2013

Drugs, Dignity and Danger: Human Dignity as a Constitutional Constraint to Limit Overcriminalization

Michal Buchhandler-Raphael
Washington and Lee University School of Law, buchhandlerraphaelm@wlu.edu

DRUGS, DIGNITY, AND DANGER: HUMAN DIGNITY AS A CONSTITUTIONAL CONSTRAINT TO LIMIT OVERCRIMINALIZATION

MICHAL BUCHHANDLER-RAPHAEL*

The American criminal justice system is increasingly collapsing under its own heavy weight and, thus, requires inevitable change. One notable feature responsible for this broken system is overcriminalization—the scope of criminal law is constantly expanding, imposing criminal sanctions on a growing range of behaviors. One area where overcriminalization is most notable concerns victimless crimes, namely, those where individual adults engage in conduct that inflicts only harm to self or to other consenting adults, but not on third parties. These victimless crimes include prostitution, pornography, sadomasochism, gambling, and most notably, drug crimes.

Despite increasing scholarly critique of the continued criminalization of these behaviors—particularly drug offenses—significant limits on the scope of victimless crimes have not yet been adopted. Two features characterizing criminal law account for this: first, in contrast with criminal procedure, constitutional law has not placed any significant limits on substantive criminal law, and second, there is no coherent theory of criminalization that sets clear boundaries between criminal and non-criminal behaviors.

This Article proposes a constitutional constraint to limit criminalization of victimless crimes and, particularly, to alleviate the pressures on the criminal justice system emanating from its continuous "war on drugs." To accomplish this goal, the Article explores the concept of human dignity, a fundamental right yet to be invoked in the context of substantive criminal law. The U.S. Supreme Court's jurisprudence invokes conflicting accounts of human dignity: liberty as dignity, on the one hand, and communitarian virtue as dignity, on the other. However, the Court has not yet developed a workable mechanism to reconcile these competing concepts in cases where they directly clash. This Article proposes guidelines for balancing these contrasting interests and then applies them to drug crimes, illustrating that adopting such guidelines would result in constraining the scope of substantive criminal law.

* Visiting Assistant Professor of Law, Washington and Lee School of Law; LL.B, Hebrew University, cum laude (1995); LL.M, Hebrew University (1999); LL.M, University of Virginia School of Law (2007); S.J.D., University of Virginia School of Law (2010). I would like to thank Eric Luna, for brainstorming with me about this Article's main themes. I would also like to thank the editors of the *Tennessee Law Review* for their excellent editing, diligent work, and invaluable contributions to this Article.

INTRODUCTION

The American criminal justice system is under tremendous pressures. It is increasingly collapsing under its own heavy weight, thus calling for a thorough re-evaluation.[1] The system's illnesses encompass various aspects of the criminal process, including failings in both criminal procedure and substantive criminal law.[2] Indeed, perhaps the feature most responsible for this broken system is what scholars have dubbed "the overcriminalization phenomenon,"[3] in which a growing number of adult individuals are liable to conviction for an ever wider range of behaviors.[4]

In criticizing the criminal justice system in its current form, scholars have mainly focused on procedure, process, and sentencing policies, giving less attention to criminal law theory and substantive criminal law. In contrast with criminal procedure, which is thoroughly constitutionalized, constitutional law places no constraints on substantive criminal law.[5] Despite occasional calls to adopt constitutional limitations on substantive criminal law, scholarly proposals have had no practical effect, as courts have failed to develop significant constitutional doctrines for checking legislatures' criminalization choices.[6]

However, the broken criminal justice system is in tension with one of the fundamental principles of American constitutional jurisprudence, namely, constitutional protection of individual liberties and freedom from government intrusion into the private lives of individuals.[7] The stringent criminal process, with its substantive and procedural shortcomings, carries tremendous power to jeopardize basic principles of liberty and justice for all defendants. Unfortunately, the current criminal justice system falls short of satisfying these constitutional commitments.

Another notable feature of substantive criminal law is the lack of a coherent theory of criminalization.[8] Scholars have acknowledged that, at the

---

1. *See* Erik Luna, *Overextending the Criminal Law*, *in* GO DIRECTLY TO JAIL: THE CRIMINALIZATION OF ALMOST EVERYTHING, 1, 1-4 (Gene Healy ed., 2004); William J. Stuntz, *Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 507 (2001).

2. *See* Luna, *supra* note 1, at 1-4; Stuntz, *supra* note 1, at 507.

