, he does not even make use of “the best insights of *On Liberty*” in his *Subjection* discussion: “such obvious ‘experiments in living’ as asking men to do some of the washing up and to change a baby’s diaper are not even mentioned.”⁴¹ This makes Mill seem a conservative who largely endorses the traditional public–private dichotomy, even if, as Nussbaum admits, he insists not only that women must have the vote but also that public law and justice must intervene in the private sphere to prevent or punish abuses within the family. It also contributes to a received view that he is a vacillating and inconsistent thinker who pays empty lip service to irreconcilable ideas.

A second complaint, closely-related to the first, is that he is overly cautious insofar as he does not draw out and clarify the practical implications of his radical liberalism in the sexual domain. “What *Subjection* should have had, its modern feminist reader feels, is an

institutional chapter asking what sorts of new rules for marriage, and what alternative lifestyles, what "experiments in living," this argument concerning the hierarchy of the sexes might suggest."⁴² Admittedly, modern feminists have stepped in where he failed to tread by making use of "the ideas of *On Liberty*, ideas of individual self-expression and freedom that are deeply woven into the 'radical' and 'queer' feminist movements, much though they would hesitate to call themselves liberals." But Mill himself, Nussbaum says, "sadly, fails to take this next step." As a result, *Subjection* "remains an excessively cautious work [...] because [it] stops short of imagining radical alternatives to dominant social norms in the areas of social division of labour, sexuality and the shape of the family."⁴³ Mill should have "pushed" his "'queer instincts' [...] much further" than he did.

It may seem plausible to dismiss these complaints on the grounds that Mill has different purposes in *Subjection* and *Liberty* so that there is no failure of the sort charged by Nussbaum. He is making the radical argument in *Subjection* that women deserve equal rights and opportunities with men and does not want to distract readers by bringing in the separate queer argument in *Liberty* that competent adults of both sexes should have complete liberty to arrange their private affairs with one another as they please: "One could try to say that *Subjection* is already such a shocking work [...] that he avoids making it yet more shocking by tying his critique to radical changes in the family."⁴⁴ But Nussbaum rejects this attempt to explain away what she considers his failure to apply the insights of *Liberty* to the argument of *Subjection*. Instead, she conjectures that the supposed failure arises because he and Harriet have "a deep attachment to conventional respectability."⁴⁵ Perhaps he disapproves of alternative lifestyles such as same-sex marriage, she says, and so does not even follow Bentham in openly ridiculing meddlesome laws against homosexuality: "he probably found homosexual relations shocking and off-putting, and simply did not wish to talk about them, much though his argument [in *Liberty*] tells in favour of their decriminalization."⁴⁶

Although her discussion of Mill's feminism is generally fair-minded and in many ways enlightening, Nussbaum's complaints are misplaced, in my opinion, and her conjectures about his character should be discounted. Mill's purposes in *Subjection* and *Liberty* really are different and yet his overall argument remains consistent. He concentrates in *Subjection* on remedying the injustices to married women under an oppressive patriarchal regime. Keeping in mind his sustained work to extend the franchise to women, which largely remains in the background, his chief purpose in this work is to get rid of coverture and associated devices that facilitate male domination and female subordination.⁴⁷ The goal is to reform the existing law of marriage in the direction of a rule of perfect equality, a rule whose implications are straightforward. At the same time, he does not fail to apply the lessons of *Liberty*, provided we appreciate that its main lesson is the moral right of absolute liberty with respect to self-regarding conduct. He indicates in *Subjection* that the parties to a marriage contract should in principle have complete liberty to structure their roles as they please within rigid rules of equal justice; it is up to them to freely decide on the arrangements, including the division of labor, in a marriage of equals. More generally, consenting adults should be free to pursue experiments in living as they desire and judge best for themselves, short of causing direct and immediate non-consensual harm to others.

The upshot is that Mill's radical liberal feminism is deserving of even more admiration than Nussbaum bestows upon it. In referring to his radical thought, I employ "radical" in a broader sense than she usually employs, although her usage vacillates. Whereas she often restricts the term to the MacKinnon–Dworkin variety of feminism so that "radical feminism" is distinct from "queer feminism," radical feminism as I understand it includes the central queer insight that conventional norms of heterosexual marriage and gender identity are not legitimately seen as "normal" or inherently "natural." As a result, Mill's liberal feminism is seen as radical not only in the sense that it objects to unreasonable hierarchies of power in the domain of gender but also in the sense that it

guarantees complete liberty for competent individuals to engage in any sexual activities they please that do not directly cause non-consensual harm to others. Nothing is privileged as "natural" or "normal" for consenting adults in matters of sex, gender identity, and love. Nussbaum is unlikely to object to my extension of "radical." She at times also refers to "'queer' radicalism" and ties queer theory to "radical changes in the family."⁴⁸

III. Public and Private

As already mentioned, Nussbaum shows that Mill rejects the traditional notion that a man's home and family are his sovereign private sphere into which the state cannot legitimately intervene: "His critique of marital rape and domestic violence, in *Subjection*, is radical: it insists that what happens behind the doors of the family is political, is a matter of law, justice and equality."⁴⁹ Moreover, he clearly believes that women should have an equal opportunity to participate in the public sphere by having the vote and holding political office. Yet she also lends credence to the oft-repeated complaint that, for him, a married woman's proper place is in the home looking after her family, even though the woman deserves to have equal rights with her income-earning husband who ought to treat her as a peer instead of as a subordinate. And it is undeniable that Mill opines that the traditional division of labor is probably the best option for most married couples when support of the family depends on earnings.

