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The Collapse of the Harm Principle

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THE COLLAPSE OF THE HARM PRINCIPLE

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I. INTRODUCTION

In November 1998, fourteen neighborhoods in Chicago voted to shut down their liquor stores, bars, and lounges, and four more neighborhoods voted to close down specific taverns. Three additional liquor establishments were voted shut in February 1999. Along with the fourteen other neighborhoods that passed dry votes in 1996 and those that went dry right after Prohibition, to date more than 15% of Chicago has voted itself dry. The closures affect alcohol-related businesses, like liquor stores and bars, but do not restrict drinking in the privacy of one's home. The legal mechanism is an arcane 1933 "vote yourself dry" law, enacted at the time of the repeal of Prohibition, and amended by the state legislature in 1995.[1]

Chicago's temperance movement reflects a fascinating development in the legal enforcement of morality. Instead of arguing about morals, the proponents of enforcement are talking about individual and social harms in contexts where, thirty years ago, the harm principle would have precluded regulation or

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[1] *See* Peter Annin, *Prohibition Revisited*, NEWSWEEK, Dec. 7, 1998 at 68; Ray Gibson, *New Anti-Liquor Votes Face Legal Challenge*, CHI. TRIB., Feb. 25, 1999 at N2; Stephen J. Siegel, *A Vote for Quality of Life in Chicago; Linking Alcohol and Blight, Neighborhoods Use '30s Law to Oust Purveyors*, BOSTON GLOBE, Nov. 11, 1998, at A3; *Vote Dry Referenda* (NPR Morning Edition, Jan. 11, 1999) (transcript # 99011112-210).

prohibition. Chicago is a case on point. The closures are part of Mayor Richard Daley's campaign to *revitalize* neighborhoods. The campaign focuses on the *harms* that liquor-related businesses produce in a neighborhood, *not* on the morality or immorality of drinking. "People are voting for their pocketbook, for home values, for church, children and seniors," Mayor Daley is reported to have said. "This is a quality of life issue, not an attempt to impose prohibition."[2]

A similar shift in justification is evident in a wide range of debates over the regulation or prohibition of activities that have traditionally been associated with moral offense—from prostitution and pornography, to loitering and drug use, to homosexual and heterosexual conduct. In a wide array of contexts, the proponents of regulation and prohibition have turned away from arguments based on *morality*, and turned instead to *harm* arguments. In New York City, for example, Mayor Rudolph Giuliani has implemented a policy of zero-tolerance toward quality-of-life offenses, and has vigorously enforced laws against public drinking, public urination, illegal peddling, squeegee solicitation, panhandling, prostitution, loitering, graffiti spraying, and turnstile jumping. According to Mayor Giuliani, aggressive enforcement of these laws is necessary to combat serious crime—murders and robberies—because minor disorderly offenses contribute causally to serious crime. The justification for the enforcement policy is the *harms* that the activities cause, *not* their immorality. "[I]f a climate of disorder and lack of mutual respect is allowed to take root," Mayor Giuliani argues, "incidence of other, more serious antisocial behavior *will increase*. . . . [M]urder and graffiti are two vastly different crimes. But they are part of the same continuum. . . ."[3]

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[2] Editorial, *Booze and Ballots*, INDIANAPOLIS STAR, Dec. 4, 1998, at A22.

[3] Rudolph W. Giuliani, *The Next Phase of Quality of Life: Creating a More Civil City* (last modified Feb. 24, 1998) <http://www.ci.nyc.ny.us/html/om/html/98a/quality.html> (emphasis added) [hereinafter *The Next Phase*]; *see also* William J. Bratton, *New Strategies For Combating Crime in New York City*, 23 FORDHAM URB. L.J. 781, 785-89 (1996); Rudolph W. Giuliani, *An Agenda to Prepare for the Next Century: 1999 State of the City Address* (last modified Jan. 14, 1999) <http://www.ci.nyc.ny.us/html/om/html/99a/stcitytext.html> [hereinafter *1999 State of the City Address*].

Similarly, in the pornography debate, Professor Catharine MacKinnon has proposed influential administrative and judicial measures to regulate pornographic material.[4] Her enforcement proposals, again, are *not* based on the immorality of pornography. Instead, the principal justification is the *multiple harms* that pornography and commercial sex cause women. "[T]he evidence of the harm of such material," MacKinnon explains, "shows that these materials change attitudes and impel behaviors in ways that are unique in their extent and devastating in their consequences."[5] MacKinnon's provocative discourse, and her vivid descriptions of injury, violence, and rape, are all about *harm.* In a similar vein, the recent crack-down on commercial sex establishments—peep shows, strip clubs, adult book and video stores—in New York City has been justified in the name of tourism, crime rates, and property value, *not* morality. As Mayor Giuliani explains, the campaign to shut down pornography businesses "will allow people to restore and maintain their neighborhoods, and protect generations of New Yorkers against . . . the destabilization that [sex shops] cause."[6]

A similar development has taken place in the debate over homosexuality. In the 1980s, the AIDS epidemic became the *harm* that justified legal intervention. When San Francisco and New York City moved to close gay bathhouses in the mid-1980s, the argument was not about the *immorality* of homosexual conduct. Instead, the debate was about the *harm* associated with the potential spread of AIDS at gay bathhouses. Former New York State Governor Mario Cuomo, who endorsed the strict regulation of gay bathhouses and threatened to close down noncompliant establishments, emphasized *harm,* stating: "We know certain sexual behavior can be fatal. We must eliminate public establishments which profit from activities that foster this deadly disease."[7] The same argument about harm has been used to jus-

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[4] CATHARINE A. MACKINNON, ONLY WORDS (1993); Catharine A. MacKinnon, *Pornography, Civil Rights, and Speech,* 20 HARV. C.R.-C.L. L. REV. 1 (1985).

[5] MACKINNON, ONLY WORDS, *supra* note 4, at 37.

[6] Giuliani, *The Next Phase, supra* note 3.

[7] Stephanie Saul, *N.Y. May Shut Some Bathhouses; Targets Acts That Risk AIDS,* NEWSDAY, Oct. 25, 1985, at 4.

tify the regulation of sexual practices among military personnel infected with the HIV virus.[8]

In fact, the focus on harm has become so pervasive that the concept of harm, today, is setting the very terms of contemporary debate. This is illustrated well, again, in the pornography context. In response to MacKinnon's proposal to regulate pornography, Professor Judith Butler has argued, in her recent book, *Excitable Speech: A Politics of the Performative*,[9] that the very etiology of pornography's harm suggests a different remedy. Butler's argument, in effect, is that the *harm to women* caused by pornography is not constitutive, but allows for a spatial and temporal gap within which personal resistance can be mounted. Similarly, in striking down MacKinnon's proposed ordinance in Indianapolis, Judge Frank Easterbrook acknowledged the harm that pornography causes women. According to Easterbrook, it is precisely the *harm* of pornography that "simply demonstrates the power of pornography as speech,"[10] and requires protected status under the First Amendment. Harm, not morality, structures the debate.

This is illustrated also in the ongoing controversy over the legalization of marijuana and other psychoactive drugs. In response to a wave of enforcement of anti-drug policies in the 1980s—a wave of enforcement that was justified because of the *harms* associated with drug use and the illicit drug trade—the movement for drug policy reform has increasingly turned to the argument of "*harm reduction.*" Whereas thirty years ago the opponents of criminalization talked about marijuana use as a "victimless crime"—as *not* causing harm to others—the opponents of criminalization now emphasize the *harms* associated with the war on drugs. Ethan Nadelmann, the director of an influential drug reform policy center in New York City, and other reformers have carefully crafted and employed the term "harm reduction." Their focus is on designing policies that will reduce the overall harm associated with drug use *and* drug interdiction policies. Nadelmann's main argument is that we must "[a]ccept

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[8] *See infra* Part III.G.

[9] JUDITH BUTLER, EXCITABLE SPEECH: A POLITICS OF THE PERFORMATIVE (1997).

[10] American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 329 (7th Cir. 1985).

that drug use is here to stay and that we have no choice but to learn to live with drugs so that *they cause the least possible harm.*"[11] Again, harm, not morality, now structures the debate.

A. A RECENT DEVELOPMENT IN THE DEBATE OVER THE LEGAL ENFORCEMENT OF MORALITY

As we approach the end of the twentieth century, we are witnessing a remarkable development in the debate over the legal enforcement of morality.[12] The harm principle is effectively collapsing under the weight of its own success. Claims of harm have become so pervasive that the harm principle has become meaningless: the harm principle no longer serves the function of a *critical principle* because non-trivial harm arguments permeate the debate. Today, the issue is no longer *whether* a moral offense causes harm, but rather what type and what amount of harms the challenged conduct causes, and how the harms compare. On those issues, the harm principle is silent. This is a radical departure from the liberal theoretic, progressive discourse of the 1960s.

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[11] Ethan A. Nadelmann, *Learning to Live With Drugs*, WASH. POST, Nov. 2, 1999, at A21, *available in* 1999 WL 23312103 (emphasis added). *See also* Ethan A. Nadelmann, *Perspective on Legalizing Drugs*, L.A. TIMES, Sept. 19, 1999, *available in* 1999 WL 26177307.

[12] Although many of the illustrations I will use directly implicate the criminal sanction—such as, for instance, criminal prosecutions for prostitution, homosexual sodomy, public intoxication, drug possession, or fornication (in the case of military personnel who are HIV positive)—others involve non-criminal measures. Professor MacKinnon's model ordinance, as well as municipal ordinances closing gay bathhouses, rely on administrative remedies, not the criminal sanction. Nevertheless, I will treat all these phenomena under the rubric of "legal regulation" and "legal enforcement of morality." The reason is that it is no longer realistic, today, I believe, to rely on formal labels to distinguish between the different mechanisms (e.g., criminal fines versus tort remedies, or criminal prohibition versus administrative injunction) by which the state may attempt to enforce morality. The harm principle applies to all criminal sanctions, including some, like fines, that resemble too closely private law remedies. There have been too many recent challenges—intellectual, institutional, and socio-cultural—to the criminal-civil line to abide by the formal lines drawn by the legislature between civil and criminal actions. *See generally* Carol Steiker, *Foreword: Punishment and Procedure: Punishment Theory and the Criminal-Civil Procedural Divide*, 85 GEO. L.J. 775, 782-97 (1997) (discussing the destabilization of the criminal-civil distinction and proposing a definition of punishment). In this Article, the non-criminal sanctions that I discuss are close enough to criminal sanctions to be considered part of the contemporary debate over the *legal enforcement* of morality.

More formally, in the writings of John Stuart Mill, H.L.A. Hart and Joel Feinberg, the harm principle acted as a *necessary but not sufficient* condition for legal enforcement.[13] The harm principle was used to *exclude* certain categories of activities from legal enforcement (*necessary condition*), but it did not determine what to *include* (*but not sufficient condition*), insofar as practical, constitutional or other factors weighed into the ultimate decision whether to regulate a moral offense. Today, although the harm principle formally remains a *necessary but not sufficient* condition, harm is no longer in fact a *necessary* condition because non-trivial harm arguments are being made about practically every moral offense. As a result, today, we no longer focus on the existence or non-existence of harm. Instead, we focus on the types of harm, the amounts of harms, and the balance of harms. As to these questions, the harm principle offers no guidance. It does not tell us how to compare harms.[14] It served only as a threshold determination, and that threshold is being

[13] To be sure, insofar as there may have been *other* limiting principles justifying restrictions on liberty, such as the offense principle, the harm principle was not necessarily, strictly speaking, a "necessary" condition. *See* 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 10, 187 (1984) ("[T]hese proposed coercion-legitimizing principles do not even purport to state necessary and sufficient conditions for justified state coercion."). Other conditions, such as offense, may have justified state coercion. However, when the harm principle is discussed in isolation—as it is here—it functions as a "necessary but not sufficient condition." It functions as a consideration that is always a good reason for criminalization, even though there may be other reasons not to criminalize. *See* 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 323 (1988); *see generally infra* notes 68-76 and accompanying text. In effect, when discussed in isolation, the harm principle operates as a necessary but not sufficient condition. *See generally* Gerald Dworkin, *Devlin Was Right: Law and the Enforcement of Morality*, 40 WM. & MARY L. REV. 927, 934 (1999); *see also* Lawrence C. Becker, *Crimes Against Autonomy: Gerald Dworkin on the Enforcement of Morality*, 40 WM. & MARY L. REV. 959, 960 (1999).

[14] Professor Feinberg's work does exclude minor harms from the harm principle, and does discuss the probability and aggregation of harms. *See* 1 FEINBERG, *supra* note 13, at 188-202, 215-16 (mediating maxims 4, 5, and 6). In this sense, the harm principle does address issues of, for example, the amount of harms. But once a compelling harm argument has been made, the harm principle itself does not determine the decision whether to prohibit the conduct or how to compare that harm to another compelling harm. As Feinberg acknowledged, with regard to comparing compelling harm arguments: "in the end, it is the legislator himself, using his own fallible judgment rather than spurious formulas and 'measurements,' who must compare conflicting interests and judge which are the more important." *Id.* at 203. *See infra* notes 280-82.

satisfied in most categories of moral offense. As a result, the harm principle no longer acts today as a *limiting principle* with regard to the legal enforcement of morality.

The collapse of the harm principle has significantly altered the map of liberal legal and political theory in the debate over the legal enforcement of morality.[15] To be sure, the liberal criteria themselves have not changed. As in the 1960s, it is still possible today to define "liberalism," in the specific context of the legal enforcement of morality, on the basis of the same three criteria, namely (1) that it is a justifiable reason to limit an individual's freedom of action if their action causes harm to other persons (the harm principle), (2) that it is also a justifiable reason to limit someone's activities in order to prevent serious offense to other persons (the offense principle), and (3) that it is generally not a justifiable reason to limit harmless conduct on the ground that it is immoral. The criteria are the same today.

But the map of liberalism has changed. In the 1960s and '70s, liberalism was predominantly progressive[16] in relation to moral offenses: liberal theory was dominated by progressives, like H.L.A. Hart, Joel Feinberg, and Ronald Dworkin, who were favorably inclined, by and large, toward the relaxation of sexual morality in the area of homosexuality, fornication, and pornography. In the 1960s and '70s, liberalism was opposed, chiefly, by moral conservatives, like Lord Patrick Devlin, who were theoretically illiberal insofar as they espoused legal moralist principles. Today, liberalism is the domain of progressives *and* conservatives. Conservatives have adopted the harm principle,

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[15] In this Article, I will refer to "liberal political theory," "liberalism," and "illiberalism." I refer to these terms in their technical sense as they have developed in the specific context of the debate over the legal enforcement of morality, discussed *infra* at Part II. I do not intend to comment on the wider debates about political liberalism or liberalism more generally.

[16] In this article, I also refer to "progressive" and "conservative." Again, I use these terms in the technical sense developed in the debate over the legal enforcement of morality. By "progressive," I mean a position that supports the relaxation of sexual and other morals; for instance, the position supporting the decriminalization of homosexual sodomy or prostitution, or opposing the regulation or prohibition of drinking. By "conservative," I mean a position that advocates the enforcement of sexual and other morality. Another term for "conservative" would be "traditionalist."

and increasingly are making harm arguments. As a result, liberal theory itself is no longer formally opposed. Liberal theory has colonized moral conservatism and, it would appear, is being colonized by conservatives in return. The net effect is the emergence of what I will call conservative liberalism. The change can be represented in the following figure:

FIGURE 1: THE EMERGENCE OF CONSERVATIVE LIBERALISM

1960s

Liberal Theory	*Illiberal Theory*
Harm Principle	Legal Moralism
H.L.A. Hart	Lord Devlin
Progressive	Conservative

1990s

Liberal Theory	
Harm Principle	
Progressive	Conservative

The emergence of conservative liberalism represents the ironic culmination of a long debate between liberal theorists and their critics. It is ironic because it symbolizes a victory for both sides. Liberal theory prevails in the sense that the harm principle is hegemonic—if only in theory. The critics of 1960s liberalism prevail in the sense that morality gets enforced—if only under a liberal regime.

B. A STUDY IN LEGAL SEMIOTICS

In this Article, I explore the emergence of conservative liberalism and the effective collapse of the harm principle. My goal is to bridge, on the one hand, the legal and political theoretic discussion of the harm principle and, on the other, the actual arguments being made by activists, lawyers, academics, judges, politicians, and cultural critics. The project is to demonstrate how debates in the philosophy of law influence legal and political rhetoric, and how the latter, in turn, impact philosophical principle. It is a project about legal rhetoric, or more

precisely about the interplay between legal philosophic and practical legal rhetoric. It is not my intention, by any means, to suggest that legislators enact or repeal, that judges uphold or strike down, or that law enforcement officials enforce or ignore laws prohibiting moral offenses *because* of legal and political justifications concerning the harm principle. Other factors—political, social, cultural, and historical—may also, and more importantly, influence the implementation of the criminal law.

In this sense, the project is situated within an already existing and substantial body of scholarship addressing legal argument.[17] This project is nevertheless distinctive in three ways: first, it explores the dynamic relationship between two disciplinary discourses; second, it investigates the historical evolution of the arguments in these two disciplines; and third, it focuses on the ambiguity within the structure of argumentation—the struggle over the meaning of *harm*—that accounts for the change in the structure of the debate itself. This project is intended to build on and contribute to existing theories of legal argument.

Although there is substantial disagreement in the literature over the political implications of the study of legal rhetoric,[18] the writings in the field are in significant agreement over the basic building blocks of legal argumentation—the pairing of legal ar-

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[17] *See, e.g.*, J.M. Balkin, *Ideological Drift and the Struggle Over Meaning*, 25 CONN. L. REV. 869 (1993); J.M. Balkin, *The Promise of Legal Semiotics*, 69 TEX. L. REV. 1831 (1991); J.M. Balkin, *The Rhetoric of Responsibility*, 76 VA. L. REV. 197, 200-01 (1990); DUNCAN KENNEDY, A CRITIQUE OF ADJUDICATION, 133-56, 344-46 (1997); Duncan Kennedy, *A Semiotics of Legal Argument*, 42 SYRACUSE L. REV. 75 (1991); Jeremy Paul, *The Politics of Legal Semiotics*, 69 TEX. L. REV. 1779 (1991); and articles cited in Kennedy, *A Semiotics of Legal Argument*, *supra*, at 105 n.4.

[18] *See* Balkin, *The Promise of Legal Semiotics*, *supra* note 17, at 1848-51 (arguing that legal semiotics should not be interpreted as undermining the authenticity of legal argument and that its politics "will be the politics of postmodernity." Balkin explains: "[b]y this I mean that [legal semiotics] rests on the social construction of subjectivity and insists that older ways of looking at the subject must be revised."); KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 17, at 345-46 (arguing that legal semiotics awakens feelings of contradiction, irony and doubleness, and "the potential excitement of their inclusion" in thinking about law); Paul, *supra* note 17 at 1826-30 (arguing that legal semiotics offers a significant contribution to progressive politics, especially in critiquing the argument of meritocracy).

guments,[19] the operations that can be performed on legal arguments,[20] and the "nesting" or "crystalline structure" of legal arguments[21]—and, more generally, about the way in which meaning is produced through legal argumentation.[22] The ambition of the field is to "identify what might be called the 'grammar' of legal discourse—the acceptable moves available in the language game of legal discourse," to "trace[] the way that the system produces meaning," and to "see the gaps or uncertainties within the structure."[23]

It is within this framework that this Article will explore the historical transformation of the harm principle in legal philosophy and rhetoric. I will sketch here the broad outline of this transformation. The Hart-Devlin debate was originally mapped onto a traditional pairing of two arguments—the harm principle and legal moralism—that had structured the debate in the nineteenth century. The several ambiguities in Lord Devlin's writings, however, fractured the conservative position and gradually gave way to the predominance of the harm principle in legal philosophical discourse. The resulting disequilibrium in both philosophy of law and substantive criminal law scholarship significantly influenced the arguments of activists, lawyers, and politicians in the struggle over the legal enforcement of morality. Proponents of regulation and prohibition began to

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[19] This refers to the recurring forms of opposition among paired legal arguments. *See, e.g.*, Balkin, *The Promise of Legal Semiotics*, *supra* note 17, at 1835; Kennedy, *A Semiotics of Legal Argument*, *supra* note 17, at 78-80; Paul, *supra* note 17, at 1781 n.6, 1786-95.

[20] This refers to the recurring ways in which people respond to legal arguments, such as for instance "flipping" the implication of your opponent's argument. *See, e.g.*, Balkin, *The Promise of Legal Semiotics*, *supra* note 17, at 1834; Kennedy, *A Semiotics of Legal Argument*, *supra* note 17, at 87-88; Paul, *supra* note 17, at 1798-1807.

[21] This refers to the reproduction, at different levels of the legal argument, of the same structure of opposed legal arguments. *See, e.g.*, J.M. Balkin, *The Crystalline Structure of Legal Thought*, 39 RUTGERS L. REV. 1 (1986); Kennedy, *A Semiotics of Legal Argument*, *supra* note 17, at 97-100 (using the term "nesting").

[22] This body of work generally argues that meaning is derived from, and changes based on, the interplay of legal arguments. Balkin explains that "the purpose of semiotic study is to understand the system of signs which creates meaning within a culture. It is to understand the underlying structures that make meaning possible." Balkin, *The Promise of Legal Semiotics*, *supra* note 17, at 1845; *see also*, Balkin, *Ideological Drift and the Struggle Over Meaning*, *supra* note 17, at 870-72; Kennedy, *A Semiotics of Legal Argument*, *supra* note 17, at 105-16.

[23] Balkin, *The Promise of Legal Semiotics*, *supra* note 17, at 1845.

employ increasingly harm arguments in support of a conservative agenda. The harm principle, traditionally associated with progressive politics, began to have an increasingly conservative tilt. It underwent an ideological shift—or what Professor Jack Balkin would call "ideological drift."[24] This shift altered the earlier pairing of arguments within legal rhetoric,[25] and significantly changed the meaning and effectiveness of the progressive counter-arguments. It affected the whole system of meaning.[26]

The original progressive political valence of the harm principle, as well as the contemporary conservative tilt, are the products of particular historical and political contexts. The harm principle was originally deployed by progressive liberals, John Stuart Mill and H.L.A. Hart, in opposition to morally conservative judges, Lords James Stephen and Patrick Devlin. The contemporary conservative tilt is the result of the strategic deployment of harm arguments by proponents of legal enforcement.

The shift has had a dramatic effect on the structure of the debate. It has, in effect, undermined the structure itself. In contrast to the earlier pairing of harm and legal moralist arguments, or even to the later dominance of the harm argument over legal moralism, today the debate is no longer structured. It is, instead, a harm free-for-all: a cacophony of competing harm arguments without any way to resolve them. There is no argument within the structure of the debate to resolve the compet-

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[24] Ideological drift occurs when a political or legal idea changes political valence. Here, the harm principle, which was originally progressive, acquires a conservative tilt as more and more proponents of enforcement make convincing harm arguments about moral offenses. Ideological drift occurs, Balkin explains, "because political, moral, and legal ideas are and can only be made public through signs that must be capable of iteration and reiteration in a diverse set of new moral, legal, and political contexts." *Id.* at 1833; *see generally* Balkin, *Ideological Drift and the Struggle Over Meaning*, *supra* note 17.

