“In Harm’s Way: JS Mill’s Feminist Opposition to the Contagious Diseases Acts”

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Abstract

In 1871, John Stuart Mill appeared before the Royal Commission on the Administration of the Contagious Diseases. He opposed the acts because they violated the principle of the “security of personal liberty”, not just of prostitutes, their ostensible target, but potentially all women. However, Jeremy Waldron suggests that Mill’s stand poses a puzzle because the “Harm Principle” in On Liberty does not preclude curtailing some liberties to achieve a greater good. Waldron tries to resolve this puzzle by using the fact of Mill’s opposition to the Acts to probe more deeply Mill’s arguments in On Liberty. We take issue with Waldron’s position to argue that his puzzle only emerges if Mill’s commitment to women’s liberty in 1871 is treated as incidental to his 1859 view of liberty. Despite noting Mill’s commitment to women’s rights Waldron inexplicably avoids discussing Mill’s feminist principles and their importance for Mill’s political philosophy. In effect, Waldron’s argument becomes yet another instance of “writing out” feminism from mainstream political theory.

Much scholarly attention has been given to John Stuart Mill’s contributions to the development of feminist theory, especially his The Subjection of Women, first published in 1869. And his very public support for women’s voting and property rights is well known. Less well known is his public opposition to the Contagious Diseases Acts (CDAs), first established in 1864, and subsequently amended in 1873 and 1886. The CDAs were a series of legislative measures enacted by the British government in response to official fears that sexually transmitted diseases among army and navy personnel in the garrison towns were undermining the health and efficiency of the military (Smith 1971). Mill strongly opposed this legislation, so much so that he gave evidence before a Royal Commission set up in 1870 to investigate the workings of the acts (Packe 1954: 501-2). For what had begun in 1864 as a seemingly uncontroversial public health measure had by 1870 become a major political controversy (eg see Self 2003; Mort 1987; Caine 1982; Walkowitz 1980; Smith 1971). Mill opposed the CDAs because they took away “the security of personal liberty … almost entirely from a particular class of women intentionally, but incidentally and unintentionally, one may say, from all women whatever” (Mill CW XXI: 351). Mill well understood the preventive intent of the legislation, namely the spread of disease, but he did not accept the CDAs as an appropriate means to achieve that goal.

However, according to an argument developed by Jeremy Waldron this poses something of a “puzzle about the relation between Mill’s writings in On Liberty and his opposition to the Acts” (Waldron 2007: 16). The principle that Mill posited in On Liberty to protect liberty, namely the “Harm Principle”, seemingly allowed for infringements of personal liberty where the public good was concerned (Waldron 2007: 16). Yet in his testimony opposing the CDAs, Mill invoked the principle of liberty to justify that opposition, while at the same time maintaining that particular liberties could be curtailed in the interests of preventing harm. Waldron then posed the question of whether Mill had changed his mind or was simply being inconsistent as a result of the political exigencies of the day. Not accepting either horn of this

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1 All citations to Mill’s writings herein are to The Collected works of John Stuart Mill. Edited by J.M. Robson. 33 vols. Toronto: University of Toronto Press.
dilemma, Waldron opted for a third alternative, namely to reinterpret Mill’s discussion of the theory of the “Harm Principle” in the light of Mill’s position on the CDAs.

In this paper we take issue with Waldron’s approach, not so much because of his novel reinterpretation of *On Liberty* and the “Harm Principle”, but rather because in making his reinterpretation he effaces the feminism within Mill’s political philosophy. Waldron acknowledged that Mill had a strong commitment to women’s political rights, which for the purpose of his argument he described as feminist, but he treated this commitment as having only marginal importance for Mill’s political philosophy. It might be objected that while Mill supported women’s social and political rights this does not warrant them being described as feminist. Granted, the nature and extent of his feminism is contested, particularly within feminist scholarship, this does not alter the fact that in the context of his time his views on women’s rights “challeng[ed] core aspects of the masculinist ontology of his fellow liberals” (Jose 2004: 13) and amounted to throwing down the gauntlet to men’s political power. In that respect, it is quiet appropriate to talk of Mill’s feminism.

