MILL ON SLAVERY, PROPERTY RIGHTS AND PATERNALISM

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INTRODUCTION

The last chapter of Mill's *On Liberty* bears the title "Applications" and includes several examples of the limits to individual freedom. One of these is that, "The principle of freedom cannot require that [a person] should be free not to be free", because:

> In this and most other civilized countries, for example, an engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void; neither enforced by law nor by opinion. The ground for thus limiting his power of voluntarily disposing of his own lot in life, is apparent, and is very clearly seen in this extreme case. The reason for not interfering, unless for the sake of others, with a person's voluntary acts, is consideration for his liberty. His voluntary choice is evidence that what he so chooses is desirable, or at the least endurable, to him, and his good is on the whole best provided for by allowing him to take his own means of pursuing it. But by selling himself for a slave, he abdicates his liberty; he foregoes any future use of it, beyond that single act (CW, XVIII, 299).

This passage has sparked a lively debate on the extent of Mill's paternalism and its coherence with other aspects of his thought. An inevitable aspect of this controversy is the position of those who believe that Mill is insufficiently paternalistic.

Although it is only one of many possible definitions of paternalism, Gerald Dworkin's is a good framework for this discussion:

> X acts paternalistically towards Y by doing (omitting) Z:
> 1. Z (or its omission) interferes with the liberty or autonomy of Y.
> 2. X does so without the consent of Y.
> 3. X does so just because Z will improve the welfare of Y (where this includes preventing his welfare from diminishing), or in some way promote the interests, values, or good of Y[1].

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[1] Dworkin (2002) goes on to cite possible distinctions between different kinds of paternalism which may be summarized as: hard or strong, versus soft or weak (the first type interferes with people's ends, the second with their choice of means); broad, versus narrow (the latter has to do with legal interference, while the former includes other kinds of social pressure); pure, versus impure (in the second case, paternalism interferes with a broader group than that which is supposedly being protected); and welfare, versus moral (here the

Dworkin's definition refers exclusively to interference with self-regarding conduct which has no effects, good or bad, on parties different than Y. In Mill's example X (society) would be paternalistic if and only if it impedes Y from voluntarily becoming a slave, for reasons exclusively concerned with Y's welfare. Dworkin suggested that Mill complements the standard utilitarian argument –the consequences of going into slavery, albeit voluntarily, are bad– with another which esteems the "absolute value of the choice itself" (1997, 73). At stake are not only the consequences of decisions but the continuing autonomy of the person who decides. He concluded that the second line of argument can "allow on its own grounds a wider range of paternalism than might be suspected" (ibid.).

C. L. Ten proposed another understanding of the example. "Mill's argument is unclear", because Mill defends the liberty of contract, which 'allows us to give up part of our freedom' when we assume binding obligations" (1980, 117). The act of an individual who freely engages to become another's slave is a kind of contract. However, this particular contract is different from any other, because it is irrevocable and because it eliminates any possibility of future choice about a change in status by the willing slave –that is to say, his return to freedom. Such a contract implies that he is not longer a person before the law. The problem would be different, in Ten's view, if the duration of servitude was limited, and if at given intervals the voluntary slave had the option of recovering his lost liberty. "For although the individual would still be giving up his freedom, the contract will not be radically different from other freedom-limiting contracts… [T]he argument I have suggested on Mill's behalf does not prohibit a person from voluntarily becoming a lifelong slave of another person. But it supports the refusal to give legal recognition to contracts for perpetual slavery" (ibid., 119). Ten's interpretation would sanction this instance of paternalism because of the very special circumstances it involves. In other terms, people have the right to make mistakes but they cannot relinquish the possibility of correcting them.

While Richard Arneson (1980) had no trouble accepting that Mill was antipaternalistic he affirmed that, "Mill's arguments even if successful in their own terms may be objectionable on grounds of fairness" (1997, 83), because freedom is a dangerous thing and not all individuals are equally equipped to deal with it. Liberty (that is to say, the absence of paternalism) has diverse effects on different persons. For the more able, freedom can have all the positive effects Mill attributes to it. For the least able there is a risk of

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distinction lies on whether the concern that motivates paternalistic interference has to do with the paternalist's moral principles or the welfare of its object).

its “making the worse off still worse off than they otherwise would be” (ibid, 87). Arneson considers that, even if we suppose that the capable would gain more than the incapable lose, making the least able bear the burden of a nonpaternalistic society is unacceptable.