[25] This is a good illustration of Balkin's claim that "history deconstructs"—by which he means that history can provide the contextual change that results in an idea acquiring different political valence. *See* Balkin, *The Promise of Legal Semiotics*, *supra* note 17, at 1834.

[26] *See* KENNEDY, A CRITIQUE OF ADJUDICATION, *supra* note 17, at 343. As Kennedy explains, this is because the new argument (or what Kennedy refers to as "argument-bite") "changes arguers' conscious or unconscious expectations about what will be said in response to those bites." *Id.*

ing claims of harm. The only real contender would have been the harm principle. But that principle provides no guidance to *compare* harm arguments. Once a non-trivial harm argument has been made and the necessary condition of harm has been satisfied, the harm principle has exhausted its purpose. The triumph and universalization of harm has collapsed the very structure of the debate.

There is, however, no reason for despair. Another structure will surely emerge. Insofar as it may continue to revolve around the idea of harm, the collapse of the harm principle may in fact be beneficial. It may increase our appreciation that there is harm in most human activities. By highlighting harms, the collapse of the harm principle may help us make more informed arguments and reach more informed decisions. It may also help us tailor more appropriate remedies when we do decide to regulate challenged conduct. In the end, the collapse of the harm principle may be a good thing.

II. THE RISE OF THE HARM PRINCIPLE

The harm principle traces back to John Stuart Mill's essay *On Liberty*.[27] Mill succinctly stated the principle in a now-famous passage in the opening pages of the essay:

> The object of this essay is to assert one very simple principle, as entitled to govern absolutely the dealings of society with the individual in the way of compulsion and control . . . . That principle is that the sole end for which mankind are warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over

[27] JOHN STUART MILL, ON LIBERTY 9 (Elizabeth Rapaport ed., 1978) (1859). The harm principle has its roots in earlier liberal theory, especially in early liberal definitions of liberty. *See, e.g.*, THOMAS HOBBES, LEVIATHAN 145-47 (Richard Tuck ed., Cambridge Univ. Press 1996) (1651) ("Liberty, or Freedome, signifieth (properly) the absence of Opposition; (by Opposition, I mean externall Impediments of motion;)."); JOHN LOCKE, TWO TREATISES OF GOVERNMENT 284 (Peter Laslett ed., Cambridge Univ. Press 1988) (1690) (Freedom of men under government is "[a] Liberty to follow my own Will in all things, where the Rule prescribes not; and not to be subject to the inconstant, uncertain, unknown, Arbitrary Will of another Man."). For present purposes, though, it makes sense to begin the discussion with John Stuart Mill. For background discussion of the harm principle, *see generally* Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM. L. & CRIMINOLOGY 710, 715, 722-25 (1995).

any member of a civilized community, against his will, is to prevent harm to others.[28]

Though simple at first blush, the harm principle actually was far more complicated than it looked, and, over the course of the essay, it took on many nuances. The argument in fact became more complex with each restatement. In Mill's short essay, the harm principle metamorphosed from a simple inquiry into harm, to a more complex analysis of interests (self-regarding and other regarding interests),[29] and eventually to a quasi-legal determination of rights. In his final restatement of the harm principle, Mill ultimately defined the concept of harm on the basis of recognized or legal rights. Mill wrote:

> Though society is not founded on a contract . . . the fact of living in society renders it indispensable that each should be bound to observe a certain line of conduct toward the rest. This conduct consists, first, in not injuring the interests of one another, *or rather certain interests which, either by express legal provision or by tacit understanding, ought to be considered as rights*; and secondly, in each person's bearing his share (to be fixed on some equitable principle) of the labors and sacrifices incurred for defending the society or its members from injury and molestation.[30]

As Mill explained elsewhere, the notion of rights embodied in this final restatement rested on a modified utilitarian calculus grounded on the permanent interests of man as a progressive being.[31]

In Mill's writings, then, the original, simple harm principle evolved into a more cumbersome principle. Mill nevertheless applied the principle and justified, on its basis, a large number of regulations and prohibitions. The harm principle, in Mill's own hands, produced a blueprint for a highly regulated society: a society that regulated the sale of potential instruments of crime, that taxed the sale of alcohol and regulated the public

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[28] MILL, *supra* note 27, at 9.

[29] *Id.* at 78.

[30] *Id.* at 73 (emphasis added).

[31] *Id.* at 10. For a discussion of Mill's emphasis on human self-development, see generally: FRED R. BERGER, HAPPINESS, JUSTICE, AND FREEDOM: THE MORAL AND POLITICAL PHILOSOPHY OF JOHN STUART MILL, 229-30 (1984); WENDY DONNER, THE LIBERAL SELF: JOHN STUART MILL'S MORAL AND POLITICAL PHILOSOPHY 188-97 (1991); Allen E. Buchanan, *Assessing the Communitarian Critique of Liberalism*, 99 ETHICS 852, 862 (1989); Russell Hittinger, *The Hart-Devlin Debate Revisited*, 35 AM. J. JURIS. 47, 51-52 (1990).

consumption of alcohol, that regulated education and even procreation, and that prohibited public intoxication and indecency.[32]

Beginning at least in the 1950s, liberal theorists, most prominently Professors H.L.A. Hart and Joel Feinberg, returned to Mill's original, simple statement of the harm principle. The context was the debate over the legal enforcement of morality. In England, this debate was reignited by the recommendation of the Committee on Homosexual Offences and Prostitution (the "Wolfenden Report") that private homosexual acts between consenting adults no longer be criminalized.[33] In the United States, the debate was reignited by the Supreme Court's struggle over the definition and treatment of obscenity[34] and the drafting of the Model Penal Code.[35] In both countries, the debate was fueled by the perception among liberal theorists that legal moralist principles were experiencing a rejuvenation and were threatening to encroach on liberalism. More than anyone else, Lord Patrick Devlin catalyzed this perceived threat. In his Maccabaean Lecture, delivered to the British Academy in 1959, Lord Devlin argued that purportedly immoral activities, like homosexuality and prostitution, should remain criminal offenses.[36] Lord Devlin published his lecture and other essays under the title *The Enforcement of Morals*, and Devlin soon became associated with the principle of legal moralism—the principle that moral offenses should be regulated *because* they are immoral.

The Hart-Devlin exchange structured the debate over the legal enforcement of morality, and thus there emerged, in the 1960s, a pairing of two familiar arguments—the harm principle

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[32] MILL, *supra* note 27, at 96, 97, 99, 100, 104, 107.

[33] REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION, 1957, Cmnd. 247, para. 61, 62. For the history of sodomy laws in England, *see generally* Clarice B. Rabinowitz, *Proposals for Progress: Sodomy Laws and the European Convention on Human Rights*, 21 BROOK. J. INT'L L. 425, 428-32 (1995).

[34] *See* Ronald Dworkin, *Lord Devlin and the Enforcement of Morals*, 75 YALE L.J. 986, 986-87 (1966).

[35] THOMAS C. GREY, THE LEGAL ENFORCEMENT OF MORALITY 4 (1983).

[36] PATRICK DEVLIN, *Morals and the Criminal Law*, *in* THE ENFORCEMENT OF MORALS 1 (1965).

and legal moralism. All the participants at the time recognized, naturally, that this structure was a recurrence of a very similar pairing of arguments that had set the contours of the debate a hundred years earlier.[37] The Hart-Devlin debate replicated, in many ways, the earlier debate between Mill and another famous British jurist, Lord James Fitzjames Stephen. In 1873, in a book entitled *Liberty, Equality, Fraternity*,[38] Lord Stephen had published a scathing attack on Mill's essay and strenuously advocated legal moralism. Stephen described his argument as "absolutely inconsistent with and contradictory to Mr. Mill's."[39] Stephen's argument, like Mill's, was best captured in a now-famous passage: "[T]here are acts of wickedness so gross and outrageous that, self-protection apart, they must be prevented as far as possible at any cost to the offender, and punished, if they occur, with exemplary severity."[40]

Professor Hart immediately underscored the similar structure of the emerging debate. "Though a century divides these two legal writers," Hart observed, referring to Lords Stephen and Devlin, "the similarity in the general tone and sometimes in the detail of their arguments is very great."[41] In his defense, Devlin responded that at the time he delivered the Maccabaean lecture he "did not then know that the same ground had already been covered by Mr. Justice Stephen . . . ."[42] Nevertheless, Devlin conceded that there was "great similarity between [Lord Stephen's] view and mine on the principles that should affect the use of the criminal law for the enforcement of morals."[43] Devlin also noted the similarity between Hart, Mill, and the

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[37] *See, e.g.*, Louis B. Schwartz, *Morals Offenses and the Model Penal Code*, 63 COLUM. L. REV. 669, 670 n.1 (1963) ("The recent controversy traverses much the same ground as was surveyed in the nineteenth century.") (citing the Mill-Stephen debate).

[38] JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY (R.J. White ed., Cambridge Univ. Press 1967) (1873).

[39] *Id.* at 162.

[40] *Id.* This passage is most frequently excerpted in discussions of Stephen. *See, e.g.*, H.L.A. HART, LAW, LIBERTY AND MORALITY, 60-61 (1963); Feinberg, *Moral Enforcement and the Harm Principle* (from SOCIAL PHILOSOPHY (1973)), *reprinted in* ETHICS AND PUBLIC POLICY 291 (Tom L. Beauchamp ed., 1975).

[41] HART, *supra* note 40, at 16.

[42] DEVLIN, THE ENFORCEMENT OF MORALS, *supra* note 36, at vii.

[43] *Id.*

Wolfenden Report.[44] Referring to the Wolfenden Report, Devlin observed that "this use of the [harm] principle is, as Professor Hart observed, 'strikingly similar' to Mill's doctrine."[45]

A. LORD DEVLIN AND THE FRAGMENTATION OF THE CONSERVATIVE POSITION

Though the paired structure of arguments was similar, it was not exactly the same. In contrast to Stephen's straightforward legal moralist argument, Lord Devlin's argument in *The Enforcement of Morality* was ambiguous and susceptible to competing interpretations. Devlin's argument played on the ambivalence in the notion of harm—at times courting the idea of social harm, at other times aligning more closely with the legal moralism of his predecessor. As a result, the conservative position began to fragment and there developed at least two interpretations of Devlin's argument: the first relied on public harm, the second on legal moralism. Professors Hart and Feinberg labeled these two versions, respectively, the moderate thesis and the extreme thesis.[46]

In large part, the source of the ambiguity stemmed from the fact that Devlin defined public morality *in terms of harm to society.* In several key passages, Devlin strongly suggested that public morality necessarily encompassed conduct that affected society as a whole. Devlin wrote, for instance, that "[t]here is a case for a collective [moral] judgement . . . *only if society is affected.*"[47] "[B]efore a society can put a practice beyond the limits of tolerance," Devlin emphasized, "there must be a deliberate judgement that the practice is *injurious to society.*"[48] In these and numerous other passages,[49] Devlin made clear that public moral-

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[44] *Id.* at 105. At other points, though, Devlin also tried to distinguish Hart from Mill. *See, e.g, id.* at 124-26.

[45] *Id.* at 105 (footnote omitted).

[46] HART, *supra* note 40, at 48; Feinberg, *supra* note 40, at 289-93.

[47] DEVLIN, *supra* note 36, at 8 (emphasis added).

[48] *Id.* at 17 (emphasis added).

[49] *See, e.g., id.* at 15 ("Immorality then, for the purpose of the law, is what every right-minded person is presumed to consider to be immoral. Any immorality is capable of affecting society injuriously and in effect to a greater or lesser extent it usually does; this is what gives the law its *locus standi.*"); *id.* at 17-18 ("It becomes then a question of balance, the danger to society in one scale and the extent of the restriction in

ity would necessarily involve injury to society, and that the injury was precisely "what gives the law its *locus standi.*"[50] This overlap of harm and morality significantly exacerbated the ambiguity in the debate, and the struggle for the meaning of harm.

The overlap fragmented the conservative argument. Under the moderate interpretation, Devlin appeared to be arguing that morality should be enforced in order to protect society from the danger of disintegration—an argument that relied on harm.[51] On this view, the only difference between Hart and Devlin was that Hart focused on harm to the individual, whereas Devlin focused on harm to society as a whole. It was precisely on this ground that Devlin criticized the Wolfenden Report. Devlin wrote:

> The error of jurisprudence in the Wolfenden Report is caused by the search for some single principle to explain the division between crime and sin. The Report finds it in the principle that the criminal law exists *for the protection of individuals*; on this principle fornication in private between consenting adults is outside the law and thus it becomes logically indefensible to bring homosexuality between consenting adults in private within it. But the true principle is that the law exists *for the protection of society.* It does not discharge its function by protecting the individual from injury, annoyance, corruption, and exploitation; *the law must protect also the institutions and the community of ideas, political and moral, without which people cannot live together.* Society cannot ignore the morality of the individual any more than it can his loyalty; it flourishes on both and without either it dies.[52]

One obvious flaw in the moderate interpretation was that Devlin never defined the causal mechanism of social harm.

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the other."); *id.* at 22 ("Adultery of the sort that breaks up marriage seems to me to be just as *harmful to the social fabric* as homosexuality or bigamy.") (emphasis added).

[50] *Id.* at 15.

[51] Feinberg similarly suggests that Devlin's moderate thesis "is really an application of the public harm principle." Feinberg, *supra* note 40, at 289. In my opinion, Professor Jeffrie Murphy's reading of Devlin is also consistent with the moderate thesis of public harm. *See* Jeffrie G. Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 76 (1995) ("Devlin is not a legal moralist. He is rather a utilitarian, democratic cynic with some controversial empirical views. Utilitarian because he regards social harmfulness, in some very extended sense, as the only factor relevant in justifying a criminal prohibition."). Professor Robert George similarly interprets Devlin as making a public harm argument. *See* Robert P. George, *Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate*, 35 AM. J. JURIS. 15, 19 (1990). *See also* Greenawalt, *supra* note 27, at 722 (offering a consequentialist interpretation of Devlin).

[52] DEVLIN, *supra* note 36, at 22 (emphases added).

Though Devlin repeatedly referred to "social disintegration," he failed to articulate the pathway of harm. As a result, there developed, again, a number of competing interpretations of the causal mechanism—which, in part, replicated the ambiguities in the conception of harm. Hart, at one point, suggested that Devlin believed that individuals who deviate from sexual morality are likely to deviate in other ways and thereby to cause society harm.[53] At another point, Hart suggested that the causal mechanism was simply change: that Devlin equated society with its morality "so that a change in its morality is tantamount to the destruction of a society."[54] Feinberg emphasized the metaphor of morality as a kind of "seamless web" and interpreted the causal mechanism as the unraveling of that "moral fabric."[55] Professor Jeffrie Murphy offered yet another interpretation: "one might . . . argue," he suggested, "that open toleration of the flouting of sexual norms threatens the honorific position historically accorded the traditional nuclear family and that such a threat risks undermining the social stability generated by such family units."[56] Devlin never really clarified his position.

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[53] HART, *supra* note 40, at 51 ("[Morality] forms a single seamless web, so that those who deviate from any part are likely or perhaps bound to deviate from the whole."); *see id.* ("But there is again no evidence to support, and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society.").

[54] *Id.* at 51. This led, of course, to Devlin's response, and an entirely fruitless semantic debate over the concept of society. *See* DEVLIN, *supra* note 36, at 13 n.1. At still another point, Hart suggested that the mechanism turned on a Durkheimian conception of social solidarity: that private immoral acts loosen the moral bonds that bring men and women together in society and thereby "threaten[] the moral principles on which society is based." HART, *supra* note 40, at 53.

[55] Feinberg, *supra* note 40, at 289.

[56] Murphy, *supra* note 51, at 77. Other interpretations were offered. *See, e.g.*, George, *supra* note 51, at 30-36 (offering an interpretation of social disintegration in terms of "the loss of a distinctive form of interpersonal integration in community understood as something worthwhile for its own sake").

I would suggest that a close reading of Devlin's *Morals and the Criminal Law* suggests yet another possibility. Devlin repeatedly suggested that, if the structure of law was not supported by our moral sentiments, then the law "forfeits respect." DEVLIN, *supra* note 36, at 2, 24. In forfeiting respect, the law loses legitimacy. This seems to capture best the mechanism at work in Devlin's discussion of homosexuality. Male homosexuality, according to Devlin, engenders a moral reaction of "deeply felt and not manufactured" "disgust," "a real feeling of reprobation," and "a general abhorrence." *Id.* at 17. When we look at it "calmly and dispassionately, we regard it as a

Another major problem with the moderate interpretation was that Devlin ignored completely the empirical dimension of the public harm claim.[57] "[N]o evidence is produced," Hart exclaimed.[58] "No reputable historian has maintained this thesis, and there is indeed much evidence against it. As a proposition of fact it is entitled to no more respect than the Emperor Justinian's statement that homosexuality was the cause of earthquakes."[59] Four years later, Professor Ronald Dworkin sounded the same refrain: "[Lord Devlin] manages this conclusion without offering evidence that homosexuality presents any danger at all to society's existence . . . ."[60]

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vice so abominable that its mere presence is an offence." *Id.* If the law does not reflect this deep sense of moral offense, then the law will no longer be perceived as legitimate. It will forfeit respect. Legitimization may have been the causal mechanism at work.

Bill Miller's discussion in *The Anatomy of Disgust* resonates well with this interpretation of Devlin. *See* WILLIAM IAN MILLER, THE ANATOMY OF DISGUST, 179-80 ("[W]hether we be Puritan or not, we express many of our bread-and-butter moral judgments in the idiom of disgust. The argument is not whether disgust operates in the moral domain, but about its proper scope, its proper object, and its reliability in that domain."). *See also id.* at 180 ("By being so much in the gut, the idiom of disgust has certain virtues for voicing moral assertions. It signals seriousness, commitment, indisputability, presentness, and reality. It drags the moral down from the skies toward which it often tends to float, wrests it from the philosophers and theologians, and brings it back to us with a vengeance."). It seems that Devlin's writings would be an excellent illustration of many of Miller's points. There is also a similar ambivalence about disgust in the writings of Miller and Devlin: disgust is at the core of morality, but it is not its foundation. It reflects moral judgment, but should not ground moral judgment. Thus Miller writes that "[d]isgust tends to be a little too zealous in its moral work. It wants to draw things into the moral domain that we feel in our better judgment should be left out." *Id.* at 181. The same ambivalence is reflected in Devlin. *See, e.g.*, DEVLIN, *supra* note 36, at 17 ("Those who are dissatisfied with the present law on homosexuality often say that the opponents of reform are swayed simply by disgust. If that were so it would be wrong, but I do not think one can ignore disgust if it is deeply felt and not manufactured.").

[57] Even Devlin's supporters acknowledge the absence of empirical evidence. *See, e.g.*, Dworkin, *supra* note 13, at 931 ("The trouble with many of Devlin's claims is the same as that faced by the strategic theorist who, when asked about his various 'calculated risks,' admitted that he had never done the calculations."); Murphy, *supra* note 51, at 77 ("Devlin on these issues seems to rely more on hunches than on solid evidence.").

[58] HART, *supra* note 40, at 50.

[59] *Id.*

[60] Dworkin, *supra* note 34, at 992. *See also* Rolf E. Sartorius, *The Enforcement of Morality*, 81 YALE L.J. 891, 893 (1972) ("[A]s Hart has convincingly argued on a number

The empirical gap in Devlin's harm argument was terribly damaging, and, as a result, a second, more extreme reading of Devlin emerged.[61] Under the second interpretation, referred to as the extreme thesis, Devlin argued that morality should be enforced for the sake of morality *tout court*: morality for morality's sake. If Devlin's claim (that private acts of immorality present a danger to society) was not intended to be an empirical claim, Hart suggested, then Devlin equated morality with society. "On this view the enforcement of morality is not justified by its valuable consequences in securing society from dissolution or decay," Hart argued. "It is justified simply as identical with or required for the preservation of the society's morality."[62]

Under the more extreme reading, Devlin's argument was much closer to the earlier statement of legal moralism in Lord Stephen's book, *Liberty, Equality, Fraternity*.[63] Certain key passages in Devlin's writings supported this reading, especially the concluding sentence of the Maccabaean lecture:

> So the law must base itself on Christian morals and to the limit of its ability enforce them, not simply because they are the morals of most of us, nor simply because they are the morals which are taught by the established Church—on these points the law recognizes the right to dissent—*but for the compelling reason that without the help of Christian teaching the law will fail.*[64]

These were ominous and somewhat bewildering words. "Christian morals." "The law will fail." To what extent was this a prediction of actual social harm or a traditional argument about legal moralism? Could they even be distinguished anymore? Was legal moralism, in reality, a harm argument? In which di-

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of separate occasions, the empirical assumption that it must legislate sexual morality in order to avoid disintegration is simply without foundation.") (footnote omitted).

[61] HART, *supra* note 40, at 55.

[62] *Id.* Hart argued, against the extreme thesis, that it rested on a vindictive, denunciatory, and hateful theory of punishment that contravened "the critical principle, central to all morality, that human misery and the restriction of freedom are evils." *Id.* at 82. Joel Feinberg also argued against the extreme thesis. Feinberg emphasized the costs of such a policy, in terms of individual privacy and other human values ("loss of spontaneity, stunting of rational powers, anxiety, [and] hypocrisy"). Feinberg argued that these costs far outweighed any possible benefit: "The price of securing mere outward conformity to the community's standards (for that is all that can be achieved by the penal law) is exorbitant." Feinberg, *supra* note 40, at 292.

[63] STEPHEN, *supra* note 38.

[64] DEVLIN, *supra* note 36, at 25 (emphasis added).

rection was Devlin going? Unsure, Hart and other liberal theorists returned to Mill's essay *On Liberty* and to the original, simple statement of the harm principle. Ironically, that rhetorical move would further ambiguate the conception of harm. The simplicity of the original harm principle would veil an intense struggle for the meaning of harm.

B. H.L.A. HART, JOEL FEINBERG, AND THE ORIGINAL SIMPLE HARM PRINCIPLE

In *Law, Liberty, and Morality*, a set of lectures delivered at Stanford University in 1962 in response to Lord Devlin, Hart rehearsed Mill's harm principle, but carefully pared the argument down to its original, simple, and succinct statement. Right after posing the central question of his lectures—"Ought immorality as such to be a crime?"—Hart immediately cited Mill in support of his position. "To this question," Hart responded, "John Stuart Mill gave an emphatic negative answer in his essay *On Liberty* one hundred years ago, and *the famous sentence in which he frames this answer expresses the central doctrine of his essay.*" Then Hart repeated the famous sentence: "He said, 'The only purpose for which power can rightfully be exercised over any member of a civilised community against his will is to prevent harm to others.'"[65] Hart endorsed the simple harm argument,[66] and declared that, "on the narrower issue relevant to the enforcement of morality Mill seems to me to be right."[67]

Similarly, in an early essay in 1973 entitled *Moral Enforcement and the Harm Principle*—an essay which would sketch the contours of his later four-volume treatise on *The Moral Limits of the Criminal Law*—Professor Joel Feinberg rehearsed Mill's harm principle and he, too, pared the principle down to its original, simple formulation.[68] Feinberg emphasized the importance of

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[65] HART, *supra* note 40, at 4 (emphasis added).