Hence after summarising Waldron’s “puzzle” we provide a brief sketch of Mill’s feminist views to establish that these formed a core part of his political philosophy. In our view Mill’s feminism was an inextricable part of his overall political philosophy. We then turn to Mill’s views on the CDAs and outline his position, noting his key objections and the principles informing them. With Mill’s perspective established we then examine Waldron’s argument that Mill’s stand over the CDAs and the apparent abandonment (in Waldron’s view) of the ‘Harm Principle’ as a sufficient justification for the state to curtail an individual’s personal liberty in the interests of the public good is a puzzling situation that must be resolved. However, Mill’s views in 1871 are only contradictory if one treats his commitment to women’s liberty as an added extra to the view of liberty presented in *On Liberty* in 1859. Waldron offers a solution to the puzzle, but only by sidestepping Mill’s feminism. In effect, he effaces it from Mill’s political philosophy. Waldron’s analysis is yet another instance of the “writing out” of feminism from the mainstream of political theory. Far from remaining true to Mill’s political philosophy Waldron places it in harm’s way, to its detriment.

**Waldron’s Puzzle**

Waldron asserts that Mill’s opposition to the CDAs is “intriguing and bewildering” because on the one hand “it brings together the author of *On Liberty* and the author of *The Subjection of Women* so that both can confront Mill the progressive”, and on the other hand, it creates a puzzle as to the “relation between Mill’s writings in *On Liberty* and his opposition to the Acts” (Waldron 2007: 16). The puzzle arises because one would not have expected the architect of the “Harm Principle”, developed explicitly in *On Liberty* as the principle to guarantee personal liberty, to have “condemn[ed] out of hand a legislative scheme like that of the Contagious Diseases Acts” (Waldron 2007: 19. Emphasis in original). Given that Mill’s “Harm Principle” allows for the state to curtail the rights and liberties of some citizens in order to secure the greater good for the whole of the society how can we account for Mill’s unequivocal opposition to this particular way of preventing the spread of sexually transmitted diseases? Waldron canvasses a number of possibilities: one, that in 1871 Mill had “changed his mind” from the view held in 1859; second, notwithstanding his philosophical views as expressed in On Liberty, “Mill just adopted a political position
that was inconsistent with his own (enduring) principles”; and third, that it might be possible to reinterpret the theory “set out in On Liberty … in the light of what we know about Mill’s deployment of it in this case” (Waldron 2007: 20). Rejecting the first two possibilities, seemingly without argument, Waldron opted for the third possibility.

However, reinterpreting Mill’s views has to be done carefully, he says, because “there is a bad way of doing it” that he regards as a “sort of originalism” by which we interpret Mill’s ideas in On Liberty “in the light of what else we know about an author’s politics” (Waldron 2007: 20-21). According to Waldron such an approach would operate in the following manner:

once we discover that Mill was opposed politically to the Contagious Diseases Acts we should adjust our interpretation of On Liberty to make that essay consistent with what we know about his politics. Thus if there are ambiguities in his views about when the state is allowed to intervene, we should perhaps interpret them more restrictively – in the light of his opposition to the Contagious Diseases Acts – than if we were reading On Liberty as a free-standing body of philosophical thought (Waldron 2007: 21).

Waldron rejected this approach because it “slights the fact that the theory … comes with credentials”, namely philosophical arguments, that presumably political intervention lacks. In “the case of a piece of political philosophy” like On Liberty, “we are only interested in the author’s doctrines to the extent that he can produce convincing arguments for them”, to the extent that “he can defend or argue for” them (Waldron 2007: 22). Thus the point of the exercise then becomes one of “consider[ing] whether Mill’s testimony before the Royal Commission deepens our understanding of what he is arguing for in On Liberty” (Waldron 2007: 22).

What can be gained suggests Waldron is a way of addressing one of the most common, and seemingly unanswerable, claims of those invoking the “Harm Principle” to justify restricting the rights or liberties of some in the interests of the many. By re-reading Mill’s arguments in On Liberty he aims to show that the Harm Principle is not exclusively about choosing between the liberty of some (ie seemingly discriminating against them) and achieving the security or good of the many. To the contrary argues Waldron, “the Harm Principle does not provide a basis for rebutting claims of discrimination” that might be made those affected by a particular policy (Waldron 2007: 41). Within On Liberty there is a concern, albeit “muted (although not absent)”, not just with the aggregate but with “the distribution of restrictions” (Waldron 2007: 38). Indeed, all other things being equal, Mill’s argument about liberty and the Harm Principle should be understood in terms of the latter “answer[ing] to concerns voiced in behalf of individuals not on behalf of liberty in the aggregate” (Waldron 2007: 41). Waldron reinforces this claim immediately in a footnote when he says that “this is very clear from the language Mill uses to formulate his principle” and then goes on to re-state the Harm Principle with stress on the parts that allegedly demonstrated Mill’s preference for individuals, namely “of any of their number” and “any member” (Waldron 2007: 41, n. 62).