True, Mill accentuates the theme of equal rights for spouses in the particular case of property rights: "The rule is simple: whatever would be the husband's or wife's if they were not married, should be under their exclusive control during marriage, which need not interfere with the power to tie up property by settlement, in order to preserve it for children".⁵⁰ But then he says:

When the support of the family depends, not on property, but on earnings, the common arrangement, by which the man earns the income and the wife

superintends the domestic expenditure, seems to me in general the most suitable division of labour between the two persons [...]. Like a man when he chooses a profession, so, when a woman marries, it may in general be understood that she makes choice of the management of a household, and the bringing up of a family, as the first call upon her exertions [...]. The actual exercise, in a habitual or systematic manner, of outdoor occupations, or such as cannot be carried on at home, would by this principle be practically interdicted to the greater number of married women.⁵¹

He apparently thinks that most women who marry genuinely want to have children and to manage the household, even if their desires are shaped to some degree by their preclusion from many outdoor employments under patriarchy. Although he stresses that women should have an equal opportunity to compete with men for all occupations, he claims that “the preference [is] always likely to be felt by the majority of women for the one vocation in which there is nobody to compete with them.”⁵²

Such passages are often cited by feminists as evidence for the charge that Mill cannot break free from the traditional view of the proper role of married women.⁵³ But we must be careful here. Two points in particular must be kept in mind when interpreting his statement that “it is not [...] a desirable custom, that the wife should contribute by her labour to the income of the family.”⁵⁴

First, when the marriage contract is unjust as it is under conditions of male domination, such a custom “enables [the husband] still farther to abuse his power, by forcing her to work [at an outside occupation], and leaving the support of the family to her exertions [as well], while he spends most of his time in drinking and idleness.”⁵⁵ Even if many husbands are not so selfish, “laws and institutions require to be adapted, not to good men, but to bad.”⁵⁶ The custom in question makes things worse for women oppressed by bad husbands under patriarchy.

Second, "if marriage were an equal contract, not implying the obligation of obedience" but instead guaranteeing the wife liberty to live apart from her husband (not necessarily divorce him) "on just terms" including due provision for the care of their children, and if she also had an equal opportunity to compete with men for "all honourable employments," then the custom "would not be necessary for her protection" and thus remains undesirable.⁵⁷

It is worth discussing further why Mill believes it is not a desirable *custom* that the wife should work at outside employment to contribute to the family income. When he states that the traditional division of labor is "in general the most suitable," he also emphasizes that the utmost liberty to deviate from it ought to exist: "the utmost latitude ought to exist for the adaptation of general rules to individual suitabilities: and there ought to be nothing to prevent faculties exceptionally adapted to any other pursuit, from obeying their vocation notwithstanding marriage; due provision being made for supplying otherwise any falling-short which might become inevitable, in her full performance of the ordinary functions of mistress of the family."⁵⁸ So he is not saying that it is desirable for middle- and lower-class married women (let alone rich women with property of their own) to be *forced* to take on the traditional role such that they ought to be punished by public opinion and perhaps even by law for engaging in outside employment. Spouses should choose whatever roles and functions they agree are most suitable for one another, with the understanding that as an empirical matter, most women who marry *do* wish to raise a family even if they would also like to work at outside employment, and that as a matter of prudence, most *ought* to accept the traditional role in the context of patriarchy where society's endorsement of that role protects them from still worse oppression if they find themselves attached to abusive husbands. More precisely, given that there is a custom under patriarchy that wives should stay at home raising the family, Mill is suggesting that in such a context most women should accept the custom as least dangerous to them even

though a numerical minority who choose outside work may be unfairly stigmatized as a result.

In this regard, Pateman properly calls attention to the long-standing view that marriage as traditionally conceived is not a typical contractual relationship whose terms and conditions are freely negotiated by the parties to the contract.⁵⁹ As she explains, marriage has traditionally been understood as an agreement to enter into an asymmetrical relationship that involves terms and conditions imposed by social authorities—lawmakers or religious leaders—on the parties. The parties themselves have no rights to establish their own terms and conditions as they wish. Under patriarchy, where most women have little choice but to marry in order to escape poverty or even to survive, the idea that they are freely consenting to an arrangement of male domination, or that they would freely negotiate and obey such unjust terms of marriage if they had equal rights with men in a society of equals, is without merit. Instead of being free to establish a genuine marriage contract with their partners, women in a traditional marriage are at least implicitly coerced to accept an unequal status with the men who gain ownership of them and their bodies, including in the term “coercion” the deliberate upbringing of women to blindly endorse the widespread custom that their “natural” role in life is subordination to their husbands.

Mill clearly rejects the unjust marriage contract that is imposed by society on women under patriarchy. Prior to marrying Harriet, he goes so far as to “put on record a formal protest against the existing law of marriage” because “it confers upon one of the parties to the contract, legal power and control over the person, property, and freedom of action of the other party, independently of her own wishes and will.”⁶⁰ He recognizes that he cannot legally divest himself of “these odious powers” but he makes “a solemn promise never in any case or under any circumstances to use them.” He says: “I absolutely disclaim and repudiate all pretension to have acquired any *rights* whatever by virtue of such [an oppressive] marriage [contract].”⁶¹

At the same time, he clearly endorses a just marriage contract whose terms are freely negotiated by the partners under conditions of equality. More than this, when he expresses his ideal of a marriage of equals, Mill stresses that spouses should not only have equal rights to set the terms of their contract but also equal rights to adjust, alter, and swap their respective roles and functions at their joint discretion:

What marriage may be in the case of two persons of cultivated faculties, identical in opinions and purposes, between whom there exists that best kind of equality, similarity of powers and capacities with reciprocal superiority in them—*so that each can enjoy the luxury of looking up to the other, and can have alternately the pleasure of leading and of being led in the path of development*—I will not attempt to describe. To those who can conceive it, there is no need; to those who cannot, it would appear the dream of an enthusiast.⁶²

In other words, they should be entitled not only to establish a fixed division of labor within the family but also to enjoy the self-regarding liberty to change the division as they desire and judge best for themselves. The importance of this self-regarding liberty is in addition to the demand for equal rights and similar levels of cultivation. Cultivated moral agents recognize that such liberty to do as one pleases is crucial even though they strongly want to exercise it by fulfilling their moral duties to one another. For Mill, in an ideal society of equals, people have developed characters that combine respect for liberty in this sense with the demand for equal justice. They refuse to tolerate the use of force or fraud to compel men and women to adopt preassigned "natural" roles and functions. Instead, they see roles and functions as fluid and contingent on circumstances and demand equal rights to freely determine which spouse takes the lead as circumstances change.⁶³