3. *See* Sara Sun Beale, *The Many Faces of Overcriminalization: From Morals and Mattress Tags to Overfederalization,* 54 AM. U. L. REV. 747, 748 (2005); Eric Luna, *The Overcriminalization Phenomenon*, 54 AM. U. L. REV. 703, 717 (2005).

4. *See* DOUGLAS HUSAK, OVERCRIMINALIZATION: THE LIMITS OF THE CRIMINAL LAW (2007).

5. *See* Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1270-71 (1998).

6. *See generally* Markus D. Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 517 (2003-2004) (stating that constitutional scrutiny has yet to be applied to substantive criminal law).

7. *See* U.S. CONST. amends. V & XIV.

8. *See* HUSAK, *supra* note 4, at 3-55.

theoretical level, criminal law is inconsistent, lacking clear conceptual boundaries to criminalization.[9] Scholars have further argued that legislatures do not abide by a consistent set of principles regarding what matters are appropriate for criminalization, employing the criminal law purely as a tool for achieving whatever end majorities choose to pursue.[10]

Furthermore, until recently, relatively little scholarship has addressed the use of substantive criminal law as a means to limit the scope of the criminal justice system. Moreover, criminal law theorists have offered little to address the problem of overcriminalization from a theoretical perspective, leaving legislatures and courts with too few sources to rely upon.[11]

Recognizing the scope and implications of overcriminalization, scholars have recently ventured into the area of criminal law theory, proposing both internal and external sets of constraints to limit the scope of criminal law.[12] This Article builds on this scholarship and links the emerging U.S. Supreme Court jurisprudence concerning human dignity to the myriad of constitutional constraints that would limit the scope of substantive criminal law by offering a workable mechanism to remedy some of the problems associated with overcriminalization.

Indeed, one area where overcriminalization is most notable concerns "vice or morals crimes." These offenses generally fall into two categories: first, individuals who engage in conduct which may inflict harm on themselves, but not on third parties, such as recreational drug use or gambling; and second, mutually *consensual* conducts between two or more adults that may inflict harm on one or more of these participants. Examples of the latter include consensual sexual activities such as prostitution and sadomasochism. While arguably, defendants who inflict harm on other adults while engaging in consensual behaviors should be able to raise the defense of consent when charged with a crime involving the infliction of serious physical harm, the law generally denies this defense except for in very limited circumstances.[13]

This Article questions the justifications for the continued criminalization of behaviors that either inflict only harm to self but not to others or inflict harm on other consenting adults (hereinafter "victimless

---

[9]. *See* Darryl K. Brown, *Can Criminal Law Be Controlled?*, 108 MICH. L. REV. 971, 972 (2010).

[10]. *Id.*

[11]. *Id.*

[12]. *See* HUSAK, *supra* note 4.

[13]. Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent,* 75 GEO. WASH. L. REV. 165, 174-75 (2007) (discussing the general rule that consent is typically not a defense when serious bodily injury occurs, except in very limited exceptions such as sport contests and medical procedures).

crimes").[14] More specifically, it examines when and to what extent these arguably victimless crimes warrant the government's intervention through criminal regulation.

The traditional justification for criminalizing conduct that is essentially victimless has strongly relied upon the state's need to enforce morality, a position most commonly associated with the famous Hart-Devlin debate.[15] However, legal moralism as a justification for criminalization was explicitly rejected in the U.S. Supreme Court's landmark decision in *Lawrence v. Texas*, which struck down as unconstitutional Texas's sodomy law.[16] *Lawrence* ostensibly adopted the Millian harm principle, standing for the proposition that a state is not justified in criminalizing a conduct unless it inflicts harm upon others.[17] In his *Lawrence* dissent, Justice Scalia predicted that the decision would lead to the invalidation of "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity"[18] and ultimately result in a "massive disruption of the current social order."[19] He further suggested that even laws criminalizing heroin use are suspect under the holding.[20] But Scalia's dire warnings have not materialized: *Lawrence* is not viewed as a criminal law opinion, thus failing to affect any substantive changes in criminal law in general and in the context of victimless crimes in particular. Various victimless crimes are still intact and the harm principle has not been able to limit their scope.[21] Moreover, *Lawrence* stands for the proposition that in the area of sexual behaviors implicating privacy, autonomy, and liberty concerns, the state cannot criminalize such conduct unless it can establish that harm to others has occurred.[22] However, *Lawrence* has not been expanded to include limitations on the criminalization of other consensual conduct outside the realm of sexual behavior, including drug use, which affects other aspects of individuals' autonomous choices.

---

[14]. It is worth mentioning that crimes may be considered "victimless" only when competent adults are involved. The discussion in this Article is therefore strictly limited to the context of competent adults.