Thus in terms of the possible solutions to the “puzzle” Waldron concludes that a satisfactory explanation need not rely on demonstrating an inconsistency between
Mill’s views as “expressed in On Liberty” and those before the Royal Commission, or on demonstrating that Mill changed his mind in the intervening years, or that it need “to resort to a crude originalist rewriting of Mill to reach this conclusion”. Reinterpreting the arguments in On Liberty in terms of “how of his Contagious Diseases intervention” enables us to demonstrate what “we should have been emphasizing all along”, namely

Citing the prevention of harm is not a way of rebutting concerns about a discriminatory or inequitably distributed restriction on liberty (Waldron 2007: 39).

If a particular piece of legislation produces an uneven distributive impact on people’s liberty then it is insufficient to cite the Harm Principle in its defence. Such legislative acts “deserve[,] the closest scrutiny” because it may well be the case that they are legitimising “prejudice and social apathy” in the form of “apparently respectable legislative campaigns” (Waldron 2007: 41). On our reading of Mill’s testimony Waldron would appear to have reached precisely the position that Mill actually put before the Royal Commission. The puzzle would appear to be less one generated by Mill’s opposition to the CDAs and more one peculiar to Waldron’s frames of reference – but we jump ahead. First it is necessary to say something about Mill’s feminism and then to provide a summary overview of his evidence before the Royal Commission.

**Mill’s Feminism**

In identifying some of Mill’s explicit feminist comments over the course of his life our intention is to emphasise their integration into his overall political philosophy. They were not momentary aberrations or the marginalia of his thought, but were an integral part of his overall political philosophy. Irrespective of the various criticisms of his feminism (eg see Jose 2004; Zerilli 1994; Di Stefano 1991; Gatens 1991; Tulloch 1989; MacKinnon 1987; Okin 1979) none dismiss the importance of his principled stand in the cause of women’s social and political equality. This was most explicitly expounded in The Subjection of Women, published in 1869 towards the end of his life. Its publication was something of a novelty for his contemporaries in that a man, well-known and widely esteemed as a philosopher to boot, had published a book-length critique of the legally sanctioned sexual basis for men’s social and political subordination of women. However, for Mill the subject matter was not novel. It had occupied his thoughts in various ways for most of his life, “from the very earliest period when [he] had formed any opinions at all on social or political matters” and it had only grown stronger “by the progress and experience of life” (CW XXI: 261). The centre of this view was that the principle “which regulates the existing social relations between the sexes” was wrong “in itself” and that “it ought to be replaced by a principle of perfect equality admitting no power or privilege on the one side, not disability on the other” (CW XXI: 261). His views, contradictory though they may have been on occasion, recognised that reforming the legislative basis for the relations between the sexes required more than legislation. It required changes to how women and men related to each other, to the long-entrenched habits of thought, and to the stereotypical turns of phrase that helped frame prevailing ideas about the natures and capacities of women (and men).

Mill gave a first inkling of this dimension of the problem in an early essay entitled Periodical Literature: Edinburgh Review published in the Westminster Review in 1824 where he noted that “the sentiments which the Edinburgh Review has put forth
concerning female character, are as little creditable to itself, and exemplify as
completely the characteristic malady of periodical literature, as any which we have yet
quoted" (Mill CWI: 311). At this stage Mill saw it as part of the writers’ hypocrisy as
what they might praise in the exceptional woman was not what they demanded of the
women that they married or sought for company. Similarly, in a letter to Thomas
Carlyle in October of 1833, Mill took him to task for using sexist stereotypes and
posed the question of “is there really any distinction between the highest masculine &
the highest feminine Character?” (Mill CW XII: 184, Letter 88. Mill’s emphasis). The
embedding of sexist stereotypes in language was an ongoing concern for Mill. In the
third and subsequent editions of A System of Logic (first published in 1843) Mill
inserted a footnote decrying the use of the masculine pronoun “to express all human
beings” because such use served to “prolong the almost universal habit of thinking
and speaking of one-half of the human species as the whole” (Mill CW VIII: 837, n.
51). In 1848 in his Principles of Political Economy Mill noted that it was “the signal
honour of Owenism and most other forms of Socialism that they assign equal rights,
in all respects, with those of the hitherto dominant sex” (Mill CW II: 209). For Mill
this was a matter of principle “intimately connected with all the more vital points of
human improvement” and he looked forward to a time when “the ideas and
institutions by which the accident of sex is made the groundwork of an inequality of
legal rights, and a forced dissimilarity of social functions, must ere long be recognised
as the greatest hindrance to moral, social, and even intellectual improvement” (Mill
CW III: 765). These “ideas and institutions” were part of what he termed in a letter in
1858 to an Australian correspondent, Henry Chapman, “the Toryism of sex” (Mill
CW XV: 557, Letter 313), a phrase echoed by three years later by that of
“aristocracies of colour, race and sex” (Mill CW X: 259). Indeed in the letter to
Chapman he chided him about how it was unfortunate that the Australians had take up
the term ‘manhood suffrage’ as it was a “vulgar and insulting expression” that “asserts
the exclusion of women as a doctrine, which is worse than merely ignoring them as
was done by giving the name universal suffrage to a suffrage limited to men” (Mill
CW XV: 558, Letter 313).