The priority assigned by Mill to self-regarding liberty explains why he rejects any custom that the wife must contribute to family income even under conditions of equal justice, where enforcement of such a

custom is not needed for the protection of women. The custom remains undesirable because it sanctions coercive interference with the liberty of the equal spouses to choose and alter their own roles and functions in the family as they please. It authorizes society to humiliate and stigmatize the wife if she does *not* choose outside employment. But there is nothing wrong with a spontaneous choice to stay at home and raise a family. At the same time, in light of his focus on liberty, Mill would not object to the husband taking over “the ordinary functions of the mistress of the family” if the spouses agree that the woman should earn the family income as sexual discrimination fades away. Nor would he disapprove if the spouses both wish to work at outside occupations and to share domestic duties, provided they make “due provision” to cover any shortfall in the care of their children by calling on grandparents, for example, or by hiring nannies, day care agencies, and the like.

Moreover, Mill is evidently disgusted that women are excluded from the vote and from virtually all honorable outside employments under patriarchy merely on the basis of sex. He laments that their personal happiness is often destroyed because they are denied any opportunity to earn income after they have raised a family and the children are gone. The freedom to pursue an occupation that engages the higher faculties is a principal ingredient of human happiness: “If there is anything vitally important to the happiness of human beings, it is that they should relish their habitual pursuit.”⁶⁴ Most women who marry may wish to raise a family but this should not preclude them from outside employment.

His focus on liberty leads us to consider in more detail the different public-private distinction, unrelated to the traditional one, which Mill endorses in *Liberty*. This is the gender-neutral distinction between a private sphere of “purely self-regarding” conduct and a public sphere of “social” (or other-regarding) conduct.⁶⁵

A competent person’s self-regarding actions belong to that person’s private sphere because they do not “directly, and in the first instance” cause any non-consensual harm to other people, where harm means any

form of perceptible damage such as physical injury, theft of property, damage to reputation, breaking a promise or contract, and so on but excludes mere dislike, that is, mere displeasure, disgust or contempt without any evidence of harm.⁶⁶ The self-regarding sphere is a private sphere in the sense that other people, including state officials, have no good reason to *coercively* intervene. They should not even consider such intervention but instead should recognize their moral duty to respect the competent agent's moral right to do as he or she wishes and judges best for himself or herself, a right that extends to voluntary groups of competent adults who freely consent to participate in jointly self-regarding activities. Others' mere dislike of any agent's self-regarding conduct *does* count in Mill's unusual utilitarianism, but not to the oppression of the agent: the others have a right to advise and warn the agent to alter his or her conduct, but the final decision must be left to the agent and, if he or she remains unpersuaded and wishes to persist in the disliked action, others have a right to freely avoid him or her as long as they do not "parade" their avoidance, that is, employ public measures such as boycotts and advertising in the media designed to marshal public opinion so as to coerce the agent to change his or her self-regarding conduct. Legal penalties and public humiliation as well as deceit, trickery, and manipulation to *force* the agent to cease his or her private conduct is illegitimate and immoral, unless it can be shown that he or she is incompetent and does not intend the consequences of the conduct that may be very harmful to self.

By contrast, society and the state have legitimate authority to consider and employ coercive interference with social conduct. Any person's social actions belong to the public sphere because these actions do cause non-consensual harm to others or pose a significant risk of doing so. A social action implicates the conflicting concerns of two or more individuals, and the conflict ought to be settled in some way thought fair and reasonable by popular majorities or their representatives including legislators and judges. Even so, there are at least two distinct ways of conflict-resolution. One way is to enforce "rigid rules of justice"

that prohibit the social action and require the agent to take some other action (or inaction) preferred by society. The second way is to enforce rigid rules of justice that give permission to compete so that winning competitors achieve results they want at the expense of losing competitors but without violating the losers' basic rights. Which of these ways is considered most generally expedient should only be decided after public discussion and deliberation that takes account of reasonable forecasts of each way's probable consequences for society. Women as well as men should have an equal opportunity to participate in these discussions, to vote, and to make a decision.

The first way of resolving conflict is evidently best in the context of social actions such as murder, theft, rape and other familiar crimes. Notice that the second way, which Mill says ought to be chosen for social actions such as speech and economic exchange, still involves coercion: the state as well as public opinion must discourage if not prevent unjust actions such as fraud and incitement to violence. But neither the state nor public stigma coercively interferes with the operation of the competitive "free" market for speech or trade itself, as long as speakers or traders do not violate others' rights. Still, the market does not permit competitors to experience liberty in the sense of doing whatever they please and being guaranteed of winning the result they want. Even if he takes prudent steps, a competitor may be a loser because others have superior skills or because circumstances change in ways beyond his or her control. Indeed, the "free" market system itself arguably involves an element of coercion insofar as the system permits winners to force their competitors to suffer losses, even if we cannot identify an individual winner who has caused and is responsible for an individual loser's failure. No rights are recognized not to suffer such losses, however, even losses so large that losers are driven into bankruptcy or deprived of an audience altogether. As Mill puts it, "society admits no right, either legal or moral, to immunity from this kind of suffering; and feels called on to interfere, only when means

of success have been employed which it is contrary to the general interest to permit—namely, fraud or treachery, and force.”⁶⁷

For Mill, coercion is legitimate and necessary to prevent injustice in the public sphere. The prevention of rights-violations is seen as essential to prevent a reduction in general welfare. Even though competitive markets may generate considerable social benefits such as more efficient allocation of resources and information that are thought to outweigh the harms suffered by losing competitors, these merely expedient kinds of net benefits can never adequately make up for injustice in the form of violations of basic rights. In cases of conflict, justice must always be secured first, only then can expedient policies legitimately be considered: “Justice is a more sacred thing than policy,” Mill affirms, “and the latter ought only to be listened to after the former has been satisfied.”⁶⁸ Of course, in an ideal society of equals where all are cultivated moral agents who voluntarily fulfill their duties correlative to other people’s rights, coercion becomes unnecessary because injustices never occur. In that ideal context, all can enjoy the liberty to do as they please with respect to all of their conduct, self-regarding and social.