[15]. *See* Alice Ristroph, *Third Wave Legal Moralism*, 42 ARIZ. ST. L.J. 1151, 1154-62 (2010-11).

[16]. Lawrence v. Texas, 539 U.S. 558, 577-78 (2003).

[17]. Bergelson, *supra* note 13, at 184 n.187 (citing JOHN STUART MILL, ON LIBERTY (1859), *reprinted in* THE NATURE AND PROCESS OF LAW 518 (Patricia Smith ed., 1993)).

[18]. *Lawrence*, 539 U.S. at 590.

[19]. *Id.* at 591.

[20]. *Id.* at 590-92.

[21]. *See* Kelly Strader, *Lawrence's Criminal Law*, 16 BERKELEY J. CRIM. L. 41 (2011).

[22]. *Id.* at 101.

This Article's main purpose is to propose a constitutional constraint that will limit criminalization of victimless crimes and, more particularly, alleviate the increasing pressures on the criminal justice system emanating from the system's continuous "war on drugs." To accomplish this goal, the Article turns to the concept of human dignity, a fundamental right, which has not yet been invoked as a mechanism to constrain overcriminalization.

Human dignity has been a recurrent theme in the U.S. Supreme Court's constitutional jurisprudence.[23] While under international law, human dignity is a specific right,[24] it is not an enumerated right in the U.S. Constitution, but rather viewed as a fundamental value, underlying other constitutional rights.[25] While in recent years the Court has invoked human dignity in a growing number of constitutional cases,[26] it has done so in strikingly different ways, illustrating that there is no single approach to the concept of human dignity.[27]

One concept of human dignity invoked by the Court implicates a liberal theory, which rests on the deontological principles of freedom and autonomy (hereinafter "liberty as dignity").[28] This concept is best articulated in the Supreme Court decisions in *Planned Parenthood of Southeastern Pennsylvania v. Casey*[29] and *Lawrence v. Texas*,[30] suggesting that in the Fourteenth Amendment, the government protects "choices central to personal dignity . . . (such as) the right to define one's own concept of existence, of meaning, of the universe and of the mystery of human life."[31] This account suggests that the government may not criminalize any conduct that interferes with "choices central to personal

---

[23]. *See, e.g.*, Brown v. Plata, 131 S. Ct. 1910 (2012) (stating that although prisoners forfeit their fundamental right to liberty, they retain their right to human dignity); Hope v. Pelzer, 536 U.S. 730, 745 (2002) (stating that cruel and unusual punishment of prisoner was "antithetical to human dignity"); Ford v. Wainwright, 477 U.S. 399, 406 (1986) (stating that the Eighth Amendment to the U.S. Constitution requires that punishment in the penal context comport with the "fundamental human dignity that the Amendment protects").

[24]. *See, e.g.*, Charter of Fundamental Rights of the European Union art. I, Dec. 7, 2000, 2000 O.J. (C 364) 9 (stating that "[h]uman dignity is inviolable. It must be respected and protected.").

[25]. *See, e.g.*, William A. Parent, *Constitutional Values and Human Dignity*, *in* THE CONSTITUTION OF RIGHTS: HUMAN DIGNITY AND AMERICAN VALUES 47 (Michael J. Meyer & William A. Parent eds., 1992); Mark Tushnet, *The First Amendment and Political Risk*, 4 J. LEGAL ANALYSIS 103, 127-28 (2012).

[26]. *See* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 207-17 (2011).

[27]. *See* Leslie Meltzer Henry, *The Jurisprudence of Dignity*, 160 U. PA. L. REV. 169, 189-90 (2011).

[28]. *Id.* at 190.

[29]. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992).

[30]. Lawrence v. Texas, 539 U.S. 558 (2003).

[31]. *Casey*, 505 U.S. at 861.

dignity."[32] A key inquiry after *Lawrence* is: what types of choices are central to personal dignity, and, in particular, whether these choices extend beyond the realm of procreation and sexual preferences to encompass additional forms of personal choices, such as the right to harm oneself.

A contrasting concept of dignity invoked by the Court embodies the notion of communitarian or collective virtue as dignity (hereinafter:i.e., "communitarian virtue").[33] Under this account, human dignity requires the adoption of societal fundamental rights, ethics, and values that every civilized society must adhere to. This account rests on a virtue ethics theory, which rejects a rights-based approach, suggesting instead that the purpose of law is to make people and society virtuous, rather than to promote individual rights.[34] Adopting this theory also requires the state to criminalize consensual activities that do not harm others in order to protect collective human dignity.