These examples taken from his writings spanning several decades indicate that his
views in The Subjection of Women were not a late-life epiphany leading to a tackled on
feminist sensibility to an essentially well-established liberalism. Rather, if anything, it
was his liberalism that was shaped by his sense of outrage that “an accident of sex is
made the groundwork of an inequality of rights”. The key here is his commitment to
the idea of “perfect equality” – a view that can be traced back to a very early age,
even before he met his future wife and collaborator, Harriet Taylor. In his
Autobiography Mill acknowledged the impact on his thinking of the ideas of Robert
Owen and the St. Simonians. Of particular interest here is his view that “in
proclaiming the perfect equality of men and women, and an entirely new order of
things in regard to their relations with one another, the St. Simonians in common with
Owen and Fourier have entitled themselves to the grateful remembrance of all future
generations” (Mill CW I: 175). While it is possible that he did not become familiar
with St Simonianism until around 1829 or 1830, he was certainly familiar with those
of Owenite and other socialists as he had debated them vigorously at meetings of the
Cooperative Society as early as 1825 (Mill I: 127). Among their number was William
Thompson, whose co-authored book published in 1825 with socialist and feminist,
Anna Wheeler, had taken Mill’s father to task over his views concerning women and
the franchise. As part of their critique of the prevailing gender order, they also
developed a powerful critique of the liberal utilitarian philosophy associated principally with Jeremy Bentham and the elder Mill. Both critiques rested on a view that “social happiness cannot breathe but in the air of equality” (Thompson & [Wheeler] 1825: 87), an equality impossible to achieve within any society in which its most fundamental social relations were shaped and sustained by “the continued practice of domestic caprice and despotism” (Thompson & [Wheeler] 1825: 87, 70). As Thompson made explicit in his “Introductory letter to Mrs Wheeler”, in effect the preface of the Appeal, the proper relationships between the sexes required not just “put[ting] the rights of women, political and civil, on a perfect equality with those of men”, it also required the abolition of “the present marriage code” and a cooperative society “founded on human benevolence … comprehending equally the interests of all existing human beings” to regulate them (Thompson 1825: xiii-iv. Emphasis in original). These themes are central to the Subjection. In particular, the idea of “perfect equality”, itself “a substantive ideal in nineteenth century socialist discourse” (Morales 1996: 42), took pride of place in the opening paragraph of the Subjection and set the standard for the argument’s that followed.

The above instances of Mill’s feminism demonstrate first, that (a particular range of) feminist ideas permeated his writings, and second that these were not simply a result of the influence of Taylor. However, it needs to be said that she was important for the sustenance and development of Mill’s commitment to a feminist outlook as well as to his philosophy as a whole, as Mill emphasised on more than one occasion (Mill CW I: 249 ff.; XVIII: 215). For many scholars Taylor’s influence on Mill’s thought has been seen as detrimental to his overall philosophical worth, either because Mill overstated her contribution, or because she was deemed to be of only marginal intellectual ability, or because her feminism unduly clouded his otherwise clear thought, or some combination of all three (Rossi 1970). Yet Mill’s ideas on liberty, equality and political community generally owe as much to his feminism, in particular to his ideal of perfect equality, as they do to other sources (Morales 1996). While we cannot pursue that particular issue in this paper it is clear that Mill’s feminist sensibilities were a significant and enduring feature of his political thought. They helped frame his thinking about abstract conceptual issues such as liberty, equality and justice, and featured in his application of those concepts to the practical policy issues of day to day politics. In appearing before the Royal Commission in 1871 Mill’s political philosophy as a whole, not just his feminist quirks, was brought to bear.