An extreme position in this debate was taken by James Fitzjames Stephen in his early critique of *On Liberty*. Mill’s defense of freedom is simply immoral. In his words, “The main subject with which law is conversant is that of rights and duties, and all the commoner and more important rights and duties presuppose some theory of morals […] Perhaps the most pointed of all illustrations of the moral character of civil law is to be found in the laws relating to marriage and inheritance. They all proceed upon an essentially moral theory as to the relations of the sexes” (1997, 172-173).

MILL ON PATERNALISM AND SLAVERY

A curious aspect of the debate on Mill’s paternalism and the example of the voluntary slave is the omission of his strong and clearly expressed views on both subjects.

The issue of paternalism was not academic in his day. A substantial body of opinion considered that the evils of the unfettered market, of capitalism and of the rise of the market as the main social institution could be countered by a return to the hypothetical past: a more harmonic, humane, and hierarchical social order, where the social classes were tied by bonds of respect, obedience and protection. In this scheme of things, the wealthy provide for the material and spiritual welfare of the poor. It was, in short, a call for benevolent paternalism.

In 1845 Mill wrote an acerbic review of a book representative of this genre of progressive social conservatism, Arthur Helps’ *The Claims of Labour*. Its desideratum, he advanced, was a situation where the law obliged the haves to assure the sustenance of the have-nots, whether or not their labour could be profitably employed. He went on to cite two contemporary instances of this model: Russian serfdom and West Indian slavery. Thus,

> The relation sought to be established between the landed and manufacturing classes and the labourers, is therefore by no means unexampled. The former have before now been forced to maintain the latter, and to provide work for them, or support them in idleness. But this obligation never has existed, and never will nor can exist, without, as a countervailing element, absolute power, or something approaching it, in those who are bound to afford this support, over those entitled to receive it… [W]ith paternal care is connected paternal authority (CW, IV, 374).

Mill developed the point more fully in the *Principles of Political Economy*. The starting point of his discussion of the future of the working class was described by Lord Robbins as one of the "most outstanding pronouncements on the fundamental principles of classical liberalism" (CW, IV, XXVI). It is the contrast between what Mill called "the theory of dependence and protection [and that] of self-dependence. According to the former theory, the lot of the poor, in all things which affect them collectively, should be regulated for them, not by them […] The relation between the rich and poor, according to this theory (a theory also applied to the relation between men and women) should be only partly authoritarian" (CW, III, 759).

Mill objected to the paternalistic dependence theory on several grounds. The notion that relations between rich and poor would only be "partly authoritarian" seemed to him an unwarranted idealization. As was the notion that such authority would be wielded with unfailing benevolence. "All privileged and powerful classes, as such, have used their power in the interest of their own selfishness" (ibid., 760)[2]. He then applied the same principle to a more domestic context. "The so-called protectors are now the only persons against whom, in any ordinary circumstances, protection is needed. The brutality and tyranny with which every police report is filled, are those of husbands to wives, of parents to children" (ibid., 761).

Further arguments are given from the perspective of the putative beneficiaries of social and economic paternalism. The nature of the labouring class has changed –workers have learned to read newspapers, they discuss politics among themselves, they are no longer mentally in awe of the higher classes. They have progressed in intelligence and autonomy, and paternalism, no matter how well-meant, will become more and more intolerable for them. Mill here anticipates a central theme of *On Liberty*. The futurity of the working class depends on their lives being regulated by them, not for them.

Mill was an ardent and life-long opponent of slavery. While he did his best to objectively analyze the positive economics of that peculiar institution in the *Principles*, he concluded his comments by qualifying it as an "enormity", about which "more needs not be said here on a cause so completely judged and decided" (CW, II, 250). Mill's private correspondence is full of references to his abolitionist views[3]. These were

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[2] This text was published in 1848, the same year as Marx and Engel's *The Manifesto of the Communist Party*.