The Court, however, has never resolved the tensions between these contrasting accounts. A few scholars have proposed using human dignity as a constitutional constraint to limit the scope of criminal law.[35] However, this proposal relies solely on the concept of liberty as dignity, while disregarding the contrasting account of human dignity as communitarian virtue, which the Court has emphasized in recent opinions. While scholars have noted that human dignity is multifaceted, they have neither proposed a test that would determine which account of human dignity prevails in cases where two concepts clash, nor elaborated on the circumstances under which one concept of human dignity outweighs the other. Furthermore, while the Court has invoked human dignity in the context of constitutional law, it has not yet extended this concept to substantive criminal law.[36]

This Article's goal is to apply the concept of human dignity in the criminal law context to limit the scope of criminalization of victimless crimes in general, and drug offenses in particular. Acknowledging that the U.S. Supreme Court's jurisprudence invokes conflicting concepts of human dignity, this Article attempts to reconcile the competing concepts of human dignity in specific categories of cases by introducing a balancing test, which would weigh individuals' interests in retaining their right to liberty as dignity against the interests of a virtuous society to preserve individuals' right to dignity under a communitarian virtue account.

The criminal regulation of drugs offers a potent test case to apply the proposed theory, as drug crimes are *the* most notable example of victimless crimes. The criminalization of *all* forms of recreational drugs and the "tough on crime" policy adopted by American criminal law towards drug

---

32. *Id*.
33. Henry, *supra* note 27, at 189-90.
34. *Id*.
35. *See* Dubber, *supra* note 6, at 515-16.
36. *See* Bergelson, *supra* note 13, at 218-20.

crimes take up a significant amount of the nation's limited resources and dominate the criminal justice system. Therefore, this Article focuses mainly on drug prohibitions by applying the proposed rules to draw distinctions between types of drug crimes.

This Article proceeds as follows: Part I examines previous attempts to limit overcriminalization, in general, and victimless crimes, in particular. It demonstrates that the harm principle has not offered a sufficient substantive constraint to limit the scope of criminal law, and that constitutional law has not placed any external limitations on substantive criminal law. Considering the empirical failure of the harm principle and its normative inability to foster substantive limits on the criminalization of victimless crimes, this section concludes that the concept of human dignity might offer an alternative means to accomplish that goal.

Part II lays out the conceptual framework for using human dignity as a constitutional constraint on the state's power to criminalize victimless crimes. It examines the current U.S. Supreme Court's multifaceted human dignity jurisprudence in light of the theoretical understandings of this concept. Acknowledging that no single account of human dignity is absolute, it proposes using a balancing test to determine which concept of human dignity prevails in specific categories of cases.[37] The crux of this test involves weighing individuals' liberty as dignity against a virtuous society's commitment to preserving communitarian virtue as a means of protecting collective dignity.

Part III introduces guidelines for decriminalizing victimless crimes in order to secure individuals' rights to dignity, liberty, and autonomy, while upholding the continued criminalization of activities that endanger individuals' fundamental right to life.

Part IV applies the proposed guidelines to drug crimes. The proposal rests on distinguishing between two types of prohibitions—drug trafficking and drug use, and "soft" and "hard" drugs—and applying the guidelines to decriminalize use and possession of "soft" drugs while upholding criminal prohibitions on use and possession of "hard" drugs and on trafficking in all types of drugs.

I. ATTEMPTS TO LIMIT OVERCRIMINALIZATION

Criminal law scholars have vehemently criticized the continuous expansion of substantive criminal law, warning against the costs and burdens incurred by the criminal justice system, as well as against the dangers this expansion poses to individual defendants.[38] Scholars note that

---

[37]. *See, e.g.*, Adam Winkler, *Scrutinizing the Second Amendment*, 105 MICH. L. REV. 683, 685-86 (2007) (proposing a standard of review for considering the individual rights approach to evaluating Second Amendment questions).

[38]. *See* Luna, *supra* note 3, at 703-04; *see also* Beale, *supra* note 3, at 748-49.

there are too many broadly-worded criminal statutes, which cover a wide range of behaviors and do not justify the use of the coercive power of the state through its extensive employment of criminal law.[39] This problem is particularly salient in three categories of crimes: offenses of risk prevention or crimes of endangerment, such as drug crimes; ancillary offenses, which function as surrogates for the prosecution of primary or core crimes unlikely to result in prosecution; and overlapping crimes, namely, recriminalizing the same crimes over and over again.[40] As scholars have already addressed the various aspects of overcriminalization,[41] this Article examines an alternative means to limit the size and scope of criminal law.