It bears repeating that the moral right of self-regarding liberty, which ought to be recognized in every civil society and not only in an ideal society of equals, guarantees *absolute* independence from coercive interference so that the right-holder can take any self-regarding action he likes:

In the part [of his conduct] which merely concerns himself, his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.⁶⁹

Other moral rights do not, for Mill, guarantee such complete liberty. In a civilized society, for example, an owner is permitted to use his private property only in accord with certain terms and conditions of justice and expediency, including restricting one’s uses to those that are compatible with the like property rights of others, respecting any public easements established for the use of others, and so on. By contrast, in patriarchal

society, where an element of barbarism exists in the despotic relations between husband and wife, property rights are improperly conflated with rights to self-regarding liberty: the husband is wrongly permitted to treat his wife as he desires even if he directly causes non-consensual harm to her, and perhaps even kills her, since she is merely his property and he is thought to rightfully have absolute control over his property.

Mill calls attention to the special absolutist nature of the right of self-regarding liberty when he argues that it is in effect a generalization of the right of religious liberty. After remarking that it is on the “battle field” of religious belief “almost solely, that the rights of the individual against society [and its government] have been asserted on broad grounds of principle, and the claim of society to exercise authority over dissentients, openly controverted,” he goes on to say:

The great writers to whom the world owes whatever religious liberty it possesses, have mostly asserted freedom of conscience as an indefeasible right, and denied absolutely that a human being is accountable to others for his religious belief.⁷⁰

Even so, he points out, religious sects continue to be reluctant to endorse this right of religious liberty and have only been willing to tolerate other sects under certain conditions, more specifically, when the sects recognize “they had no chance of becoming majorities” and where “religious indifference, which dislikes to have its peace disturbed by theological quarrels, has added its weight to the scale.” Where a sect is in the majority, however, the danger of religious intolerance remains high: “Wherever the sentiment of the majority is still genuine and intense, it is found to have abated little of its claim to be obeyed.”

Among the “great writers” on religious liberty to whom Mill implicitly refers are Thomas Jefferson and James Madison. They both claim that the individual has a natural right to hold and express any religious opinions he or she finds compelling, short of harm to others; he or she should not be punished or disadvantaged or denied any civil rights or privileges for his or her convictions.⁷¹ As Jefferson asserts in *Query*

XVII of his *Notes on the State of Virginia*:

The legitimate powers of government extend to such acts
only as are injurious to others. But it does me no injury
for my neighbor to say there are twenty gods, or no God.
It neither picks my pocket nor breaks my leg.⁷²

Only if the person threatens to disturb the social peace by directly causing non-consensual harm to others under color of religion does government have legitimate authority to step in. Both thinkers apparently take for granted that anyone who conscientiously pays homage to his or her God or gods takes what Mill calls a purely self-regarding action, no matter the content of his or her religious opinions, because the Creator is a benevolent divinity that does not tolerate false religions that preach harm to others and that incite civil war for its own sake. Even so, unlike Locke whom they both admire, each of them extends complete liberty to atheism. Liberty for atheism can hardly be justified as the demand of a benevolent Creator, although such a Creator might not object to it since atheism does not advocate harm to humans or civil chaos. In any case, Madison and Jefferson in effect anticipate a moral right to complete liberty of self-regarding conduct while supposing that there is no necessary connection between morality and theology.⁷³

III. Purely Self-Regarding Sexual Liberty

The moral right of self-regarding liberty is of central importance for a full appreciation of the radical character of Mill's liberal feminism. The implications of this right are straightforward for sexual relations: competent adults can and should freely participate in any self-regarding sexual practices they please. The requirement that non-consensual harm must not be caused to others means that due precautions must be taken, including birth control measures to avoid creating children that couples do not want or cannot afford to raise, revelation of any infectious diseases prior to sex, disclosure of any marriage contracts with others, and so on. There is no reason for Mill to spell all this out in detail with illustrations: competent adults can figure it out for themselves. And the

choices of sexual activities made by consenting adults are virtually certain to vary across different people. Some may freely choose to participate in sado-masochistic sex or homosexual relations whereas others freely avoid these activities without “parading” their avoidance, for instance, and some may choose to have multiple sexual partners at any time whereas others settle down with a single partner for the foreseeable future. Everyone else, including government officials, has a duty not to coercively interfere so long as non-consensual harm is absent. The duty ought to be enforced by dictates of conscience and, where expedient, by law and public opinion in a just society.

Nussbaum is unhappy that Mill “fails” to tell us “what alternative lifestyles, what ‘experiments in living’” he prescribes in the domain of sexual relations.⁷⁴ “In *On Liberty*, where reference to same-sex relationships would have been apropos,” she complains, “Mill certainly does not talk about sexual experimentation, or different forms of sexual life.”⁷⁵ But such complaints as well as the criticism that he does not “call for the repeal of sodomy laws” are unwarranted in light of the clear implications of the right of self-regarding liberty. Also without merit is Nussbaum’s “conjecture that he probably found homosexual relations shocking and off-putting, and simply did not wish to talk about them.” There is not a shred of evidence for the conjecture and, in any case, it is irrelevant whether Mill liked or disliked homosexuality or other sexual lifestyles. Indeed, one of his main purposes in *Liberty* is to argue that people’s likings and dislikings are not the proper standard for determining whether an individual’s conduct is rightfully free from all coercive interference by others. The principle of self-regarding liberty does not depend on mere likings and dislikings, including those of majorities.