[3] When he learned that Lincoln intended to proclaim abolition Mill wrote to John Lorthrop Motley that, "no American, I think, can have received [these news] with more exaltation than I did" (CW, XV, 800). To Joseph Henry Allen he wrote that abolition was "not only the

the basis of his polemic with Carlyle on the "Negro Question", which concerned Mill's opinion that after emancipation the former slave-owners of Jamaica were trying to perpetuate slavery by other means (1850). Mill considered, in the *Autobiography,* his agitation against the Confederacy during the American Civil War to be one of the major achievements of his public life. It was in his own words a duty performed.

When he criticised this institution Mill probably had in mind two distinct types of chattel slavery: that which prevailed in Antiquity and the model current in his day[4]. Both had the essential features described by R. M. Hare, "slavery is, first a *status* in society, and secondly, a *relation* to a master" (1979, 105). But there were significant differences between the two models.

Ancient slavery was harsh, but it had some moderating features. Most slaves were the product of conquest and piracy. However, slavery could be the consequence of persons selling themselves (Mill's example), the sale of children by impecunious fathers, insolvency or legal penalties. Hence, there was some degree of ethnic and cultural identity between slaves and their masters. An ancient writer felt it necessary to advise slave-owners against excessive familiarity with their slaves[5]. Under Roman law, the head of household's *patria potestas* over wife and children was not very different from his authority over its slaves. The initial meaning of the term "emancipation" was the coming of age which freed a son from the domination of *patria potestas*. Ancient Greeks and Romans frequently manumitted their slaves and freedmen in Rome could easily attain citizenship. The institution of ancient slavery underwent a long decline and was gradually replaced by another form of servitude, serfdom. A milestone was Diocletian's prohibition of free persons selling themselves into slavery.

Modern slavery had a different nature and was a consequence of the discovery of America. After the initial ravages inflicted by Spanish conquerors on the indigenous population, many factors led to the import of Africans (captured by force) to supply the Western Hemisphere's needs for servile labour. Modern slavery was gradually abolished during Mill's lifetime. In the British Empire, the transatlantic slave trade was prohibited in

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removal of a stain but of a moral incubus, and is likely to be the starting point of a moral progress not inferior to the prodigious material expansion which will be hereafter dated from the annihilation of negro slavery" (CW, XVI, 974).

[4] Mill mentions both in chapter 5 of Book II of the *Principles.*

[5] The so-called Pseudo-Aristotle. The comedies of Aristophanes, Plautus and Terence yield similar evidence on the closeness between masters and slaves.

1807 and slavery as such in 1838. It required the Civil War to end to slavery in the United States in the 1863.

While the exit conditions of ancient and modern slavery were similar (manumission), entry conditions were different. Any member of ancient societies could in principle be enslaved, given certain circumstances. Modern slavery was inflicted on a specific group (blacks). The only manners of becoming a slave were being kidnapped in Africa or being born to a slave mother.

The crucial point is that modern slavery was based on a racial distinction and that it would have been unthinkable (and illegal) in Mill's day for a free person to sell himself into slavery. To use such an extreme example in order to explain the limits of individual liberty might be considered abstract hair-splitting with few, if any, implications for the question of when paternalism is warranted.

Ten's very plausible reading of the problem distinguishes between voluntary commitment to lifelong slavery and other kinds of engagements which temporarily limit a person's liberty. A form of temporary servitude did exist in Mill's time, under the form of coolie labour. Chinese and Indian workers contracted to work in less densely populated countries for a fixed term. At the end of the contract, they could return to their homeland or become settlers. Mill did not countenance this form of voluntary, albeit transitory, servitude. In a letter to Henry George on the issue of Chinese migration to the United States, written in 1871, he affirmed that:

> One kind of restrictive measure seems to me not only desirable, but absolutely called for: the most stringent laws against introducing Chinese immigrants as Coolies, i. e. under contracts binding them to the service of particular persons. All such obligations are a form of compulsory labour, that is, slavery: and though I know that the legal invalidity of such contracts does not prevent them from being made, I cannot but think that if… it were made a penal offence to enter into them, that mode of immigration would receive a considerable check (CW, XVII, 1654-1655)[6].

Was Mill's example entirely hypothetical? The rest of this paper will be devoted to an examination of Mill's conception of property rights as a social creation that can be limited by social convenience, and of marriage and

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[6] The main line of Mill's argument on Chinese immigration to the United States is that it should not be restricted as the negative effects on that country would be minimal, while he expected significant positive effects from the exposure of the Chinese workers to American values and society.

divorce as relevant to the issue at hand because of strong analogies to voluntary slavery.

