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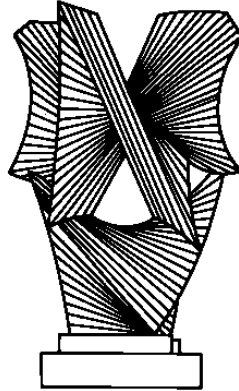
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THE COLLAPSE OF THE HARM PRINCIPLE REDUX: ON SAME-SEX
MARRIAGE, THE SUPREME COURT'S OPINION IN *UNITED STATES*
V. WINDSOR, JOHN STUART MILL'S *ESSAY ON LIBERTY* (1859),
AND H.L.A. HART'S MODERN HARM PRINCIPLE

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An adapted version of this paper is forthcoming as
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The Collapse of the Harm Principle *Redux*

On Same-Sex Marriage, the Supreme Court's Opinion in *United States v. Windsor*, John Stuart Mill's essay *On Liberty* (1859), and H.L.A. Hart's Modern Harm Principle

Bernard E. Harcourt¹

Introduction

In an article published in 1999, titled 'The Collapse of the Harm Principle,'² I argued that the harm principle, originally articulated in John Stuart Mill's essay *On Liberty* (1859), had collapsed under the weight of its own success and no longer serves, today, as a limiting principle on the legal enforcement of morality. The widely-perceived triumph of the harm principle over legal moralism, I argued, produced a proliferation of harm arguments across the political spectrum, including among proponents of legal enforcement; given that the harm principle is a limiting principle and does not contain a criterion to evaluate non-trivial harms, nor to adjudicate between competing claims of non-trivial harms, the hegemonic success of the harm principle and the resulting proliferation of harm arguments effectively eviscerated the ability of the harm principle to *limit* the legal regulation and punishment of morality.

Several commentators raised forceful questions about the relationship between Mill's essay and the harm principle, as well as about the continuing vitality of Mill's argument in *On Liberty*.³ In this article, I return to my original argument to draw an important distinction and to clarify a central point.

First, the distinction: Although Mill first articulated, in the 'Introductory' to *On Liberty*, a simple harm principle focused on the basic notion of 'harm to others,' Mill went on to develop and elaborate over the following chapters of *On Liberty* a far more intricate theory about the protection of certain interests and legal rights—express and customary legal rights—in order to advance his ethical vision of individualism, diversity, creativity, and human self-development, grounded on a utilitarian approach. Mill's fully articulated theory in *On Liberty* must be distinguished from Mill's early statement of a simple harm principle focused on the basic notion of 'harm to others.'

Second, then, the clarification: Liberal legal thinkers at the mid-twentieth century, especially H.L.A. Hart, but others as well such as Joel Feinberg and Herbert Wechsler, drew on Mill's early statement of a simple 'harm to others' principle to develop the modern harm

¹ Julius Kreeger Professor of Law and Political Science, University of Chicago. Special thanks to Guyora Binder, Alan Brudner, Marc DeGirolami, Markus Dubber, Klaus Günther, Mia Ruyter, Simon Stern, Mariana Valverde, and Anders Walker for insightful comments on this essay; and to Daniel Henry for excellent research assistance.

² B Harcourt, 'The Collapse of the Harm Principle,' 90 J. Crim. L. & Criminology 109 (1999); *see also* B E Harcourt, *Illusion of Order* (2001).

³ For a review of this debate, *see* A Duff, 'Theories of Criminal Law,' Section 6 'Crimes as Public Wrongs,' *The Stanford Encyclopedia of Philosophy* (Summer 2013 Ed.), E N Zalta (ed.), available at <http://plato.stanford.edu/archives/sum2013/entries/criminal-law/>.

principle, which they deployed successfully in the debate with modern legal moralists, such as Lord Devlin, over prostitution, homosexuality, and the legal enforcement of morals. As a result, it is Hart's modern harm principle, focused on the basic notion of 'harm to others' and 'human suffering,' that triggered a proliferation of harm arguments and ultimately collapsed the modern harm principle, not Mill's fully articulated theory of protected interests and legal rights. Although, as Anders Walker has shown,⁴ there was already a turn back to the simple notion of 'harm to others' in the nineteenth century, it was only after the liberal legal thinkers at the mid-twentieth century seized on the early 'harm to others' language from Mill's introduction to *On Liberty* that there would be a proliferation of non-trivial harm arguments across the political spectrum, and ultimately the collapse of the modern 'harm to others' principle. As for Mill's fully articulated theory of legal rights associated with his Humboldtian vision of human self-development, that aspect of Mill's essay has had relatively little influence on modern criminal law and on contemporary debates over the legal enforcement of morality⁵, and it is therefore difficult to assess the continuing vitality of Mill's elaborated theory in *On Liberty*.

With this distinction and clarification in mind, the argument of *The Collapse of the Harm Principle* can be slightly restated and, I believe, continues to shed light on ongoing contemporary debates over the legal regulation of morality: today, the hegemony of the modern harm principle continues to generate a proliferation of non-trivial harm arguments on both sides of the debates, and the competing claims of non-trivial harms have effectively neutralized the critical, limiting function of the modern harm principle. The proliferation of harm arguments has given rise to a cacophony of harms that can only give rise to what I would call 'harm decisionism'—i.e. political decisions about which harms are more compelling than others and crude, intuitive utilitarian calculi about minimizing social harms. But on those matters, the modern harm principle does not perform a limiting function. Once the modern harm principle has been satisfied by a claim of non-trivial harm, the decision whether to legally enforce morality becomes, in essence, a harm free-for-all in which the victor is usually the one who makes the most compelling and popular claim of injury—which, paradoxically, may lead precisely to the kind of demagoguery and mass appeals that Mill tried to rein in with his elaborate theory of interests and legal rights in *On Liberty*.

In this article, I demonstrate the continued vitality of the collapse of the modern harm principle argument by exploring the recent United States Supreme Court decision on same-sex marriage—a context involving a civil, not a criminal prohibition on behavior that is viewed by some as immoral. *United States v. Windsor*⁶ involved a challenge to the constitutionality of Section 3 of the Defense of Marriage Act (DOMA), which defined marriage for purposes of federal law as the union between a man and woman—thereby excluding legal same-sex marriages conducted in States that allow such marriages from the federal definitions of

⁴ A Walker, 'Strange Traffic: Sex, Slavery, and the Freedom Principle,' working draft presented at the University of Chicago (2013) 19-20.

⁵ As Joseph Hamburger correctly pointed out, this may be attributable in large part to the fact that so many contemporary commentators have not focused on the crucial passages in *On Liberty* in which Mill argued for legal restrictions on self-regarding conduct. See J Hamburger, *John Stuart Mill On Liberty and Control* (1999) 180-184.

⁶ *United States v. Windsor*, 570 U.S. __ (2013).

‘marriage’ and ‘spouse.’ Insofar as DOMA enacts a moral objection to same-sex marriage, DOMA should be conceived here as a federal legal prohibition on same-sex marriage, in other words as the legal enforcement of morals.

From this perspective, the Supreme Court’s decision in *Windsor* reflects perfectly the collapse of the modern harm principle. Notice, first, that DOMA was enacted because of a *conservative harm argument* about the potential injuries that same-sex marriages may cause to traditional marriage and the family. DOMA itself reflects the proliferation of harm arguments and the turn to harm by social conservatives. The statute, after all, was called the *defense of marriage act*: Congress (and President Bill Clinton) were *defending* traditional marriage from the *potential harm* that same-sex unions could have on heterosexual marriage and on the traditional family. The legislative history from the House of Representatives reflects this well and explicitly: the House Report states that ‘it is both appropriate and necessary for Congress to do what it can to defend the institution of traditional heterosexual marriage.... H.R. 3396 is appropriately entitled the “Defense of Marriage Act.” The effort to redefine “marriage” to extend to homosexual couples is a truly radical proposal that would fundamentally alter the institution of marriage.’⁷ Justice Samuel Alito, in his dissenting opinion in *Windsor*, gives voice to what he clearly considers to be potential non-trivial harms: ‘The family is an ancient and universal human institution,’ Alito writes in *Windsor*.⁸ ‘Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects.’ These changes, Alito emphasized, can have ‘far-reaching consequences.’ Alito warns: ‘We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come.’ Alito added in a footnote that ‘As sociologists have documented, it sometimes takes decades to document the effects of social changes—like the sharp rise in divorce rates following the advent of no-fault divorce—on children and society,’ and Alito cited a study about the ‘Unexpected Legacy of Divorce.’ Alito is clearly referencing *potential non-trivial harms*: harms to children and society potentially equivalent to those (purported real harms) associated with no-fault divorce.