[66] Hart qualified his endorsement insofar as he supplemented the harm principle with an offense principle. It is not clear, however, that Mill would have disagreed with Hart, since the Millian notion of other-regarding conduct seems to embrace both the harm principle and the offense principle.

[67] HART, *supra* note 40, at 5.

[68] *See generally* Feinberg, *supra* note 40.

distinguishing between direct and indirect harm,[69] but went no further, at the time, in developing the harm argument. Feinberg endorsed the argument[70] and wrote that the distinction, "as Mill intended it to be understood, does seem at least roughly serviceable, and unlikely to invite massive social interference in private affairs."[71]

Eleven years later, Feinberg published the first volume of *The Moral Limits of the Criminal Law,* entitled *Harm to Others.* Feinberg explored there the contours of the harm principle and developed fifteen supplementary criteria, or what he called "mediating maxims," to assist in the application of the harm principle.[72] Throughout the four-volume treatise, Feinberg maintained that the harm argument, as refined by the mediating maxims, was one of only two considerations (the other being the offense principle) that were always a good reason for prohibiting purportedly immoral activity.

Feinberg's experience with the harm principle mirrored, in significant ways, Mill's own experience.[73] Like Mill, Feinberg's confidence in the robustness of the original harm principle eroded somewhat over the course of his writings. Whereas Feinberg originally defined liberalism, in his own words, "boldly,"[74] relying exclusively on the harm principle (supplemented by an offense principle),[75] Feinberg concluded the

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[69] *Id.* at 284.

[70] Feinberg also supplements the harm principle with an offense principle. *See id.* at 297; *see also* 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 49 (1985).

[71] Feinberg, *supra* note 40, at 286.

[72] 1 FEINBERG, *supra* note 13, at 214-17, 243-45.

[73] Joel Feinberg himself acknowledges the strong similarity, in terms of the increased complexity of the harm principle, between his work and Mill's. Conversation with Joel Feinberg (Oct. 14, 1998). In his treatise, Feinberg specifically remarked that "[a]t first sight, the harm principle seems a straightforward and unproblematic guide to legislative decision-making." But, he noted, "[t]he analysis proposed in this and the preceding chapters, however, reveals that harm is a very complex concept with hidden normative dimensions . . . ." 1 FEINBERG, *supra* note 13, at 214.

[74] 4 FEINBERG, *supra* note 13, at 323-24.

[75] Feinberg's original definition of liberalism posited that the harm and offense principles were exclusive. He wrote:

> We can define liberalism in respect to the subject matter of this work as the view that the harm and offense principles, duly clarified and qualified, between them exhaust the class

fourth and last volume of *The Moral Limits of the Criminal Law* by softening his claims about the critical role of the harm principle. But even under the more cautious version proposed by Feinberg at the end of his treatise, the qualified harm principle still played a dominant role. Feinberg concluded his treatise with the following "cautious" definition of liberalism:

> [W]e can define liberalism cautiously as the view that as a class, harm and offense prevention are far and away the best reasons that can be produced in support of criminal prohibitions, and the only ones that frequently outweigh the case for liberty. They are, in short, the only considerations that are *always good reasons* for criminalization. The other principles [moralist or paternalist] state considerations that are at most sometimes (but rarely) good reasons, depending for example on exactly what the non-grievance evil is whose prevention is supposed to support criminalization.[76]

As this passage makes clear, the original harm principle remained, even by the end of Feinberg's treatise, one of the two main limits on state regulation of moral offenses.

Gradually, over the course of the 1960s, '70s, and '80s, Mill's famous sentence began to dominate the legal philosophic debate over the enforcement of morality. Harm became *the* critical principle used to police the line between law and morality within Anglo-American philosophy of law. Most prominent theorists who participated in the debate either relied on the harm principle or made favorable reference to the argument. Professor Ronald Dworkin engaged the Hart-Devlin debate in an article first published in the *Yale Law Journal* in 1966 entitled *Lord Devlin and the Enforcement of Morals.*[77] Although Dworkin focused on the implications for democratic theory—arguing that legislators must ultimately decide whether the community has

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of morally relevant reasons for criminal prohibitions. Paternalistic and moralistic considerations, when introduced as support for penal legislation, have no weight at all.

1 FEINBERG, *supra* note 13, at 14-15. *See also* 4 FEINBERG, *supra* note 13, at 321.

[76] 4 FEINBERG, *supra* note 13, at 323. Feinberg goes on to say:

> Indeed there are some extraordinary, and up to now only hypothetical examples of non-grievance evils (neither harms nor offenses, nor right-violations of any kind) that are so serious that even the liberal (if he is sensitive and honest) will concede that their prevention would be a *good* reason for criminalization, and in the most compelling examples of all, perhaps even a *good enough* reason, on balance, for criminalization.

Id. at 324.

[77] The article subsequently became a chapter of RONALD DWORKIN, TAKING RIGHTS SERIOUSLY (1977).

expressed a reasoned moral position about purportedly immoral activities[78]—Dworkin presented the harm principle as a leading response in the debate.[79] Professor Louis Henkin similarly joined the debate, with specific reference to the question of obscenity. Although Henkin, like Dworkin, took a different approach to the question—emphasizing the constitutional dimensions of laws enforcing claims of morality that have their roots in religious principles—Henkin also sided with Hart against Devlin. "By my hypotheses," Henkin noted in conclusion, "the United States would be a polity nearer the heart of Professor Hart, and of John Stuart Mill."[80]

Over time, the harm principle essentially prevailed in the legal philosophic debate over the legal enforcement of morality. From one end of the spectrum to the other, there arose a consensus that Hart had carried the day. At the liberal end of the spectrum, Professor Ronald Dworkin reported that Devlin's argument "was widely attacked" and that his thesis was, ultimately, "very implausible."[81] On the other end of the spectrum, Professor Robert George would report that "many . . . perhaps even most [commentators] think that Hart carried the day . . . ."[82] Professor Jeffrie Murphy—who is today a skeptic of the harm principle—captured well the prevailing consensus. "I believed, along with most of the people with whom I talked about legal

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[78] Dworkin, *supra* note 34, at 1001 ("[The legislator] must sift these arguments and positions, trying to determine which are prejudices or rationalizations, which presuppose general principles or theories vast parts of the population could not be supposed to accept, and so on. It may be that when he has finished this process of reflection he will find that the claim of a moral consensus has not been made out."). For a discussion of Dworkin's argument, see Sartorius, *supra* note 60, at 893-98.

[79] Dworkin, *supra* note 34, at 996. Dworkin sets forth in the second paragraph of the essay the different positions available in response to Lord Devlin, and highlights the harm principle:

> Must there be some demonstration of present harm to particular persons directly affected by the practice in question? . . . [M]ust it also be demonstrated that these social changes threaten long-term harm of some standard sort, like an increase in crime or a decrease in productivity? . . . If so, does the requirement of harm add much to the bare requirement of public condemnation?

Id. at 986.

[80] Louis Henkin, *Morals and The Constitution: The Sin of Obscenity*, 63 COLUM. L. REV. 391, 413 (1963).

[81] Ronald Dworkin, *Liberal Community*, 77 CAL. L. REV. 479, 487 (1989).

[82] George, *supra* note 51, at 30.

philosophy," Murphy wrote, "that legal moralism had been properly killed off, that liberalism had once again been vindicated against the forces of superstition and oppression, and that legal philosophy could now move on to new and more important topics."[83]

This is not to suggest that the controversy simply disappeared from philosophic circles.[84] There were attempts to rehabilitate Devlin's position.[85] There were even attempts to radicalize Devlin's argument.[86] And still today, Devlin has supporters. In fact, just this year, Professor Gerald Dworkin published a provocative essay entitled *Devlin Was Right.*[87] In the essay, Dworkin sides with Devlin "in believing that there is no principled line following the contours of the distinction between immoral and harmful conduct such that only grounds re-

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[83] Murphy, *supra* note 51, at 74-75.

[84] Under one reading, the Hart-Devlin debate metamorphosed and resurfaced as the liberal-communitarian debate, a much larger debate about liberalism and its ability to accommodate the need for community. This is most evident in Michael J. Sandel's article, *Moral Argument and Liberal Toleration: Abortion and Homosexuality*, 77 CAL. L. REV. 521 (1989). In his article, Sandel argues that it is in fact impossible to bracket controversial moral and religious convictions in debates over abortion and homosexuality, and that the liberal attempt to do so results, at best, in a "thin and fragile toleration." *Id.* at 537. *But see* Toni M. Massaro, *Gay Rights, Thick and Thin*, 49 STAN. L. REV. 45 (1996) (arguing that "thinner" approaches to gay rights may be more effective in protecting gay rights in the constitutional law context). Sandel's discussion develops many of the themes in the Hart-Devlin debate. *Compare* Sandel, *supra*, at 537-38, *with* Dworkin, *supra* note 13, at 946 ("I encourage liberals who wish to argue against, for example, the criminalization of homosexual sex, to engage in the honest toil of arguing that the reason such conduct ought not be criminalized is that there is nothing immoral in it."). But Sandel carries the discussion into the larger context of liberalism and its critics. Since the larger liberal-communitarian debate is beyond the scope of this Article, I will not pursue here this strand of the Hart-Devlin debate.

[85] *See, e.g.*, Murphy, *supra* note 51, at 76-78 (arguing that Devlin was right to challenge the inconsistency within liberalism between the harm principle and other liberal doctrines like the retributive principle and the principle of fundamental rights constitutionalism).

[86] *See, e.g.*, George, *supra* note 51, at 30-37 (offering a communitarian re-interpretation of Devlin that supposedly survives Hart's criticisms, according to which Devlin's conception of social disintegration referred to interpersonal disintegration in the community; and arguing, *contra* Devlin, for the more radical position that the *truth* of a moral position is a necessary condition for the legitimacy of its legal enforcement). *See also* ROBERT P. GEORGE, MAKING MEN MORAL: CIVIL LIBERTIES AND PUBLIC MORALITY (1993).

[87] Dworkin, *supra* note 13.

ferring to the latter may be invoked to justify criminalization."[88] Dworkin argues that Devlin was right in criticizing the line between immoral and harmful conduct, and offers his own justification for criminalizing immoral conduct—namely, that the term "wrongful" connotes conduct that "ought not to be done" in the very same way that the terms "harmful" or "offensive" do. Nevertheless, even Gerald Dworkin's provocative essay does not significantly alter the equation. To a certain extent, Dworkin's argument in fact reflects the fragmentation on the conservative side of the debate. In several key passages of his essay, Dworkin seems to premise his argument on the assumption that harmless wrongdoing is simply not possible.[89] If that is true, of course, then his argument collapses into the public harm thesis—and legal moralism is indistinguishable from the harm principle. In any event, and more importantly for present purposes, Dworkin is willing to concede in his essay that he is swimming against the liberal tide. He readily acknowledges that he is practically alone today in defending Lord Devlin.[90] The fact is that, over time, a consensus emerged that the liberal harm principle prevailed in the legal philosophic debate over the enforcement of morality.

C. THE INFLUENCE ON LEGAL RHETORIC

As the harm principle began to dominate the legal philosophic debate, the principle also began to dominate criminal law scholarship and legal rhetoric. Most of the leading criminal law scholars either adopted the harm principle or incorporated it in their writings. Herbert Packer, in his famous book published in 1968, entitled *The Limits of the Criminal Sanction*, included the harm principle in his list of limiting criteria that justified the criminal sanction.[91] Although Packer did not focus

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[88] *Id.* at 928.

[89] Dworkin intimates throughout his discussion of Feinberg's work that harmless wrongdoing may not be possible. *See, e.g., id.* at 937 ("[The legal moralist is someone] who wants to defend some kind of identification of harm and wrongdoing."); *id.* at 938 ("What we need are examples of types of acts which, while wrongful, do not (usually, tend to) set back interests. Whether it is possible for such acts to exist depends upon one's views about the nature of morality.").

[90] *See id.* at 927-28.

[91] HERBERT L. PACKER, THE LIMITS OF THE CRIMINAL SANCTION 296 (1968).

primarily on the harm principle—focusing instead on the effectiveness and social consequences of policing certain activities—he did incorporate it into his work and argued that "[t]he harm to others formula seems to me to have . . . uses that justify its inclusion in a list of limiting criteria for invocation of the criminal sanction."[92]

The harm principle featured prominently in criminal law treatises and casebooks. Most casebooks reproduced for law students the Hart-Devlin debate. One of the most popular casebooks, Professors Monrad Paulsen and Sanford Kadish's first edition of *Criminal Law and Its Processes*, published in 1962, started off on page one with the debate over Devlin's Maccabaean lecture. It extracted a lengthy portion of the lecture, as well as Hart's preliminary response published in the *Listener*.[93] Later editions of the popular casebook would excerpt Devlin's lecture, describe Hart's response in *Law, Liberty and Morality*, and refer the law student to Feinberg's four-volume treatise.[94] Professors Rollin Perkins and Ronald Boyce, in their treatise, *Criminal Law*, emphasized that the genus of crime is harm. Crime, they explained, is "any social harm defined and made punishable by law."[95] Professor Paul Robinson, in his popular treatise, *Criminal Law*, refers first and foremost to societal harm in discussing the definition of criminal conduct.[96] Robinson cites exclusively Joel Feinberg's treatise, *The Moral Limits of the Criminal Law*.

The simple harm principle also permeated the rhetoric of the criminal law itself. This was reflected most clearly in the drafting of the Model Penal Code by the American Law Institute, which was begun in 1952 and completed in 1962.[97] Profes-

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[92] *Id.* at 267.

[93] MONRAD G. PAULSEN & SANFORD H. KADISH, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 1-17 (1st ed., 1962) (excerpting H.L.A. Hart, *Immorality and Treason*, 62 LISTENER 162-63 (1959)).

[94] SANFORD H. KADISH & STEPHEN J. SCHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 160-64 (6th ed. 1995).

[95] ROLLIN M. PERKINS & RONALD N. BOYCE, CRIMINAL LAW 12 (3d ed. 1982).

[96] PAUL ROBINSON, CRIMINAL LAW 131 (1997).

[97] *See* Herbert Wechsler, *Codification of Criminal Law in the United States: The Model Penal Code*, 68 COLUM. L. REV. 1425, 1426 (1968). The Model Penal Code was a proposed model of legislation drafted by the American Law Institute. It significantly in-

sor Herbert Wechsler, the chief reporter and intellectual father of the Model Penal Code, strongly endorsed harm as the guiding principle of criminal liability. As early as 1955, Wechsler wrote: "All would agree, I think, that there is no defensible foundation for declaring conduct criminal unless it injures or threatens to injure an important human interest . . . ."[98] In his scholarly writings, Wechsler consistently emphasized the harm principle: conduct "is not deemed to be a proper subject of a penal prohibition" unless it "unjustifiably and inexcusably inflicts or threatens substantial harm . . . ."[99] This was, Wechsler emphasized, "a declaration designed to be given weight in the interpretation of the [Model Penal] Code."[100]

The language of the Model Penal Code reflected this emphasis on the harm principle. In the preliminary article, section 1.02, the drafters addressed the purposes of criminal law and stated, as the very first principle, the objective "to forbid and prevent conduct that unjustifiably and inexcusably inflicts or threatens substantial harm to individual or public interests."[101] In the Explanatory Note attached to the final draft, the drafters referred to this harm principle as the "major goal" of the provisions governing the definition of crimes—in contrast to the other four stated purposes which are referred to as "subsidiary themes."[102] The Comment to the preliminary article refers to the harm principle as "the dominant preventive purpose of the penal law."[103] It emphasizes that the harm principle "reflect[s] inherent and important limitations on the just and prudent use

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fluenced state legislation insofar as it was implemented or significantly influenced the enactment of new criminal codes in approximately 34 states during the 1960s, '70s, and '80s. *See* MODEL PENAL CODE, OFFICIAL DRAFT AND EXPLANATORY NOTES, at xi (Complete Text of Model Penal Code as Adopted at the 1962 Annual Meeting of The American Law Institute at Washington, D.C., May 24, 1962) (1985).

[98] Herbert Wechsler, *American Law Institute: II. A Thoughtful Code of Substantive Law*, 45 J. CRIM. L., CRIMINOLOGY, & P.S. 524, 527 (1955).

[99] Wechsler, *supra* note 97, at 1432 (citation omitted).

[100] *Id.*

[101] *See* MODEL PENAL CODE AND COMMENTARIES (Official Draft and Revised Comments 1985) Pt. I, Vol. I, § 1.02(1)(a).

[102] *See* MODEL PENAL CODE, OFFICIAL DRAFT AND EXPLANATORY NOTES, *supra* note 97, at Note 14.

[103] *See id.* at 16 (comment on preventing defined conduct).

of penal sanctions as a measure of control."[104] Substantially similar provisions regarding the harm principle were enacted in Alabama, Alaska, Delaware, Florida, Georgia, Nebraska, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Texas, and Washington, among other states.[105]

The harm principle was also reflected in the definition of crimes, especially moral offenses and public decency crimes. "The Model Penal Code does not attempt to enforce private morality," the drafters explained. "Thus, none of the provisions contained in Article 251 purports to regulate sexual behavior generally."[106] Professor Wechsler emphasized that:

> Private sexual relations, whether heterosexual or homosexual, are excluded from the scope of criminality, unless children are victimized or there is coercion or other imposition. Penal sanctions also are withdrawn from fornication and adultery, contrary to the law of many states. Prostitution would continue to be penalized, primarily because of its relationship to organized crime in the United States, but major sanctions would be reserved for those who exploit prostitutes for their own gain.[107]

With regard to each moral offense, the drafters specifically discussed harm. In the case of prostitution, the drafters retained the criminal sanction specifically because of the potential harm in the spread of syphilis and gonorrhea. "Of special importance to the continuation of penal repression," the drafters emphasized, "was the perceived relationship between prostitution and venereal disease."[108] In the case of consensual homosexual activity, the drafters rejected criminal responsibility on the ground of lack of harm. The drafters canvassed the moral grounds for sanctioning sodomy, but ultimately rejected them

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[104] *See id.* at 17.

[105] *See* ALA. CODE § 13A-1-3(1) (1994); ALASKA STAT. § 11.81.100(1) (1998); DEL. CODE ANN. tit. 11, § 201(1) (1995); FLA. STAT. ANN. § 775.012(1) (West 1992); GA. CODE ANN. § 26-102(1) (1998); NEB. REV. STAT. § 28-102(1) (1998); N.J. STAT. ANN. § 2C:1-2(a)(1) (West 1998); N.Y. PENAL LAW § 1.05(1) (McKinney 1998); OR. REV. STAT. § 161.025(1)(b) (1992); 18 PA. CONS. STAT. ANN. § 104(1) (West 1998); TENN. CODE. ANN. § 39-11-101(1) (1997); TEX. PENAL CODE ANN. § 1.02 (West 1994); WASH. REV. CODE ANN. § 9A.04.020(1)(a) (West 1998). *See generally* MODEL PENAL CODE, OFFICIAL DRAFT AND EXPLANATORY NOTES, *supra* note 97, at 17 n.4.

[106] MODEL PENAL CODE: OFFICIAL DRAFT AND EXPLANATORY NOTES, *supra* note 97, at 196.

[107] Wechsler, *supra* note 97, at 1449. *See also* Schwartz, *supra* note 37, at 673-74.

[108] MODEL PENAL CODE, OFFICIAL DRAFT AND EXPLANATORY NOTES, *supra* note 97, at 458.

because of the "absence of harm to the secular interests of the community occasioned by atypical sexuality between consenting adults."[109] With regard to obscenity, the drafters paid special attention to the relationship between obscene materials and overt misbehavior. The drafters noted that "in another era, spiritual error may have been a sufficient ground for penal repression, but in an age of many faiths and none, society tends to look to more objective criteria to determine what is harmful."[110] Even the proposed definition of public drunkenness incorporated the harm (and offense) principles. In the Model Penal Code, the offense of public intoxication "differs from prior law principally in requiring that the person be under the influence of alcohol or other drug 'to the degree that he may endanger himself or other persons or property, or annoy persons in his vicinity.'"[111]

From philosophy of law to substantive criminal law, the harm principle permeated the debate during the 1960s and 1970s. As evidenced by the writings of Professors Hart and Feinberg in the legal philosophic debate, and of Professor Wechsler and the drafters of the Model Penal Code in the substantive criminal law debate, the harm principle became the dominant discursive principle used to draw the line between law and morality. The decision to embrace Mill's original, simple statement of the harm principle was a powerful rhetorical move. Devlin's writings had fragmented the conservative position by conflating harm and morality—by defining public morality in terms of social harm—and had significantly ambiguated the conception of harm at the heart of the debate. The liberal response reclaimed the conception of harm. It simplified and pared it back down to the mere idea of "harm." It bracketed out the competing normative dimensions of harm. And it offered a bright-line rule. A rule that was simple to apply. A rule that was simply applied.

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[109] *Id.* at 369. Though this was the principal reason advanced, the drafters reviewed a host of other reasons not to criminalize sodomy, including, *inter alia*, finite resources, invasion of privacy, and arbitrary enforcement.

[110] *Id.* at 482.

[111] *Id.* at 190.

III. THE EMERGENCE OF CONSERVATIVE LIBERALISM

During the course of the last two decades, the proponents of legal enforcement have increasingly deployed the rhetoric of harm. Armed with social science studies, with empirical data, and with anecdotal evidence, the proponents of regulation and prohibition have shed the 1960s rhetoric of legal moralism and adopted, instead, the harm principle. Whether they have been motivated by moral conviction or by sincere adherence to the harm principle,[112] the result is the same: the harm principle has undergone an ideological shift—or, what Professor Balkin would call "ideological drift"—from its progressive origins.[113]

Today, the harm principle is being used increasingly by conservatives who justify laws against prostitution, pornography, public drinking, drugs, and loitering, as well as regulation of homosexual and heterosexual conduct, on the basis of *harm to others.* The conservative harm arguments are powerful. By endorsing the harm principle and simultaneously making harm arguments, the proponents of legal enforcement have disarmed the progressive position and the traditional progressive reliance

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[112] Many of the proponents of regulation and prohibition may have turned to harm arguments purely for rhetorical purposes, and may continue to be motivated entirely by moral principle. Dan M. Kahan's recent article, *The Secret Ambition of Deterrence,* would suggest that the real value of harm arguments—the secret ambition—is precisely "to quiet illiberal conflict between contending cultural styles and moral outlooks." 113 HARV. L. REV. 413, 415 (1999). For purposes of this Article, though, it does not really matter what motivates the proponents of enforcement. What matters is how their rhetoric has altered the structure of the debate over the legal enforcement of morality.

[113] It is interesting to note that there have also been attempts by progressives to appropriate the legal moralist argument. Some progressive thinkers have argued for the decriminalization of moral offenses, like prostitution or homosexual sodomy, on moral grounds. *See, e.g.,* Jeffrie G. Murphy, *Moral Reasons and the Limitation of Liberty,* 40 WM. & MARY L. REV. 947, 949-57 (1989) ("[T]he reason that homosexual conduct ought not to be criminalized is that there is nothing immoral in such activity."); David A.J. Richards, *Commercial Sex and the Rights of the Person: A Moral Argument for the Decriminalization of Prostitution,* 127 U. PA. L. REV. 1195 (1979) ("Judgments of the immorality of prostitution are . . . wrong; indeed, the right to engage in commercial sex is one of the rights of the person which the state may not transgress."); Jeffrey G. Sherman, *Love Speech: The Social Utility of Pornography,* 47 STAN. L. REV. 661 (1995) ("[P]ornography—at least gay male pornography—is to be valued as serving a social good: [i]t enables its consumers to realize satisfying, nurturing sexual lives.").

on the harm principle. This has significantly changed the structure of the debate over the legal enforcement of morality.