Mill does not need to approve of homosexuality: the only relevant point is that he implicitly prescribes absolute liberty to pursue a self-regarding homosexual lifestyle. There is no requirement to personally endorse all self-regarding actions such as gambling or consuming narcotics or getting drunk with other consenting adults. He stresses that

some self-regarding actions are foolish and pitiable, evidence of a poor character that the agent should take steps to improve. Moreover, he does not think that majorities must approve of self-regarding conduct to recognize that its absolute freedom from coercive interference is justified by the self-regarding liberty principle. Whether a majority approves or disapproves of homosexuality or of atheism or of getting drunk does not enter into the justification: all that matters is that the conduct does not directly cause non-consensual harm to others.

Similarly, it does not matter if Mill "finds polygamy personally abhorrent" even if Nussbaum is correct about this.⁷⁶ Even if most people find polygamy disgusting, competent adults and not just Mormons ought to have complete freedom to participate in such a group experiment in sexual living if all members of the group consent without force or fraud to the arrangement and no non-consensual harm is caused to others. What may trouble Mill is not consensual polygamy per se but rather the same oppressive features that infect monogamous marriage contracts under patriarchy, including coverture and the virtual impossibility of divorce. Under patriarchy, polygamous marriage contracts (like their monogamous cousins) are asymmetric contracts-in-perpetuity (that is, long-term irrevocable contracts) that turn women into permanent slaves. True, Mill argues that even equal contracts-in-perpetuity are unreasonable and should not be enforced by society.⁷⁷ But consistent with that he may believe that as long as all spouses are treated as equals and women can freely obtain divorces under reasonable terms and conditions, polygamous marriage should be completely free from coercive interference.

When the principle of spousal equality in marriage is combined with the principle of complete liberty in self-regarding matters, the practical implications for sexual relations are remarkably radical. Nussbaum is wrong to charge Mill with failure because he does not spell out for us "different ways of dividing household labour, of arranging for the care of children and the elderly, [and] of supporting the demands of same-sex couples for legal and emotional equality."⁷⁸ His principles clearly point

the way and competent adults are reasonably expected to imagine and choose for themselves how best to apply them in their own particular circumstances.

IV. Gender Identity

Although not discussed by Mill, the implications of his liberal feminist thought for transgender people are also straightforward. An individual has a moral right to be free from any gender identity imposed by society. Genders are cultural constructions that a society employs to constrain how anatomical differences between male and female sexes are to be interpreted in that particular society. But no individual should be forced to interpret their anatomy in ways dictated by others. Moreover, an individual has a right to transform his or her anatomy, assuming medical technology makes the transformation feasible, despite any risk of self-harm. The transgender person should also be free to live with and marry any other consenting adults who ought to be treated as equals, even if majorities disapprove and refuse to enforce transgender marriage contracts. The individual ought to be free to divide household labor and, more generally, to select family roles as agreed with their partners; and free to obtain divorce on reasonable terms as long as suitable arrangements are made to divide accumulated wealth, support any dependents, and so on.

Morales suggests that “Mill, like many contemporary radical feminists, worried deeply about the identification of women with their bodies and their sex/gender.”⁷⁹ In her view, “he would have advocated that women become ‘disembodied’ and ‘de-sex/gendered.’”⁸⁰ The idea seems to be that women would no longer be forced to identify with their anatomy or to conform to some artificial sexual role constructed under patriarchy: “The freedom that Mill sought for women is not the ‘freedom’ that being gendered *man* would entail, but rather the freedom to live *beyond* gender—a freedom that would liberate men as well.”⁸¹

It seems right to say that Mill would welcome a society of equals in which gender is of no significance for human happiness. But Morales

seems incorrect to claim that he would advocate that women become "disembodied." There is no reason to think that, in his view, humans should not take pleasure in their bodies or enjoy sex. Such a view is contrary to his explicit commitment to hedonism. It seems better to say that, for him, a competent individual has a right to conceive and pursue any self-regarding sexual lifestyle he or she pleases with other consenting adults. In an ideal society of equals where people are free from imposed gender identities, a competent person would cease to have any concern for gender because gender vanishes: it would become an empty concept of no significance for human happiness.⁸²

V. Conclusion: A Radical Liberal Feminism

Mill's liberal feminism is truly radical thought far in advance of his time if not our own as well. Nussbaum is on solid ground when she says that it "is still alive philosophically, and still provides valuable guidance."⁸³ As she argues, his feminist thought anticipates the central insights of modern radical feminisms without their crippling defects. More specifically, he consistently extends the liberal philosophical critique of unreasonable hierarchies into the domain of gender; he rejects the traditional public-private dichotomy associated with patriarchy and defends principles of equal justice and liberty; he dismisses as baseless the claims that men and women have different inherent natures and that each gender has its own "normal" personal lifestyle in the sexual domain; and he recognizes that men and women need to cultivate their feelings and emotions as well as their faculties of reason and intellect to become well-developed human beings in possession of an admirable moral character.

And yet, despite her copious praise, even Nussbaum underestimates just "how insightful, and how radical, a feminist Mill was."⁸⁴ For she fails to appreciate the importance he assigns to complete liberty in the sense of doing as one pleases with respect to self-regarding matters such as sexual relations. His principle of self-regarding liberty in combination with his rule of perfect equality for all carries practical implications that

are astonishingly radical and plain for all competent people to see and apply to their own circumstances.

Given that even Nussbaum and other progressive critics underestimate how radical Mill's liberal feminist thought is, it seems fair to dismiss the charge commonly made by all manner of critics that Mill is at bottom a conservative man who cannot fully break away from the traditional public-private view. As we have seen, he has powerful reasons for opposing a custom that married women should contribute to family income under conditions of male domination. He never backs away from the importance he assigns to self-regarding liberty of spouses to jointly choose a family structure that suits them, although he recognizes that this liberty is compromised for many wives who need protection from abusive husbands under patriarchy. He always remains committed to bringing about the conditions under which his ideal of a marriage of equals, and more generally of a society of equal justice, can be realized.