Mill on the CDAs
In presenting Mill’s testimony we want to stress that his political position rested on arguments that were no less philosophical than those he marshalled to support the politics of his position in On Liberty. One of the interesting aspects of Mill’s views in the context of a Royal Commission is that the mode of evidence meant that he was subject to cross-examination. It is in the nature of Royal Commissions that, despite the usual parliamentary rhetoric to the contrary, they are expected to serve the purposes of those who set them up, in this case the government that had nominal responsibility for the Acts. Consequently, Mill’s claims could not and did not go unanswered by the Commissioners. Hence he was obliged to defend those claims, not with “out of hand” dismissals” (pace Waldron 2007: 19), but with reasoned arguments.
Mill prefaced his testimony with an acknowledgement that he did not have a practical, working knowledge of the Acts, but that in his view this was not an issue of any consequence for his position. Throughout his testimony he made two things quite clear to the Commissioners. First, his opposition to the Acts was founded on principle, namely that the Acts were “opposed to one of the greatest principles of legislation, the security of personal liberty” (Mill CW XXI: 351). Second, the legislation was partial and discriminatory; it really only threatened the personal liberty of one particular class of persons: women. While he acknowledged that the purported targets of the Acts were women prostitutes, in his view the liberty of all women was threatened. He was questioned on this point by Mr Nathaniel Massey who put it to him that “The Act of Parliament in express terms applies only to common prostitutes, plying their trade within the protected districts.” In response, Mill argued that the Acts gave the police discretion that may well allow them to apprehend “modest women, or women at any rate not prostitutes.” The power to apprehend women on suspicion and have them examined was a power “liable to very great abuse” because, even if it was the case (as the Commissioners claimed) that no instances of abuse had been recorded, Mill argued that “when power is given that might easily be abused, we ought always to presume that it will be”, as such it was a power that ought not be given by such legislation (Mill CW XXI: 352). The potential for a policing power to be abused was also a point emphasised by Mill in On Liberty (Mill CW XVIII: 294-295).

Certainly, Mill accepted that the purported object of the Acts was to “protect the innocent from having these diseases communicated to them” (Mill CW XXI: 354). Having acknowledged this general object, he immediately identified the double standard of the rationale for the Acts. The beneficiaries of this particular legislation were to be the soldiers and sailors of the garrison ports since it was the alleged incidence of venereal disease within the garrison towns that prompted the legislation in the first place. As he pointed out to the Commissioners, the soldiers and sailors (and men clients in general) were not innocent victims, but complicit in their own infection insofar as they sought out and had, indeed paid for, connections with the alleged source of their disease. Consequently, argued Mill, if the government was serious about eradicating diseases of this sort then it would be better served to police the men (Mill CW XXI: 354). He noted that “the same system of espionage which is necessary to detect women would detect also the men who go with them” (Mill CW XXI: 354. His emphasis). However, he was not actually advocating “a system of espionage” because he did not “recommend the Acts at all” (Mill CW XXI: 363), rather he raised the idea of "espionage" to illustrate the one-side operation of the acts:

I am not suggesting espionage; but if it is already in practice on women who go to brothels, with a view of ascertaining whether a woman is a prostitute by her being seen there, I think the woman should not be singled out to be subject to examination, but the men should be subjected to it also, or even if the women were not subjected the men might be, but if the one is, certainly I should say both (Mill CW XXI: 362-363).

Here we see once again, Mill’s concern with the equality of treatment before the law, an equality clearly breached by the terms and operation of the Acts.

It was not just that the CDAs singled out a particular class of women, and only women, for arbitrary policing, for Mill these women were also denied due process
because a woman accused of prostitution had “no power to defend herself in the same manner as before any ordinary tribunal, and of being heard by counsel” (Mill CW XXI: 352). The Commissioners pointed out to Mill that women had a choice to submit voluntarily or if they objected to be brought before a magistrate and in that case would have the opportunity to be “heard by counsel”. Mill agreed that a voluntary submission to medical inspection on the face of it was not an infringement of liberty. He disagreed that the system of summary tribunals provided adequate legal protection for the women. Further, he argued, that “all the protection, which is necessary in other cases of judicial investigation, would be necessary in this”, because for a woman who was not a prostitute there could “hardly be any more serious case” than to have her reputation maligned by an accusation of being a prostitute (Mill CW XXI: 353).