Second, these potential harms of same-sex marriage satisfy, and thereby neutralize the modern harm principle. Let me spell this out step-by-step: the conservative moral position, in this context, is that same-sex marriage is morally wrong. On this basis, a legal moralist would argue that there should be a prohibition on same-sex marriage—or, in other words, that DOMA should be upheld since it represents a prohibition on immoral conduct. The modern harm principle would state that same-sex marriage can only be prohibited—i.e. DOMA should only be upheld—if same-sex marriage causes ‘harm to others.’ Inversely, the modern harm principle would *disallow* DOMA if same-sex marriage causes *no* ‘harm to others.’ But given that the legislation is based on a claim of non-trivial harm, the modern harm principle cannot function here as a limiting principle to strike down DOMA. The modern harm principle cannot limit the prohibition on same-sex marriage—it cannot strike down DOMA—precisely because the traditionalists have turned to harm as well. And what is fascinating about the Supreme Court

⁷ H R Rep No 104–664 (1996) 12-13, quoted in *Windsor*, ___.

⁸ *Windsor* (J. ALITO, dissenting), 570 U.S. ___.

liberal majority in *Windsor* is that not a single justice takes the position that same-sex marriage *causes no potential harm to others*. Faced with the conservative harm argument, all of the justices defer to the political process on the question whether same-sex marriage causes harm to others. No one on the Court is prepared to say that Section 3 of DOMA should be struck down because same-sex marriage does not cause harm to traditional marriage or the family, and that morals enforcement does not satisfy reasonable basis review (as the Court announced in *Lawrence*). As a result, the modern harm principle has been neutered by the proliferation of conservative harm arguments.

Third, rather than argue that same-sex marriage causes no harm, the liberal thinkers on the Supreme Court ratchet up the harm, and outdo the conservative harm arguments: they double the harm, by claiming an even greater harm. That greater harm, according to the liberal thinkers on the Court, is the injury that Congress (and President Clinton) inflicted on same-sex couples by enacting DOMA. Just as H.L.A. Hart would argue that the prohibition on homosexual sodomy does greater harm than the harm of sodomy itself, just as the drug legalization lobby would argue that the War on Drugs does more harm than drug use, the liberals on the Court pile on more harm arguments: ‘the principal purpose and the necessary effect of this law,’ Justice Kennedy writes for the majority, ‘are to *demean* those persons who are in a lawful same-sex marriage.’⁹ DOMA, Kennedy writes, ‘brings *financial harm* to children of same-sex couples. It *raises the cost* of health care for families by taxing health benefits provided by employers to their workers’ same-sex spouses. And it *denies or reduces benefits* allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.’¹⁰ The opinion is all about harms. In his usual way, Justice Scalia, in dissent, offers a succinct restatement of the liberal majority’s harm arguments: ‘the majority says that the supporters of this Act acted with *malice*—with the “purpose” “to disparage and to injure” same-sex couples. It says that the motivation for DOMA was to “demean;” to “impose inequality;” to “impose ... a stigma;” to deny people “equal dignity;” to brand gay people as “unworthy;” and to “*humiliat[e]*” their children (emphasis added).’¹¹ In effect, the liberal response to the conservative harm arguments is to double the harm and to ratchet things up—which, incidentally, succeeds.

Fourth, what we are left with in *Windsor* is a rather typical harm free-for-all: a cacophony of harm claims that the modern harm principle—which is intended to be a *limiting* principle—cannot resolve. As a limiting principle, the harm principle cannot adjudicate between these competing non-trivial harm arguments. Instead, we are forced to resort to ‘harm decisionism’: we have to decide which harm is more important to us and then act accordingly. That is precisely what happened at the Supreme Court. Now, to be sure, the Supreme Court did not apply the harm principle: this was constitutional adjudication and the legal question was whether DOMA’s Section 3 violates equal protection or due process under the U.S. Constitution. But the majority in effect did take sides in the harm competition: Justice Kennedy’s opinion for the majority does ultimately hold that it is the harm to same-sex couples that violates equal protection: ‘The

⁹ *United States v. Windsor*, 570 U.S. ___ (emphasis added).

¹⁰ *Ibid.* (emphasis added)

¹¹ *United States v. Windsor*, 570 U.S. ___ (J. SCALIA, dissenting).

Constitution's guarantee of equality "must at the very least mean that a bare congressional *desire to harm a politically unpopular group* cannot" justify disparate treatment of that group.'

Now, you might respond that the harm principle prevailed in *Windsor* either (1) because the majority prohibited morals legislation on the ground that DOMA itself *caused 'harm to others,'* or (2) because the Supreme Court was focused on the issue of harm—perhaps net harm or overall harm—and that, basically, is what the harm principle is all about, i.e. about avoiding overall net harm. But neither of those responses are consistent with the modern harm principle.

The first response turns the modern harm principle on its head and completely *inverts* the logic: the majority did not address the harm of the underlying behavior, rather the harm of the morals legislation. But of course morals legislation *is going to cause harm*. It is intended to cause harm. It is intended to prohibit certain behaviors that are deemed, and in the process labeled or stigmatized, as immoral. *All morals legislation is going to cause that kind of harm*. The criminalization of incest or bestiality causes harm by punishing persons who engage in that behavior and labeling them as immoral. What the modern harm principle is all about is avoiding that kind of harm *if the underlying conduct does not cause harm to others*. The harm principle is premised on the assumption that legal enforcement causes harm. But that secondary harm is simply not a problem for the harm principle *once it is established that the underlying conduct causes 'harm to others.'* For instance, prohibiting polygamy causes harm to polygamists and labels them as criminal and immoral. In fact, it is intended to do them harm and disrupt their families, send them to prison and punish them. But the harm principle is silent about all of that secondary harm, so long as the principle is satisfied, i.e. so long as it is the case that polygamy *causes harm to others*. The first response simply fails to appreciate that all regulation, criminalization, punishment, and legal enforcement of morality causes harm to the targets of enforcement, and therefore that there will always be an argument to strike down prohibitions because they cause harm. But it is not an application of the harm principle to strike down morals legislation because the legislation causes harm—that is assumed; it is only the job of the harm principle to strike down morals legislation if the underlying conduct does not cause harm to others. The first response, in other words, is all inside out: it incorrectly takes the premise as the principle.

The second response—namely that the harm principle continues to do work at the level of overall, net harm—completely misconstrues the modern harm principle: the harm principle is a *limiting* principle that is intended to shield behavior that does not harm others. It is not the equivalent of the larger utilitarian principle that legislation should minimize social harm or maximize social utility. Once there exists 'harm to others,' conduct is no longer shielded by the harm principle and the harm principle *does no more work*. And once you have gotten *past* the limiting effect of the harm principle, then any number of rules of decision could apply. To say that overall net harm becomes the most important factor in deciding whether to legislate does not mean that the harm principle has triumphed, it simply means that society has adopted a utilitarian calculus focused on maximizing well-being. It is just plain utilitarianism. And it is not required by, it does not implicate, and it is not even akin to the limiting harm principle. Society could, just as easily or reasonably, adopt the harm principle and beyond that, a rule of thumb that young

people decide: in other words, if behavior causes harm to others (if it satisfies the harm principle), it can be prohibited, but society decides whether to prohibit based on a survey of 17 to 19-year-olds. There could be any number of rules of decision whether to prohibit behavior *once the limiting harm principle has been satisfied and the behavior is deemed to cause harm to others*. To try to maximize happiness in society by minimizing the amount of social harm and human suffering is orthogonal to the modern harm principle—which states only that conduct should not be prohibited unless it causes ‘harm to others.’

In sum, the modern harm principle has prevailed over legal moralism, but its victory and the resulting proliferation of prohibitionist harm arguments have sapped the modern harm principle of any limiting function on the legal enforcement of morals. Let me begin, then, with the first and important distinction between John Stuart Mill’s elaborate rights theory in *On Liberty* and the modern harm principle.