In this Part, I will discuss a number of illustrations from a variety of different contemporary debates. The purpose of these illustrations is to show significant examples of the conservative deployment of harm arguments—significant in the sense that these particular arguments have been taken seriously in contemporary debates. My purpose here is not to prove that these conservative harm arguments have been accepted by everyone, nor even by a majority of the participants in the debates. Nor is it my intention to prove that these conservative harm arguments have resulted in a higher level of actual enforcement. Again, larger social, political, cultural and historical factors may also, and more significantly, influence the actual regulation or prohibition of conduct. My focus in this Article is on changes in justification, and these changes themselves may not necessarily produce different enforcement. They do, however, have a significant impact on the way we think, argue, and debate practices like prostitution, drug use, drinking, and homosexuality, as well as other conduct that has traditionally been viewed as morally offensive.

A. PORNOGRAPHY AND HARM

In the mid-1980s, Professor Joel Feinberg discussed the feminist critique of pornography and suggested that the proper liberal position would be to leave open the possibility of regulating pornography if empirical evidence of harm developed. Feinberg intimated that further empirical research regarding some types of pornography might demonstrate harm. "In that case," Feinberg wrote, "a liberal should have no hesitation in using the criminal law to prevent the harm."[114] Feinberg cautioned, however, that "in the meantime, the *appropriate liberal response* should be a kind of uneasy skepticism about the harmful effects of pornography on third-party victims, conjoined with increasingly energetic use of 'further speech or expression' against the cult of macho, 'effectively to combat the harm.'"[115]

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[114] 2 FEINBERG, *supra* note 70, at 157.

[115] *Id.* *See also* 4 FEINBERG, *supra* note 13, at xv:

Things are different today. The "appropriate liberal response" to pornography today, I would suggest, is the free speech argument—not the harm principle.[116] Proponents of the regulation and prohibition of pornography have skillfully employed the harm argument in support of their own position, and thereby undercut the earlier progressive response. Professor Catharine MacKinnon, perhaps more than anyone else, has focused the debate on the harm to women caused by pornography. MacKinnon's work has emphasized at least three types of harm emanating from pornography. First, pornography inflicts harm on the women who are used to make the pornographic material.[117] "It is for pornography," MacKinnon explains, "and not by the ideas in it that women are hurt and penetrated, tied and gagged, undressed and genitally spread and sprayed with lacquer and water so sex pictures can be made."[118] Second, MacKinnon has argued, pornography harms the women who are assaulted by consumers of pornography. Men who consume pornography may be led—and in some cases are led—to commit crimes of sexual violence against women. "It is not the ideas in pornography that assault women," MacKinnon writes. "[M]en do, men who are made, changed, and impelled by it."[119] Third, pornography supports and promotes a general climate of discrimination against women. It becomes a part of the identity of women and of women's sexuality. "As the industry expands," MacKinnon explains, "this becomes more and more the generic experience of sex, the woman in pornography becoming more and more the lived archetype for women's sexuality in men's,

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The two traditional legal categories involved in the harm-principle arguments are defamation and incitement (to rape). I find the defamation argument ("Pornography degrades women") defective. I treat the incitement argument with respect, leaving the door open to criminal prohibitions of pornography legitimized on liberal (harm principle) grounds should better empirical evidence accumulate, while expressing skepticism over simple causal explanations of male sexual violence.

Id.

[116] There is, of course, a complicated relationship between the First Amendment and the harm principle. However, I will set aside detailed discussion of that relationship since it is somewhat beyond the scope of this Article.

[117] *See, e.g.*, MACKINNON, ONLY WORDS, *supra* note 4, at 15 ("In pornography, women are gang raped so they can be filmed.").

[118] *Id.*

[119] *Id.*

hence women's, experience."[120] Pornography, in sum, causes multiple harms to women by shaping and distorting the modern subject.[121]

MacKinnon's arguments have infiltrated American legal and political rhetoric. Though many resist MacKinnon's argument or the full implications of her argument, there is no question that, today, pornography is associated with harm in a way that it was not in the 1960s. Based at least in part on MacKinnon's argument, several municipalities have begun to enforce regulations aimed at decreasing the amount of pornography. The city council of Indianapolis, for instance, implemented MacKinnon's model ordinance.[122] And in New York City, Mayor Rudolph Giuliani has forcefully implemented a new zoning ordinance, passed in 1995, that is aimed at closing down commercial sex establishments like strip clubs, sex shops and adult book and video stores. Giuliani has justified the crack-down on the harm that commercial sex poses to ordinary citizens and to neighborhoods—not just in terms of increased crime against women, but also in terms of reduced property values, tourism, and commerce.[123]

MacKinnon's focus on harm also has influenced the responses of her main opponents—Judge Frank Easterbrook, who struck down the Indianapolis ordinance in *American Booksellers*

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[120] *Id.*

[121] *See id.* at 37 ("[T]he evidence of the harm of such materials . . . shows that these materials change attitudes and impel behaviors in ways that are unique in their extent and devastating in their consequences. In human society, where no one does not live, the physical response to pornography is nearly a universal conditioned male reaction, whether they like or agree with what the materials say or not. There is a lot wider variation in men's conscious attitudes toward pornography than there is in their sexual responses to it.").

[122] *See generally* American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323 (7th Cir. 1985). According to Judge Easterbrook, "A national commission in Canada recently adopted a similar rationale for controlling pornography." *Id.* at 323 n.1 (citing SPECIAL COMMISSION ON PORNOGRAPHY AND PROSTITUTION, 1 PORNOGRAPHY AND PROSTITUTION IN CANADA 49-59 (Canadian Government Publishing Centre 1985)).

[123] *Justices OK X-Rated Shops Crackdown*, N.Y. TIMES, Jan. 11, 1999; Richard Perez-Pena, *City Too Zealous on X-Rated Shops, State Court Rules*, N.Y. TIMES, Dec. 21, 1999, at A1; David Rohde, *Supreme Court Denies Appeal by Sex Shops*, N.Y. TIMES, Jan. 12, 1999, at B1. Giuliani's justification relies in large part on the "broken windows" theory which is discussed *infra* Part III.B. *See* Giuliani, *The Next Phase*, *supra* note 3; *see also* Bratton, *supra* note 3, at 785–88; Giuliani, *1999 State of the City Address*, *supra* note 3.

Association, Inc. v. Hudnut,[124] and Professor Judith Butler, whose recent book, *Excitable Speech: A Politics of the Performative*,[125] takes issue with MacKinnon's approach.

Though Easterbrook, writing for the Seventh Circuit, struck down MacKinnon's ordinance on First Amendment grounds, he nevertheless acknowledged the harm that pornography may cause women.[126] Easterbrook wrote in *Hudnut*:

> [W]e accept the premises of this legislation. Depictions of subordination tend to perpetuate subordination. The subordinate status of women in turn leads to affront and lower pay at work, insult and injury at home, battery and rape on the streets. In the language of the legislature, "[p]ornography is central in creating and maintaining sex as a basis of discrimination. Pornography is a systematic practice of exploitation and subordination based on sex which differentially harms women. The bigotry and contempt it produces, with the acts of aggression it fosters, harm women's opportunities for equality and rights [of all kinds]."[127]

Ironically, it is precisely the harm associated with pornography that, according to Easterbrook, "simply demonstrates the power of pornography as speech."[128] It is the harm of pornography that triggers First Amendment protection. Easterbrook struck down the ordinance, not because pornography causes no harm, but rather because the harm is evidence of the power of speech and of the importance of protecting free speech. "If the fact that speech plays a role in a process of conditioning were

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[124] *Hudnut*, 771 F.2d at 323.

[125] BUTLER, *supra* note 9.

[126] MacKinnon emphasizes this fact. *See* MACKINNON, ONLY WORDS, *supra* note 4, at 92 ("[The court in *Hudnut*] began by recognizing that the harm pornography does is real, conceding that the legislative finding of a causal link was judicially adequate . . . .").

[127] *Hudnut*, 771 F.2d at 329 (citing INDIANAPOLIS, IND., CODE § 16-1(a)(2) (1984)). To be sure, in the margin, Easterbrook couched these observations as a judicial acceptance of legislative findings. "In saying that we accept the finding that pornography as the ordinance defines it leads to unhappy consequences," Easterbrook noted, "we mean only that there is evidence to this effect, that this evidence is consistent with much human experience, and that as judges we must accept the legislative resolution of such disputed empirical questions." *Id.* at 329 n.2. Nevertheless, his very comment ("that this evidence is consistent with much human experience"), as well as his lengthy discussion, in which he equates pornography with Nazism, communism, and sedition, reflect his acceptance of MacKinnon's harm argument.

[128] *Id.* at 329.

enough to permit governmental regulation, that would be the end of freedom of speech."[129]

In the academy, Judith Butler has argued against MacKinnon's proposal to regulate pornography. Butler is concerned that regulation may give too much power to the state. The potential risk, according to Butler, is that the state will then deploy its regulatory power against the interests of minority groups. Butler warns that "such strategies tend to enhance state regulation over the issues in question, potentially empowering the state to invoke such precedents against the very social movements that pushed for their acceptance as legal doctrine."[130] She suggests that "this very extension of state power . . . comes to represent one of the greatest threats to the discursive operation of lesbian and gay politics."[131] In the place of state regulation, Butler advocates nonjuridical, nonregulatory forms of resistance, like everyday forms of opposition and organized group resistance.[132] The paradigm of resistance, for Butler, is the way in which the term of abuse "queer" was reappropriated by gay men and lesbians and given new meaning through a process of resignification.[133]

Throughout Butler's discussion, the concept of *harm* plays a central role. Butler's argument attempts to refine MacKinnon's discussion of harm in order to insert a gap between pornography and its harm that would allow time and space for nonjuridical intervention. Butler's argument draws heavily on J.L. Austin's early distinction in *How to Do Things with Words* between illocutionary and perlocutionary speech acts. "Illocutionary" describes speech acts that, in the very expression, produce effects. The conventional examples are the judge saying "I sen-

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[129] *Id.* at 330.

[130] BUTLER, *supra* note 9, at 24.

[131] *Id.* at 22.

[132] *Id.* at 23.

[133] *Id.* at 14 ("The revaluation of terms such as 'queer' suggest that speech can be 'returned' to its speaker in a different form, that it can be cited against its originary purposes, and perform a reversal of effects. More generally, then, this suggests that the changeable power of such terms marks a kind of discursive performativity that is not a discrete series of speech acts, but a ritual chain of resignifications whose origin and end remain unfixed and unfixable.").

tence you" or the groom saying "I do." In each case, the speech is simultaneously an act, a doing.[134] "Perlocutionary" describes speech acts that may trigger consequences, but do not do so at the very moment of speaking. In perlocutionary acts there is a temporal space between the saying and the consequences.

Butler argues that MacKinnon wrongly ascribes both perlocutionary and illocutionary attributes to pornography. The perlocutionary aspect corresponds to the incitement to rape; the illocutionary to the demeaning of women and the shaping of women's identity. Butler explains, "[i]n MacKinnon's recent work, *Only Words*, pornography . . . is understood not only to 'act on' women in injurious ways (a perlocutionary claim), but to constitute, through representation, the class of women as an inferior class (an illocutionary claim)."[135] Butler suggests that the illocutionary character is a new development,[136] and argues that it has negative political implications. The problem, according to Butler, is that if pornography is indeed illocutionary, there is no room for resistance. The very possibility of resistance, especially nonjuridical resistance, depends on there being some time and space between the speech act and the injury. "The possibility for a speech act to resignify a prior context depends, in part, upon the gap between the originating context or intention by which an utterance is animated and the effects it produces."[137] Butler argues that pornography should not be interpreted as having an illocutionary effect in order, precisely, to allow for linguistic struggle.[138]

Butler's argument, then, underscores the perlocutionary aspect of the *harm to women.* Harm drives Butler's conception of individual agency and creates the need for a political struggle at the individual level against harmful speech. Butler's use of language demonstrates this well:

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[134] *Id.* at 17.

[135] *Id.* at 20-21.

[136] *Id.* at 18 ("Significantly, MacKinnon's argument against pornography has moved from a conceptual reliance on a perlocutionary model to an illocutionary one.").

[137] *Id.* at 14.

[138] *Id.* at 21 ("I will argue that, taken generically, the visual text of pornography cannot 'threaten' or 'demean' or 'debase' in the same way that the burning cross can.").

> In the place of state-sponsored censorship, a social and cultural struggle of language takes place in which agency is derived from *injury*, and *injury* countered through that very derivation.
>
> Misappropriating the force of *injurious* language to counter its *injurious* operations constitutes a strategy that resists the solution of state-sponsored censorship, on the one hand, and the return to an impossible notion of the sovereign freedom of the individual, on the other.[139]

It is clear from this passage that harm is at the heart of the debate. Butler's response both acknowledges harm and seeks to refine the harm argument. At the political strategic level, ironically, Butler's proposal closely resembles Joel Feinberg's earlier recommendation. Recall that Feinberg advocated "increasingly energetic use of 'further speech or expression' against the cult of macho, 'effectively to combat the harm.'"[140] But, in contrast to Feinberg, Butler does not adopt a stance of uneasy skepticism concerning the harm to women. To the contrary, Butler's careful analysis of the etiology of harm justifies her argument against state regulation of pornography.

In the specific context of the pornography debate then, MacKinnon's use of the harm argument has produced an ideological shift in the harm principle. In contrast to an earlier period when the harm principle was employed by progressives to justify limits on the regulation of pornography, the principle is no longer an effective response to conservative proposals to regulate. To the contrary, the conservatives have essentially taken over the harm principle: harm has become the principal argument for state intervention, as illustrated and, in this particular case, at least temporarily implemented, in Indianapolis and New York City. Easterbrook and Butler's responses to MacKinnon reflect how destabilizing this ideological shift has been. These contemporary responses essentially discard the harm principle in favor of free speech and strategic arguments about political effectiveness. Most tellingly, these contemporary responses *incorporate harm* into their own arguments to bolster their position—in the case of free speech, to show the very power of speech, and in the case of political strategy, to demonstrate the need for political resistance, rather than state inter-

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[139] *Id.* at 41 (emphasis added).

[140] 2 FEINBERG, *supra* note 70, at 157.

vention. The result is an entirely different structure in the debate over the legal enforcement of morality: a structure of competing harm claims with no internal mechanism to resolve them.

B. PROSTITUTION AND HARM

Traditionally, prostitution presented a hard case for the progressives. It implicated all three safe harbors in the harm principle: consent, privacy, and supposedly self-regarding conduct. The private act of consensual, heterosexual fornication was, after all, the paradigm activity protected by the harm principle. What then distinguished a private act of consensual, heterosexual prostitution?

John Stuart Mill framed the question as follows: "Fornication, for example, must be tolerated, and so must gambling; but should a person be free to be a pimp, or to keep a gambling house?"[141] Mill never really answered the question. "The case is one of those which lie on the exact boundary line between two principles," Mill suggested, "and it is not at once apparent to which of the two it properly belongs."[142] Mill rehearsed strong arguments on both sides of the question. Consistency militated in favor of toleration. On the other hand, pimps stimulate fornication for their own profit and society may elect to discourage conduct that it regards as "bad."[143] In the end, Mill refused to take a position regarding the pimp. "I will not venture to decide whether [the arguments] are sufficient to justify the moral anomaly of punishing the accessory when the principal is (and must be) allowed to go free; of fining or imprisoning the procurer, but not the fornicator . . . ."[144] With regard to the fornicator, though, Mill clearly believed that no liability should attach.

In *Law, Liberty, and Morality*, H.L.A. Hart also straddled the fence. As we saw earlier, Hart's lectures were a response to Lord Devlin, and Devlin had argued that all aspects of prostitution should be prohibited. Devlin had argued the flip side of Mill's

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[141] MILL, *supra* note 27, at 98.

[142] *Id.*

[143] Mill employs the term "bad" in his discussion. *See id.*

[144] *Id.* at 99.

consistency thesis: if the law can prohibit brothel-keeping because it is exploitative, then surely the law could also regulate prostitution. "All sexual immorality involves the exploitation of human weaknesses," Devlin argued. "The prostitute exploits the lust of her customers and the customer the moral weakness of the prostitute."[145] In contrast to Devlin, but like Mill, Hart refused to resolve the issue explicitly. Instead, Hart reported on the English Street Offences Act of 1959 and endorsed its underlying rationale. Under the Act, prostitution was not made illegal, but solicitation in a street or public place was.[146] According to Hart, this approach respected the important distinctions between public and private, and between immorality and indecency. Hart favored these distinctions, and, approvingly, reported that "the recent English law relating to prostitution attends to this difference. It has not made prostitution a crime but punishes its public manifestation in order to protect the ordinary citizen, who is an unwilling witness of it in the streets, from something offensive."[147] For Hart, the offense principle justified prohibiting the public manifestations of prostitution. Prostitution itself, however, conducted in complete privacy, could remain unregulated since it was not perceived as harmful.

Joel Feinberg adopted a similar approach in *The Moral Limits of the Criminal Law.* Feinberg avoided reference to harm in the context of prostitution, and suggested instead that an offense principle could plausibly restrict overtly erotic behavior, public acts of solicitation, and houses of prostitution.[148] The same offense principle, however, would not preclude private sexual conduct including prostitution.[149] Other contemporary liberal writers similarly relied on the offense principle rather than the harm principle. Herbert Packer, for instance, wrote:

> It seems that prostitution, like obscenity and like other sexual offenses, should be viewed as a nuisance offense whose gravamen is not the act itself, or even the accompanying commercial transaction, but rather

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[145] DEVLIN, *supra* note 36, at 12.

[146] HART, *supra* note 40, at 11.

[147] *Id.* at 45.

[148] 2 FEINBERG, *supra* note 70, at 43.

[149] *Id.* at 46 (Feinberg qualifies his statement about not restricting private prostitution with the phrase: "except for rules regulating commerce").

its status as a public indecency. That is the approach taken in England, where law enforcement does not seem to be plagued with the self-imposed problems that our prostitution controls engender.[150]

In sharp contrast, the last two decades have witnessed a distinct shift in the debate over prostitution. The proponents of regulation or prohibition, instead of arguing about morality or offense, have turned to the harm argument, and thereby disarmed the traditional progressive position. This shift is the result again, at least in part, of Catharine MacKinnon's writings. MacKinnon has argued that prostitution is on par with rape, battery, sexual harassment, and pornography in its harm to women.[151] The impact of MacKinnon's work has been to focus on the harm to the women who engage in commercial sex and to women's identity more generally. What also has transformed the debate over prostitution is the "broken windows" theory of crime prevention, first articulated in James Q. Wilson and George L. Kelling's article, *Broken Windows*, in the *Atlantic Monthly* in 1982.[152] I have described and analyzed the broken windows theory in extensive detail in my recent article *Reflecting on the Subject.*[153] For present purposes, what is important is that, under the broken windows argument, the potential harm to society in prostitution is not so much the harm to women, but rather the likelihood of increased serious criminal activity. The broken windows hypothesis provides that, if prostitution and other minor disorderly conduct in a neighborhood go unattended, serious crime will increase in that neighborhood. Disorder, such as prostitution, brings about increased criminal

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[150] PACKER, *supra* note 91, at 331.

[151] *See* CATHARINE A. MACKINNON, TOWARD A FEMINIST THEORY OF THE STATE 138 (1989). To be sure, prostitution had been a target of the feminist movement since the nineteenth century. At that time, however, many "feminists believed that prostitutes had a right to perform their work free from police harassment." Eleanor M. Miller, *The United States, in* PROSTITUTION: AN INTERNATIONAL HANDBOOK ON TRENDS, PROBLEMS AND POLICIES 300, 302 (Nanette J. Davis ed., 1993). Although many feminists in the nineteenth century perceived prostitution as causing harm to the prostitutes, they nevertheless militated for legalization. *Id.*

[152] James Q. Wilson & George L. Kelling, *Broken Windows*, THE ATLANTIC MONTHLY, Mar. 1982, at 29.

[153] Bernard E. Harcourt, *Reflecting on the Subject: A Critique of the Social Influence Conception of Deterrence, the Broken Windows Theory, and Order-Maintenance Policing New York Style*, 97 MICH. L. REV. 291 (1998).

activity. According to the broken windows argument, prostitution causes harm to society by causing more violent crimes.

The broken windows hypothesis focuses on a range of minor disorderly conduct of both a social (prostitution, public intoxication, aggressive panhandling, and loitering) and physical nature (littering, abandoned buildings, and broken windows). Of special relevance here, the theory highlights the role of prostitution as part of the disorder. Prostitutes are among the disorderly—they are among "the disreputable or obstreperous or unpredictable people: panhandlers, drunks, addicts, rowdy teenagers, *prostitutes,* loiterers, the mentally disturbed."[154] And prostitution plays a central role in the process whereby disorder causes serious crime:

> [A disorderly] area is vulnerable to criminal invasion. Though it is not inevitable, it is more likely that here, rather than in places where people are confident they can regulate public behavior by informal controls, drugs will change hands, *prostitutes will solicit,* and cars will be stripped. That the drunks will be robbed by boys who do it as a lark, and *the prostitutes' customers will be robbed by men who do it purposefully and perhaps violently.* That muggings will occur.[155]

As this passage makes clear, prostitution is central to the causal chain connecting disorder and crime in the broken windows hypothesis.[156]

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[154] Wilson & Kelling, *supra* note 152, at 30 (emphasis added).

[155] *Id.* at 32 (emphasis added).

[156] Surprisingly, there is actually a lack of empirical evidence. The only social scientific study on point found that prostitution and commercial sex activities were not correlated with the other indices of disorder and were not significantly related to major crimes. The author of the study, Wesley G. Skogan, ultimately excluded prostitution and commercial sex activities from his index of disorder precisely because they were not related to other aspects of social or physical disorder. WESLEY G. SKOGAN, DISORDER AND DECLINE: CRIME AND THE SPIRAL OF DECAY IN AMERICAN NEIGHBORHOODS (1990). Skogan wrote:

> At the individual level, reactions to these problems [prostitution and smut] formed a separate factor in every area in which they were included. A separate index of the extent of *commercial sex problems* was formed, but—as the status of the items as a separate factor hints—it was correlated only +.18 with the summary disorder measure and was not related to other neighborhood factors in the same fashion as either social or physical disorder .... As a result, this cluster of (very interesting) problems will not be considered in any detail in this report.