THE LIMITS OF PROPERTY RIGHTS

Mill belonged to the utilitarian tradition, for which property rights are a social construct. Bentham, for example, held that property was the mere expectation of utility from a thing possessed[7]. For Mill, "private property, as an institution, did not owe its origin to any of those considerations of utility, which plead for the maintenance of it when established" (CW, II, 201). As the basis of property rights is social utility, their limitation can be justified on the same grounds, because "in the social state […] any disposal whatever of [property rights over anything] can only take place by the consent of society, or rather of those who dispose of its active force" (ibid., 200).

Property rights are heterogeneous. The essential element of private property is "the recognition [by society], in each person, of a right to the exclusive disposal of what he or she have produced by their own exertions, or received either by gift or by fair agreement, without force or fraud, from those who produced it" (ibid., 215).

That said, there are several types of individual property for which Mill considered exceptions might be made. Two of the most notable are land tenure and inheritance. Unlike the improvements made to it, land is not the product of human enterprise. Thus, "whenever, in any country, the proprietor, generally speaking, ceases to be the improver, political economy has nothing to say in defence of landed property, as there established"(ibid., 228). This argument was used by Mill to defend land reform. Mill did not question the right to bequeath; everybody has the liberty to dispose of his own wealth. However, he affirmed that the right to inherit, beyond certain limits, was not socially convenient[8]. Finally, there was slavery. For Mill, it came under the heading of things "in which no proprietary rights ought to exist at all" (ibid., 232).

In societies with market economies most property rights are derived from contracts, and another aspect of the discussion is the role of government in their regulation and enforcement. This is a practical matter as much as one of principle. As Hobbes' state of nature would demonstrate, public intervention (in the form of, say, codes and courts of law) is both

[7] See the discussion in the appendix of chapter IV of Cooter and Ulen (2002).

[8] In both cases, the social recognition of property rights over things of value whose existence had no relation with the productive activity of the owner were in Mill's opinion undesirable incentives and, for that utilitarian reason, inconvenient.

necessary for normal intercourse between individuals and a limit to their freedom.

In the example from *On Liberty* quoted at the beginning of this essay, Mill states that, “an engagement by which a person should sell himself, or allow himself to be sold, as a slave, would be null and void; neither enforced by law nor by opinion”. Independently of the moral questions raised by the decision of the once willing slave to renege on his contractual obligations by running off, it is the legal validity of such a contract that would give his master the right to enjoin public authorities to capture and bring him back, by force if necessary. Such was Roman law until the time of Diocletian.

The extent and nature of the general functions of government is analysed by Mill in the *Principles* and these include the enforcement of contracts, which is a mean of “giving effect to their own expressed desire” (CW, III, 801). But is any contract enforceable? In a prefiguration of the later example in *On Liberty*, Mill says that,

> There are promises by which it is not for the public good that persons should have the power of binding themselves. To say nothing of engagements to do something contrary to law, there are engagements which the law refuses to enforce, for reasons connected with the interest of the promiser, or with the general policy of the state. A contract, by which a person sells himself to another as a slave, would be declared void by the tribunals of this and of most other European countries (CW, III, 802).

A new issue is addressed: the “public good” or the “general policy of the state”. It should be noted that here that such policy is not necessarily paternalistic, in the sense of Dworkin’s definition. It can involve a genuine conflict between the private and public interests and government interference with conduct which is not purely self-regarding.

What could be understood as the public interest in prohibiting voluntary slavery? The last chapter of the *Principles* deals with the limits of laissez-faire; in other words, the reasons why government should intervene in social and economic affairs. A possible interpretation of Mill’s position is that government action is warranted in response to what contemporary economic theory calls market failures[9]. One is decision externality, which involves one person making decisions of behalf of another. If the former reaps the benefits while the latter bears the costs, the choice made will not necessarily maximise their joint utility and may be unfair. It is not a question of whether,

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[9] See the discussion in Pérez Salazar, 2003, chapter VII.