I. *John Stuart Mill On Liberty (1859)*

‘That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.’¹²

This simple sentence from John Stuart Mill’s ‘Introductory’ to *On Liberty*—pulled out of context and denuded of Mill’s sophisticated philosophical treatment—became a foundational reference of Anglo-American criminal law and helped shape the course of penal legislation, enforcement, and theory during the twentieth century. Known as the ‘harm to others’ principle—or ‘harm principle’ for short—Mill’s simple sentence emerged, in the hands of H. L. A. Hart, Joel Feinberg, Herbert Wechsler, and other liberal legal thinkers at mid-century, as *the* critical principle used to shield individuals from the legal enforcement of morals legislation—including, most notably, penal laws against homosexual conduct, commercial sex, illicit drugs, and other behaviors that came to be known as ‘moral vices’ for some and ‘victimless crimes’ for others. ‘Harm to others’ became, in the 1970s and 1980s, the defining criteria of liberal thinkers in the debate over the proper scope of the criminal law and the legitimate reach of the State—as evidenced, perhaps most notably, by the lead volume of Feinberg’s magisterial and influential treatise on *The Moral Limits of Criminal Law*, titled ‘Harm to Others,’ published in 1984.

As Mill himself had recognized in his sophisticated analysis of the ‘harm to others’ language in later chapters of *On Liberty*, however, the simple notion of ‘harm to others’ was far too crude a criterion to withstand the pressure of majority opinion—far too vulnerable to the rhetorical ploys and charismatic interventions that shape mass public sentiment—which was precisely what Mill was trying to rein in. The advent of liberal democracy in the nineteenth century, Mill explained in framing *On Liberty*, had raised a new set of concerns, not only about representation, but also about ‘social tyranny.’¹³ In the emerging liberal democracies, Mill wrote, the problem was no longer, or not only to protect against ‘the acts of the public authorities,’ but

¹² J S Mill, *On Liberty*, E Rapaport (ed.) (1978) 9.

¹³ *Ibid.* 4.

also to guard against the tidal wave of public opinion that could so easily encroach on individuality and self-development: ‘Protection, therefore, against the tyranny of the magistrate is not enough; there needs protection also against the tyranny of the prevailing opinion and feeling, against the tendency of society to impose, by other means than civil penalties, its own ideas and practices as rules of conduct on those who dissent from them...’¹⁴ Mill was rather explicit in his criticism of public opinion, which, he observed, ‘now rules the world’ and reflects ‘the tendencies and instincts of the masses,’ which he expressly equated with ‘collective mediocrity.’¹⁵

Mill was by no means opposed to liberal democracy, to majority rule, nor to the extension of suffrage—in fact, he was an outspoken advocate of women’s suffrage and defended universal suffrage¹⁶—but he was deeply concerned about the potential impact of mass popular opinion on individualism. He did not resist, but sought instead to mediate the emerging defects of the more generalized suffrage by refining democratic theory. And he did so, in part, by advocating leadership by the more enlightened few:

‘I am not complaining of all this. I do not assert that anything better is compatible, as a general rule, with the present low state of the human mind. But that does not hinder the government of mediocrity from being mediocre government. No government by a democracy or a numerous aristocracy, either in its political acts or in the opinions, qualities, and tone of mind which it fosters, ever did or could rise above mediocrity except in so far as the sovereign Many have let themselves be guided (which in their best times they always have done) by the counsels and influence of a more highly gifted and instructed *one* or *few*. The initiation of all wise or noble things comes and must come from individuals; generally at first from some one individual.’¹⁷

From this perspective, evidently, the simple notion of ‘harm to others’ was a notion that was particularly susceptible to mass appeal—precisely the kind of emotional and populist rhetorical flourish that could be slapped on to any behavior and lead to improper government intervention. Left to the devices of the masses, ‘harm to others’ could potentially result in the most oppressive restrictions on individual self-development.

II. *On Liberty*: From ‘Harm to Others’ to Legal Rights and Duties

On this ground, Mill would develop gradually, over the course of his essay *On Liberty*, a far more refined principle to limit interference with individual liberty. At first, Mill would qualify the ‘harm to others’ language by specifying that only those acts can be proscribed which do harm to others ‘*without justifiable cause*.’¹⁸ At this initial stage, Mill would emphasize that

¹⁴ Ibid.

¹⁵ Ibid., 63.

¹⁶ J S Mill, *Public and Parliamentary Speeches*, regarding the Reform Bill of 1866, 31 May 1866, 85-86, in J S Mill, *Collected Works of John Stuart Mill*, J M Robson (ed), Volumes 28-29 (1963); *see generally* J S Mill, *The Subjection of Women* (1869).

¹⁷ Ibid., 63.

¹⁸ Ibid., 53 (emphasis added).

the individual ‘must not make himself a nuisance to other people’¹⁹: he must ‘refrain[] from molesting others *in what concerns them*, and merely act[] according to his own inclination and judgment *in things which concern himself*...’²⁰ Mill developed and elaborated a first distinction between self-regarding and other-regarding acts—between ‘the part of a person’s life which concerns only himself and that which concerns others.’²¹

But here too, Mill acknowledged that the plain distinction between self and other-regarding acts would not hold up, without more. ‘I fully admit,’ Mill conceded, ‘that the mischief which a person does to himself may seriously affect, both through their sympathies and their interests, those nearly connected with him and, in a minor degree, society at large.’²² And when self-regarding mischief has such effects on others, or on society at large, Mill declared, it must be ‘taken out of the self-regarding class.’²³ Mill went even further, arguing that the mere *risk of affecting others* could render legitimate legal prohibition: ‘Whenever, in short, there is a definite damage, *or a definite risk of damage*, either to an individual or to the public, the case is taken out of the province of liberty and placed in that of morality or law.’²⁴

Further elaboration and refinement of the distinction would lead Mill to focus on notions of interests, rights, and duties: the simple ‘harm to others’ principle would have to be embedded in a far more robust theoretical structure of legal rights and obligations. And so, in his later statements of the limiting principle, Mill framed the notion of harm within a liberal structure of recognized legal rights. Mill declared that individuals had a duty ‘to observe a certain line of conduct toward the rest,’ and that society ‘is justified in enforcing [this duty] at all costs to those who endeavor to withhold fulfillment.’²⁵ The line of conduct in question was to be understood through the lens of *legal rights*: namely, it consisted ‘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.’²⁶

In framing the ‘harm to others’ principle through the lens of express and customary legal rights, Mill drew on the foundations of liberal thought. The liberal strand in modern political thought had woven together, from a very early date, the notions, on the one hand, of obstructing the movement or interests of others with, on the other hand, the idea of legal rights. In the *Leviathan*, Hobbes had defined liberty as the very ‘absence of Opposition,’ and opposition as ‘externall Impediments of motion.’²⁷ More importantly, Hobbes characterized civil laws as ‘hedges’ intended to protect citizens from the harmful consequences of the actions of others. As Hobbes explained, ‘the use of Lawes, (which are but Rules Authorised) is not to bind the People

¹⁹ Ibid.

²⁰ Ibid. (emphasis added).

²¹ Ibid. 78.

²² Ibid. 79.

²³ Ibid. 79.

²⁴ Ibid. 80.

²⁵ Ibid. 73.

²⁶ Ibid. 73.

²⁷ T Hobbes, *Leviathan*, R Tuck (ed.) (1996) 145-147.

from all Voluntary actions; but to direct and keep them in such a motion, *as not to hurt themselves by their own impetuous desires, rashness, or indiscretion*; as Hedges are set, not to stop Travellers, but to keep them in the way.²⁸ These hedges, Hobbes argued, ‘are a necessary means of the safety and well being of Man in the present World.’²⁹ Locke as well borrowed the image of hedges to describe law, referring to laws as what ‘hedges us in . . . from Bogs and Precipices.’³⁰ He too defined liberty in terms of both legal rights and interference from others: ‘For *Liberty* is to be free from restraint and violence from others which cannot be, where there is no Law.’³¹ These early liberal definitions reflected the close nexus between legal rights and the potential harm of infringing conduct—or, more simply, the basic liberal liberty principle, namely ‘that people should be able to live their lives as they choose without interference from others so long as they are not preventing others from doing the same.’³²

Mill did not elaborate in *On Liberty* the exact contours of the express and customary legal rights that would undergird the ‘harm to others’ principle; but he would provide enough illustrations in the ‘Applications’ chapter of his famous essay to suggest an outline. A good sense, then, can be gleaned from the following list of legitimate government prohibitions and regulations:

1. It is legitimate to forbid and punish marriage between two consenting individuals if they cannot establish that they have sufficient financial means to support a family, because of the negative effect of overpopulation on the return to labor for ‘all who live by the remuneration of their labor.’³³ In Mill’s words, such laws prohibiting marriage ‘are not objectionable as violations of liberty’ because they prohibit ‘a mischievous act’ that is ‘an act injurious to others...’³⁴
2. It is acceptable to forbid and punish idleness ‘in a person receiving support from the public’³⁵ or if, as a result of that idleness, an individual fails to support their children or otherwise fails to perform their legal duties to others.³⁶
3. It is proper to impose ‘a moderate fine’ on a father if his child is unable to read at a public examination, because it is a duty of a parent to ensure that their child be able ‘to perform his part well in life toward others and toward himself.’³⁷ To fail to do so is ‘a moral crime, both against the unfortunate offspring and against society.’³⁸ As Mill explained, the way to enforce his vision of education was through ‘public

²⁸ Ibid. 239–240.