In closing, I want to register a sharp protest against the more specific claim, made by Nussbaum and others, that Mill and Harriet are properly seen as a conventional couple because they both express resentment at criticisms of their decision to marry, advanced by the likes of Mill's younger brother George: "To get this angry over the suggestion that perhaps they ought to have lived experimentally rather than conventionally betrays, I suggest, a deep attachment to conventional respectability."⁸⁵ But Nussbaum is wildly off-track here. It is disappointing to see her lend support to such nonsense.

The claim is that Mill and Harriet are keen to conform to prevailing public opinion because they both react so harshly to George's letters to Harriet and her son Haji, which were sent about a month after the marriage took place on 21 April 1851. In the letter to Haji (which has been lost although evidence from various other letters gives some indication of its contents), George apparently raises doubts that Harriet has acted in accord with her principles, although he admits that he does not know what her principles are. He presumed, he says elsewhere, that

she was against marriage in principle. This is truly an asinine presumption, and George either does not know or does not care why his expressing unsolicited criticisms based on it would be perceived as an insult by Harriet and John. The couple (whom Mill depicts as "one" in their principles) rejected the unequal terms and conditions of the marriage contract under patriarchy, and Mill took pains to make a public declaration that he would respect equal property rights instead of obeying the unjust laws and customs that gave him control over Harriet's property and person.⁸⁶ But the couple certainly celebrated the ideal of a marriage of equals. They acted perfectly in accord with their principles that spouses ought to be equal in rights and cultivation, holding similar opinions and purposes. Moreover, they exercised their rights of self-regarding liberty by choosing to marry one another rather than to live together as unmarried partners or to participate in polygamy or whatever; monogamous marriage was the option they jointly desired and judged best for themselves, and it was nobody else's business to protest or interfere. George's objections rudely expressed his mere displeasure at the marriage since he suffered no direct harm by it, and he could hardly expect his announced displeasure to be well-received. John and Harriet may well have hoped by their example to give some hint to others of how wonderful the marriage of a man and a woman could be, showing how much pleasure and happiness it could bring to equals deeply in love with one another.

Much more can be said to justify the couple's irritation at George's conduct in this matter. In his letter to Harriet, for example, George signs off by referring to her as "Mrs. Taylor" and adding in brackets "I can't forget the old name." He is content to deliver this slight to the woman whom his elder brother has just made Mrs. J.S. Mill. What seems to have really angered the couple, however, is the complete absence of any expression of "good feeling" let alone joy for their happy union. Instead, he complains that John did not directly inform him of the wedding before it took place, criticizes him for negotiating poor financial deals with his publishers, advises that it is past time for him to resign from the East

India Company, and so forth. Under the circumstances, Mill and Harriet are quite restrained in their letters replying to George (some of which may have been mere drafts never mailed), especially given that the brothers had already been on poor terms for years. Something might be added about Mill's cool relations with his mother and other siblings, but I must stop here.⁸⁷

Notes

The abbreviation CW refers to John Stuart Mill, *Collected Works of John Stuart Mill*, 33 Volumes, ed. John M. Robson (Toronto: University of Toronto Press, 1963-1991).

¹ I thank Sven-Ove Hansson, guest editor, for the invitation to contribute to this special issue on Mill. I am especially grateful to Molly Rothenberg, my wife, for her critical comments on an earlier draft. Responsibility for the views expressed is mine alone. jonriley@tulane.edu.

² Shanley 1998.

³ Mill, *The Subjection of Women*, CW 21:336.

⁴ Pateman 1988 and 1989. Morales 1996 and 2007. Nussbaum 2010.

⁵ For the details of my interpretation of Mill's doctrine of individual liberty, see Riley 2015. I draw upon my interpretation later in the main text of this article.

⁶ Mill, *On Liberty*, CW 18:226 and 260.

⁷ Mill, *The Subjection of Women*, CW 21:336.

⁸ Mill, *The Subjection of Women*, CW 21:336.

⁹ Nussbaum 2010, 138.

¹⁰ Nussbaum 2010, 143. As I will explain in due course, Nussbaum tends to depict "radical feminism" rather narrowly so as to distinguish it from "queer feminism." But I think that radical feminism properly includes a central aspect of queer feminism. Indeed, Nussbaum herself speaks at times of the radical nature of queer feminism.

¹¹ Nussbaum 2010, 143.

¹² Nussbaum 2010, 130.

¹³ Nussbaum 2010, 131.

¹⁴ Nussbaum 2010, 135.

¹⁵ Notice that it is an implication of Nussbaum's argument that the radical feminism of MacKinnon and Dworkin is closely related to a truly liberal feminism such as Mill's. Nussbaum also points out that MacKinnon's (1989) treatment of Mill is "far more nuanced" than the general critique presented throughout her work, and especially in MacKinnon (1987), of liberalism (mis)characterized in legal-formalist terms. Nussbaum 2010, 144, n. 5.

¹⁶ Nussbaum 2010, 133.

¹⁷ See also Nussbaum 1999. According to her, "any critique of liberalism that cannot be taken seriously as a criticism of Kant or Mill probably is not worth discussing." Nussbaum 1999, 57.

¹⁸ Nussbaum 2010, 133. Emphasis added.

¹⁹ Mill, *The Subjection of Women*, CW 21:270. On the human tendency to conflate what is customary with what is inherently natural, see also Mill, *Nature*, CW 10:373-402, and *On Liberty*, CW 18:213-310.

²⁰ Nussbaum 2010, 135.

²¹ Nussbaum 2010, 134.

²² Nussbaum 2010, 134.

²³ In light of his unusual utilitarianism together with his critique of "one person one vote," it seems doubtful that Mill would agree that the separate individual is "the locus of moral worth" or that "all individuals are of equal and independent worth." For him, it seems, moral value is located in the community and increases as individual members learn to relate to one another as bearers of equal rights, whereas the worthiness of any particular person, as well as the relative weight of his political voice, depends on his level of self-development in attaining an ideal moral character. Clarification of Mill's utilitarian liberalism is beyond the scope of this article. But see Riley 2010 and 2014.