A comprehensive theory of criminalization, elaborating the substantive requirements of any criminal statute, could be a natural candidate for limiting the scope of substantive criminal law. However, a notable feature of substantive criminal law is the lack of a comprehensive theory of criminalization, in the absence of which legislatures are free to continue to expand criminal law by enacting more offenses and criminalizing additional types of behaviors.[42] Without a comprehensive theory, the necessary components of new crimes are left undefined and the boundary between criminal conduct and conduct that ought to remain beyond the scope of criminalization are blurred.

A. The Harm Principle's Empirical Failure

Following John Stuart Mill's famous articulation of the "harm principle," many scholars posit that under contemporary jurisprudence, harm to others is the key predicate for criminalization.[43] The underlying view of the harm principle is utilitarian in essence, measuring an action's social utility and overall societal advantages of criminalization against its costs and unintended consequences.[44] The judicial recognition of the harm principle as the core justification for criminalization is best demonstrated in the U.S. Supreme Court's landmark decision in *Lawrence v. Texas*.[45] While numerous different readings have been offered to Justice Kennedy's majority holding in *Lawrence*, the harm principle plays a crucial role in all of them, as *Lawrence* has been read to stand for the proposition that the harm principle is the key justification for criminalizing consensual conduct

---

39. *See* HUSAK, *supra* note 4, at 3-54.

40. *Id.* at 36-41.

41. *Id.* at 41.

42. *See* Brown, *supra* note 9, at 972; *see also* HUSAK, *supra* note 4, at 58 (stating that until a comprehensive theory of substantive criminal law is developed, it will continue to expand).

43. *See* JOEL FEINBERG, HARM TO OTHERS 116-17 (1987).

44. *Id.* at 105-06.

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

between adults. In other words, when adults engage in fully consensual conduct in the privacy of their homes, the state is unjustified in criminalizing such conduct.

However, the practical effects of endorsing the harm principle have been limited, raising doubts concerning its actual ability to limit criminal law, in general, and criminalization of victimless crimes, in particular. Indeed, the harm principle's failure to offer a comprehensive account for criminalization is twofold: from an empirical perspective, it has not been able to limit criminalization and has also resulted in expanding the scope of criminal law;[46] from a normative perspective, the harm principle is unable to limit criminalization because it does not articulate the substantive content of its normative component. However, little has been offered by scholars to address these challenges, and the search for the missing component to supplement the harm principle has not yet been successful.

While the *Lawrence* decision is typically viewed as a victory for those who support the de-criminalization of consensual conducts and reject legal moralism as a justification for criminalization, little attention has been given to the practical ramifications of the harm principle as endorsed by the decision.[47] Despite what seemed to be a revolutionary holding, fueled by Justice Scalia's "parade of horribles" dissent and his slippery-slope style warning that *Lawrence* signals the end of all morals statutes, *Lawrence* has surprisingly not resulted in far-reaching practical implications on the scope of criminal law.[48] While *Lawrence* is understood to be a landmark constitutional law decision, its effects on both the criminal law and the criminalization of victimless crimes have been rather modest.[49]

While the harm principle is deeply rooted in a libertarian view, focusing on individuals' rights to liberty, autonomy, and privacy, an unintended consequence of the alleged "victory" of the harm principle has been its excessive use to justify a broad range of criminal bans, resulting in an illiberal criminal law.[50] Today, the harm principle serves not only to justify criminal regulation, but also to expand it—a surprising consequence given that the harm principle was initially viewed as a mechanism to limit

---

46. *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109 (1999).

47. *See* Bernard E. Harcourt, *Foreword: "You Are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers*, 94 J. CRIM. L. & CRIMINOLOGY 503, 503-04 (2004) (characterizing the *Lawrence* Court's adoption of the harm principle as "the coup de grâce to legal moralism administered after a prolonged, brutish, tedious, and debilitating struggle against liberal legalism in its various criminal law representations").

48. *Lawrence*, 539 U.S. at 590 (Scalia, J., dissenting).

49. *See* Strader, *supra* note 21, at 95-97.