²⁹ T Hobbes, *Dialogue between a Philosopher and a Student of the Common Laws of England*, J Cropsey (ed.) (1971) 58; see generally M M Goldsmith, ‘Hobbes on law’ in *The Cambridge Companion to Hobbes*, T Sorell (ed.) (1996) 291.

³⁰ J Locke, *Two Treatises of Government*, P Laslett (ed.) (1988) 305.

³¹ Ibid. 306; see generally P Laslett, ‘Introduction’ to *Two Treatises of Government* (1996) 112.

³² I M Young, *Intersecting Voices: Dilemmas of Gender, Political Philosophy, and Policy* (1997) 9.

³³ Ibid. 107.

³⁴ Ibid. 107.

³⁵ Ibid. 97.

³⁶ Ibid. 97.

³⁷ Ibid. 104.

³⁸ Ibid. 104.

- examinations, extending to all children and beginning at an early age;’ and if the examination revealed that the child was not able to read, ‘the father, unless he has some sufficient ground of excuse, might be subjected to a moderate fine, to be worked out, if necessary, by his labor, and the child might be put to school at his expense.’³⁹
4. It is legitimate to prohibit and punish drunkenness for any individual ‘who had once been convicted of any act of violence to others under the influence of drink’ or who has a propensity or risk of violence to others while drunk, because ‘The making himself drunk, in a person whom drunkenness excites to do harm to others, is a crime against others.’⁴⁰
 5. It is appropriate to mandate and use the criminal sanction to enforce a mandate that a seller of a substance that is poisonous label the substance ‘with some word expressive of its dangerous character...’; or to require that a seller of ‘articles adapted to be instruments of crime,’ such as firearms presumably, ‘to enter in a register the exact time of the transaction, the name and address of the buyer, the precise quality and quantity sold; to ask the purpose for which it was wanted, and record the answer he received.’⁴¹
 6. It is legitimate for the State to impose restrictions on ‘dealers in strong drinks’ to make sure that they do not promote ‘intemperance;’⁴² also, to tax stimulants, such as alcohol, ‘up to the point which produces the largest amount of revenue (supposing that the State needs all the revenue which it yields)’ and to regulate the sale of such commodities by means of licensing, hours regulation, 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.’⁴³
 7. It is legitimate to prohibit and punish acts that are ‘a violation of good manners,’ such as ‘offenses against decency,’ if they are done in public, because when they are done publicly they are ‘offenses against others.’⁴⁴

Evidently, Mill justified a large number of regulations and penal prohibitions on the basis of his rights framework. The theoretical structure, in Mill’s own hands, produced a blueprint for a highly regulated society: a society that restricted procreation and regulated education, prohibited public intoxication and indecency, regimented the sale of firearms and other potential

³⁹ Ibid. 105.

⁴⁰ Ibid. 96-97.

⁴¹ Ibid. 96.

⁴² Ibid. 99.

⁴³ Ibid. 100.

⁴⁴ Ibid. 97.

instruments of crime, taxed the sale of alcohol and regulated its consumption. The risk of future injury to protected interests or legal rights justified all forms of intervention.⁴⁵

Many theorists have observed this apparent paradox in Mill's writings—the curious juxtaposition of a liberty principle with so many intrusions into the family and private, consensual behavior.⁴⁶ Some have attributed it to a deeper contradiction in early liberal thought. Sheldon Wolin, for instance, in *Politics and Vision*, traces the apparent paradox in Mill's work back to Hobbes and an early liberal failure 'to grasp the interconnections between social and political forces'—to grasp, in effect, 'the extent to which political practices were shaped by social relationships.'⁴⁷ Early liberal thought, Wolin argues, focused on the purely political—namely, on questions of authority and superintendence of rulers, of obligations and duties of citizens, and of the proper system of rules governing behavior—at the expense of the social realm. The development of liberal thought during the next three centuries, Wolin suggests, involved the gradual erosion of this distinctively political realm, and the rediscovery of society. But the vision of the social realm which was gradually reintroduced into liberal thought was overly idealized—even among those, such as Mill, who had a critical eye for the 'mediocrity' of the masses and of public opinion.

Even in someone like Mill, Wolin contends, this produced a certain 'blindness to social coercions.'⁴⁸ Although Mill, more than others, resisted the oppression of public opinion and conformity, Wolin argues, Mill nevertheless fell back on the power of society to regulate human conduct. 'The same Mill who had accused Comte of aiming at "a despotism of society over the individual," who had welcomed de Tocqueville's profound analysis of social conformity,' Wolin emphasizes, 'nevertheless proposed that the tyranny of opinion be invoked in order to promote some of his own pet causes'—the problem of overpopulation, the policy of open balloting, and the benefits of communal ownership.⁴⁹ Even Mill, who was more vigilant than most in this respect, nevertheless succumbed to this liberal blindness: 'Mill failed to understand fully the threat of social conformity.'⁵⁰ As Wolin explains:

'In retrospect the long journey from private judgment to social conformity appears as the desperate effort of liberals to fashion a substitute for the sense of community that had been lost. For what liberalism had thought it had solved, it had only exposed as a problem.... They had conceived the issue as one of reconciling freedom and authority, and they solved it by destroying authority in the name of liberty and replacing it by society, but only at the cost of exposing freedom to society's controls. To the nineteenth

⁴⁵ For a discussion of the relationship between legal rights and the harm principle in contemporary accounts, see H Stewart, 'The Limits of the Harm Principle,' 4 *Criminal Law and Philosophy* (2010) 18-20.

⁴⁶ For a defense of Mill, see D Spitz, 'Freedom and Individuality: Mill's *Liberty* in Retrospect,' *Nomos IV* ed. C J Friedrich (1962) 195.

⁴⁷ S Wolin, *Politics and Vision* (1960) 287.

⁴⁸ *Ibid.* 349.

⁴⁹ *Ibid.* 349. See also J Hamburger, *John Stuart Mill On Liberty and Control* (1999) 9-17.

⁵⁰ *Ibid.* 350.

and twentieth centuries fell the task of stating the problem more correctly: not freedom versus authority, or Man against the State, but authority *and* community.’⁵¹

In order to make sense of this apparent paradox in Mill’s writings, though, I think it is important to recognize that Mill’s entire theoretical intervention was aimed at enhancing a particular vision of human self-development. It was directed toward a goal of individual growth and self-development—as commentators have noted.⁵² For Mill, the notions of protected interests and legal rights were inextricably linked to the virtues of individualism and individual growth reflected in the maxims of Wilhelm von Humboldt, which Mill quoted extensively and with great praise in the body of his essay: ‘the end of man, or that which is prescribed by the eternal or immutable dictates of reason, and not suggested by vague and transient desires, is the highest and most harmonious development of his powers to a complete and consistent whole.’⁵³ This is the idea that Mill would enshrine as the very epigraph to *On Liberty*—again, citing Humboldt: ‘The grand, leading principle, towards which every argument unfolded in these pages directly converges, is the absolute and essential importance of human development in its richest diversity.’⁵⁴

This is by no means a new insight, but it does serve to make sense of the apparent tension in Mill’s thought. The scholarship on Mill’s moral and political philosophy has certainly emphasized the centrality of self-development. As Alan Ryan suggests, ‘Mill’s concern with self-development and moral progress is a strand in his philosophy to which almost everything else is subordinate.’⁵⁵ In *Happiness, Justice and Freedom: The Moral and Political Philosophy of John Stuart Mill*, John Berger refers to the doctrine of self-development as ‘the most important and distinctive feature of [Mill’s] work.’⁵⁶ Berger claims that, ‘[i]n writing about *On Liberty*, it is clear that [Mill] viewed the essay as asserting (what I regard as) a powerful, somewhat innovative, positive doctrine . . . of the importance to human well-being of individual self-development, or, as I prefer to call it, autonomy.’⁵⁷ Focusing on Mill’s complex views of the good, Wendy Donner reaches a similar conclusion in *The Liberal Self: John Stuart Mill’s Moral and Political Philosophy*. Donner writes that ‘Mill’s most fundamental commitment, the driving force of all his thought and writing, is the promotion of human self-development and the happiness involved in the development and exercise of our higher human faculties’ and refers to this as ‘the positive defense of the right to liberty of self-development....’⁵⁸ The connection between this overarching objective—well recognized—and the specific outcomes of Mill’s

⁵¹ Ibid. 350-351.