> the government should interfere with individuals in the direction of their own conduct and interests, but whether it should leave absolutely in their power the conduct and interests of somebody else... Whatever it can be clearly seen that parents ought to do or forbear for the interest of children, the law is warranted, if it is able, in compelling to be done or forborne, and is generally bound to do so. To take an example from the peculiar province of political economy; it is right that children, and young persons not yet arrived at maturity, should be protected so far as the eye and hand of the state can reach, from being over-worked. Labouring for too many hours in the day, or on work beyond their strength, should not be permitted to them, for if permitted it may always be compelled. Freedom, of contract, in the case of children, is but another word for freedom of coercion (CW, III, 952).

Mill also warns about contracts which bind an agent irrevocably, in perpetuity or for very long periods. This category includes voluntary slavery. When entering this kind of contract, that party cannot have sufficient information about what its consequences for her welfare will be in changing and unforeseeable circumstances[10]. No matter how rational the actor, a rational decision cannot be taken under conditions of uncertainty[11]. It is an extreme case of imperfect information. Mill's rationale is that,

> The practical maxim of leaving contracts free, is not applicable without great limitations in case of engagement in perpetuity; and the law should be extremely jealous of such engagements; should refuse its sanction to them, when the obligations they impose are such as the contracting party cannot be a competent judge of; if it ever does sanction them, it should take every possible security for their being contracted with foresight and deliberation; and in compensation for not permitting the parties themselves to revoke their engagement, should grant them a release from it, on a sufficient case being made out before an impartial authority (ibid., 954).

Surprisingly, Mill does not use voluntary slavery to exemplify the general principle, but "marriage, the most important of all cases of engagement for life".

[10] Amongst them the master's discretional interpretation of the contract in the future. The relation between the person selling himself into slavery and the buyer has an additional asymmetry. The former cannot unilaterally decide to return to freedom, while the slave-owner can always end the contract through manumission.

[11] In the sense of having no information about future events, as contrasted with risk (having at least some information about the probability of future events); this distinction was proposed by Frank Knight (1921).

MARRIAGE, DIVORCE AND THE CONDITION OF WOMEN

The analogy between slavery and the condition of women in his time came easily to Mill[12]. To cite but one example, he noted that democracy in America was marred by the fact that "the aristocracy of skin, and the aristocracy of sex, retain their privileges"[13]. The development of this analogy in *The Subjection of Women* with particular reference to marriage and divorce leads to the conclusion that Mill's position on voluntary slavery is anti-paternalistic.

His basic premise is explicitly so. "In practical matters, the burthen of proof is supposed to be with those who are against liberty; who contend for any restriction or prohibition either any limitation of the general freedom of human action or any disqualification or disparity of privilege affecting one person or kind of persons, as compared with others" (1869, 10).

The analogy will examined from three perspectives: the conditions of entry into marriage, the conditions of this relation as described by Mill and the conditions of exit (divorce).

For the purposes of discussion, it will be assumed that the entry condition –a woman's decision to marry– is voluntary. There is full and conscious assent on her part[14]. But in what sense is the decision free? Mill's answer involves two separate arguments. In the first place, generalised discrimination against women limits their access to education and to profitable employment. Unless a woman has exceptional circumstances (e.g., independent means) she has scarce possibilities of material sustenance outside of marriage. Secondly, what little education women do receive imparts a value structure that gives most of them the conviction that they are inferior to men and that marriage is their natural lot in life, indispensable for their personal fulfilment. As Mill remarked in a letter to Auguste Comte in 1843, "Jamais d'ailleurs des esclaves quelconques n'ont été si soigneusement élevés, dès la première enfance, dans la ferme croyance

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[12] The analogy was not original. Offen (2001) has traced it *Précieuses* of the 17th century, such as Madeleine de Scúdery. This tradition was continued by Montesquieu and Rousseau in the 18th century and had an important role in the redefinition of civil legislation during the French Revolution, before the Napoleonic reaction embodied in his Civil Code.

[13] In his review of Tocqueville's book (CW, XVIII, 55, note). The terms "slave" and "slavery" are used 70 times in *The Subjection of Women*. It is perhaps not coincidental that the first Spanish translation of this work was titled *La esclavitud de la mujer* –literally "woman's slavery" (1892, Madrid, Agustín Avrial).