WESLEY G. SKOGAN, DISORDER AND COMMUNITY DECLINE: FINAL REPORT TO THE NATIONAL INSTITUTE OF JUSTICE 19 (1987) (emphasis added). Using Skogan's data and replicating his study, I found that the correlation between prostitution and robbery victimization is in fact -.10 and that there is no statistically significant relation-

The conception of harm at the heart of the *Broken Windows* essay—in conjunction with MacKinnon's harm argument—has significantly altered the structure of the debate over the enforcement of laws against prostitution. The contemporary proponents of regulation or prohibition have changed the equation of harm, undercut the earlier progressive argument, and neutralized the harm principle: the principle is no longer an effective argument because it is silent once a threshold of harm has been met. The conservative claims of harm have, in essence, disarmed the 1960s progressive position.[157]

In this particular context, it is interesting to note that the shift in justification has coincided with heightened enforcement of domestic laws against prostitution. This is not to suggest a causal relationship—again, factors other than justification play a significant role in law enforcement—but to underscore an interesting coincidence. In the past ten to twenty years, there has been an increase in the enforcement of laws against prostitution from an earlier period of effective decriminalization. Professor Bill Nelson has chronicled the changes in the laws dealing with prostitution in New York State from 1920 to 1980, and has highlighted the trend toward decriminalization that occurred after World War II.

According to Nelson, the earlier period—1920 to 1940—was characterized by "intense criminal regulation"[158] of prostitution and "judicial enforcement of Victorian sexual norms."[159] During that earlier period, "most judges . . . adopted a tough stance toward prostitution"[160] and justified their actions based on their

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ship between prostitution and robbery victimization (p-value of .712). *See* Harcourt, *supra* note 153, at 319 n.116.

[157] Another factor that may have contributed to the harm argument is the AIDS epidemic, discussed more fully *supra* Part III.D. In relation to the enforcement of laws against prostitution, see, for example, REPORT OF THE PRESIDENTIAL COMMISSION ON THE HUMAN IMMUNODEFICIENCY VIRUS EPIDEMIC, RECOMMENDATION 9-51, at 131 (June 1988) ("Prostitution laws should be strictly enforced.") (quoted in AIDS LAW AND POLICY 249 (Arthur Leonard et al. eds., 2d ed. 1995)).

[158] William E. Nelson, *Criminality and Sexual Morality in New York, 1920-1980*, 5 YALE J.L. & HUMAN. 265, 275-76 (1993).

[159] *Id.* at 268.

[160] *Id.* at 266.

concern to preserve "high moral standards."[161] The trend toward decriminalization of prostitution in New York State began in the mid-1940s, took hold in the 1950s, and continued through 1980. During this period, "[b]y construing legislation narrowly and holding evidence of guilt insufficient to sustain convictions, a majority of judges, in effect, pursued a policy of decriminalization."[162] Nelson's review of the legal arguments employed during this period reveals heavy reliance on the harm principle. One family court judge, for instance, went so far as to state that "[h]owever offensive it may be, recreational commercial sex threatens no harm to the public health, safety or welfare," and should "not be proscribed."[163]

Nelson suggests that, during the late 1970s, "a new, radical feminist opposition to prostitution began to emerge as the main force behind the expansion of the criminal law."[164] Nelson is referring here to the social movement that deployed the feminist harm arguments discussed earlier. As Nelson explains, "the new radical feminists focused on prostitution not as an evil to society in general but as a harm to women in particular; in the radical view, it was the prostitutes themselves who were victimized and exploited and needed to be protected."[165] According to Nelson, however, this social movement was effectively countered by the proponents of decriminalization—including "liberal feminists"[166]—and, as a result, decriminalization continued to mark the period ending in 1980.

Since 1980, however, laws criminalizing prostitution have been more vigorously enforced. In New York City, the police have targeted prostitution—and other minor misdemeanor offenses—under a new policing strategy known as the quality-of-

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[161] *Id.* at 277.

[162] *Id.* at 288.

[163] *Id.* at 288 (quoting *In re* P., 400 N.Y.S.2d 455, 468 (N.Y. Fam. Ct. 1977), *rev'd*, 418 N.Y.S.2d 597 (N.Y. App. Div. 1979)).

[164] *Id.* at 333.

[165] *Id.* at 333. I should emphasize here, again, that I am not arguing—perhaps in contrast to Nelson—that legal and political arguments *cause or produce* actual change in the enforcement of laws against prostitution. My purpose in describing the history of enforcement is to observe the coincidence between changing justifications and actual enforcement.

[166] *Id.* at 268.

life initiative. Premised on the *Broken Windows* essay, the new policing initiative seeks to create public order by aggressively enforcing laws against prostitution, as well as public drunkenness, loitering, vandalism, littering, public urination, aggressive panhandling, and other minor misdemeanors.[167] With regard to prostitution, "the city's police crackdown on streetwalking began in 1994, when more than 9,500 prostitutes and clients were arrested. Clients found their names being published and vehicles taken away, while judges proved less likely to allow prostitutes back on the street without jail sentences."[168] The crackdown has had a significant impact on the public manifestations of prostitution. "Experts say the crackdown has cut the number of streetwalkers in half in some parts of the city, and repeat offenders are fewer."[169]

At the national level, the overall regulation of female streetwalkers has also increased in recent years. According to experts, "attempts to control the prostitute herself by law have increased in the United States, while, at the same time, they have waned in Europe."[170] In addition,

> [c]ommunities across the nation have . . . enact[ed] loitering ordinances based upon the one used in Seattle, Washington. Such ordinances generally allow the authorities to arrest either "any person" or "any person known" to be a member of a category of persons (e.g., prostitutes,

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[167] Mayor Rudolph Giuliani and former New York City Police Commissioner William Bratton, the principal architects of the quality-of-life initiative, cite the *Broken Windows* article as the main source of their ideas. *See* Kevin Cullen, *The Comish*, BOSTON GLOBE SUNDAY MAGAZINE, May 25, 1997, at 12; Fred Kaplan, *Looks Count*, BOSTON GLOBE, Jan. 19, 1997, at E1. *See also* William J. Bratton, *The New York City Police Department's Civil Enforcement of Quality-of-Life Crimes*, 3 J.L. & POL'Y 447 (1995); Giuliani, *The Next Phase*, *supra* note 3.

[168] Kit R. Roane, *Prostitutes on Wane in New York Streets But Take to Internet*, N.Y. TIMES, Feb. 23, 1998, at A1.

[169] *Id.* According to experts, though, prostitution is no less present in the city. It has simply moved from the public streets to the Internet and pagers. These venues are far more difficult for the police to penetrate because prostitutes who work on-line or through escort services are better able to detect undercover police officers. As a result, the New York Police Department only succeeded in closing down 30 on-line and escort service establishments during the first eight months of 1997, and only 44 such establishments for all of 1996. *Id.*

[170] Miller, *supra* note 151, at 318.

pimps) if they repeatedly attempt to engage passersby in conversation or beckon to them.[171]

In the case of prostitution, then, the proliferation of conservative harm arguments—arguments about the harm to women, to crime victims, to neighborhoods and property value—has coincided with heightened enforcement of laws against prostitution. The enforcement measures have had a significant effect, particularly on the perception of orderliness in many cities. The transformation of Forty-Second Street and Times Square in New York City, for instance, has made a far-reaching impression across the nation. It has signaled the tremendous financial costs, in terms of lost tourism and commerce, that commercial sex establishments impose on a neighborhood. Undoubtedly, this has reinforced the rhetorical strength of the conservative harm arguments against prostitution.

C. DISORDERLY CONDUCT AND HARM

The broken windows theory also significantly altered the debate in the area of disorderly conduct more generally. The *Broken Windows* essay, which appeared in 1982, revolutionized the way police departments and policy-makers think about minor misdemeanor offenses, like loitering, panhandling, public urination, graffiti spraying, illegal peddling, turnstile jumping, and other "quality-of-life" offenses. As Professor Debra Livingston observes, the essay has been:

> "widely cited," has become "one of the most influential articles on policing," and has helped to create what some have termed a "consensus" in community and problem-oriented policing circles that the neglect of

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[171] *Id.* at 318-19. Such statutes have been enacted, for instance, in Alabama (ALA. CODE § 13A-11-9 (1994)), Arizona (ARIZ. REV. STAT. ANN. § 13-2905 (West 1989)), Arkansas (ARK. CODE ANN. § 5-71-213 (Michie 1997)), California (CAL. PENAL CODE § 647 (West 1999)), Colorado (COLO. REV. STAT. § 18-9-112 1998)), Hawaii (HAW. REV. STAT. ANN. § 712-1206 (1994)), Idaho (IDAHO CODE § 18-5613 (1997)), Kentucky (KY. REV. STAT. ANN. § 525.090 (Michie 1990)), Minnesota (MINN. STAT. ANN. § 609.725 (West 1987)), New Jersey (N.J. STAT. ANN. § 2C:34-1 (West 1995)), New York (N.Y. PENAL LAW § 240.37 (McKinney 1998)), North Carolina (N.C. GEN. STAT. § 14-204 (1993)), Ohio (OHIO REV. CODE ANN. § 2907.24 (West 1999)), Rhode Island (R.I. GEN. LAWS § 11-34-8 (1994)), and Wisconsin (WIS. STAT. ANN. § 947.02 (1996)).

quality-of-life problems was a deficiency of urban policing in the period into the 1980s.[172]

What the broken windows theory accomplished was to transform these quality-of-life offenses from mere nuisances or annoyances into *positively harmful conduct*—conduct that in fact contributes to serious crimes, like murder and armed robbery. Now, to be sure, many of these quality-of-life offenses easily satisfied the harm principle. Graffiti spraying and public urination cause property damage, and therefore harm. Similarly, turnstile jumping represents lost income. In other words, many of these minor offenses could be regulated consistently with the harm principle. What I would like to focus on, however, are the type of quality-of-life offenses that were not previously viewed as *per se* harmful. A good illustration is loitering.

The debate over anti-loitering ordinances has significantly changed during the past thirty years, from a debate that focused on loitering as a public nuisance to a debate that is focusing increasingly on loitering as a generalized harm. This is reflected well in the litigation over anti-loitering statutes, the legal challenges under the vagueness and free speech provisions, and the various courts' treatment of these challenges. Debra Livingston has reviewed in detail the historical development and legal transformation of the courts' treatment of anti-loitering laws,[173] and I will not repeat the history here. I will focus instead on the changes that illustrate the conservative turn to harm.

In the 1960s and 1970s, loitering was viewed primarily as an annoyance. The history of vagrancy laws, and especially their origin in early English laws regulating the labor force, is well known.[174] For present purposes, what is important is that, in the

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[172] Debra Livingston, *Police Discretion and the Quality of Life in Public Places: Courts, Communities, and the New Policing*, 97 COLUM. L. REV. 551, 584 (1997); *see also* Harcourt, *supra* note 153, at 292-95.

[173] *See* Livingston, *supra* note 172, at 595-627; *see also* Alfred Hill, *Vagueness and Police Discretion: The Supreme Court in a Bog*, 51 RUTGERS L. REV. 1289 (1999).

[174] *See generally* Papachristou v. City of Jacksonville, 405 U.S. 156, 157-59 (1972); Loper v. New York City Police Dep't, 802 F. Supp. 1029, 1032 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993); MODEL PENAL CODE AND COMMENTARIES, *supra* note 101, § 250.6, cmt 1; Jeffrey S. Adler, *A Historical Analysis of the Law of Vagrancy*, 27 CRIMINOLOGY 209 (1989); Caleb Foote, *Vagrancy-Type Law and Its Administration*, 104 U. PA. L. REV. 603 (1956).

'60s and '70s, prior to the broken windows hypothesis, anti-loitering statutes were most often justified on the grounds of preventing annoyance to the public and idleness among the able-bodied. Many of the anti-loitering ordinances specifically referred to idleness and annoyance in proscribing conduct. The ordinance that the Supreme Court struck down in *Coates v. City of Cincinnati* in 1971, for instance, made it a criminal offense for a group of persons to "conduct themselves in a manner *annoying* to persons passing by."[175] The ordinance that the Court struck down in *Papachristou v. City of Jacksonville* in 1972 criminalized, among other things, "habitual loafers," "persons able to work but habitually living upon the earnings of their wives or minor children," and "persons neglecting all lawful business and habitually spending their time by frequenting houses of ill fame, gaming houses, or places where alcoholic beverages are sold or served."[176] As the comment to the Model Penal Code explains, anti-loitering ordinances most commonly proscribed "living in idleness without employment and having no visible means of support."[177] To be sure, anti-loitering laws were used by the police to investigate crime, to create order in neighborhoods and, in many cases, to oppress minorities. But the typical justification offered for the statutes was to cut down on a public nuisance. Even the 1960s reforms—the new ordinances and the legal doctrinal transformations—continued to treat these quality-of-life offenses as annoyances. The Model Penal Code revision of the crime of "disorderly conduct," for instance, was specifically drafted, according to its authors, to "penalize public nuisance."[178] The drafters required, as the mental state, that the offender have the "purpose to cause public inconvenience, annoyance or alarm."[179]

An important and influential legal doctrine that was used repeatedly in the '60s and '70s—and continues to be used today—was that "a statute which fails to distinguish between inno-

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[175] Coates v. City of Cincinnati, 402 U.S. 611, 611 (1971) (emphasis added).

[176] *Papachristou*, 405 U.S. at 156 n.1.

[177] MODEL PENAL CODE, *supra* note 101, § 250.6, cmt. 1.

[178] *Id.* § 250.2, cmt 2.

[179] *Id.*

cent conduct and action which is calculated to cause harm may not be sustained."[180] The distinction between *innocent loitering* and *harmful loitering* reflected the idea that *not all loitering was harmful.* Harmful loitering involved someone casing a store, or soliciting prostitution, or offering to sell drugs. Innocent loitering, in contrast, involved merely hanging around without any criminal intent. Courts generally required—and often still do today[181]—that statutes distinguish between these two types of conduct, and only criminalize harmful loitering. The typical justification was that "an ordinance which makes no distinction between conduct calculated to harm and conduct which is essentially innocent is an unreasonable exercise of the government's police power."[182] Similarly, many jurisdiction adopted anti-loitering laws that specifically targeted illegal conduct, like soliciting prostitution, or gambling, or the sale of illegal drugs.[183] These new statutes proscribed *harmful* loitering. This distinction was similarly incorporated into the Model Penal Code's definition of disorderly conduct, which, according to the drafters, "prohibits only conduct that is itself disorderly and does not punish lawful behavior that prompts others to respond in a disorderly manner."[184]

The broken windows theory of harm—the notion that *all* loitering may cause harm to a neighborhood by creating an atmosphere of disorder that renders the neighborhood vulnerable to crime—was not prevalent in the debate in the '60s and '70s. The few references to such an idea were generally dismissed summarily. In *Papachristou,* for instance, Justice Douglas rejected a broken windows-type argument out of hand. Douglas remarked, writing for a unanimous Court:

> A presumption that people who might walk or loaf or loiter or stroll or frequent houses where liquor is sold, or who are supported by their wives or who look suspicious to the police are to become future criminals

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[180] *See, e.g.,* People v. Pagnotta, 253 N.E.2d 202, 205 (N.Y. 1969).

[181] For instance, the Illinois Supreme Court relied on this doctrine in its opinion recently holding Chicago's anti-gang loitering ordinance unconstitutionally vague. *See* City of Chicago v. Morales, 687 N.E.2d 53, 60-61 (Ill. 1997), *aff'd,* 119 S. Ct. 1849 (1999).

[182] City of Seattle v. Webster, 802 P.2d 1333, 1339 (Wash. 1990).

[183] *See* MODEL PENAL CODE, *supra* note 101, § 250.6, cmt 4.

[184] *See id.* § 250.

> is too precarious for a rule of law. The implicit presumption in these generalized vagrancy standards—that crime is being nipped in the bud—*is too extravagant to deserve extended treatment.*[185]

Things changed, however, with the *Broken Windows* essay. Increasingly today, municipalities are offering evidence of the broken windows argument to support loitering and curfew ordinances. The most telling cases involve litigation arising in New York City, where the city specifically introduced "broken windows" evidence of the harm caused by loitering.[186] *Loper v. New York City Police Department* involved a First Amendment challenge to a New York State loitering statute which prohibited anyone from "loiter[ing], remain[ing] or wander[ing] about in a public place for the purpose of begging."[187] At the trial court, the city presented the expert testimony of George Kelling, co-author of the *Broken Windows* essay, to provide evidence of the broken windows theory and the harm that loitering causes.[188] As the trial court explained:

> Professor Kelling has testified without contradiction that beggars and panhandlers indicate to society that disorder has set in. A neighborhood with such people, in which there are broken windows, drug dealers, and youth gangs, is threatening to the society precisely because of the indication of disorder. . . . Though he tends to lump peaceful and aggressive begging together . . . the thrust of his testimony is that the police, by enforcing the Statute, seek to reassert an orderly society. Realty [sic] and everyday experience confirm this "Broken Windows" effect.[189]

Based on this evidence, the city argued that the loitering ordinance was "justified due to the 'Broken Windows' message beggars convey."[190] Three years earlier, in *Young v. New York City Transit Authority*, a case challenging the prohibition against begging in the New York City subways, the city had similarly pre-

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[185] *Papachristou*, 405 U.S. at 171 (emphasis added); *see also, e.g.*, Farber v. Rochford, 407 F. Supp. 529, 534 (N.D. Ill. 1975).

[186] Young v. New York City Transit Auth., 903 F.2d 146, 149-50 (2d Cir. 1990) (upholding law prohibiting begging in the subway); Loper v. New York City Police Dep't., 802 F. Supp. 1029, 1034-35 (S.D.N.Y. 1992), *aff'd*, 999 F.2d 699 (2d Cir. 1993) (striking down anti-loitering statute). *See generally* Peter A. Barta, Note, *Giuliani, Broken Windows, and the Right to Beg*, 6 GEO. J. POVERTY L. & POL'Y 165 (1999).

[187] *Loper*, 802 F. Supp. at 1032.

[188] *See id.* at 1034-35, 1046.

[189] *Id.* at 1034-35.

[190] *Id.* at 1040.

sented expert evidence from Kelling concerning the broken windows theory.[191]

Other municipalities similarly have been presenting evidence of harm. In litigation over the San Diego youth curfew, the city of San Diego introduced evidence, including "national and local statistics," to support the claim that a juvenile curfew would "reduce juvenile crime and victimization."[192] The evidence presented included a Department of Justice report on juvenile offenders and victims, showing rising juvenile crime rates in the country, and a local police department report that purportedly revealed a drop in victimization during curfew hours while the curfew was enforced.[193]

In the Supreme Court litigation concerning the anti-gang loitering ordinance in Chicago, *City of Chicago v. Morales*, as well as in academic debate, Professors Dan Kahan and Tracey Meares have presented evidence that enforcement of the anti-loitering ordinance has resulted in significant declines in gang-related violence.[194] Their contention is premised on the broken

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[191] *Young*, 903 F.2d at 149-50.

[192] Nunez v. City of San Diego, 114 F.3d 935, 947 (9th Cir. 1997) (ultimately holding the curfew ordinance unconstitutional).

[193] *Id.* at 947.

[194] *See* Brief Amicus Curiae of the Chicago Neighborhood Organizations in Support of Petitioner at 24, Chicago v. Morales, 119 S. Ct. 1849 (1999) (No. 97-1121), *available in* LEXIS, Supreme Court Cases and Materials Library, U.S. Supreme Court Briefs File ("Law-enforcement officials in Chicago, for example, report dramatic reductions in violent offenses in the neighborhoods where the Ordinance has been most vigorously enforced."); Tracey L. Meares & Dan M. Kahan, *Law and (Norms of) Order in the Inner City*, 32 LAW & SOC'Y REV. 805, 822 (1998) ("Law enforcement officials in Chicago, for example, report dramatic reductions in violent offenses in neighborhoods in which that city's gang-loitering ordinance is most vigorously enforced. . . . Numerous other municipalities report the effectiveness of curfews in reducing the incidence of juvenile victimization and juvenile crime."); *see also* Tracey L. Meares, *Social Organization and Drug Law Enforcement*, 35 AM. CRIM. L. REV. 191, 224-25 (1998). Their argument has generated significant debate in academic circles, and their empirical evidence of the effectiveness of the ordinance has been challenged. *See* Bernard E. Harcourt, *After the "Social Meaning Turn": Implications for Research Design and Methods of Proof in Contemporary Criminal Law Policy Analysis*, 34 LAW & SOC'Y REV. (forthcoming 2000) (on file with author); Dorothy E. Roberts *Foreword: Race, Vagueness, and the Social Meaning of Order-Maintenance Policing*, 89 J. CRIM. L. & CRIMINOLOGY 775, 794-95 (1999); Stephen J. Schulhofer & Albert W. Alschuler, *Getting the Facts Straight: Crime Trends, Community Support, and the Police Enforcement of "Social Norms"*, 34

windows theory that gang-loitering *causes serious crime.* Their *amicus curiae* brief to the Supreme Court contains the following long-list of harms caused by gang-loitering. To place this list of harms in perspective, recall that the ordinance prohibited any person from loitering ("remaining in any one place with no apparent purpose") with one or more other persons whenever the police reasonably believed that *any one* of those persons was a criminal street-gang member.[195]

> Gang criminality has made the inner-city neighborhoods of Chicago deadly places to live. Stories of innocent bystanders shot in gang-war crossfire have become staples of newspaper headlines and TV news in Chicago as elsewhere. . . . Street-level intimidation is one of the primary strategies by which gangs extend their influence. By stationing small groups of gang members on the streets, gangs stake out and lay claim to turf, sell drugs to finance the procurement of arms, recruit new members (often coercively), serve as lookouts and intelligence gatherers, and intimidate neighborhood residents and passers-by. Intimidation takes many forms. . . . Law-abiding citizens are effectively imprisoned in their homes as a result of the mere presence of gang members on the streets. . . . Children are particularly vulnerable to the intimidation of gang members congregating on the streets. Fear is the primary tool of gang recruitment. . . . Inner-city residents in Chicago and elsewhere are, in a very real sense, engaged in a battle to protect themselves from a deadly urban disease that victimizes both gang members and non-gang members. Their formidable challenge is to find a cure that does not itself threaten the well-being of their communities and children.[196]

To be sure, Justice Stevens, writing for the majority of the Court, rejected the city of Chicago's argument that the ordinance has been effective, stating that "[g]iven the myriad factors that influence levels of violence, it is difficult to evaluate the probative value of this statistical evidence, or to reach any firm conclusion about the ordinance's efficacy."[197] However, what matters is not whether the broken windows harm argument prevails in the litigation. It did not prevail in *Morales, Loper,* or *Nunez*—although it did in *Young.* What matters is that the proponents of regulation have turned increasingly to harm ar-

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LAW & SOC'Y REV. (forthcoming 2000) (on file with author); *see generally* Toni Massaro, *The Gang's Not Here,* 2 THE GREEN BAG 25 (1998).

[195] City of Chicago v. Morales, 119 S. Ct. 1849, 1854 n.2 (1999).

[196] Brief Amicus Curiae of the Chicago Neighborhood Organizations in Support of Petitioner, *supra* note 194, at 19-21.