⁵² F R Berger, *Happiness, Justice, and Freedom: The Moral and Political Philosophy of John Stuart Mill* (1984) 229-230; A Buchanan, ‘Assessing the Communitarian Critique of Liberalism,’ 99 *Ethics* (1989) 862; W Donner, *The Liberal Self: John Stuart Mill’s Moral and Political Philosophy* (1991) 188-97; R Hittinger, ‘The Hart-Devlin Debate Revisited,’ 35 *American Journal of Jurisprudence* (1990) 51–52.

⁵³ W von Humboldt, *The Sphere and Duties of Government*, quoted in Mill, *On Liberty* (1978) 55.

⁵⁴ Ibid., epigraph.

⁵⁵ A Ryan, *The Philosophy of John Stuart Mill* (1988) 255. See also G Kateb, ‘A Reading of *On Liberty*,’ in *On Liberty* by John Stuart Mill, eds. David Bromwich and George Kateb (2003) 66.

⁵⁶ Berger (1984) 229.

⁵⁷ Ibid. 229.

⁵⁸ Donner (1991) 3; Ibid. 191; see also Hittinger (1990) 51-52.

analysis in his ‘Applications’ chapter, though, is precisely what can make sense of the structure of protected interests and legal rights that Mill had in mind.

The notion of legal rights embodied in Mill’s more elaborated restatements of the limiting principle rested on a utilitarian calculus intended to maximize the diversity, creativity, and self-development of individuals.⁵⁹ Mill emphasized: ‘I forego any advantage which could be derived to my argument from the idea of abstract right as a thing independent of utility. I regard utility as the ultimate appeal on all ethical questions; but it must be utility in the largest sense, *grounded on the permanent interests of man as a progressive being.*’⁶⁰ The utilitarian element would infuse not only the definition of legal rights, but also the method of assessing, after a violation of right is identified, whether the criminal sanction was appropriate.⁶¹ And Mill did not believe that the numerous regulations that he justified would infringe on the self-development of humankind, because, in Mill’s opinion, the regulations promoted the interests of a more noble and artistic self.⁶² Restrictions on activities like drinking did not present a threat to human self-development, but rather promoted a healthier and more noble individual and society.⁶³

In the end, Mill substituted for the ‘harm to others’ principle a far more intricate liberty principle that depended on a robust definition of *express and customary legal rights* constructed in order to promote the ideal of individual self-development in its richest diversity. ‘Encroachment *on their rights*; infliction on them of any loss or damage not justified by *his own rights*, Mill argued, ‘these are fit objects of moral reprobation and, in grave cases, of moral retribution and punishment.’⁶⁴ In his final articulation of the ‘two maxims which together form the entire doctrine of this essay,’ Mill made clear that he had developed an elaborated theory of legal interests and rights:

‘The maxims are, first, that the individual is not accountable to society for his actions in so far as these concern *interests of no person but himself*.... Secondly, that for such actions as are prejudicial *to the interests of others*, the individual is accountable and may be subjected either to social or to legal punishment if society is of opinion that the one or the other is requisite for its protection.’⁶⁵

Mill himself was not particularly focused on or vested in the implications for the criminal law, and had far greater ambitions than penal reform. His was a political and moral philosophy aimed at a larger contribution to democratic theory and governance. To be sure, Mill’s essay *On Liberty* would immediately engage and provoke jurists, especially the British barrister and judge, Lord James Fitzjames Stephen. In 1873, in a book entitled *Liberty, Equality, Fraternity*, Stephen would publish a scathing attack on Mill’s essay and strenuously advocate legal moralism as a

⁵⁹ Mill (1978) 10.

⁶⁰ Ibid. (emphasis added).

⁶¹ Ibid. 73. (‘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.’)

⁶² See Hamburger (1999) 190.

⁶³ See, e.g., Mill (1978) 60.

⁶⁴ Ibid. 76 (emphasis added).

⁶⁵ Ibid. 93 (emphasis added).

principle to justify government enforcement of morals legislation.⁶⁶ Stephen described his argument as ‘absolutely inconsistent with and contradictory to Mr. Mill’s,’⁶⁷ and his argument 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.’⁶⁸ But Mill’s ambition was far greater than to intervene simply in the criminal law. It was to develop a more encompassing utilitarian framework to advance a conception of individuality, of creativity, of diversity, and of individual differentiation and self-development—in Mill’s words, ‘to see that it is good there should be differences.’⁶⁹

III. The Modern Harm Principle: The Road Back to the Simple Notion of Harm

Although Mill fully recognized that the simple notion of ‘harm to others’ would not withstand scrutiny, nor the test of time, a century later the debate would focus on that very issue of ‘harm to others’ and—as Mill would have predicted—the early, simplified ‘harm to others’ principle would collapse under the weight of its own success. It collapsed over the course of the second half of the twentieth century, as more and more participants in the debate over the legal enforcement of morals legislation, on both sides of the debate, would turn to harm-based arguments in order to persuade public opinion—what Mill feared. After a momentary triumph of the simple ‘harm to others’ principle, primarily due to its simplicity, the gradual proliferation and accumulation of social harm arguments, without a limiting principle to adjudicate between claims of harm, would ultimately render the modern harm principle useless—or worse, a mere rhetorical ploy.

The problem, it seems, originated with H. L. A. Hart, who would almost single-handedly focus the debate back onto the simple notion of ‘harm to others.’ Hart’s intervention was sparked by a series of events in England and the United States: in England, the Committee on Homosexual Offences and Prostitution (the ‘Wolfenden Report’) had recommended that private homosexual acts between consenting adults no longer be criminalized and discussed at length the privacy interests in consensual commercial sex but the problems associated with public solicitation and street prostitution; in the United States, the Supreme Court was struggling over the definition and treatment of obscenity, and the American Law Institute was drafting a Model Penal Code and rethinking the criminalization of ‘vice crimes.’⁷⁰ In both countries, liberal thinkers believed that legal moralism, along the lines of Stephen’s arguments in *Liberty, Equality, Fraternity*, was experiencing a rejuvenation and threatening to encroach on liberal ideals. More than anyone else, Lord Patrick Devlin catalyzed this perceived threat. In his Maccabean Lecture, delivered to the British Academy in 1959, Devlin argued that purportedly immoral activities, like homosexuality and prostitution, should remain criminal offenses.⁷¹

⁶⁶ J F Stephen, *Liberty, Equality, Fraternity* (1967); see also M DeGirolami, ‘The Punishment Jurist: James Fitzjames Stephen,’ *Liberty, Equality, Fraternity* (1873), in this volume.

⁶⁷ Stephen (1967) 162.

⁶⁸ *Ibid.* 162.

⁶⁹ *Ibid.* 71.

⁷⁰ R Dworkin, ‘Lord Devlin and the Enforcement of Morals,’ 75 *Yale Law Journal* 986 (1966) 986-87; T C Grey, *The Legal Enforcement of Morality* (1983) 4.

⁷¹ P Devlin, Patrick, ‘Morals and the Criminal Law’ in Patrick Devlin, *The Enforcement of Morals* (1965).

Devlin published his lecture and other essays under the title *The Enforcement of Morals* and soon became associated with a renewed principle of legal moralism—namely, that moral offenses should be regulated *because* they are immoral, regardless of whether they infringe on legitimate interests in the Millian sense.