Mill went on to argue that even if a woman submitted voluntarily to the medical inspections, the Acts were still objectionable because they provided before the fact protection against “the consequences of immoralities of any kind” rather than “remedying the consequences after they occur” (Mill CW XXI: 353). The effect would be for the government to sanction immorality, if not give its outright stamp of approval. This was a view that the Commissioners attacked from a number of angles (Mill CW XXI: 360, 363, 365-7, 371), but Mill remained unshakeable in his view that the acts were objectionable in principle, partly because they appeared to sanction immorality and licentiousness, and partly because they were lopsided and discriminatory. For Waldron the question of immorality was the basis for Mill’s opposition. But as the above demonstrates, the basis for Mill’s opposition was the sexist thinking informing the CDAs. In Mill’s view this thereby sanctioned the infringement of women’s liberty (and the concomitant punishment of those particular women who facilitated the sexual indulgences of men), and hence in the second place, gave de facto government approval to immoral and licentious behaviour (principally to the benefit of men).

The Puzzle of Waldron’s Solution
As we noted above, Waldron set up his argument with a number of moves. First he juxtaposed “the author of On Liberty” with “the author of The Subjection of Women” and contrasts both with a third Mill: “Mill the progressive”. He suggested that unless we are prepared to accept that Mill was simply being inconsistent or that he had changed his mind there must be some other way of explaining his differing views. Hence, a second move was to consider a form of explanation involving an “originalist” approach in which Mill’s political views are invoked to reinterpret his earlier philosophical views. This Waldron dismissed as methodologically unsound because it is both a distraction from Mill’s philosophical arguments and an insult to their philosophical provenance. Hence, third, the only appropriate method of explanation is to re-examine Mill’s arguments in On Liberty in order to explain why Mill was adamant that his opposition to the CDAs was a matter of principle drawn from his philosophy of liberty.

The first of these moves creates a scenario that denies continuity over time to Mill’s political philosophy. By beginning from a perspective that posits three Mills – the one who wrote On Liberty, the one who wrote The Subjection of Women, and the one who was the progressive – Waldron sets it up so that the neither of the “authors” can be considered “the progressive”, and secondly that there is no real connection between
the two “authors” worth worrying about, especially where Mill’s feminist ideals are concerned. Yet by any standards, both On Liberty and The Subjection were progressive works. Each challenged the status quo from a perspective that argued for outcomes that Mill certainly thought would be an improvement to the then dominant philosophical understandings and prevailing social conditions. Each sought to persuade its readers of a need to readjust their thinking and character. And as importantly, from what is known of Mill’s publishing strategies, it is reasonable to suggest that he thought that the readership would be much the same for both books. Further, implied by Waldron’s tripartite framing of the problem, is the idea that the feminism of The Subjection, and certainly Mill’s “feminist objections” before the commissioners, was something distinct from the concerns of On Liberty. But as we have already established, On Liberty was infused with Mill’s feminist sensibility. In The Subjection the ideal of perfect equality encapsulated Mill’s ideal form of human relationships, and in On Liberty he spelt out his conception of what type of individual, what qualities of individual character, would be needed “to enter into the best kind of human relations” such that the corrupting influence of power and subjection, of relations of domination and subordination, might be eliminated (Morales 1996: 109).

For Mill, the atomistic individualism characteristic of the utilitarianism associated with his father and Bentham was not conducive to fostering other-regarding social relationships. In fact Waldron states explicitly that Mill “was adamant that his philosophy was not one of irresponsible individualism” (Waldron 2007: 17). However, this is not so much an acknowledgement of Mill’s commitment to the necessity for other-regarding individualism as a claim alleging Mill’s acceptance of a need for social institutions to bind individuals to “a certain line of conduct towards the rest” (Mill CW XVII: 276 cited in Waldron 207: 17). Mill’s Harm Principle could favour regulation if needed and in this sense Mill “was a liberal not a libertarian” (Waldron 2007: 17). While we would agree that Mill was not a libertarian Waldron nevertheless misconstrues Mill’s position because he asserts that Mill would have agreed to the subjection of individuals by those more powerful than themselves. In a society of equals, the “civilised community” as Mill envisaged it for the purposes of extolling his philosophical position in On Liberty and The Subjection, this would not be acceptable (though it is understood that Mill was less charitable towards those who did not fit his conception of being civilised). In both essays, Mill was laying the basis for a philosophical understanding of liberty in community, a form of liberty that was grounded in perfect equality and which did not preclude the possibility that legislative acts might result legitimately in the restriction of the liberties of some of its members.