[197] *Morales,* 119 S. Ct. at 1855 n.7.

guments and that these harm arguments have begun to shape the current debates on anti-loitering statutes.[198]

D. HOMOSEXUAL CONDUCT AND HARM

The case of homosexual conduct is particularly interesting because here, it seemed, legal moralism was still strong. In 1986, the United States Supreme Court adopted legal moralism for purposes of rational basis review under the Fourteenth Amendment to the United States Constitution. In *Bowers v. Hardwick*,[199] Justice White, writing for the Court, specifically said that moral sentiments provided a rational basis for enforcing Georgia's criminal ban on homosexual sodomy. In other words, morality alone justified limiting the liberty of homosexuals.[200] In the case of the debate over the enforcement of laws regulating homosexuality, then, it appeared that legal moralism remained strong and that, as a result, there was no real need for the pro-

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[198] What is equally remarkable is that, perhaps for the first time, the broken windows theory has made it into a Supreme Court decision. In his concluding paragraph of his lengthy dissent, Justice Scalia writes:

> [A]ll sorts of perfectly harmless activity by millions of perfectly innocent people can be forbidden—riding a motorcycle without a safety helmet, for example, starting a campfire in a national forest, or selling a safe and effective drug not yet approved by the FDA. All of these acts are entirely innocent and harmless in themselves, but *because of the risk of harm that they entail*, the freedom to engage in them has been abridged. The citizens of Chicago have decided that depriving themselves of the freedom to "hang out" with a gang member is necessary to eliminate pervasive gang crime and intimidation—and that the elimination of the one is worth the deprivation of the other. This Court has no business second-guessing either the degree of necessity or the fairness of the trade.

Morales, 119 S. Ct. at 1879 (Scalia, J., dissenting) (emphasis partially added). Justice Scalia is, in effect, referring here to the broken windows argument—that although loitering may be innocent, innocent loitering may nevertheless entail a risk of harm.

[199] 478 U.S. 186, 196 (1986).

[200] For discussion of this point in relation to the Hart-Devlin debate, see Anne B. Golstein, *History, Homosexuality, and Political Values: Searching for the Hidden Determinants of* Bowers v. Hardwick, 97 YALE L.J. 1073 (1988); Greenawalt, *supra* note 27, at 724; Murphy, *supra* note 113, at 947. *See generally*, Symposium, *Law, Community, and Moral Reasoning*, 77 CAL. L. REV. 475-594 (1989) (discussing the debate over the enforcement of morality in light of *Bowers*). For a discussion of the constitutional standard of rational basis review in relation to the enforcement of morals, see WILLIAM N. ESKRIDGE JR., GAYLAW: CHALLENGING THE APARTHEID OF THE CLOSET 161-73 (1999); D. Don Welch, *Legitimate Government Purposes and State Enforcement of Morality*, 1993 U. ILL. L. REV. 67 (1993).

ponents of regulation to turn to harm arguments to justify regulation or prohibition.[201]

The tragic advent of the AIDS epidemic, however, changed things. The threat of AIDS became the harm that justified increased regulation. So much so, in fact, that today harm arguments appear to play at least an equal role with legal moralist arguments in the debate over the regulation of homosexual conduct.

This is not to suggest that prior to the AIDS epidemic, harm played no role in regulating homosexuality; it certainly did,[202]

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[201] To be sure, legal moralist arguments have not always trumped harm principle arguments. In several important cases, the harm principle has been used to protect the interests of gay men and lesbians. For instance, in the Hawai'i case of *Baehr v. Miike*, No. 91-1394, 1996 WL 694235 (Haw. Cir. Ct. Dec. 11, 1996), *aff'd*, 950 P.2d. 1234 (Haw. 1997), *subsequently rev'd*, No. 20371, 1999 Haw. LEXIS 391 (Haw. Dec. 9, 1999), in striking down a statute prohibiting same-sex marriage, the trial court relied heavily on the harm principle. The court ruled that there was no "causal link between allowing same-sex marriage and adverse effects upon the optimal development of children." *Id.* at *18. Similarly, in the Georgia case of *Powell v. State*, 510 S.E.2d 18, 24-26 (Ga. 1998), in striking down the state anti-sodomy law, the state supreme court also relied on lack of harm, and it rejected legal moralism. The court concluded that "[w]hile many believe that acts of sodomy, even those involving consenting adults, are morally reprehensible, this repugnance alone does not create a compelling justification for state regulation of the activity." *Id.* at 26. More importantly, in the more recent decision of *Romer v. Evans*, 517 U.S. 620 (1996), the United States Supreme Court took a different approach than it had in *Hardwick*. In *Evans*, the Court can be interpreted as having relied on a harm principle; and it is possible—in fact, probable—that the logic of *Evans* will eventually prevail over the reasoning of *Hardwick*. *See* Toni M. Massaro, *History Unbecoming, Becoming History*, 98 MICH. L. REV. (forthcoming 2000) (on file with author).

But the legal moralism argument has been accepted in *Hardwick*, and thus, within the framework of this Article, it is fair to say that legal moralism still appeared to be a viable argument in the late 1980s. In contrast to the other categories of conduct discussed previously, the legal moralism argument had not been disabled by the harm principle in the debate over the legal regulation of homosexual conduct. One very important point here, though, is that we should not confuse legal and political theoretic discussion with actual litigation strategy. As my colleague Toni Massaro demonstrates in an important forthcoming essay, *History Unbecoming, Becoming History*, *supra*, lawyers are probably better off invoking *less* rather than more political theorizing in the courtroom, and focusing on extensive fact-finding and documentation of the concrete harms and adverse consequences of antigay measures. As Massaro argues, correctly I believe, "advocates of gay equality . . . should avoid ornate political theorizing or post-liberal, legal theories, and rivet the judicial gaze on the antigay policy in question—what it really is, what it really does, whom it really hurts, and what it really costs." *Id.*

and continues to.[203] Nor is this to suggest that AIDS has only played a role in the regulation of homosexuality. HIV-infected persons have been convicted of a variety of crimes for exposing others to the virus, in sexual and non-sexual, heterosexual and homosexual, and civilian and military contexts.[204] The point

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[202] For instance, in many jurisdictions, a nonviolent homosexual advance amounted to harm sufficient to give rise to a heat of passion defense to murder. *See generally* Joshua Dressler, *When "Heterosexual" Men Kill "Homosexual" Men: Reflections on Provocation Law, Sexual Advances, and the "Reasonable Man" Standard*, 85 J. CRIM. L. & CRIMINOLOGY 726 (1995); Robert B. Mison, Comment, *Homophobia in Manslaughter: The Homosexual Advance As Insufficient Provocation*, 80 CAL. L. REV. 133 (1992).

[203] Other harms—other than the harm associated with AIDS—continue to be used to justify regulating homosexuality. For instance, in several cases, courts have denied a parent custody of their child because they have admitted, or are involved in, a homosexual relationship. The harm here is the purported harm to the development of the child. *See, e.g., Ex parte* J.M.F, 730 So. 2d 1190, 1196 (Ala. 1998) (stating that "a child raised by two women or two men is deprived of extremely valuable developmental experience and the opportunity for optimal . . . development"); *In re* Marriage of Martins, 645 N.E.2d 567, 569 (Ill. App. Ct. 1995) (finding that children required ongoing counseling as a result of their mother's acknowledgment of her lesbianism); Knotts v. Knotts, 693 N.E.2d 962, 966 (Ind. Ct. App. 1998) (finding that mother's homosexual relationship "impacted negatively upon her oldest child" who was "diagnosed with major depression and prescribed Prozac, based at least in part upon her mother's relationship with another woman"); Scott v. Scott, 665 So. 2d 760, 766 (La. Ct. App. 1995) (writing that "[i]t is the opinion of this court that under such facts, primary custody with the homosexual parent would rarely be held to be in the best interests of the child"); *see generally* ESKRIDGE, *supra* note 200, at 139-41; Elizabeth Trainor, *Custodial Parent's Homosexual or Lesbian Relationship with Third Person as Justifying Modification of Child Custody Order*, 65 ALR5th 591 (1999). The controversy over same-sex marriage and child custody has recently generated more heated debate about the purported harm to children of homosexual parenting. *Compare* Lynn D. Wardle, *The Potential Impact of Homosexual Parenting on Children*, 1997 U. ILL. L. REV. 833, 897 (1997) (arguing that the research cited in most law reviews "is unreliable" and "colored significantly by bias in favor of homosexual parenting," and that, in contrast, "some of the research suggests that there are some serious potential harms to children raised by homosexual parents"), *with* Carlos A. Ball & Janice Farrell Pea, *Warring with Wardle: Morality, Social Science, and Gay and Lesbian Parents*, 1998 U. ILL. L. REV. 253, 338 (1998) (arguing that Wardles' list of potential harms "once subjected to scrutiny, quickly disintegrates into unwarranted assumptions and questionable conclusions").

[204] HIV-infected persons have been convicted of reckless endangerment, attempted murder, and aggravated assault with intent to murder for biting or attempting to bite corrections or police officers. *See, e.g.*, Burk v. State, 478 S.E.2d 416 (Ga. Ct. App. 1996) (upholding conviction for reckless endangerment for attempting to bite corrections officer); State v. Haines, 545 N.E.2d 834 (Ind. Ct. App. 1989) (upholding attempted murder conviction where defendant bit and spread blood from his own wounds on police officer and paramedic); State v. Smith, 621 A.2d 493 (N.J. App. Div. 1993) (upholding conviction for attempted murder where HIV-infected prisoner bit

here is simply that the AIDS epidemic has also been used in the debate over homosexual conduct as a harm to justify regulation.

This became immediately apparent in the debate over the closing of gay bathhouses at the time of the outbreak of the AIDS epidemic. The issue of closing gay bathhouses—and thereby regulating homosexual activity—first arose in San Francisco in 1984. With approximately 475 men in San Francisco diagnosed with AIDS, the director of public health announced that the city would prohibit sexual contacts in gay bathhouses and close down any establishment that did not comply with the new prohibition.[205] Six months later, the public health director ordered the closure of fourteen gay bathhouses and clubs. The bathhouses were allowed to reopen in November 1985 under strict court-ordered guidelines regulating sexual contacts.[206] Those regulations "ordered operators to hire employees to monitor patrons; ordered doors removed from private cubicles; and required the bathhouses to expel patrons seen engaging in 'high-risk sexual activity.'"[207]

What is important, for present purposes, is that the justification offered by the proponents of regulation was harm, not morality. The justification was the potential threat of the spread of AIDS. The director of public health accused the establishments of "fostering disease and death" by allowing high-risk sexual contacts.[208] In other words, the city officials relied on harm ar-

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corrections officer); Weeks v. State, 834 S.W.2d 559 (Tex. App. 1992) (pet. ref'd) (attempted murder conviction upheld where HIV positive defendant spit on prison guard with intent to infect). *See generally,* Comment, *Deadly and Dangerous Weapons and AIDS: The* Moore *Analysis is Likely to be Dangerous,* 74 IOWA L. REV. 951 (1989). Subsequent to many of these cases, legislatures in different states began passing criminal legislation creating the offense of intentionally exposing another person to AIDS or HIV. *See* TEX. PENAL CODE ANN. § 22.012 (West Supp. 1992) (subsequently deleted in 1994). *See generally* Marvin E. Schechter, *AIDS: How the Disease is Being Criminalized,* CRIM. JUST., Fall 1988, at 6; Kathleen Sullivan & Martha Field, *AIDS and the Coercive Power of the State,* 23 HARV. C.R.-C.L. L. REV. 139 (1988). For a discussion of regulation in the military context, see *infra* notes 267-69 and accompanying text.

[205] *The Bathhouse War: San Francisco's Move to Fight AIDS Creates Rift Among Gays,* WASH. POST, Apr. 19, 1984, *available in* 1984 WL 2040939.

[206] Mark Z. Barabak, *Lax Enforcement of Ban: Risky Bathhouse Sex Goes On,* S.F. CHRON., Nov. 18, 1985, *available in* 1985 WL 3509968.

[207] *See id.*; *see also* Saul, *supra* note 7, at 4; Jerry Schwartz, *Council Authorizes Closure of Bathhouses,* ASSOCIATED PRESS, Oct. 25, 1985, *available in* 1985 WL 2880269.

[208] *Sex Clubs Must Close,* WASH. POST, Oct. 10, 1984, *available in* 1984 WL 2011996.

guments, rather than legal moralism, *even though* legal moralism may have been sufficient as a legal matter.

The same thing happened in New York City, beginning in October 1985. Around that time, the Republican mayoral candidate, Diane McGrath, and the New York State AIDS Advisory Council recommended that gay bathhouses be closed in order to stop the spread of AIDS.[209] The AIDS advisory panel proposed regulations that would have required gay bathhouses to get rid of bathtubs and other communal areas for sexual activity, ensured proper lighting, made condoms available, and posted AIDS information.[210] Former Governor Mario Cuomo endorsed the regulations and threatened to close down any bathhouses that did not comply.

Cuomo emphasized that the regulations were aimed at curbing the spread of AIDS: "We know certain sexual behavior can be fatal," Cuomo said at a press conference. "We must eliminate public establishments which profit from activities that foster this deadly disease."[211] Immediately following Cuomo's endorsement, the New York State Public Health Council ruled that local health authorities could close down gay bathhouses—asserting that "an AIDS emergency is at hand."[212] The Council declared that bathhouses were a public nuisance because high-risk sexual activities took place there. Dr. David Axelrod, New York State health commissioner, explained the emergency procedure, stating that "[e]very day we wait there are additional people who are being exposed."[213] The regulations were commonly referred to as "emergency anti-AIDS regulations" and

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[209] *See* Joe Calderone, *Mayoral Candidates Field Questions*, NEWSDAY, Oct. 5, 1985, at 10 ("McGrath repeated her proposal to close gay bathhouses, bars and pornographic shops 'that accommodate . . . sexual activity on the premises' to try to stop the spread of AIDS."); Saul Friedman, *AIDS Panel: Regulate Bathhouses*, NEWSDAY, Oct. 10, 1985, at 19 ("The state AIDS Advisory Council recommended yesterday that sex establishments and gay bathhouses be regulated or closed as part of an effort to prevent the further spread of AIDS.").

[210] *See* Saul, *supra* note 7, at 4.

[211] *Id.*

[212] *See* Schwartz, *supra* note 207.

[213] *Id.*

were endorsed by, among others, the federal Center for Disease Control.[214]

New York City health officials began implementing the regulations in November and December 1985, enjoining the closure of a gay bar and a bathhouse under the emergency regulations.[215] They closed another bathhouse in the spring of 1986.[216] The closures were upheld by the Appellate Division.[217] By November 1986, one year after the emergency regulations, two bathhouses had been closed and three had shut on their own, reducing the number of gay bathhouses in New York City by half.[218] Ultimately, gay bathhouses were allowed to reopen in 1990, provided that they not maintain "private rooms which are not continuously open to visual inspection."[219]

Similar efforts at regulating gay bathhouses occurred in other major cities, including Los Angeles, where regulations were first implemented and then agreed upon in a 1992 settlement of a legal challenge.[220] In other cities, like Houston and Washington, D.C., gay bathhouses closed on their own or converted into gymnasiums, because of the sharp drop in clien-

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[214] *See, e.g., N.Y. AIDS Law Padlocks First Gay Bar*, SAN DIEGO UNION-TRIBUNE, Nov. 8, 1985, at A16 (referring to "emergency anti-AIDS regulations").

[215] *See, e.g., id.* (closing of gay bar); Paul Moses, *Bathhouse Fights Close*, NEWSDAY, Dec. 28, 1985, at 11; Sharman Stein, *St. Mark's Baths Shut as AIDS Threat*, NEWSDAY, Dec. 7, 1985, at 10.

[216] *See Second Bathhouse Closed Over AIDS*, NEWSDAY, Mar. 7, 1986, at 20.

[217] Ellis Henican, *AIDS Scare Hasn't Closed Bathhouses*, NEWSDAY, Nov. 30, 1986, at 7.

[218] *Id.*

[219] City of New York v. New St. Mark's Baths, 562 N.Y.S.2d 642 (N.Y. App. Div. 1990).

[220] *See Addenda*, WASH. POST, Dec. 4, 1985, *available in* 1985 WL 2081380 ("The Board of Supervisors voted to close gay bathhouses in Los Angeles County if they refuse to comply with new regulations aimed at slowing the spread of the virus linked to acquired immune deficiency syndrome (AIDS). The board will require the estimated 20 bathhouses to provide 'monitors' to evict patrons if they have 'high-risk' sex."); Bettina Boxall, *A Look Ahead*, L.A. TIMES, Oct. 27, 1997, at B1, *available in* 1997 WL 13994205 ("Some baths closed. Others fought back in the courts, beginning a legal battle that ended with a 1992 settlement keeping them open with the understanding that they would prohibit anal sex without a condom and offer safe sex information and condoms to patrons."); Kevin Roderick, *L.A. Gay Panel Favors Closure of Bathhouses*, L.A. TIMES, Nov. 11, 1985, at A1; Ted Vollmer & Cathleen Decker, *L.A. County to Draft Guide for Gay Bathhouses*, L.A. TIMES, Nov. 13, 1985, *available in* 1985 WL 2016389.

tele.[221] Still other cities relied on zoning ordinances to close down gay clubs.[222] At the federal level, the House of Representatives passed a measure in October 1985 allowing the surgeon general to close down public bathhouses.[223] And the House of Delegates of the American Medical Association also endorsed in 1986 efforts to close down gay bathhouses.[224]

The controversy over the closing of gay bathhouses demonstrates well how the AIDS epidemic became a symbol of harm and was used to justify restrictions on homosexual conduct. It was—and still is—a powerful rhetorical device in the debate over the regulation of homosexual conduct.[225] As a result, today, in many cases, the harm associated with the potential spread of AIDS has replaced legal moralism as the legal justification for restrictive legislation.[226]

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[221] *See House Measure Won't Stop Sex, Officials Say*, HOUS. CHRON., Oct. 4, 1985, *available in* 1985 WL 3682395 (the two gay bathhouses in Houston turned into gymnasiums because of lack of business); Michael Specter, *One of D.C.'s 2 Gay Bathhouses Closes As in Other Cities, Fear of AIDS and Controversy Hurt Business*, WASH. POST, Aug. 17, 1985, *available in* 1985 WL 2100609.

[222] *See* Boxall, *supra* note 220 (discussing Los Angeles' use of zoning ordinances to close gay clubs, and comparing the actions of other communities).

[223] *See House Passes Tough Bill to Fight AIDS*, CHI. TRIB., Oct. 4, 1985, *available in* 1985 WL 2549710.

[224] *AMA Wants Smoking Banned in Planes, Hospitals, Schools*, ATLANTA J., June 19, 1986, *available in* 1986 WL 283579.

[225] It has also infiltrated the regulation of heterosexual high risk activities. The anti-AIDS regulations have also been enforced in the context of adult bookstores more generally. *See* Doe v. City of Minneapolis, 693 F. Supp. 774 (D. Minn. 1988), *aff'd*, 898 F.2d 612 (8th Cir. 1990) (ruling that city ordinance requiring removal of booth doors in adult bookstore is narrowly tailored to legitimate city interest in reducing spread of AIDS). *See also infra* Part III.G (discussing regulation of fornication).

[226] I have set aside, for purposes of this discussion, the debate over consensual homosexual sadomasochistic practices, because those practices raise complicated collateral questions concerning consent and physical force. For an introduction to that debate, see Linda Williams, *Pornographies On/scene, or Diff'rent Strokes for Diff'rent Folks*, *in* SEX EXPOSED: SEXUALITY AND THE PORNOGRAPHY DEBATE 233, 245-52 (Lynne Segal & Mary McIntosh eds., 1992) (arguing that sadomasochistic practices serve useful subversive purposes); Didi Herman, *Law and Morality Re-visited: The Politics of Regulating Sado-Masochistic Porn/Practice*, 15 STUD. L., POL. & SOC'Y 147 (1996) (reviewing the literature and arguing that sadomasochistic practices are immoral). It is interesting to note that these practices may raise very similar issues in the debate over the legal enforcement of morality. *See* Laskey v. United Kingdom, 24 Eur. H.R. Rep. 39 (1997) (upholding convictions for assault and wounding in cases involving consensual homosexual sado-masochistic practices, in part, on the grounds of harm; Court held

E. ALCOHOL CONSUMPTION AND HARM

The traditional liberal position on alcohol consumption was always murky, in large part because of John Stuart Mill's writing on temperance. Relying on the harm and offense principles, Mill justified a wide and complex regulatory scheme directed at discouraging the use of alcohol. In addition to the prohibition on consuming excessive amounts of alcohol that could rightly be imposed on persons with prior convictions for drunken violence[227] and on soldiers or policemen on duty,[228] as well as the prohibition on public intoxication,[229] Mill also approved of taxing the sale of alcohol and regulating the sale and consumption of liquor.[230] Mill defended taxation on the ground that some taxation on consumption was inevitable and that it may as well be directed against disfavored consumption. "It is . . . the duty of the State to consider, in the imposition of taxes, what commodities the consumers can best spare; and *a fortiori*, to select in preference those of which it deems the use, beyond a very moderate quantity, to be *positively injurious*."[231] As a result, Mill concluded, "[t]axation . . . of stimulants up to the point which produces the largest amount of revenue (supposing that the State needs all the revenue which it yields) is not only admissible, but to be approved of."[232]

Mill also favored the regulation of alcohol-serving establishments, but opposed limiting the number of "beer and spirit houses."[233] Because of its direct relevance to the contemporary Chicago temperance movement, I will quote his lengthy discussion *verbatim*:

> All places of public resort require the restraint of a police, and places of this kind peculiarly, because offenses against society are especially apt to originate there. It is, therefore, fit to confine the power of

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that "in deciding whether or not to prosecute, the State authorities were entitled to have regard not only to the actual seriousness of the harm caused . . . but also . . . to the potential for harm inherent in the acts in question").

[227] MILL, *supra* note 27, at 96-97.

[228] *Id.* at 80.

[229] *Id.* at 97.

[230] *Id.* at 99-100.

[231] *Id.* at 100 (emphasis added).

[232] *Id.*

[233] *Id.*

> selling these commodities (at least for consumption on the spot) to persons of known or vouched-for respectability of conduct; to make such regulations respecting hours of opening and closing as may be requisite for public surveillance; and to withdraw the license if breaches of the peace repeatedly take place through the connivance or incapacity of the keeper of the house, or if it becomes a rendezvous for concocting and preparing offenses against the law. Any further restriction I do not conceive to be, in principle, justifiable. The limitation in number, for instance, of beer and spirit houses, for the express purpose of rendering them more difficult of access and diminishing the occasions of temptation, not only exposes all to an inconvenience because there are some by whom the facility would be abused, but is suited only to a state of society in which the laboring classes are avowedly treated as children or savages, and placed under an education of restraint, to fit them for future admission to the privileges of freedom. This is not the principle on which the laboring classes are professedly governed in any free country . . . .[234]

As this passage suggests, Mill opposed limiting the number of liquor establishments, but nevertheless justified significant regulations on the operation of bars and lounges. He justified these regulations because he perceived alcohol consumption as, in some sense, causally related to crime and the need for police expenditures.

Mill's position on alcohol consumption, then, was slightly inconsistent. In certain passages, Mill viewed the consumption of alcohol both as an offense, in the case of public intoxication, and as a harm that justified numerous regulations and, in some cases, prohibition. Mill justified taxing alcohol in order to make the cost of drinking prohibitive—especially, one would assume, among the less wealthy. In other passages, however, Mill opposed making access to alcohol more difficult because it would treat the laboring classes paternalistically. This seems inconsistent, or, at the very least, ambiguous.