In *Law, Liberty, and Morality*, a set of lectures delivered at Stanford University in 1962 in response to Devlin, Hart squarely addressed the debate over the enforcement of morals: ‘the subject of these lectures,’ Hart declared, ‘concerns the legal enforcement of morality and has been formulated in many different ways: Is the fact that certain conduct is by common standards immoral sufficient to justify making that conduct punishable by law? Is it morally permissible to enforce morality as such? Ought immorality as such to be a crime?’⁷² And right after posing the subject his lectures, Hart immediately cited Mill, but refocused the entire debate on the narrow question of *harm to others*:

‘To this question 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*. 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.”’⁷³

Hart rehearsed and embraced Mill’s limiting principle, but carefully and deliberately pared the argument down to its original, simple, succinct, and crude statement regarding ‘harm.’ Notice the emphasis on that single ‘famous sentence,’ reproduced in full, alone, without further development: the core of Mill’s doctrine, Hart maintained, was the notion of ‘harm to others.’ Hart did not refer his listeners to the later elaborations of the limiting principle, which Mill himself had referred to as ‘the entire doctrine of this essay.’⁷⁴ Hart referenced only the first crude articulation.

In this and subsequent passages, Hart would reduce Mill’s argument to the ‘harm to others’ language. Hart endorsed the simple harm argument, and declared that, ‘on the narrower issue relevant to the enforcement of morality Mill seems to me to be right.’⁷⁵ Throughout his lectures, Hart would constantly and repeatedly oppose the notion of ‘immorality’—the basis of the legal moralist argument—to the fact that the underlying conduct is ‘not harmful to others’ or involves no ‘suffering.’⁷⁶ Hart reduced the complexity of Mill’s essay, reiterating, throughout,

⁷² H L A Hart, *Law, Liberty, and Morality* (1963) 4. As many commentators recognized, the ensuing Hart-Devlin debate would replicate in many ways the contours of the debate a hundred years earlier. See L B Schwartz, ‘Morals Offenses and the Model Penal Code,’ 63 *Columbia Law Review* 669 (1963) 670 n.1.

⁷³ *Ibid.* 4 (emphasis added).

⁷⁴ Mill (1978) 93.

⁷⁵ Hart (1963) 5. 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.

⁷⁶ Hart (1963) 5; see also *ibid.* 5 (‘I myself think there may be grounds justifying the legal coercion of the individual other than the prevention of harm to others’); *ibid.* 25 (‘to suppress practices condemned as immoral by positive morality though they involve nothing that would ordinarily be thought of as harm to other persons’); *ibid.* 33 (‘harming others is something we may still seek to prevent by use of the criminal law, even when the victims consent to or assist in the acts which are harmful to them’); *ibid.* 34 (‘forms of immorality which involve no

‘Mill’s own principle that coercion may be justifiably used *to prevent harm to others*.’⁷⁷ Hart’s focus was narrowly on *harm*—which would, predictably, undermine the very principle advanced.⁷⁸

In a somewhat similar way, the liberal philosopher Joel Feinberg, in an essay entitled *Moral Enforcement and the Harm Principle* published in 1973, would embrace Mill’s argument, but he too would pare the limiting principle down to its original, simplified formulation focused on harm to others.⁷⁹ Feinberg distinguished between direct and indirect harm, but did not go much further, at the time, in developing the notion of harm at the heart of the limiting principle.⁸⁰ Feinberg endorsed the simple harm principle 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.’⁸¹ Feinberg published the first volume of *The Moral Limits of the Criminal Law*, tellingly called *Harm to Others*, eleven years later in 1984. Feinberg analyzed and elaborated on the harm principle, developing fifteen supplementary criteria which he called ‘mediating maxims’ to assist in the application of the ‘harm to others’ principle.⁸² But even by the end of his four-volume treatise, Feinberg had remained wedded to the basic harm principle, concluding his treatise with the following definition of liberalism: ‘we 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.’⁸³ The original, simplified harm principle—focused on harm to others—remained, even by the end of Feinberg’s treatment, one of the two main limits on state regulation of moral offenses.

IV. The Rise and Fall, and the Eventual Collapse of the Simple Harm Principle

In an article titled ‘The Collapse of the Harm Principle,’⁸⁴ I traced a history of the harm principle, demonstrating how the return to a crude notion of ‘harm to others’ in the work of Hart, Feinberg, and other liberal theorists originally succeeded, at least at a rhetorical level, in defeating the renewed legal moralist arguments at mid-century; how the simple harm principle then became dominant in Anglo-American criminal law and theory; how moral prohibitionists

suffering to any sentient being’); *ibid.* 34-35 (‘an instrument for the prevention of suffering or harm’); *ibid.* 40 (‘harms to individuals which the criminal law may properly seek to prevent by punishment’); *ibid.* 40 (‘are harms to individuals which the criminal law may properly seek to prevent by punishment’); *ibid.* 53 (‘crimes obviously harmful to others’); *ibid.* 65 (‘especially when applied to conduct not harmful to others’)

⁷⁷ *Ibid.* 46 (emphasis added)

⁷⁸ As D.G. Brown writes, in attempting to dissociate ‘the Devlin advocacy of enforcing accepted morality’ from Mill’s thesis, Hart abstracts Mill’s argument from the text such that ‘one cannot even tell whether Hart would agree with Mill’s thesis or not.’ ‘Mill on Liberty and Morality’ 81 *The Philosophical Review* 2 (1972) 147 n.7.

⁷⁹ J Feinberg, ‘Moral Enforcement and the Harm Principle’ (from *Social Philosophy* (1973)) reprinted in *ETHICS AND PUBLIC POLICY*, T Beauchamp (ed.) (1975).

⁸⁰ *Ibid.* 284.

⁸¹ Feinberg 1975:286. Feinberg also supplemented 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).

⁸² J Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* (1984) 214–17; 243–45

⁸³ J Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing* (1988) 323.

⁸⁴ B Harcourt, ‘The Collapse of the Harm Principle,’ 90 *J. Crim. L. & Criminology* 109 (1999); *see also* B E Harcourt, *Illusion of Order* (2001).

then turned to harm arguments in order to support their legal moralist positions; and how, as a consequence, the simple harm principle collapsed under the weight of its own success and eventually no longer provided a limiting principle to the exercise of the government's power to punish. Rather than repeat the argument here, I will simply summarize its four steps with some slight revisions.

1. *Triumph*: Over the period 1960-1980, Hart's restatement of the simple 'harm to others' principle (which I will henceforth refer to as 'the modern harm principle') began to dominate the legal philosophic debate over the enforcement of morality. Most prominent theorists who participated in the debate either relied on the modern harm principle or made favorable reference to the argument.⁸⁵ As Robert George, who many might characterize as a legal moralist, acknowledged, 'many . . . perhaps even most [commentators] think that Hart carried the day'⁸⁶ Jeffrie Murphy, who is today a skeptic of the harm principle, captured well the prevailing consensus at the time: 'I believed, along with most of the people with whom I talked about legal 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.'⁸⁷
2. *Hegemony*: As the modern harm principle began to dominate the legal philosophic debate, most of the leading criminal law scholars either adopted the modern harm principle or incorporated it in their writings.⁸⁸ 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. Herbert Wechsler, the chief reporter and intellectual father of the Model Penal Code, strongly endorsed harm as the guiding principle of criminal liability: conduct, Wechsler wrote, 'is not deemed to be a proper subject of a penal prohibition' unless it 'unjustifiably and inexcusably inflicts or threatens substantial harm'⁸⁹ This was, Wechsler emphasized, 'a declaration designed to be given weight in the interpretation of the [Model Penal] Code.'⁹⁰ As a result, throughout the Model Code and the Comments, the statutory language and discussion reflected this emphasis on the modern harm principle⁹¹—as did the substantially similar provisions regarding the harm principle enacted in Alabama, Alaska,

⁸⁵ See, e.g., Dworkin (1966) 996; L Henkin, 'Morals and The Constitution: The Sin of Obscenity,' 63 *Columbia Law Review* 391 (1963) 413.

⁸⁶ R P George, 'Social Cohesion and the Legal Enforcement of Morals: A Reconsideration of the Hart-Devlin Debate,' 35 *American Journal of Jurisprudence* 15 (1990) 30.

⁸⁷ J G Murphy, 'Legal Moralism and Liberalism,' 37 *Arizona Law Review* 73 (1995) 74-75.

⁸⁸ See, e.g., H Packer, *The Limits of the Criminal Sanction* (1968) 267 and 296; M Paulsen and S H Kadish, *Criminal Law and Its Processes* (1st edition 1962) 1-17; R Perkins and R Boyce, *Criminal Law* (1982) 12; P Robinson, *Criminal Law* (1997) 131.