[14] Of course, a woman can be compelled to marry, like a person can be coerced into becoming a slave. But in such a case the analogy to voluntary slavery is lost.

qu'ils doivent toujours être assujettis á d'autres hommes" (CW, XIII, 609)[15]. Systematically bringing up the lower orders (social or sexual) in the belief that subjection is good for them smacks of paternalism, but this is certainly not the kind of paternalism one could attribute to Mill.

His arguments do not suppose, however, that we are dealing with what Joel Feinberg termed "substantially nonvoluntary" choices, which might lead to the charge that he was a "soft" antipaternalist. Mill does not deny that a woman's decision to marry can faithfully represents her settled values and preferences[16].

The conditions of marriage for women entail the two essential features described by Hare: a status in society which implies the deprivation of certain rights and a subordinate relation to a master (1979, 105). Mill described her position as "not a forced slave but a willing one" (1869, 16). In Mill's Great Britain,

> the absorption [by the husband] of all rights, all property, as well as all freedom of action, is complete. The two are called "one person in law," for the purpose of inferring that whatever is hers is his, but the parallel inference is never drawn that whatever is his is hers; the maxim is not applied against the man, except to make him responsible to third parties for her acts, as a master is for the acts of his slaves or of his cattle… What is her position in regard to the children in whom she and her master have a joint interest? They are by law his children. He alone has any legal rights over them (1869, 27).

Such a marriage reduced a woman's status and subordinated her to a man. It was a contract which created property rights. A married woman's property, as a general rule, belonged to her husband; and he had over her some rights associated with the master's in chattel slavery –a major exception being the possibility of selling the slave.

The wife's subordination to her husband was often justified by arguments akin to the Aristotelic defence of slavery: as women are naturally inferior to men, it befits them to be under the custody of males. Mill's scathing rebuttal was based on the question of *cui bono*: who benefits? Imposed inequality benefits some at the expense of others. The position of

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[15] Comte's views on the equality of the sexes were less progressive than Mill's.

[16] See Arneson (1997, 97-98) for discussion of this point. According to Arneson's reading of Feinberg, choice would be substantially voluntary if and only if: the chooser is competent; the choice is not made under duress; the choice is not made under more subtle manipulation (such as posthypnotic suggestion); the chooser does not decide because of ignorance or mistaken belief about the consequences of his act; and the chooser is not under circumstances that temporarily distort his judgement. Soft antipaternalism accepts restrictions of individual liberty in the case of substantially nonvoluntary choices.

those who held that the proper occupation of women was housework and childrearing could be expressed as, "It is necessary to society that women should marry and produce children. They will not do so unless they are compelled. Therefore it is necessary to compel them". A parallel opinion was held by former slave-owners of the American South, "It is necessary that cotton and sugar should be grown. White men cannot produce them. Negroes will not, for any wages which we choose to give. Ergo they must be compelled" (1869, 25). This is clearly paternalism which is not altruistic and benevolent, although it may masquerade as such. It is a pretext for the exercise of self-interested exploitation.

Mill further sustained that the very asymmetrical nature of marriage could have negative effects even on the men whom it favours. Domination corrupts the character of both slave and master, of both husband and wife (when the conditions of marriage are unequal). "The almost unlimited power which present social institutions give to the man over at least one human being […] this power seeks out and evokes the latent germs of selfishness in the remotest corners of his nature […] offers to him a licence for the indulgence of those points of his original character which in all other relations he would have found it necessary to repress" (ibid., 31).

The exit condition of marriage is separation and divorce. In the case of the willing slave, there can be a change of mind regarding the convenience of his initial decision. Unless the master acquiesces to manumission, the only alternative is to escape. But the institution of slavery supposes that public authorities will do their best to capture him and return him to his master. A slave who opts for freedom without his master's consent is a criminal, because he disposes of another's property (his person) without the owner's permission. Mill underscored this aspect of the analogy between slavery and marriage (for women) in these terms: "If [the wife] leaves her husband, she can take nothing with her, neither her children nor anything which is rightfully her own. If he chooses, he can compel her to return, by law, or by physical force; or he may content himself with seizing for his own use anything which she may earn, or which may be given to her by her relations" (ibid., 28)[17].

Mill noted in *The Subjection of Women* that, excepting a small minority of the accommodated, legal separation was not a practical option for women; he declined to enter into a detailed discussion of divorce, which was even more difficult for them.