Waldron’s second move is largely a methodological red herring. He claimed that it was methodologically unsound to reinterpret an author’s major text “in the light of what else we know about an author’s politics”, in effect to “adjust our interpretation of On Liberty to make that essay consistent with what we know about [Mill’s] politics” (Waldron 2007: 20-21). Yet there would seem to be very little difference between this and his use of Mill’s testimony as a means of “deepen[ing] our understanding” of On Liberty. What does it mean to “deepen[.] our understanding” if not to reinterpret what we currently think, to “adjust our interpretation”? Waldron might defend his approach by pointing out that he was not trying to make On Liberty consistent with the Mill’s politics (as expressed before the Royal Commission) as per an “originalist” approach, nor was he trying to match Mill’s “theory with what we know about his personal or political positions” (Waldron 2007: 22). Rather the point
was to use Mill’s testimony as a means to improve our understanding of an important philosophical work because “[w]e are only interested in the author’s doctrines to the extent that he [sic] can produce convincing arguments for them” (Waldron 2007: 22). What would seem to follow from this chain of reasoning is that Mill’s testimony should not be regarded as providing arguments for his “doctrines”; or if they are regarded as arguments they are not “convincing”.

Since Waldron referred to various parts of Mill’s testimony as arguments it is reasonable to conclude that he accepted that Mill provided arguments, but they were unconvincing. In fact this was his view with regards to what he called Mill’s “moral hazard argument” where he took issue with what he regarded as Mill’s “tenuous distinction” (Waldron 2007: 24) between “facilitating the vice beforehand” and “correcting the evils which are the consequences of vices and faults” (Mill CW XXI: 358). Waldron was not convinced by Mill’s logic on this point, arguing that “the contrast between his willingness to waive the moral hazard argument in regard to ex post remediation and his strident insistence on the moral hazard in relation to the preventative measures” is an unimpressive argument (Waldron 2007: 24-25). When asked if one of his objections to the Act was “that the State thereby gave security for the consequences of committing an immoral act”, Mill expressed his objection to “facilitating the vice beforehand” and posited that “a line must be drawn somewhere”:

You may draw a line between attacking evils when they occur, in order to remedy them as far as we are able, and making arrangements beforehand which will enable the objectionable practices to be carried on without incurring the danger of the evil (Mill CW XXI: 358).

For Waldron, this was a “lame” (Waldron’s word) response and indicated that Mill had in fact conceded that the means may undermine in some way the end that the policy is intended to bring about.

Undoubtedly Mill understood this problem, but the distinction that he was drawing is only unconvincing if the principle informing the distinction is not accepted. The CDAs had as their object the prevention of the spread of sexual disease and sought to achieve this by rendering sexual intercourse with prostitutes safe for the men (and those whom these men, as husbands, might subsequently infect). In Mill’s view this merely enshrined men’s privileges and by extension reinforced their sexual despotism (see the arguments in *The Subjection*) while simultaneously denying personal liberty to women. In this respect Mill argued that the effect of the CDAs was to give the imprimatur of the state to men’s sexual license while punishing some women, and putting all women at risk of enforced medical examinations. Underpinning Mill’s argument is the principle of perfect equality, a principle held in common by The

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2 We have drawn attention to the masculine pronoun here because it highlights Waldron’s implicit ambivalence about feminist issues within political philosophy (eg see Pateman 1995). The full passage reads “And in the case of a piece of political philosophy – whether it is Mill *On Liberty* or Locke’s *Two Treatise* [sic] – we are interested in an author’s doctrines only to the extent that he can produce convincing arguments for them” (Waldron 2007: 22). In the context of referring to two men philosophers Waldron might seem justified in using the masculine pronoun. Yet neither Mill nor Locke is the subject of his sentence. The subject of the sentence is “a piece of political philosophy” and hence the sex of the author is indeterminate. Waldron’s use of two men philosophers to instantiate what he meant by “a piece of political philosophy” does not warrant his use of the masculine pronoun as he could just as easily have used a woman political philosopher; that he did not suggests that his own thinking remains informed by a predominantly masculinist frame of reference.
Subjection and On Liberty. Had Waldron taken Mill’s feminism seriously he might have found Mill’s arguments before the Royal Commission more convincing.