⁸⁹ H Wechsler, 'Codification of Criminal Law in the United States: The Model Penal Code,' 68 *Columbia L. Rev.* 1425 (1968) 1432.

⁹⁰ *Ibid.*

⁹¹ See, e.g., MPC 1985:1.02(1)(a) and MPCOD 1985:Note 14; MPCOD 1985:16; MPCOD 1985:17; MPCOD 1985:196; MPCOD 1985:458; MPCOD 1985:369; MPCOD 1985:482; MPCOD 1985:190.

Delaware, Florida, Georgia, Nebraska, New Jersey, New York, Oregon, Pennsylvania, Tennessee, Texas, and Washington, among other states.

3. *Proliferation*: The rise of the modern harm principle in criminal law gave way, in the 1980s and 1990s to a proliferation of harm arguments across the political spectrum, especially at first among those advocating for prohibition. Armed with social science studies, with empirical data and with anecdotal evidence, the proponents of regulation and enforcement shed the 1960s rhetoric of legal moralism and adopted, instead, harm arguments: Catharine MacKinnon focused on the multiple harms to women and women’s sexuality caused by pornography; the proponents of the ‘broken windows theory’ emphasized how minor disorder, like prostitution and loitering, cause major crimes, neighborhood decline, and urban decay; the harm associated with the spread of AIDS was used to justify increased regulation of sexual conduct; a new temperance movement in Chicago and the quality-of-life initiative in New York City focused on the harmful effect of liquor establishments and public drunks on neighborhoods and property values; the debate over the legalization of drugs focused on the harms caused by drug use. There emerged what can only be described as a proliferation of prohibitionist harm arguments aimed at satisfying the modern harm principle. To be sure, as Anders Walker correctly points out, the proliferation of harm arguments was not entirely new;⁹² ‘reformers like Anthony Comstock,’ Walker points out, ‘began to enlist harm arguments in the regulation of illicit sex as early as 1872, not long after Mill finished *On Liberty*.’⁹³ And so, for example, ‘Among the physical effects that Comstock focused on was pornography’s tendency to encourage the “fatal habit of masturbation,” a physical and psychological “debility.”’⁹⁴ But the proliferation in the late twentieth century was so uniquely extensive and wide-ranging that it would have an impact on the stability of the modern harm principle.
4. *Collapse*: The proliferation of harm arguments, on both sides of the debates—not just over prostitution and homosexuality, but also over alcohol and drug consumption, loitering, gambling, pornography, and adultery—has effectively collapsed the simple harm principle. ‘Harm to others’ is no longer today a *limiting* principle because it, by itself, no longer *excludes* categories of moral vice from the scope of the law. It no longer discriminates 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, comparisons of harms, and our willingness, as a society, to bear the harms. And the harm principle is silent on those questions—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 does not address the comparative importance of harms.

⁹² Walker, (2013) 19-20.

⁹³ Ibid. 20.

⁹⁴ Ibid.

The Collapse of the Harm Principle documents in detail the proliferation of prohibitionist harm arguments throughout different contemporary debates, ranging from pornography and prostitution, to homosexuality and fornication, to drug use and alcohol consumption.⁹⁵ It shows how liberal theorists responded by claiming even greater harm, and demonstrates how that cycle ultimately collapsed the modern harm principle. The clearest example involves the case of illicit drugs, where the arguments for and against prohibition have produced a kind of harm-ratchet that has effectively neutered the harm principle. The liberal position in the 1960s and early 1970s was characterized by the argument that marijuana use was essentially a ‘victimless’ crime—that it caused no ‘harm to others.’⁹⁶ That early progressive argument was countered in the late 1970s and early 1980s by a campaign against drug use that emphasized the *harms to society* and justified an all-out ‘War on Drugs.’ This prohibitionist turn to harm disarmed the traditional liberal position, forcing the progressives to turn to arguments about ‘harm reduction’: The term ‘harm reduction,’ crafted in the early 1990s as an alternative to ‘legalization,’ was a direct response to the conservative harm arguments, but at the same time a ratcheting of those harm arguments. ‘Harm reduction,’ according to its leading proponent, is ‘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.’⁹⁷ In response to that, the proponents of the ‘War on Drugs’ argued *even greater harm*: ‘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.*’⁹⁸ As a result, today, both prohibitionists and legalizers make harm arguments. The debate is over which harms are worse. And on that question, the modern harm principle is entirely silent.

V. Recent Developments in the Area of Same-Sex Sexual Conduct and Marriage

Rather than continue further to refine the collapse of the modern harm principle argument, it may be useful to focus on more recent developments in one specific area—namely same-sex sexual conduct and marriage—to show the continuing vitality of the thesis. Recent developments in this area demonstrate well that the proliferation of harm arguments is still going strong and, once again, eviscerating the modern harm principle.

Mill himself did not address the prohibition on same-sex sexual conduct in *On Liberty* or elsewhere—to the best of my knowledge—although commentators tend to marshal his writings on liberty in support of deregulation and decriminalization—in favor of disenforcement.⁹⁹ H.L.A. Hart, naturally, directly addressed the question in response to Devlin’s provocation, in *Law, Liberty, and Morality*, and came down staunchly against prohibition, arguing both that the claim that homosexuality causes social harm has no empirical foundation and that the prohibition

⁹⁵ Harcourt (1999) 139-183.

⁹⁶ See, e.g., H Packer, *The Limits of the Criminal Sanction* (1968) 338; J Kaplan, *Marijuana—The New Prohibition* (1970)

⁹⁷ E A Nadelmann, *Learning to Live With Drugs*, Washington Post, Nov. 2, 1999, at A21.

⁹⁸ B R McCaffrey, *Don’t Legalize Those Drugs*, Washington Post, June 29, 1999, at A15 (emphasis added).

⁹⁹ See, e.g., P Singer, ‘Homosexuality is Not Immoral,’ *Project Syndicate*, October 2006.

itself inflicts unnecessary suffering on individuals. On the question of harm, Hart protested, ‘no evidence is produced.... 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.’¹⁰⁰ Other liberal theorists agreed with Hart and sounded the same refrain: as Ronald Dworkin suggested, ‘[Devlin] manages this conclusion without offering evidence that homosexuality presents any danger at all to society’s existence....’¹⁰¹ The tragic advent of the AIDS epidemic in the 1980s, however, changed things, and the threat of AIDS soon became the harm that justified increased regulation; this became immediately apparent in the debate over the closing of gay bathhouses at the time of the outbreak of the AIDS epidemic.¹⁰²

At the heart of the AIDS outbreak in 1986, the United States Supreme Court would adopt a legal moralist position regarding homosexual sodomy, declaring in *Bowers v. Hardwick* that moral sentiments against homosexuality provided a rational basis for enforcing Georgia’s criminal ban.¹⁰³ Justice Byron White declared for the Court, in *Hardwick*, that the criminal law is constantly, and may properly be, ‘based on notions of morality.’¹⁰⁴ But twelve years later, with the epidemic somewhat under control and changed social circumstances, the Supreme Court would reverse course and, in *Lawrence v. Texas*, strike down Texas’s anti-sodomy law.¹⁰⁵ This time it was Justice John Paul Stevens’s declaration, from his dissent in *Hardwick*, that governed: “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”¹⁰⁶

What is important for present purposes, though, is not how the Court ruled in *Hardwick* or *Lawrence*, but rather that in both cases—as well as in the more recent controversy over same-sex marriage—there are harm arguments advanced on *both* sides of the debates and that the modern harm principle offers no guidance as to how to resolve the competing claims of harm. This is most evident in the recent debates over same-sex marriage—decidedly not a criminal law matter, but bearing the same relation to the government’s legitimate role in regulating—or deregulating—moral norms surrounding the family.

The Supreme Court’s recent opinion regarding a challenge to Section 3 of DOMA is a case on point, a decision in which battling claims of harm ultimately neutralize the effect of the harm principle. As noted, the case, *United States v. Windsor*, involved a challenge to Section 3 of the Defense of Marriage Act (DOMA), passed in 1996, which defined ‘marriage’ for purposes of all federal legislation as ‘only a legal union between one man and one woman as husband and wife,’ and the word ‘spouse’ as ‘a person of the opposite sex who is a husband or a wife.’¹⁰⁷ By means of this enforceable definition, Congress intended to deny to same-sex couples, lawfully

¹⁰⁰ Hart (1963) 50.