In addition, Mill's discussion of alcohol consumption was somewhat at odds with his other applications of the harm principle in *On Liberty*. In the context of drinking, it seems, Mill failed to distinguish between harmful and harmless private consumption of alcohol. Surely the private consumption of alcohol in one's own home, even to excess, was not necessarily harmful from a Millian perspective. Certainly the private consumption of alcohol, even to excess, could not be viewed as *more* harmful

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[234] *Id.*

than engaging in acts of prostitution. Why then would Mill justify taxing the sale of stimulants, but not regulating fornication?

The ambiguity in Mill's writings had a significant impact on the 1960s progressive position on drinking—a position which was equally murky. If anything, the progressive position rested on the offense principle. Drinking alcohol fit well within the framework of Hart's analysis of prostitution: the public manifestations should be prohibited in order to avoid any affront to public decency—"in order to protect the ordinary citizen, who is an unwilling witness of it in the streets, from something offensive."[235] The justification for regulation was based on public offense, which explains why the matter of drinking generally fell under the rubric of "public decency." In Joel Feinberg's later work, Feinberg acknowledged one potential harm associated with drinking—specifically the risk of vehicular homicide and accidents—but nevertheless stressed the interests of the majority of innocent or harmless drinkers in being allowed to continue to drink.[236]

Lord Devlin, in response to Hart, focused on the ambiguities of the progressive position. Devlin criticized the traditional liberal reliance, first, on the public-private distinction and, second, on the distinction between harmful and harmless private drinking. With regard to the latter, Devlin emphasized the harm that could be associated with private drinking and argued that there is no principled way to distinguish between harmless and harmful private drinking. According to Devlin, the determination of harm had to be made on a case-by-case basis and, as a result, there could be no principled opposition to complete prohibition if necessary.[237] After an abbreviated discussion of

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[235] HART, *supra* note 40, at 45.

[236] 1 FEINBERG, *supra* note 13, at 197.

[237] In *Mill on Liberty in Morals*, Devlin wrote:

> [W]hile a few people getting drunk in private cause no problem at all, widespread drunkenness, whether in private or public would create a social problem. The line between drunkenness that creates a social problem of sufficient magnitude to justify the intervention of the law and that which does not, cannot be drawn on the distinction between private indulgence and public sobriety. It is a practical one, based on an estimate of what can safely be tolerated whether in public or in private.... [T]here is no doctrinal answer even to complete prohibition. It cannot be said that so much is the law's business but more is not.

harm, however, Devlin returned to his principal argument concerning legal moralism and his claim that shared morality is essential to social cohesion.[238]

The debate over the regulation of alcohol consumption, then, had traditionally been fragmented. The progressive position was itself fractured. Mill had offered both harm and offense arguments in support of regulation. Later progressive thinkers focused increasingly on the offense argument, but nevertheless recognized potential harms. More conservative thinkers, like Devlin, capitalized on the ambiguity to argue about both harm and morality.

Today, however, the debate seems less fragmented, again, because contemporary proponents of regulation and prohibition have focused on the harm argument. The recent social and political movements in Chicago and New York City have zoomed-in on the specific causal relationship between liquor and harm. In Chicago, the new temperance movement has targeted liquor stores, bars and lounges because of the *harm* they are causing neighborhoods. The movement justifies closing businesses in order to revitalize neighborhoods, to cut down on crime, and to increase property value and commerce.[239] Reverend Al Meeks, a Baptist minister and leader of the temperance movement, emphasizes that the closures are *economic* measures, and *not* moralistic measures. "We're trying to redevelop our community," Meeks explains. "This is not a return to Prohibition, we're not saying that people can't drink. We're not even saying that people can't buy alcohol. . . . We're simply saying that on a commercial strip we need to have some immediate redevelopment."[240] Chicago Mayor Richard Daley makes the same point. "This is a quality of life issue," Daley suggests, "not an attempt to impose prohibition."[241]

The target is slightly different in New York City, but the focus is also on harm. Mayor Giuliani's policing initiative has tar-

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DEVLIN, *supra* note 36, at 113.

[238] *Id.* at 114.

[239] *See* Annin, *supra* note 1; Gibson, *supra* note 1; Siegel, *supra* note 1; *Vote Dry Referenda*, *supra* note 1.

[240] *Vote Dry Referenda*, *supra* note 1.

[241] *Booze and Ballots*, *supra* note 2.

geted public drunks because of the *harm* they cause neighborhoods. The justification, again, is the broken windows argument, and the claim that small disorder causes serious crime. On the basis of this justification, the New York Police Department has cracked-down—and continues to crack-down—on "the squeegee pests; people urinating in public; *people drinking in public*; [and] illegal peddling."[242]

The more intense focus on harm by contemporary proponents of legal regulation and prohibition has transformed the contemporary debate. It has undermined whatever remained of the harm principle in the context of alcohol consumption—already a thin fragment of a principle in the 1960s due to Mill's ambiguous writings on temperance. It has focused the debate on the different kinds of harm associated with liquor, ranging from the harms to commerce and community, to increased serious crime. And it has forced the participants in the debate to weigh harms, to value harms, and to compare harms. On these issues the harm principle itself offers no guidance.

F. DRUG USE AND HARM

The structure of the debate over the criminalization of the use of psychoactive drugs has also changed significantly since the 1960s. The early progressive argument that the use of marijuana was a "victimless crime" was countered in the late 1970s and 1980s by a campaign against drug use that emphasized the *harms to society*, and justified an all-out war on drugs. The proponents of legal enforcement—in this case modeled on military enforcement—forcefully deployed the harm argument. Here, again, the harm principle experienced an ideological shift from its progressive origins: today, the debate over drug use pits conservative harm arguments against new progressive arguments about "harm reduction."

The progressive position in the 1960s and early 1970s was characterized by the argument that marijuana use was essentially a "victimless" crime. In his 1968 book, *The Limits of the Criminal Sanction*, Herbert Packer emphasized the "fact" that

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[242] Bratton, *supra* note 3, at 789 (emphasis added).

"the available scientific evidence strongly suggests that marijuana is less injurious than alcohol and may even be less injurious than ordinary cigarettes."[243] Packer refuted, one-by-one, the various claims of harm—including the claims that marijuana use stimulates aggression, causes anti-social behavior, and leads to the use of stronger narcotics. "[T]here is a total lack of solid evidence connecting its use with the commission of other crimes in a causative way," Packer argued.[244] Professor John Kaplan, in his 1970 book *Marijuana—The New Prohibition*, similarly offered a point-by-point rebuttal of practically every possible harm argument associated with the use of marijuana.[245] My colleague, Ted Schneyer, suggested that Kaplan's "treatment of these issues is unassailable and, on the basis of existing evidence, Kaplan's conclusion seems warranted—*marijuana use can be considered no more harmful to users and other members of society than the use of alcohol.*"[246] Schneyer remarked that Kaplan's arguments "are applicable . . . to policymaking in the general area of 'victimless' crime."[247] Joel Feinberg placed the case of the use of psychoactive drugs under the rubric of "legal paternalism"—the principle that justifies criminal sanctions where an activity causes possible harm to the actor, but no harm to others.[248]

All that has changed today. The conservative harm arguments disarmed the traditional progressive position. Today, the opponents of drug prohibition—a loosely grouped coalition critical of current anti-drug enforcement policies[249]—argue

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[243] PACKER, *supra* note 91, at 338.

[244] *Id.*

[245] *See* JOHN KAPLAN, MARIJUANA—THE NEW PROHIBITION (1970).

[246] Theodore J. Schneyer, *Problems in the Cost-Benefit Analysis of Marijuana Legislation*, 24 STAN. L. REV. 200 (1971) (book review) (emphasis added).

[247] *Id.* at 201.

[248] 1 FEINBERG, *supra* note 13, at 12-13.

[249] The status and motivations of this coalition is itself a source of significant contestation and acrimonious debate. Proponents of drug prohibition characterize the coalition as "the drug legalization movement" and suggest that their motives are to legalize all psychoactive drugs. *See Testimony of Barry R. McCaffrey, Director, Office of National Drug Control Policy Before the House Government Reform and Oversight Committee, Subcommittee on Criminal Justice, Drug Policy, and Human Resources; The Drug Legalization Movement in America, Part I: What Proponents of Legalization Really Want: Easy Access to All Drugs of Abuse* (June 16, 1999) <http://www.whitehousedrugpolicy.gov/news/testimony/legalization/partI_eng.htm> [hereinafter McCaffrey Testimony] ("Careful ex-

about "harm reduction." The term "harm reduction" was crafted in the early 1990s as an alternative to "legalization."[250] Ethan Nadelmann, the director of the Lindesmith Center (a drug policy reform center established in New York City with funding from George Soros) and a leading spokesperson for the reform coalition, explains the "harm reduction" argument: we must "[a]ccept that drug use is here to stay and that we have no choice but to learn to live with drugs so that *they cause the least possible harm.*"[251] Rather than continue the war on drugs, Nadelmann argues, "[t]he more sensible and realistic approach today would be one based on the principles of 'harm reduction.' It's a policy that seeks to reduce the negative consequences of both drug use and drug prohibition, acknowledging that both are likely to persist for the foreseeable future."[252] Nadelmann explains:

> What does "harm reduction" mean in practice? . . . "Harm reduction" means designing policies that are likely to do more good than harm, and trying to anticipate the consequences of new policy initiatives. . . . "Harm reduction" requires governments to keep public health precepts and objectives front and center in its drug control policies, and to banish the racist and xenophobic impulses that stirred prohibitionist

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amination of the words—speeches, webpostings, and writings—and actions of many who advocate policies to 'reduce the harm' associated with illegal drugs reveals a more radical intent. In reality, their drug policy reform proposals are far too often a thin veneer for drug legalization."); Barry R. McCaffrey, *Legalization Would Be the Wrong Direction*, L.A. TIMES, July 27, 1998, at A11, *available in* 1998 WL 2449260 ("[T]he real intent of many harm reduction advocates is the legalization of drugs."). The critics of current anti-drug enforcement policies view themselves as a diverse group that includes drug legalizers as well as persons "who vigorously oppose any broader trend toward disassembling the drug prohibition system." Ethan A. Nadelmann, *Thinking Seriously About Alternatives to Drug Prohibition*, DAEDALUS, Summer 1992, at 85, 88-89. Nadelmann argues, "[t]he fact is, there is no drug legalization movement in America. What there is is a nascent political and social movement for drug policy reform." Nadelmann, *Perspective on Legalizing Drugs*, *supra* note 11.

[250] In fact, as late as 1988, the most vocal advocate of "harm reduction," Ethan Nadelmann, still made the argument for "legalization," rather than "harm reduction." *See, e.g.*, Ethan A. Nadelmann, *The Case for Legalization*, PUBLIC INTEREST, Summer 1988, at 3-17 (making the case for legalization without explicitly focusing on the label "harm reduction").

[251] Nadelmann, *Learning to Live With Drugs*, *supra* note 11 (emphasis added). *See also* Nadelmann, *Perspective on Legalizing Drugs*, *supra* note 11.

[252] Nadelmann, *Learning to Live With Drugs*, *supra* note 11.

> sentiments and laws earlier in this century. . . . "Harm reduction" means keeping our priorities in order.[253]

In fact, the "harm reduction" movement has cleverly turned the table on the conservative harm arguments, focusing instead on the harms caused by the policies prohibiting drug use. "[M]any, perhaps most, 'drug problems' in the Americas are the results not of drug use per se but of our prohibitionist policies,"[254] Nadelmann claims. The greater harms, then, are "the harms that flow from our prohibitionist policies."[255] Nadelmann emphasizes: "[Milton] Friedman, [Thomas] Szasz and I agree on many points, among them that U.S. drug prohibition, like alcohol Prohibition decades ago, *generates extraordinary harms.*"[256]

The concept of "harm reduction" traces its origins to alternative public policies adopted in the late 1970s and early 1980s in the Netherlands and Great Britain. Policies there were designed to render drug use safer and thereby reduce the harms associated with illicit drug use—including the transmission of diseases like AIDS or hepatitis, and the risks of overdose. Policies were also developed to separate out certain drug markets (marijuana and hashish) from others (heroin), and to relax, but still regulate, the possession and sale of small quantities of marijuana. These policies became part of a public health approach to drug use that now includes methadone programs, needle exchange programs, and community outreach programs, in contrast to the more punitive measures associated with the war on drugs.[257] And they are now part of the domestic "harm reduction" agenda.

The counter-argument from proponents of the enforcement of anti-drug laws has been to argue *even greater harm.* Barry McCaffrey, director of the Office of National Drug Control Policy and better known as the current "Drug Czar," responds to

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[253] *Id.*

[254] *Id.*

[255] *Id.*

[256] Nadelmann, *Perspective on Legalizing Drugs, supra* note 11 (emphasis added).

[257] *See generally* REDUCING DRUG-RELATED HARM: NEW DEVELOPMENTS IN THEORY AND PRACTICE (Peter McDermott & Pat O'Hare, eds. 1992); PSYCHOACTIVE DRUGS & HARM REDUCTION: FROM FAITH TO SCIENCE (Nick Heather et al. eds., 1993); *see also* Nadelmann, *Thinking Seriously About Alternatives to Drug Prohibition, supra* note 249, at 85-132.

the "harm reduction" argument: "The plain fact is that drug abuse wrecks lives."[258] "[E]ach year drug use contributes to 50,000 deaths and costs our society $110 billion in social costs."[259] McCaffrey also extolls the benefits of prohibition: "In the past 20 years, drug use in the United States decreased by half and casual cocaine use by 70%."[260] McCaffrey's response, in a nut-shell, is that "[a]ddictive drugs were criminalized because they are harmful; they are not harmful because they were criminalized."[261]

In testimony before Congress, McCaffrey has referred to the "harm reduction" movement as "a carefully-camouflaged, well-funded, tightly-knit core of people whose goal is to legalize drug use in the United States. It is critical to understand that whatever they say to gain respectability in social circles, or to gain credibility in the media and academia, their common goal is to legalize drugs."[262] And, in a recent editorial, McCaffrey argues that:

> The so-called harm-reduction approach to drugs confuses people with terminology. All drug policies claim to reduce harm. No reasonable person advocates a position consciously designed to be harmful. The real question is which policies actually decrease harm and increase good. The approach advocated by people who say they favor "harm reduction" would in fact harm Americans.[263]

As a result, today, both conservatives and progressives are making harm arguments. The debate is over which harms are worse. In that debate, the harm principle is silent.

G. OTHER ILLUSTRATIONS OF CONSERVATIVE HARM ARGUMENTS

There are numerous other illustrations of the increased proliferation of conservative harm arguments. Debates over fornication and adultery, for example, are two other areas of sexual morality where proponents of regulation have, in certain discrete instances, turned to harm arguments. Surprisingly,

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[258] McCaffrey, *Legalization Would be the Wrong Direction*, *supra* note 249.

[259] McCaffrey Testimony, *supra* note 249.

[260] McCaffrey, *Legalization Would be the Wrong Direction*, *supra* note 249.

[261] Barry R. McCaffrey, *Don't Legalize Those Drugs*, WASH. POST, June 29, 1999, at A15, *available in* 1999 WL 107011390.

[262] McCaffrey Testimony, *supra* note 249.

[263] McCaffrey, *Legalization Would Be the Wrong Direction*, *supra* note 249.

Lord Devlin himself had excluded fornication and adultery (and possibly lesbian sexual relations[264]) from the list of purportedly immoral activities that ought to be prohibited. Devlin acknowledged that fornication and adultery were as immoral and dangerous to society as homosexuality, but suggested that they were impossible to eradicate. "Adultery of the sort that breaks up marriage seems to me to be just as harmful to the social fabric as homosexuality or bigamy," Devlin wrote. "The only ground for putting it outside the criminal law is that a law which made it a crime would be too difficult to enforce; *it is too generally regarded as a human weakness not suitably punished by imprisonment.*"[265] Accordingly, Devlin concluded that "[a]ll that the law can do with fornication is to act against its worst manifestations,"[266] by which he meant brothels and commercial sex.

Once again, however, the AIDS epidemic has changed the equation—in this case, beyond even Devlin's imagination. The possible risk of the spread of AIDS through sexual contact has become an argument militating in favor of regulating fornication by persons infected with the HIV virus. In both the heterosexual and homosexual contexts, the possibility of the spread of AIDS has justified, in certain cases, criminalizing, and in other cases, enhancing the culpability of, certain sexual acts. I am not referring here to nonconsensual acts, such as sexual assault, nor am I referring to unprotected, unwarned consensual acts of sexual intercourse. These categories of acts are classically within the scope of the criminal law. Where the legal enforcement of morality issues arise are in the cases of informed and/or protected sexual activity. It is there that we see AIDS being used as the harm that justifies the regulation of sexual activity.

This has been most clearly demonstrated in the military context. There, informed but unprotected consensual sexual intercourse between unmarried, noncivilian partners, where

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[264] Devlin wrote, seemingly approvingly, that "adultery, fornication, and lesbianism are untouched by the criminal law" and suggested that this fact "does not prove that homosexuality ought not to be touched." DEVLIN, *supra* note 36, at 22.

[265] *Id.* (emphasis added).

[266] *Id.*

one of the partners is HIV-infected, is proscribed. In other words, even where the service member who is HIV-positive fully discloses that he or she is infected, the service member can be prosecuted for aggravated assault if he or she engages in unprotected sexual intercourse with an uninfected, unmarried, noncivilian partner.[267] Moreover, unwarned but protected consensual sexual intercourse between unmarried service members is also prohibited. It will support a conviction for aggravated assault with a dangerous weapon or other means or force likely to produce death or grievous bodily harm.[268]

The United States government, in fact, has argued in court that there is a compelling interest in the complete celibacy of HIV-positive service members. The government justified its position based on the harm associated with the potential spread of AIDS. The Court of Appeals for the Armed Services did not rule on the point, and thus has left open the question whether a conviction for aggravated assault would stand in the case of protected, informed, consensual sex between unmarried service members.[269]

With the exception of the military, adultery today is effectively beyond the scope of the criminal law. The few states that have failed to repeal their criminal laws against adultery do not enforce the prohibitions. Thus, there would be little more to say about adultery were it not for the recent impeachment proceedings against President Bill Clinton: the debate over Clinton's impeachment reflected an emphasis on *harm* that was, in many ways, similar to the harm arguments being made in the context of other moral offenses. During the proceedings, both the House managers and the President's attorneys drew a line between the sexual offense of adultery and the political harm that it may cause. Both sides agreed that a President should not be impeached because of the immorality of adultery. Where

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[267] *See* United States v. Bygrave, 46 M.J. 491, 497 (C.A.A.F. 1997) (upholding conviction for aggravated assault).

[268] *See* United States v. Joseph, 37 M.J. 392 (C.M.A. 1993) (upholding conviction for aggravated assault).

[269] *See Bygrave*, 46 M.J. at 494-95 n.8.

they disagreed was on whether the President's immoral activity had caused *political harm.*

The President's attorneys and advocates attempted to portray the case against Clinton as a case merely about *sex.* This was most poignantly reflected in the presentation of Dale Bumpers, former Democratic Senator from Arkansas, during closing argument in the Senate impeachment proceedings. "H.L. Mencken said one time, 'When you hear somebody say, 'This is not about money,' it's about money,'" Bumpers argued. "And when you hear somebody say, 'This is not about sex,' it's about sex."[270] As Richard Posner suggests, in his recent book *An Affair of State,* "[f]rom the beginning, the main line of defense for Clinton was that the scandal and the ensuing investigation by the Independent Counsel were just about sex."[271] By invoking sex, the President's defenders were attempting to put the controversy in the liberal safe harbor: if it was about sex and adultery, and about the typical cover-up that attends such misconduct, then the controversy did not rise to the level of harmful or impeachable conduct.

In contrast, the House managers and advocates of impeachment attempted to portray the case against Clinton as a case about *political harm.* They were focusing on the harm that would result to the rule of law if the President's purported perjury and obstruction of justice were not redressed. Their argument was that the case against Clinton was not about sex, but rather about injury to the rule of law. This was reflected in the response that Representative Henry Hyde, the chief House manager, made to Dale Bumpers' presentation:

> I'm a World War II combat veteran. I hit the beaches under Japanese fire, and I know what I was fighting for. I was fighting for freedom and to have an opportunity, the same as anybody else, to make a life for myself. Justice, the rule of law—that's just a phrase that encompasses equal protection of the law and opportunity for everybody. And I believe that's what every G.I. fought for.[272]

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[270] *Weight of History Is "On All of Us," Senate is Told by One of Its Own,* N.Y. TIMES, Jan. 22, 1999, at A17 (transcript of Dale Bumpers presentation).

[271] RICHARD A. POSNER, AN AFFAIR OF STATE: THE INVESTIGATION, IMPEACHMENT, AND TRIAL OF PRESIDENT CLINTON 213 (1999).

[272] Alison Mitchell, *Hyde Cites His War Past, Too,* N.Y. TIMES, Jan. 22, 1999, at A17.

In effect, the impeachment debate became a controversy between two different ways of characterizing Clinton's misconduct: as sexual misconduct that was politically harmless, or as a politically harmful assault on the rule of law.

In this regard, Richard Posner's contribution to the impeachment debate is of particular interest. Posner describes two factions within the Right—the "libertarian conservatives"[273] and the "moralistic conservatives"[274]—and assails the moralistic conservatives for obscuring the debate by talking about Clinton's immorality and his attitude toward sex. Posner argues that the real issue was the potential damage to the rule of law. For Posner, the conduct at issue was "conduct to which sex is almost incidental."[275] Posner agrees with Philip Elman:

> The sex was little but the lies were big. As was his [Clinton's] disrespect for, and damage to, the rule of law and a judicial process which depends for its effective functioning upon truthful testimony of witnesses. In rapid succession came repeated lying in court, encouraging others to join and support his lies, perjury and subornation of perjury; obstruction of justice; use of government officials and employees under his direction . . . to spread and support his lies; his casual contempt for judicial oaths; his frivolous and unprecedented invocation of executive privilege . . . his use of the presidential "bully pulpit" to hoodwink the American people . . . .[276]

"That is the conduct," Posner emphasizes, "on which the debate should have focused."[277]

Within the factions of conservatism that Posner identifies, Posner falls squarely in the libertarian camp. This is the camp that effectively employed the *political harm* argument. I would

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[273] The libertarian wing of the Right are described as "closer to John Stuart Mill (whether they know it or not) than they are to William Buckley and Jerry Falwell." POSNER, *supra* note 271, at 201. Posner writes:

> They support free markets and limited government. They want government to concentrate on national defense and the repression of serious crimes and to go easy on redistributing income and wealth. They don't worry a lot about the "moral tone" of society and hence about homosexuality, abortion, pornography, and recreational drug use.

Id. at 201-02.

[274] The "moralistic conservatives," according to Posner, agree with the libertarians on many issues, but are obsessed about "homosexuality, premarital and extramarital sex, feminism, and abortion." *Id.* at 204.

[275] *Id.* at 207.

[276] *Id.* at 207-08.