²⁴ Mill, *The Subjection of Women*, CW 21:305. In *Utilitarianism*, Mill depicts Kant as a rational intuitionist but does not discuss whether Kant is a defender of patriarchy. He disputes Kant's alleged intuitionism

but not the content of his intuitive conclusions in so far as they reflect equal justice. CW 10:206-7 and 249. But, as Pateman argues, Kant does defend patriarchy by relying on a dubious sexual contract between men and women to voluntarily exchange use of their bodies as means while both of them remain equal persons. Pateman 1988, 168-82.

²⁵ Mill, *The Subjection of Women*, CW 21:275.

²⁶ Mill, *The Subjection of Women*, CW 21:261.

²⁷ Mill, *The Subjection of Women*, CW 21:328. In *Utilitarianism*, Mill argues that there is a natural utilitarian conscience or desire to do right that grows spontaneously—or would grow were it not obstructed and corrupted by manipulative political and religious élites for their own purposes—from the natural social feeling of unity with one's fellows, whether members of one's tribe, nation, or, when fully developed, of humanity at large. The natural utilitarian conscience is a sentiment that urges the protection of equal rights of a certain liberal content for all. For Mill, natural feelings survive analysis: unlike artificial feelings manufactured by rewards and punishments through laws of association, the natural feelings cannot be analyzed away such that they lose their vitality and power to motivate. CW 10: 227-33. See Riley 2017.

²⁸ Nussbaum 2010, 133-34.

²⁹ Nussbaum 2010, 135.

³⁰ Nussbaum 2010, 136-37, quoting Mill, *The Subjection of Women*, CW 21:272.

³¹ Nussbaum 2010, 137.

³² Nussbaum 2010, 139.

³³ Nussbaum 2010, 140.

³⁴ Nussbaum 2010, 140.

³⁵ Mill, *The Subjection of Women*, CW 21:329.

³⁶ Nussbaum 2010, 140.

³⁷ Nussbaum 2010, 140.

³⁸ Nussbaum 2010, 141.

³⁹ Nussbaum 2010, 141.

⁴⁰ Nussbaum 2010, 140-41.

⁴¹ Nussbaum 2010, 142.

⁴² Nussbaum 2010, 143.

⁴³ Nussbaum 2010, 131.

⁴⁴ Nussbaum 2010, 142.

⁴⁵ Nussbaum 2010, 143.

⁴⁶ Nussbaum 2010, 141.

⁴⁷ Coverture means that the husband and wife are a unity such that the wife is merely the property of the husband. For discussion of the husband's right to his wife's income, his right to her body (so that his rape of her was a legal impossibility), his right to treat her violently with near legal impunity, his right to imprison her against her will given the near-impossibility of divorce, his right of ownership of the children, and so forth, see Shanley 1989. For an indication of the horrific abuses of wives and children by brutal husbands who usually escaped with astonishingly light punishment even when committing murder, see the series of newspaper writings by Mill and his wife Harriet Taylor Mill relating to various cases in the police reports, as reprinted in CW, volumes 24-25. See also Morales 1996 and 2007.

⁴⁸ Nussbaum 2010, 141 and 142.

⁴⁹ Nussbaum 2010, 134.

⁵⁰ Mill, *The Subjection of Women*, CW 21:297.

⁵¹ Mill, *The Subjection of Women*, CW 21:297-298. – In an early unpublished essay, Mill supplies similar passages. He suggests that in well-off families that can afford to hire servants to do the housework and experts to educate the children, the wife should cultivate her aesthetic sentiments and occupy herself with the fine arts. In families that depend on earnings, he thinks it is fine for the wife to manage the household and to help educate the children by encouraging them to cultivate their feelings and emotions whereas the husband is responsible for earning the income. "It is not desirable," he argues, "to burthen [sic] the labour market with a double number of competitors" ("On Marriage", CW 21:43), a point also emphasized by his wife Harriet Mill (1851). By implication, if both spouses work at outside

occupations, their combined earnings are likely to be smaller than they expect and exceeded by the extra costs of hiring others to run the household unless the grandparents or others can be prevailed upon to subsidize or do that work.

⁵² Mill, *The Subjection of Women*, CW 21:300.

⁵³ See, for example, Pateman 1989, 129-31 and 214-18. She goes so far as to argue that Mill's endorsement of the traditional custom undermines his case for extending the franchise to women because they will not have opportunities to participate in "a wide variety of institutions, especially the workplace" and thus will not be able to develop the capacities needed to become "active, democratic" citizens: "Mill's failure to question the apparently natural division of labour within the home means that his arguments for democratic citizenship apply only to men" (Pateman 1989, 217). But her objection seems misplaced. Mill no doubt recognizes that suitable reforms of the national education system for young women as well as men, the opening up of external occupations for women, and giving the vote to women will be products of a long and gradual process. But there is no reason to think that these crucial reforms are incompatible with one another. Moreover, he has limited expectations that participation in political institutions will help to develop the impartial sense of justice required for effective democratic decision-making, and no expectation at all that participation in for-profit enterprises will help to develop it. For further discussion, see Riley 2007.

⁵⁴ Mill, *The Subjection of Women*, CW 21:298.

⁵⁵ Mill, *The Subjection of Women*, CW 21:298.

⁵⁶ Mill, *The Subjection of Women*, CW 21:287.

⁵⁷ Mill, *The Subjection of Women*, CW 21:298.

⁵⁸ Mill, *The Subjection of Women*, CW 21:298.

⁵⁹ Pateman 1988, 154-68.

⁶⁰ Mill, "Statement of marriage" CW 21:99.

⁶¹ Mill, "Statement of marriage" CW 21:99. Emphasis original.

⁶² Mill, *The Subjection of Women*, CW 21:336. Emphasis added.