It is surprising that at no stage in Waldron’s analysis, is there any discussion of, let alone engagement with, Mill’s feminism. This is surprising because he stated explicitly that he intended “to examine Mill’s feminist objection to the Contagious Diseases Acts in this light” (Waldron 2007: 32). What he meant by “this light” was a reference to two ideas that he believed were central to Mill’s thinking in opposing the CDAs: legislative purpose and liberty as a distributive idea. Both ideas, especially the latter one, Waldron teased out of his re-reading of On Liberty. He does not develop his analysis of these by exploring Mill’s “feminist objections”, except insofar as one accepts that Mill’s testimony was informed by feminist ideas. One would expect that if there was a stated intent to examine Mill’s “feminist objection” then there would be some informed discussion of the feminism that informed the objection. Or perhaps there might have been some exploration of the relationship between the “feminism” and the “objection”. At no stage does Waldron give any credit to Mill’s feminist ideas, beyond noting that they were important for Mill. In many respects Waldron simply treats Mill’s active engagement in the suffrage and other campaigns on behalf of women’s social and political rights as feminism. The implication here is that Mill’s feminism was simply a matter of every-day politics and hence is of no moment for the weighty matters of political philosophy. Nor does Waldron acknowledge the pervasiveness of feminist ideas within Mill’s political philosophy. He mentions The Subjection, but only as a foil to set up the “puzzle” in the first place. After using it to establish a prima facie case that there are possibly two Mill’s at odds with each other (and the third progressive Mill), he then ignores it. It is not surprising that he is puzzled; had he consulted some of the extensive feminist scholarship on Mill’s political philosophy he might have found Mill’s political position in 1871 less puzzling.

Conclusion
Waldron’s solution to the puzzle rests on moves that are not supportable and on interpretations of Mill’s testimony that are flimsy at best. What is curious here is that there was in fact no substantive puzzle to be resolved. The puzzle, if such it be, only arises if Mill’s feminist views are treated as something outside his political philosophy. We have argued that Mill’s political philosophy cannot be understood in isolation from his feminist views, that in fact feminist views were very much constitutive of his philosophy. Waldron’s failure to take into account Mill’s feminism, despite saying that he intended to explore Mill’s “feminist objection” (Waldron 2007: 32), means that he missed the point about Mill’s political stand in 1871.

We noted above that Waldron ended up concluding that Mill’s testimony enables us to have a defence against those who would appeal to Mill’s Harm Principle to justify policies that produce an uneven distributive impact on people’s liberty. Most reasonable people would agree with Waldron on the need to be on our guard against allowing well-meaning legislative acts to become vehicles for institutionalised prejudice. However, while we share his concern with this problem, and in fact agree with his general sentiment, we disagree that his reading of On Liberty either solves the so-called “puzzle” of Mill’s apparently inconsistent views or that it is necessary to reinterpret On Liberty in the light of the testimony. It is indeed ironic that after denying Mill’s own arguments Waldron ends up at the very position that Mill himself
advocated before the Commissioners – that the CDAs were bad policy and could not be justified in terms of the Harm Principle.

Indeed, we would suggest that Waldron’s representation of Mill’s views before the Royal Commission operates rhetorically to position the reader to conclude that Mill’s objections were little better than dogmatism in that they brooked no rational engagement. As far as Waldron is concerned, Mill’s feminism was a matter of politics or doctrine, not political philosophy and hence can be ignored. However, as we have argued above, it is clear that Mill did not condemn the CDAs “out of hand”, but in fact posited his objections in clear and reasoned arguments. Waldron did not consider that Mill’s views formed a “convincing” argument because he refused to address the feminist principles underpinning them, preferring to represent them as instances of political intervention, if not political dogmatism. In this way Waldron’s reinterpretation of Mill’s political philosophy re-presented it as owing no debt to feminist ideas and principles. In so doing Waldron effaced the centrality of feminism for Mill’s political philosophy. Waldron’s puzzling contradiction only emerges if Mill’s commitment to women’s liberty in 1871 is treated as incidental to the view of liberty that he argued for in 1859. As such this is yet another instance of “writing out” feminism from mainstream of political theory, in this case that of Mill.
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