[277] *Id.* at 208.

suggest that the House managers were also primarily in that camp, and that, as a result, the political debate revolved importantly around the notion of political harm. Ultimately, Posner is unsure whether Clinton's conduct has caused, or will really cause, harm to the country. "[T]he actual impact that his conduct has had or will have on the rule of law and other valued social goods is unknowable and possibly slight."[278] But what is clear is that, if Posner had had a vote and had voted for impeachment, it would have been on the ground of potential public harm. Posner's justification would have been that, in his own words, "President Clinton engaged in a pattern of criminal behavior and obsessive public lying the tendency of which was to disparage, undermine, and even subvert the judicial system of the United States, the American ideology of the rule of law, and the role and office of the President."[279]

Regardless of one's political position on impeachment, what was remarkable was how far the political harm argument carried—that it led to the second impeachment of a sitting President—and the extent to which it prolonged the Senate impeachment proceedings. What is remarkable is the dominant role of the harm argument—in this context, the *political* harm argument—despite the overwhelming popular support of the President.

IV. THE COLLAPSE OF THE HARM PRINCIPLE

A. THE RELATIVE IMPORTANCE OF HARMS

Pornography, prostitution, disorderly conduct, homosexuality, intoxication, drug use, and fornication: with regard to each of these, the proponents of legal enforcement are now deploying the harm argument in support of a conservative agenda. The arguments are powerful. It is hard to respond adequately to the harm to women caused by pornography and prostitution, to the threat of the spread of AIDS caused by high-risk activities like homosexual and heterosexual fornication, or to the neighborhood decline and loss of property value associated with pros-

[278] *Id.* at 10.
[279] *Id.*

titutes, smut shops, and liquor establishments. The harm arguments are particularly compelling when the conception of harm has been pared down to its bare bones and brackets out other normative values.

The proliferation of harm arguments in the debate over the legal enforcement of morality has effectively collapsed the harm principle. Harm to others is no longer today a *limiting* principle. It no longer *excludes* categories of moral offenses from the scope of the law. It is no longer a *necessary (but not sufficient) condition*, because there are so many non-trivial harm arguments. Instead of focusing on whether certain conduct causes harm, today the debates center on the types of harm, the amounts of harm, and our willingness, as a society, to bear the harms. And the harm principle is silent on those questions.

The harm principle is silent in the sense that it does not determine whether a non-trivial harm justifies restrictions on liberty, nor does it determine how to compare or weigh competing claims of harms. It was never intended to be a *sufficient* condition. It does not address the comparative importance of harms. Joel Feinberg's thorough discussion of the harm principle recognized this important fact. In discussing the relative importance of harms, Feinberg admitted that "[i]t is impossible to prepare a detailed manual with the exact 'weights' of all human interests, the degree to which they are advanced or thwarted by all possible actions and activities, duly discounted by objective improbabilities mathematically designated."[280] Thus, Feinberg concluded, "in the end, it is the legislator himself, using his own fallible judgment rather than spurious formulas and 'measurements,' who must compare conflicting interests and judge which are the more important."[281]

Feinberg proposed a three-prong test to determine the relative importance of harms:

> Relative importance is a function of three different respects in which opposed interests can be compared:
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> a. how 'vital' they are in the interest networks of their possessors;

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[280] 1 FEINBERG, *supra* note 13, at 203.

[281] *Id.*

b. the degree to which they are reinforced by other interests, private and public;

c. their inherent moral quality.[282]

But what are the inherent moral qualities of interests affected by claims of harm? And how could the harm principle tell us what those inherent moral qualities are? In the end, it can not. The harm principle itself—the simple notion of harm—does not address the relative importance of harms. Once non-trivial harm arguments have been made, we inevitably must look beyond the harm principle. We must look beyond the traditional structure of the debate over the legal enforcement of morality. We must access larger debates in ethics, law and politics—debates about power, autonomy, identity, human flourishing, equality, freedom and other interests and values *that give meaning to the claim that an identifiable harm matters.* In this sense, the proliferation of conservative harm arguments and the collapse of the harm principle has fundamentally altered the structure of the future debate over the legal enforcement of morals.

B. A SKEPTICAL RESPONSE

At this point, some readers of this Article may respond that the discussion here—especially the emphasis on rhetorical structure and legal semiotics—is misleading. A skeptical reader might respond: Truth is, the harm principle is still right today and the structure of the debate has not really changed. What we have witnessed, over the past two decades, is not the *collapse* of the harm principle, but rather the natural *evolution* of a useful analytic principle. What we need to do is to continue to *refine* the harm principle to better address these claims of harm. The harm principle is fully capable of dealing with these conservative harm arguments.

This skeptical response could take either of two forms. The first variant of the argument is that the harm principle remains a serviceable distinction and functions entirely properly today. Progressive thinkers in the 1960s and 1970s were simply wrong to suggest that pornography, prostitution, or drinking were

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[282] *Id.* at 217; *see also id.* at 204-06.

harmless. In fact, they do cause certain harms and therefore may be legally regulated. Still, there are other activities generally considered to be morally questionable that are nonetheless protected by the harm principle. These include, for instance, masturbation or non-fraudulent lying. Many people might consider these acts immoral, but very few would argue that they should be regulated by the state because of their harm.

A second version of the argument is that the harm principle is still a useful critical principle in theory, but that it has been distorted in practice. The new evidence of harm is simply misleading. We should continue to use the harm principle, but we must do a better job at policing the facts. We should subject the empirical evidence to more rigorous scrutiny.

I suspect that many opponents of Professor MacKinnon's argument would respond in this way. Judge Easterbrook in fact flirts with this response in the *Hudnut* decision, when he writes in the margin:

> The social science studies are very difficult to interpret, however, and they conflict. Because much of the effect of speech comes through a process of socialization, it is difficult to measure incremental benefits and injuries caused by particular speech. Several psychologists have found, for example, that those who see violent, sexually explicit films tend to have more violent thoughts. But how often does this lead to actual violence? National commissions on obscenity here, in the United Kingdom, and in Canada have found that it is not possible to demonstrate a direct link between obscenity and rape or exhibitionism.[283]

This footnote is intended, at the very least, to undermine our confidence in the causal connection underlying MacKinnon's harm argument. Similarly, my previous article on the broken windows theory, *Reflecting on the Subject*, could be interpreted as an attempt to police the harm argument underlying the broken windows hypothesis. The quantitative analysis, in particular the replication of Wesley Skogan's study on disorder and crime, could be seen as an effort to prove that the harm allegedly associated with disorder has not been established. The article as a whole could be read as an attempt to police the facts.

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[283] American Booksellers Ass'n, Inc. v. Hudnut, 771 F.2d 323, 329 n.2 (7th Cir. 1985).

Alternatively, it could be argued that the theories of harm—not the facts—are wrong. The harm alleged by MacKinnon or by the broken windows theory relies on an intervening actor—the rapist, the sexist male, or the armed robber—and therefore should not be imputed to the original conduct—viewing pornography or loitering. In other words, the argument would go, it is not pornography or disorder that causes serious crime, it is serious criminals; therefore, the challenged conduct does not cause harm to others, and should not be regulated. This argument is somewhat similar to the "perpetrator theories" advanced by opponents of gun control, or more popularly the argument that guns don't kill people, people kill people.[284]

Under both versions of the argument, the central point is that the harm principle continues to be a useful analytic principle and that it is simply undergoing a natural process of evolution. Like any other analytic principle, it is only clear and easy when it is first articulated. It becomes more cumbersome as it is applied in an increasing number of cases. At present, it may have a temporary conservative tilt, but over the long run, it will even out politically and continue to be a useful and fair way to draw the line between law and morality. In other words, the structure of the debate may be undergoing change, but the harm principle will nevertheless remain at its core: the harm principle has *not* collapsed.

C. THE NORMATIVE DIMENSIONS OF HARM

The problem with the skeptical response is that it ignores the hidden normative dimensions of harm and their crucial role in the application of the harm principle. Those hidden normative dimensions are what do the work in the harm principle, not the abstract, simple notion of harm. They *limit* claims of harm. They *exclude* harm arguments. In contrast, the abstract, simple idea of harm—bracketing out any other normative value—is broad enough to include most, if not all, of the harms alleged

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[284] *See, e.g.*, Daniel D. Polsby & Don B. Kates, Jr., *American Homicide Exceptionalism*, 69 U. COLO. L. REV. 969, 971 (1998) ("Perpetrator theories . . . focus on the motives, intentions, and risk-taking preferences of individuals instead of on the tools ('instrumentalities') that they have selected to carry on their activities.").

by contemporary proponents of regulation and prohibition. It is sufficiently robust to include the incitement to rape, the negative effects on women's sexuality, the stimulus to rob, the possible spread of AIDS, or the diminution in property values. In each of these cases, the strength of the abstract claim of harm will depend on normative assessments of pornography, male dominance, disorder, crime, or sexual freedom. Depending on those assessments, harm may be easier or harder to prove. But experience suggests that some harm attaches to most human activities, and especially to conduct that traditionally has been associated with moral offense. The very fact that society views these activities with opprobrium itself *generates harms.* Thus, even if we set aside the notion of legal rhetoric, the skeptical response is not persuasive.

Looking at the historical shifts in the debate through the lens of legal semiotics, however, offers an important insight: the ideological shift of the harm principle over the past twenty years reflects a natural tilt in the original, simple harm principle—*a natural tilt that favors a finding of harm.* By returning to the original, simple statement of the harm principle in the 1960s, the progressives opened the door to the proliferation of harm arguments and brought about the collapse of the harm principle.

This risk was always present. Critics of Mill had warned that most, if not all, human activity could be deemed to cause harm to others, and that "no man is an island." Mill acknowledged this criticism.[285] So did Hart and Feinberg.[286] They each tried to shield the harm principle from this criticism. What I would suggest, though, is that they were only able to hold the line on harm—to give the conception of harm a critical edge—by deploying *other* normative principles. In all three cases, there were competing normative values lurking behind their definition of harm, and limiting the scope of the harm principle.[287] In Mill,

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[285] MILL, *supra* note 27, at 78 ("No person is an entirely isolated being").

[286] HART, *supra* note 40, at 5; Feinberg, *supra* note 40.

[287] In this regard, I agree with Professor Gerald Dworkin's suggestion, in his recent essay *Devlin Was Right,* that if one examines closely the category of harm "one reaches the conclusion that the term itself is a normative one. Not every setback to a person's

the supplemental normative principle was the notion of human self-development; in Hart, it was an emphasis on preventing human suffering; and in Feinberg, it was the concern for consistency and equal treatment.

With hindsight, the proliferation of harm arguments could have been predicted. The notion of harm, standing alone, was not the only critical principle at play in Mill, Hart, or Feinberg. Yet the original, simple statement of the harm principle attempted to bracket out normative values other than harm. By paring the harm principle back to its original formulation, progressive theorists actually undermined its critical potential.

D. HARM IN MILL, HART AND FEINBERG

We saw earlier, in the discussion of Mill's essay *On Liberty*, that Mill's treatment of harm led him to an analysis of legal or recognized rights. Mill referred to these interests as "certain interests which, either by express legal provision or by tacit understanding, ought to be considered as rights."[288] Mill explained that a right, in order to be cognizable, must relate in some way to utility. But, he emphasized, not just any kind of utility. "I regard utility as the ultimate appeal on all ethical questions," Mill famously wrote, "but it must be utility in the largest sense, grounded on the permanent interests of man as a progressive being."[289] For Mill, the utilitarian calculus had to be defined in terms of human self-development.[290]

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interests counts as harmful for the purposes of justifying coercion. Only those that are 'wrongs' count." Dworkin, *supra* note 13, at 930.

[288] MILL, *supra* note 27, at 73.

[289] *Id.* at 10.

[290] This interpretation of Mill is consistent with the emerging secondary literature on Mill that emphasizes the centrality of self-development in Mill's politics. *See, e.g.*, BERGER, *supra* note 31, at 229-30 ("In writing *about On Liberty*, it is clear that he viewed the essay as asserting (what I regard as) a powerful, somewhat innovative, positive doctrine that has important practical consequences, and which is crucial to the ultimate defense of his theory of freedom. This is the doctrine of the importance to human well-being of individual self-development, or, as I prefer to call it, autonomy."); DONNER, *supra* note 31, at 188-97 ("If we see how Mill explains harm in terms of interests and note that interests, especially vital interests, ground rights, the positive defense of the right to liberty of self-development is clarified . . . ." *Id.* at 191); Hittinger, *supra* note 31, at 51-52.

In Mill's writings, then, the conception of harm was tied to that of human flourishing.[291] The harm principle was supplemented by a principle of utility in the interest of "man as a progressive being."[292] And it resulted in a surprisingly regulated society. Mill envisioned a society that regulated the sale of potential instruments of crime,[293] alcohol consumption,[294] education,[295] and even procreation.[296] In his essay dedicated to liberty, Mill even endorsed laws forbidding marriage among the poor in order to effectively limit the number of children that poor couples could have.[297]

Mill did not perceive that these numerous regulations would infringe on the self-development of humankind, because the regulations promoted the interests of a more noble and artistic self. Restrictions on activities like drinking did not present a threat to human self-development, but rather promoted a healthier and more noble society. The normative work—the critical principle—was being done by the concept of human self-development—by the idea that human beings should become "a noble and beautiful object of contemplation,"[298] and that human life should become "rich, diversified, and animating, furnishing more abundant aliment to high thoughts and elevating feelings, and strengthening the tie which binds every individual to the race, by making the race infinitely better worth

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[291] In this respect, I agree with Professor Gerald Dworkin. *See* Dworkin, *supra* note 13, at 934.

[292] This is reflected most clearly in Mill's restatement of the harm principle in layman's terms. "As soon as any part of a person's conduct affects prejudicially the interests of others, society has jurisdiction over it, and the question *whether the general welfare will or will not be promoted by interfering with it* becomes open to discussion." MILL, *supra* note 27, at 73 (emphasis added).

[293] *Id.* at 96.

[294] *Id.* at 100.

[295] *Id.* at 104.

[296] *Id.* at 107.

[297] Mill wrote:

> The laws which, in many countries on the Continent, forbid marriage unless the parties can show that they have the means of supporting a family do not exceed the legitimate powers of the State; and whether such laws be expedient or not (a question mainly dependent on local circumstances and feelings), they are not objectionable as violations of liberty.

Id. at 107.

[298] *Id.* at 60.

belonging to."[299] In the end, Mill's harm principle was not simply about harm. It was also, importantly, about human flourishing.[300]

H.L.A. Hart's writings betray, similarly, an important added normative dimension to harm. In Hart's case, though, the emphasis was not so much on human self-development, but rather on an abhorrence for human suffering. In this regard, Hart's writings are similar to those of Ronald Dworkin, who also emphasized, in the context of regulating homosexuality, the "miseries of frustration and persecution."[301]

Central to Hart's writings is a concern about human misery. This concern recurred throughout his debate with Devlin. Human suffering made an appearance at almost every pivotal juncture.[302] Hart repeatedly referred to the "cost of human suffering"[303] that attends the enforcement of morality—"the misery and sacrifice of freedom,"[304] "the cost in human misery."[305] In fact, Hart vigorously opposed the legal enforcement of morality precisely because it inflicted so much human suffering. He opposed the regulation of homosexuality because it "demand[s] the repression of powerful instincts with which personal happiness is intimately connected."[306] Hart attacked Devlin for his underlying retributiveness. Hart wrote:

> Notwithstanding the eminence of its legal advocates, this justification of punishment, especially when applied to conduct not harmful to others, seems to rest on a strange amalgam of ideas. It represents as a value to be pursued at the cost of human suffering the bare expression of moral condemnation, and treats the infliction of suffering as a uniquely appropriate or "emphatic" mode of expression. But is this really intelligible? Is the mere expression of moral condemnation a thing of value in itself to be pursued at this cost? The idea that we may

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[299] *Id.*

[300] *See* Hittinger, *supra* note 31, at 51 ("Without this philosophy [of human flourishing], I suggest, Mill's famous rule is virtually worthless as a tool in judging which particular items of conduct might legitimately be counted as the sort of 'harm' that summons the coercive powers of the law.").

[301] Dworkin, *supra* note 34, at 992.

[302] HART, *supra* note 40, at 43, 57, 65, 69.

[303] *Id.* at 65.

[304] *Id.* at 57.

[305] *Id.* at 69.

[306] *Id.* at 43.

> punish offenders against a moral code, not to prevent harm or suffering or even the repetition of the offence but simply as a means of venting or emphatically expressing moral condemnation, is uncomfortably close to human sacrifice as an expression of religious worship.[307]

Hart's emphasis was on the human aspects of human suffering. His focus was on individual pain.

Hart suggested, at one point in his lectures, that anyone engaged in the debate over the legal enforcement of morality must accept "the critical principle, central to all morality, that human misery and the restriction of freedom are evils."[308] Otherwise, Hart explained, the legal enforcement of morality would not call for justification.[309] Of course, the restriction of freedom was not itself a critical principle since the very purpose of a critical principle was to find proper limits on freedom. But the question of human misery certainly was, at least for Hart. Human misery was the added normative dimension to harm that, in Hart's writings, reined in the harm principle.

Joel Feinberg, more so than Mill or Hart, explicitly acknowledged the multiple normative dimensions of harm. In *Harm to Others*, Feinberg conceded that "harm is a very complex concept *with hidden normative dimensions* . . . ."[310] Feinberg defined harm in a way that incorporated these normative dimensions,[311] and he emphasized in particular the protection of personal autonomy and the equal respect for persons.[312] Feinberg explained that "the harm principle . . . protects personal autonomy and the moral value of 'respect for persons' that is associated with it; it incorporates nonarbitrary interest-ranking

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[307] *Id.* at 65-66.

[308] *Id.* at 82.

[309] *Id.*

[310] 1 FEINBERG, *supra* note 13, at 214.

[311] *See id.* at 215.

> The term "harm" as it is used in the harm principle refers to those states of set-back interest that are the consequence of *wrongful* acts or omissions by others. This interpretation thus excludes set-back interests produced by *justified or excused conduct* ("harms" that are not wrongs), and violations of rights that do not set back interests (wrongs that are not "harms"). A harm in the appropriate sense then will be produced by *morally indefensible conduct* that not only sets back the victim's interest, but also violates his right. A right, in turn, was analyzed as a *valid* claim against another's conduct, and what gives cogency to a claim is the set of reasons that can be proffered in its support.

Id. (emphasis added).

[312] *See* 4 FEINBERG, *supra* note 13, at 12, 81-123.

principles and principles of fairness regulating competitions; it 'enforces' the moral principles that protect individual projects that are necessary for human fulfillment."[313]

There is considerable debate over the normative ingredients in Feinberg's definition of harm and in his liberal position, and I do not intend to resolve that question here.[314] Instead, I will return to Feinberg's earlier writings on legal reasoning and his emphasis on consistency and equal treatment of similar cases, and suggest that those writings corroborate the value of "respect for persons" that is expressly stated in *The Moral Limits.* In those earlier writings, Feinberg advocates a type of moral reasoning, similar to legal reasoning, that involves an analysis and consideration, back and forth, between principle and outcome. Feinberg described this method of analysis as follows:

> The best way to defend one's selection of principles is to show to which positions they commit one on such issues as censorship of literature, "moral offenses," and compulsory social security programs. General principles arise in the course of deliberations over particular problems, especially in the efforts to defend one's judgments by showing that they are consistent with what has gone before. If a principle commits one to an antecedently unacceptable judgment, then one has to modify or supplement the principle in a way that does the least damage to the harmony of one's particular and general opinions taken as a group. On the other hand, when a solid, well-entrenched principle entails a change in a particular judgment, the overriding claims of consistency may require that the judgment be adjusted. This sort of dialectic is similar to the reasonings that are prevalent in law courts.[315]

What is doing much of the normative work in Feinberg's writing, then, is a type of legal reasoning based on consistency, equal treatment of similarly situated persons, analogy, and harmony. The harm principle itself does not dictate any specific resolution with regard to specified moral offenses—it is rather consistency and equal treatment, and, of course, fundamental commitments on issues such as "censorship of literature, 'morals offenses,' and compulsory social security programs."[316]

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[313] *Id.* at 12.

[314] *See* Buchanan, *supra* note 31, at 879-81; Dworkin, *supra* note 13, at 931 & n.15; Gerald J. Postema, *Collective Evils, Harms, and the Law,* 97 ETHICS 414, 418 (1987).

[315] Feinberg, *supra* note 40, at 287.

[316] *Id.*

H.L.A. Hart's return to the original, simple statement of the harm principle reflected a desire for a bright-line rule that would draw a clean distinction between law and morality. But the simple harm principle bracketed out other important normative dimensions. It excluded Mill's discussion of human flourishing and Hart's abhorrence for human suffering. It eliminated the very principles that reined in the harm principle and actually gave the harm analysis its critical edge. The predictable result was a proliferation of harm arguments and a struggle over the meaning of harm. The very simplicity of the harm principle may explain why harm became universal and how the struggle over the meaning of harm eventually collapsed the harm principle.

V. CONCLUSION

During the past two decades, the proponents of regulation and prohibition of a wide range of human activities—activities that have traditionally been associated with moral offense—have turned to the harm argument. Catharine MacKinnon has focused on the multiple harms to women and women's sexuality caused by pornography. The broken windows theory of crime prevention has emphasized how minor crimes, like prostitution and loitering, cause major crimes, neighborhood decline, and urban decay. The harm associated with the spread of AIDS has been used to justify increased regulation of homosexual and heterosexual conduct. The new temperance movement in Chicago and the quality-of-life initiative in New York City have focused on the harmful effects of liquor establishments and public drunks on neighborhoods and property values. The debate on drugs has focused on the harms caused by drug use and the harms caused by the war on drugs.

The proliferation of conservative harm arguments has produced an ideological shift in the harm principle from its progressive origins. This shift has significantly changed the structure of the debate over the legal enforcement of morality. The original pairing of the harm and legal moralist arguments in the nineteenth century offered two competing ways to resolve a dispute. Legal moralists could argue that the immorality of

the offense was sufficient to enforce a prohibition, and the proponents of the harm principle could argue that the lack of harm precluded legal enforcement. Similarly, in the 1960s and 1970s, when the debate was structured by the predominance of the harm principle over legal moralism, there were still two competing ways of resolving a dispute—even if there was a certain disequilibrium in the relative rhetorical force of the competing arguments.

The proliferation of conservative harm arguments has changed all that. Today the debate is characterized by a cacophony of competing harm arguments without any way to resolve them. There is no longer an argument within the structure of the debate to resolve the competing claims of harm. The original harm principle was never equipped to determine the relative importance of harms. Once a non-trivial harm argument has been made, the harm principle itself offers no further guidance. It is silent on how to weigh the harms, balance the harms, or judge the harms. With regard to those questions, we need to look beyond the original harm principle and the traditional debate over the legal enforcement of morality.

It may be wrong, however, to decry this development. The collapse of the harm principle may ultimately be beneficial. It may help us realize that there is probably harm in most human activities and, in most cases, on both sides of the equation—on the side of the persons harmed by the purported moral offense, but also on the side of the actor whose conduct is restricted by the legal enforcement of morality. By highlighting the harm on both sides of the equation, the collapse of the harm principle may help us make more informed arguments, and reach more informed conclusions. It may force us to address the other normative dimensions lurking beneath the conception of harm. It may force us to carefully analyze the harm to others, as well as the harm to the purportedly immoral actor, remembering that the punishment itself may affect, positively or negatively, the subject of punishment, our assessment of harm, and society as a whole. Moreover, it may change the way that we think about remedies. Instead of broad prohibitions that affect entire categories of moral offenses, we may instead develop more nuanced

remedies that address particular harms. In sum, the collapse of the harm principle may bring about a richer structure for future debates over the legal enforcement of morals.