[17] The situation of men with regard to separation and divorce was, of course, something completely different.

In other writings, Mill made several explicit considerations on the subject. The earliest was a private essay written for Harriet Taylor, probably in 1832. The biographical context is important. Mill had met Mrs. Taylor the year before and they had fallen violently in love. According to Hayek, Mrs. Taylor obtained from her husband an experimental separation for six months in 1833 (1951, 49). This essay was probably written by Mill as part of an effort to persuade her to divorce her husband and with some expectation that she would actually do so[18].

> It is not to be denied by anyone that there are numerous cases in which the happiness of both parties would be greatly promoted by a dissolution of marriage… The arguments, therefore, in favour of the indissolubility of marriage are as nothing in comparison with the far more potent arguments for leaving this like other relations contracted by human beings, to depend for its continuance upon the wishes of the contracting parties[19] (1832, 69-74).

Mill was to return to the same issue in two major works –the passage of the *Principles* cited before, and the "Applications" chapter of *On Liberty*. In the latter, the interests of a third party are mentioned– those of the children born in the marriage that divorce would dissolve[20].

> If the relation between two contracting parties has been followed by consequences to others; if it has placed third parties in any peculiar position, or, as in the case of marriage, has even called third parties into existence… A person is bound to take all these circumstances into account, before resolving on a step which may affect such important interests of others; and if he does not allow proper weight to those interests, he is morally responsible for the wrong. I have made these obvious remarks for the better illustration of the general principle of liberty, and not because they are at all needed on the particular question, which, on the contrary, is usually discussed as if the interest of children was everything, and that of grown persons nothing (CW, XVIII, 300-301)[21].

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[18] In fact, Mrs. Taylor chose to remain married to her husband until his death in 1849. She married Mill two years later.

[19] Two valid reasons cited by Mill for divorce are "uncongeniality of dispositions" and a "strong passion conceived by one of the parties for a third person".

[20] The 1832 essay had also touched the subject. Mrs. Taylor had several children by her first husband.

[21] These words follow the voluntary slave example. The transition is made with the following statement: "The principle, however, which demands uncontrolled freedom of action in all that concerns only the agents themselves, requires that those who have become bound to one another, in things which concern no third party, should be able to release one another from the engagement: and even without such voluntary release, there are perhaps no contracts or engagements, except those that relate to money or money's worth, of which one can venture to say that there ought to be no liberty whatever of retractation".

CONCLUSIONS

The analogy between willing slavery and marriage and divorce helps to understand why Mill modulated his "extreme example" so carefully. Mill did not say that people should be forbidden to sell themselves into slavery; he said that such an engagement "would be null and void; neither enforced by law nor by opinion", and that the fact that it would cause them injury would be "sufficient reason for releasing them from [such] an engagement" (CW, XVIII, 299). Mill did not disapprove of marriage as such. A good part of *The Subjection of Women* is dedicated to praise of what that institution can be, at its best[22].

It is possible that the paternalism debate has addressed the wrong questions. What was at stake in Mill's example is not whether a prohibition of people's selling themselves into slavery should be considered as a restriction of individual freedom, but whether society should enforce the property rights created by this particular kind of contract.

Mill's discussion of the institution of marriage in his time, if the analogy with voluntary slavery is valid, suggests the conclusion that the former was the cause and consequence of restrictions of the individual liberty of one half of the human race. Women married in spite of the subjection it implied because they had precious little chance of choosing another plan of life. A biased education biased them towards marriage. Once married, they were placed in a condition of acute legal inequality. And the possibility of recovering their freedom, if this inequality led to harmful consequences for them, was severely restricted (because of applicable law, but also because of the social sanctions faced by women who sought divorce[23]).

In the debate on Mill's supposed paternalism, several conclusions may be reached. Dworkin's assertion that Mill in this example considered the "absolute value of the choice itself" is unobjectionable. This, after all, is the central theme of the third chapter of *On Liberty.* But to infer that this "allows on its own grounds a wider range of paternalism than might be suspected" probably goes beyond Mill's meaning and intent. If Mill's discussion of marriage and divorce is pertinent to voluntary slavery, several

[22] By all accounts, his marriage to Harriet Taylor was a very happy union.