¹⁰¹ Dworkin (1966) 992; *see also* Murphy (1995) 77.

¹⁰² *See* Harcourt (1999) 161-167.

¹⁰³ *Bowers v. Hardwick*, 478 U.S. 186 (1986) 196.

¹⁰⁴ 478 U.S. 186, 196 (1986).

¹⁰⁵ *Lawrence v. Texas*, 539 U.S. 558 (2003).

¹⁰⁶ *Lawrence*, 123 S. Ct. at 2483 (quoting *Bowers*, 478 U.S. at 216 (Stevens, J., dissenting)).

¹⁰⁷ DOMA, 110 Stat. 2419, Section 3.

married in states that permit same-sex marriage, any of the federal benefits or rights provided to married couples under federal law. The Supreme Court ultimately held in *Windsor* that Congress had overstepped its authority in defining ‘marriage’ and that the States should be the ones who define marriage. The Court majority ruled on the grounds of due process and equal protection, but what is clear from the dueling opinions is that the notion of harm was at the very heart of the debate—and on both sides of the argument. There are dueling theories of harm at play.

Justice Samuel Alito, in his dissenting opinion, expressed the new, prohibitionist harm arguments against same-sex marriage—or more appropriately, the risks of harm. ‘The family is an ancient and universal human institution,’ Alito emphasized. ‘Family structure reflects the characteristics of a civilization, and changes in family structure and in the popular understanding of marriage and the family can have profound effects.’ These changes, Alito emphasized can have ‘far-reaching consequences. But the process by which such consequences come about is complex, involving the interaction of numerous factors, and tends to occur over an extended period of time.’ Alito warned: ‘We can expect something similar to take place if same-sex marriage becomes widely accepted. The long-term consequences of this change are not now known and are unlikely to be ascertainable for some time to come.’ Alito added in a footnote that ‘As sociologists have documented, it sometimes takes decades to document the effects of social changes—like the sharp rise in divorce rates following the advent of no-fault divorce—on children and society,’ and cited a study about the ‘Unexpected Legacy of Divorce.’¹⁰⁸ Alito continued: ‘At present, no one—including social scientists, philosophers, and historians—can predict with any certainty what the long-term ramifications of widespread acceptance of same-sex marriage will be.’ Alito’s tone is ominous, and even though he is essentially arguing for deference to the democratic process, the dice are somewhat loaded and the harm arguments are clear.

On the other side of the debate, harm played an equally central role: Congress had intended to harm same-sex couples, and the Court needed to protect them from that harm. As Justice Kennedy wrote for the majority, ‘The Constitution’s guarantee of equality “must at the very least mean that a bare congressional *desire to harm a politically unpopular group* cannot” justify disparate treatment of that group.’¹⁰⁹ Justice Kennedy’s opinion stresses the *harms* of DOMA to same-sex couples. DOMA, Kennedy wrote, ‘brings financial harm to children of same-sex couples. It raises the cost of health care for families by taxing health benefits provided by employers to their workers’ same-sex spouses. And it denies or reduces benefits allowed to families upon the loss of a spouse and parent, benefits that are an integral part of family security.’ The opinion is all about harms. ‘Under DOMA,’ Kennedy emphasized, ‘same-sex married couples have their lives burdened, by reason of government decree, in visible and public ways.’ DOMA ‘prevents same-sex married couples from obtaining government healthcare benefits they would otherwise receive;’ it ‘deprives them of the Bankruptcy Code’s special protections for domestic-support obligations;’ ‘it forces them to follow a complicated procedure to file their state and federal taxes jointly;’ and ‘It prohibits them from being buried together in

¹⁰⁸ J Wallerstein, J Lewis, & S Blakeslee, ‘The Unexpected Legacy of Divorce: The 25 Year Landmark Study’ (2000).

¹⁰⁹ *Windsor*, __ (emphasis added).

veterans' cemeteries.' 'For certain married couples,' Kennedy went on, 'DOMA's unequal effects are even more serious,' depriving them of the federal protections against domestic violence and other safeguards of federal criminal law. Kennedy's opinion is steeped in harm: 'What has been explained to this point should more than suffice to establish that the principal purpose and the necessary effect of this law are *to demean those persons who are in a lawful same-sex marriage*. This requires the Court to hold, as it now does, that DOMA is unconstitutional as a deprivation of the liberty of the person protected by the Fifth Amendment of the Constitution.'

In his dissent, Chief Justice Roberts tried to neutralize Kennedy's harm arguments, writing that there is 'hardly enough' evidence 'to support a conclusion that the "principal purpose" of the 342 Representatives and 85 Senators who voted for it, and the President who signed it, was *a bare desire to harm*.'

¹¹⁰ Roberts then himself turns the harm tables: 'At least without some more convincing evidence that the Act's principal purpose was to codify malice, and that it furthered *no* legitimate government interests, I would not *tar the political branches with the brush of bigotry*.'¹¹¹

Justice Scalia joined in as well, mitigating Kennedy's harm arguments. The evidence of other justifying rationales for DOMA—that is, besides intentionally wanting to harm same-sex couples—'give the lie to the Court's conclusion that only those with hateful hearts could have voted "aye" on this Act.' As Scalia emphasized, 'it is harder to maintain the illusion of the Act's supporters as unhinged members of a wild-eyed lynch mob when one first describes their views as *they* see them.' Scalia declared: 'the majority says that the supporters of this Act acted with *malice*—with *the "purpose"* "to disparage and to injure" same-sex couples. It says that the motivation for DOMA was to "demean;" to "impose inequality;" to "impose ... a stigma;" to deny people "equal dignity;" to brand gay people as "unworthy;" and to "*humiliat[e]*" their children (emphasis added). I am sure these accusations are quite untrue.' And then, in closing, once again, Scalia raised the specter of polygamy—though not bestiality this time. 'It is enough to say that the Constitution neither requires nor forbids our society to approve of same-sex marriage, much as it neither requires nor forbids us to approve of no-fault divorce, polygamy, or the consumption of alcohol.'

¹¹²

The Court ultimately ruled in favor of the same-sex marriage position in the DOMA case, giving voice to the harm that the DOMA inflicts on same-sex couples. The opinions are dressed in constitutional discourse, but it is really harm that is at play. One can favor the result, or object to it—that, I think, for present purposes, is irrelevant. What is relevant and telling is that the real battle is between harms, that both sides of the debate are throwing around harm arguments, and that the decision ultimately rests on who is more convincing on comparative harms, not whether there is 'harm to others.' In that debate, the modern harm principle has no role. It is a debate that is vulnerable to the greatest demagoguery, mass public appeal, and social pressure. It reverts the

¹¹⁰ *United States v. Windsor* (Chief Justice Roberts, dissenting), ___.

¹¹¹ *Ibid.* (emphasis added).

¹¹² *United States v. Windsor* (J. SCALIA, dissenting).

most important questions about the protection of the individual to the kind of rhetorical and popular debates that Mill would have avoided at all cost. The problem, in effect, is that the simple notion of ‘harm to others,’ as Mill had warned us, is not up to the task. By returning to that simple notion of harm, the liberals first, but the legal moralists second, and then both in ratcheted cycles, have essentially gutted the limiting principle that Mill began to develop. They have functionally neutralized the modern harm principle as a critical limiting principle.

Conclusion

Liberal thinkers in the twentieth century sapped Mill’s limiting principle of its strength by returning to ‘harm to others.’ What we are left with today is not a limiting harm principle, but rather harm decisionism. And that, more than anything, opens the way precisely to the threat of ‘social tyranny’¹¹³ that Mill feared and tried to protect against. H.L.A. Hart was certainly right when he wrote that ‘For Mill, these dangers were part of the price to be paid for all that is so valuable in democratic government. He thought the price certainly worth paying; but he was much concerned to remind the supporters of democracy of the danger and the need for vigilance.’¹¹⁴ Mill tried to protect us from these dangers by elaborating on protected interests and legal rights in furtherance of a vision of individual diversity, creativity, and self-development—but his project was undermined by his own followers in the twentieth century. It is questionable whether Mill’s unique approach would have had more success. It is not at all clear that Mill’s notion of legal rights would offer greater determinacy than the notion of ‘harm to others.’ In the end, it is perhaps only ‘the need for vigilance,’ as Hart phrased it, that can best protect liberal democracy.

¹¹³ Mill (1978) 4.

¹¹⁴ Hart (1963) 78.

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