50. *See* Steven D. Smith, *Is The Harm Principle Illiberal?*, 51 AM. J. JURIS. 1, 14 (2006).

criminal law by rejecting moral arguments that supported criminalization to uphold morality per se.[51] The expansive reading of the harm principle, however, has resulted in turning an ostensibly liberal idea into a conservative concept, which is too readily able to generate harm arguments to justify expansive prohibitions that previously had only moralism rationales.[52] Scholars have concluded that "[t]he concept of 'harm' itself so eludes definition that it has been employed to describe all manner of conduct with no tangible or emotional injury, no victim, and no significant risk creation."[53]

B. Victimless Crimes After Lawrence v. Texas

Applying the harm principle in the context of victimless crimes further sharpens its empirical failure, as the justifications for the continued criminalization of victimless crimes appear dubious after *Lawrence v. Texas*. Recall, that the category of victimless crimes includes not only activities where individuals inflict only harm to themselves—such as gambling and the use of recreational drugs—but also consensual activities that take place between two or more adults, inflicting only harm to those who engage in them but not on third parties—such as prostitution, pornography, polygamy, incest, and sadomasochism.[54]

In theory, adopting the Millian harm principle should have resulted in the decriminalization of all forms of victimless crimes. Under the *Lawrence* rationale, when individuals are engaging in consensual activities, they ought to enjoy a right to choose to engage in those activities, even if they inflict harm upon themselves or upon other consenting participants. The right to consent to harm, either self-inflicted or at the hands of other participants, is grounded in the fundamental right to autonomy, liberty, and, most importantly, human dignity.[55] A libertarian approach requires the government to refrain from intervening in individuals' free choices, including choices that the government may view as harmful, injurious, or simply "bad".[56] In addition, the government needs a specific justification to restrict an individual's right to choose to engage in activities that may harm that individual in some way.[57]

---

51. *See, e.g.*, Meir Dan-Cohen, *Thinking Criminal Law*, 28 CARDOZO L. REV. 2419, 2421-22 (2007).

52. *Id.*

53. *See* Brown, *supra* note 9, at 971.

54. BLACK'S LAW DICTIONARY 400 (8th ed. 1999).

55. *See* Dubber, *supra* note 6, at 568. *See generally* Meir Dan-Cohen, *Basic Values and the Victim's State of Mind*, 88 CALIF. L. REV. 759, 770-71 (2000) (discussing different aspects of the notion of dignity and its relation to the notion of autonomy).

56. *See* Dubber, *supra* note 6, at 543.

57. *Id.* at 536.

However, the Court's decision in *Lawrence* has not resulted in a comprehensive overhaul of all victimless crimes, nor has it had much practical effect on substantive criminal law.[58] To name a few examples: prostitution is still criminalized in all states (except several counties in Nevada where legalized brothels are closely regulated);[59] the laws in all jurisdictions refuse to recognize consent as a defense to bodily injury;[60] polygamy is still a criminal offense in all states; and while pornography is heavily regulated but legal, the law still criminalizes obscenity, based on its offensiveness to certain segments of society.[61] The continued criminalization of these offenses sharpens the question of consent to harm: if one individual authorizes another to inflict harm on him while engaging in mutually consensual activities, such as sadomasochism practices, why should the state intervene in these autonomous choices by criminalizing these conducts?

Commentators have long grappled with the legal significance of consent to harm and its precise role in criminal cases involving the infliction of severe harm to others[62]: Vera Bergelson, for example, contends that consent should always be at least a partial defense in cases involving conducts which result in physical harm to another individual.[63] However, she also argues that consent alone does not suffice to justify bodily harm and that to qualify as a full defense, the defendant must also establish that the consensual harmful act either did not significantly set back the victim's interests or did not disregard the victim's dignity.[64]

But not all victimless crimes involve the question of consent to harm, since some vices consist of individuals inflicting harm only upon themselves. Indeed, the most notable example concerning the continued criminalization of victimless crimes is the use and possession of recreational drugs. Recent years have seen a push in the direction of

---

[58]. *See generally* Strader, *supra* note 21, at 42 (suggesting that "[d]espite Lawrence's purported landmark status and the vast amount of commentary that the decision has produced, the case has had remarkably little impact on substantive criminal law as applied by lower federal courts and state courts").

[59]. *See* Robert A. Mikos, *Can the States Keep the Secrets from the Federal Government?*, 161 U. PA. L. REV. 103, 124 (2012).

[60]. *See, e.g.*, MODEL PENAL CODE § 2.11(2) (only allowing consent as a defense to physical harm when the injury is not serious, when the injury is a reasonably foreseeable result of "participation in a lawful athletic contest or competitive sport," and when "the consent establishes justification for the conduct under Article 3 of the Code").

[61]. Strader, *supra* note 21, at 102-04.

[62]. *See, e.g.*, Dubber, *supra* note 6, at 569; Paul Roberts, *Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform*, 5 BUFF. CRIM. L. REV. 173, 252-53 (2001).

[63]. *See* Bergelson, *supra* note 13, at 170.