⁶³ Remarkably, Pateman apparently denies the possibility of a marriage contract freely negotiated by equals. If I understand her correctly, she believes that a "sexual contract" between individuals for the use of one another's bodies is inseparable from the idea that one individual dominates whereas the other submits. For her, the very idea of "the 'individual' is a patriarchal category—The 'individual' is a man who makes use of a woman's body (sexual property); the converse is much harder to imagine" (Pateman 1988, 184-85). Even if homosexual men contract to marry one another, some form of subordination is constituted by the contract: "The buyer [...] contracts for jurisdiction over a masculine or feminine body and forms of subjection differ according to the sex of the body" (*Ibid.*, 231). As for a same-sex marriage contract between homosexual women, one of them must, it seems, be assigned a masculine gender to facilitate the requisite relation of domination. In any case, the implication is that under contract a marriage of equals is impossible and so is a society of equals: "A free social order cannot be a contractual order" (*Ibid.*, 232). Instead, according to Pateman, the logic of contract replaces marriage with short-term prostitution contracts: "A universal market in bodies and services would replace marriage [...]. Marriage would give way to *universal prostitution*" (*Ibid.*, 184, emphasis original). Moreover, it is a delusion to think that "'individuals,' and not 'men' and 'women,' would enter these contracts" so that "sexual difference would be meaningless." The individual buyer would have a masculine gender and "masculinity means sexual mastery," whereas the prostitute would be gendered feminine and femininity means sexual submission. Prostitution contracts would merely reinstate a capitalist patriarchy in which men are entitled to gain access to women's bodies and services at market prices. See also Pateman 1988, 189-218.

⁶⁴ Mill, *The Subjection of Women*, CW 21:339-40.

⁶⁵ Nussbaum recognizes that "there are realms of intimacy that, for Mill, law cannot or should not regulate" (Nussbaum 2010, 134). But she does not discuss this topic because, in her view, there is "no deep disagreement here" between Mill and radical feminists, "who themselves

typically defend at least some protections for intimacy.” It remains unclear and seems unlikely that Nussbaum has in mind the public-private distinction I go on to outline in the main text.

⁶⁶ Self-regarding conduct also does not directly and immediately cause any non-consensual perceptible benefits to others but this point is ignored for present purposes.

⁶⁷ Mill, *On Liberty*, CW 18:293.

⁶⁸ Mill, *Utilitarianism*, CW 10:255.

⁶⁹ Mill, *On Liberty*, CW 18:224.

⁷⁰ Mill, *On Liberty*, CW 18:222.

⁷¹ Mill explicitly disavows any reliance on a theory of natural rights and says that he regards “utility [in the largest sense] as the ultimate appeal on all ethical questions.” *On Liberty*, CW 18:224. This includes the question of which claims of a human being ought to be seen as his or her basic moral rights. As he explains, “I can give [...] no other reason than general utility” for why society ought to distribute and sanction rights to individuals. *Utilitarianism*, CW 10:250.

⁷² Jefferson 1984, 285. Similar views are stated by Madison (1902) in his *Memorial and Remonstrance Against Religious Assessments* that helped defeat Virginia Governor Patrick Henry’s proposal to levy a general tax to provide support for teachers of all forms of Christian religion but not of non-Christian religions or atheism. Madison makes clear that absolute independence from state interference implies that government cannot legitimately punish or deny civil rights to an individual on account of his or her religious convictions. Madison and Jefferson also argue that religious sects should respect one another’s religious liberty, and Jefferson even tinkers with the idea that religious leaders and teachers should be required to swear oaths to that effect. But neither of them explicitly requires the state to ban coercive public humiliation of any sect.

⁷³ Some commentators such as Munoz (2003 and 2009) emphasize dissimilarities between Jefferson’s and Madison’s understandings of religious liberty, and between their understandings and those of other

leading members of the founding generation such as Washington. But the general agreement between Jefferson and Madison, while not perfect, is overwhelming, in my opinion. It is not quite right to argue as Munoz does that Madison defends "a principle of state non-cognizance of religion," for example: government must have authority to declare that religions that involve intolerance and non-consensual harm to others (such as human sacrifice to appease God or gods) are false religions that are properly suppressed. Still, Munoz is right to point out that Jefferson, unlike Madison, defends "a wall of separation between church and state" such that even Christian ministers are banned from holding political office or teaching in public universities because religious sects have allegedly contaminated acceptable tenets of human morality (such as those preached by Christ himself) with mystical theological dogmas that needlessly provoke religious conflicts. According to Munoz, Madison thinks that Jefferson is being inconsistent here because such bans amount to a denial of civil rights and imply that government must be cognizant of who is an active religious leader. But all turns on whether the churches with their theological differences are seen as posing a threat of civil disturbances and provoking non-consensual harm to others, as Jefferson apparently believes. Madison may disagree with Jefferson about the present danger and yet endorse the principle that false religions that advocate intolerance and violence should not be tolerated. Separately, it is implausible to claim, as Munoz and others do, that for Madison, unlike Jefferson and Locke, the right of religious liberty is the sole inalienable natural right. But further discussion of this literature would take us too far afield.

⁷⁴ Nussbaum 2010, 143.

⁷⁵ Nussbaum 2010, 141.

⁷⁶ Nussbaum 2010, 141.

⁷⁷ For further discussion, see Riley 2018.

⁷⁸ Nussbaum 2010, 143.

⁷⁹ Morales 2007, 64.

⁸⁰ Morales 2007, 64-65.

⁸¹ Morales 2007, 65, emphasis original.

⁸² Pateman also rejects the idea that women should be viewed as disembodied selves. But she apparently believes that a free society of equals in which gender has no significance is impossible if marriage is a contractual relation (Pateman 1988, 206-7). It remains unclear whether the possibility exists when marriage is a non-contractual relation or, if so, what form of non-contractual arrangement does the trick, so to speak.

⁸³ Nussbaum 2010, 144.

⁸⁴ Nussbaum 2010, 144.

⁸⁵ Nussbaum 2010, 143.

⁸⁶ Mill, "Statement of marriage", CW 21:97-99.

⁸⁷ For the available letters making up the correspondence between Mill, Harriet, George, and other members of Mill's family, see Hayek 2015, 162-76, including the references cited there.

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