[23] It is probable that one of the reasons why Harriet Taylor did not divorce her first husband in 1833 was the penalties that polite society would have imposed on her. Mrs. Taylor's friendship and subsequent marriage with Mill provoked the censure of many of their friends and even of Mill's immediate family. Hence the double condition: "neither enforced by law *nor by opinion*".

issues are addressed that do not fit in Dworkin's definition of paternalism. Amongst them are negative spillover effects on third parties (conflict between the willing slave's individual decision and the interests of society[24], as well as the undesirable consequences of slavery on the masters' character) and the fact that society is not obliged to enforce every property right created by private contract, even if the object of the contract is not in itself illegal[25].

Ten's argument that there is a difference between permanent and temporal servitude is also valid but insufficient. Mill would probably have objected to Ten's interpretation of his point of view on the grounds that it ignores the negative externalities created by servile labour in an economy where personal liberty is the rule. Enforcing coolie contracts –or any other form of slavery– would create distortions in the labour market which would be inefficient as well as unjust. More broadly, slavery in any form is inconsistent with the public interest of a free society. Again, the charge of paternalism does not meet the standards of Dworkin's definition, as third parties are involved.

For James Fitzjames Stephen, the "moral character of civil law is to be found in the laws relating to marriage and inheritance. They all proceed upon an essentially moral theory as to the relations of the sexes". Given this premise paternalism is not a problem. Stephen's "moral theory" is that women are inherently inferior to men. For Mill the issue of the equal capacity of women was not "moral" but empirical. Women never had a chance, he sustained, to prove their equality. The experience of the 20th century proved Mill right. In the realm of the creative arts, one of the best demonstrations of his thesis was the work of Stephen's niece, Virginia Woolf.

Perhaps the most interesting question in the debate is raised by Arneson's objection to Mill's antipaternalism on the ground of fairness. Giving people the freedom of experimenting with their lives, of making their own mistakes, will disproportionately harm those most prone to making mistakes. Mill was quite conscious of the problem, and made explicit mention of it in his discussion of paternalism in the *Principles*. Unlike Arneson, he considered the possibility that the paternalist may have (or, more probably, will have) ulterior and selfish motives. Paternalism easily degenerates into "freedom of coercion".

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[24] Mill pointed out that the restriction of women's liberty in marriage probably led them to have more children than they would otherwise; from the perspective of his Ricardian political economy, excessive population growth was seen as the fundamental cause of poverty. See the discussion in Pérez Salazar (2003, 105-107).

[25] Thus, gambling may be legal while gambling debts are unenforceable.

Mill had a more fundamental argument: people can, do and should learn from their mistakes, as he believed was happening with the English working class of his day. If they are not allowed to choose, they will not learn. Learning leads the "least able" (to use Arneson's expression) to improve their capabilities and thus the quality of the decisions they make. It also improves their qualities as human beings. Unlike Arneson, who posits that the least able will remain so, Mill contended that in the long term, considering men and women as progressive beings, antipaternalism narrows the gap between the more able and the less able and is thus fairer than paternalism. Mill's rationale here is close to Sen's emphasis on freedom and individual agency as essential to development[26].

This point was made by Harriet Taylor Mill in her 1851 essay, "Enfranchisement of Women":

> The agitation which has commenced is not a pleading by male writers and orators for women, those who are professedly to be benefited remaining either indifferent or ostensibly hostile; […] it is a movement not merely *for* women, but *by* them.

The difference between *for* and *by* is the essence of the Mills' antipaternalism. This distinction, also found in the *Principles*, recalls the definition of democracy given by Lincoln a few years later in the final sentence of the Gettysburg Address: a form of government which is not just "of the people" and "for the people", but also "by the people".

Was Mill a consistent antipaternalist? He made an exception regarding persons who have not reached the age of reason. This is the primitive sense of paternalism, and his advocacy of universal compulsory education is clearly paternalistic. A more troubling case from our perspective is another analogy proposed by Mill, between the immaturity of individuals and that of people, which he used to justify colonialism in the last chapter of *Representative Government* (CW, XIX).

[26] An agent, for Sen, is "someone who acts and brings about change, and whose achievements can be judged in terms of her own values and objectives, whether or not we assess them in terms of some external criteria as well" (1999, 19).

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