[64]. *Id.*

decriminalizing both use and possession for self-use of marijuana.[65] This change has come about in the wake of several developments: first, Colorado and Washington state have recently become the first states that legalized the possession of up to one ounce of marijuana for adults twenty-one years and older;[66] second, many states now legalize the use of medical marijuana with a doctor's recommendation;[67] third, in many jurisdictions, possession and use of small quantities of marijuana is no longer a crime but rather a misdemeanor, punishable by a fine;[68] and lastly, many jurisdictions have significantly relaxed their law enforcement practices concerning self-use and possession of marijuana, making it the lowest enforcement priority.[69]

However, despite these winds of change, the federal government and the majority of states still make possession of marijuana a criminal offense punishable by imprisonment.[70] Moreover, every year, federal and state drug laws result in the arrest of more than 700,000 Americans for marijuana possession alone.[71] These statistics are particularly surprising in light of the fact that more than 100 million Americans use marijuana, thus potentially turning all of them into criminals.[72]

The continued criminalization of all types of drugs, including those whose effects are scientifically proven to be similar to their legal counterparts, alcohol and tobacco, is in direct conflict with the harm principle.[73] Furthermore, criminalizing possession and use of small amounts of marijuana is not only unjustified under the utilitarian harm principle, but also antithetical to fundamental libertarian values such as autonomy, liberty, and privacy.[74] This Article revisits this problem in Part IV, applying a proposal to limit the overcriminalization of victimless crimes.

---

65. Eric Blumenson & Eva Nilsen, *Liberty Lost: The Moral Case for Marijuana Law Reform*, 85 IND. L.J. 279, 298 (2010).

66. *See* Jack Healy, *Voters Ease Marijuana Laws in 2 States, but Legal Questions Remain*, N.Y. TIMES, Nov. 8, 2012, at P15(describing the legal changes in Washington and Colorado).

67. *See* Ekow N. Yankah, *A Paradox in Overcriminalization*, 14 NEW CRIM. L. REV. 1, 6 (2011) (describing medical marijuana reforms).

68. *Id.* at 7-8 (discussing the growing trend in many jurisdictions towards decriminalization of use and possession of marijuana).

69. Blumenson & Nilsen, *supra* note 65, at 297-98.

70. *Id.* at 279.

71. *Id.* at 280.

72. *Id.* at 298.

73. *See* Eric Blumenson & Eva Nilsen, *No Rational Basis: The Pragmatic Case for Marijuana Law Reform*, 17 VA. J. SOC. POL'Y & L. 43 (2009).

74. *See* Blumenson & Nilsen, *supra* note 65.

C. The Harm Principle's Normative Failure

The harm principle is unable to limit the scope of criminalization because its definition lacks some essential normative components.[75] Under the harm principle, the main trend has been to demoralize criminal law both in regard to criminalization and to punishment.[76] According to this utilitarian view, crime is just one source of harm among many other harmful activities, therefore diminishing the significance of the moral component in crime and blurring the distinction between criminal law and other areas of law.[77] While the harm principle ostensibly ought to play an important role in every criminalization decision in a post-*Lawrence* era, criminal law theorists have long recognized that this principle, in itself, is insufficient to justify criminal regulation.[78] Furthermore, as harm arguments become broader and more speculative, evaluating these claims, and comparing between competing harms get more complicated. Acknowledging the limits of the harm principle to provide a comprehensive justification for criminalization, scholars concede that establishing the perpetrator's guilt and justifying his punishment requires the adoption of an additional normative component, which stems from moral principles and philosophical theories of rights and wrongdoing.[79]

Joel Feinberg offers one of the most comprehensive works on the limits of the harm principle in his four volume series on justifications for criminalization, contending that the harm principle consists of both a setback to interests as well as establishing the perpetrator's wrongdoing.[80] However, a crucial question remains under Feinberg's account: this theory calls for supplementing the harm principle with a separate theory of rights, namely, a theory that would provide substantive content to the wrongdoing element.[81] Moreover, prominent criminal law scholars concede that modern criminal law is far from neutral and ought to encompass moral judgments and fundamental societal values, both of which are common to all societies.[82] Furthermore, this normative moral dimension is not only an

---

75. *Id.* at 281.
76. *Id.* at 285.
77. *Id.* at 284.
78. Andrew Koppelman, *Drug Policy and the Liberal Self*, 100 NW. U. L. REV. 279, 281 (2006).
79. *See* FEINBERG, *supra* note 43, at 118.
80. *See id.*
81. HUSAK, *supra* note 4, at 71.
82. *See generally* Paul H. Robinson, *The Ongoing Revolution in Punishment Theory: Doing Justice as Controlling Crime*, 42 ARIZ. ST. L.J. 1089, 1105 (2011) (arguing that the law depends on voluntary compliance, which is best attained by aligning law and popular shared moral intuitions of ordinary people).

inevitable component of any criminal law theory but also the distinctive feature that separates criminal law from civil law.

Conceding that the harm principle in itself is unable to provide a sufficient justification for criminalization, several scholars consider some alternatives. Providing one example, Meir Dan-Cohen has proposed the adoption of a rights-based perspective that departs from the harm principle and focuses on human dignity as the key justification for criminalization.[83] Dan-Cohen contends that the main and distinctive purpose of criminal law is to uphold the equal moral worth of human beings.[84] This type of proposal responds to the claim that one of utilitarianism's main flaws is its failure to give adequate weight to the dignity of persons.[85]

Another proposal is offered by Michael Moore, who contends that the harm principle is unable to explain why the criminal law punishes only some omissions and harmless wrongdoing on one hand, but refuses to punish harmful acts and other omissions that are not morally wrong on the other.[86] The law punishes omissions because moral obligations require individuals to help; harmless wrongdoing justifies punishment because while nobody is actually harmed, the act is still morally wrong; and harmful acts that are not wrongful do not justify punishment because there is simply no culpable wrongdoing.[87] Rejecting the sole reliance on the harm principle, Moore contends that the focus of justified criminal legislation ought to be moral wrongdoing, not harms.[88] Moore further argues that his modified version of legal moralism as justification for criminalization is compatible with liberal theories, in prohibiting the use of criminal law in cases of moral paternalism.[89]

Douglas Husak advocates the adoption of the wrongdoing component as one of the internal limitations on criminalization, in addition to other constraints. These additional constraints include the nontrivial harm requirement, the desert requirement—namely, that punishment is justified only when and to the extent it is deserved—and the burden of proof constraint, which holds that those who advocate the imposition of penal sanctions should carry a heavy burden of proof of justifying them.[90]

---

[83]. *See* Dan-Cohen, *supra* note 51, at 2420 (suggesting that "the agenda of the criminal law" be viewed "in terms of a Kantian morality focused on the core value of human dignity").

[84]. *Id.*

[85]. *See* Koppelman, *supra* note 78, at 281.

[86]. *See* MICHAEL S. MOORE, PLACING BLAME: A GENERAL THEORY OF CRIMINAL LAW 649 (2010).

[87]. *Id.* at 753.

[88]. *Id.* at 659, 669.

[89]. *Id*. at 792-94.

[90]. *See* HUSAK, *supra* note 4, at 55, 82-83, 92-100 (elaborating on the four internal constraints that he identifies as limits on criminalization).

However, while Husak concedes that the wrongdoing component calls for adopting a separate moral theory of rights, his work does not provide such a supplemental theory, perhaps owing to the lack of consensus on what type of theory ought to be adopted.[91] As a libertarian, Husak would have advocated a theory focusing on individuals' free choices, liberty, and autonomy.[92] However, with an extensive liberal theory having failed to promote instrumental change in criminal law and many forms of activities that interfere with individuals' freedoms still criminalized, the wrongdoing component is unable to constrain overcriminalization. Arguably, the problem stems from the fact that scholars are unable to reach a consensus concerning the precise definition and content of injuries and criminal wrongdoing: while liberals focus on individual rights such as liberty and autonomy as long as there is no harm to third parties, conservatives would advocate a moral theory of rights that focuses on paternalistic justifications favoring the protection of individuals from their own choices on the grounds that they harm themselves.

D. The Unconstitutional Nature of Criminal Law

Another potential mechanism that could be used to constrain overcriminalization is constitutional law: the doctrine of judicial review authorizes the judiciary to review both state legislative enactments as well as federal statutes, allowing federal judges to strike down legislation that is incompatible with the U.S Constitution.[93] However, while constitutional law has successfully placed significant limits on criminal procedure, it has not played a significant role in the realm of substantive criminal law, leaving it almost completely beyond constitutional scrutiny.[94]

Commentators have long noted that substantive criminal law is not constitutionalized, namely, that constitutional law places no constraints on the content of substantive criminal law.[95] In his landmark paper, William Stuntz discusses three possible solutions to the problem of over-criminalization: limiting prosecutorial discretion, ending legislative monopoly on crime definition, and constitutionalizing criminal law, which he favors.[96] While more than a decade has passed since the publication of Stuntz's work, courts have not developed significant constitutional doctrines for checking legislatures' crime creation choices, and the law has

---

91. *Id.* at 71.
92. *Id.*
93. *See* Dubber, *supra* note 6, at 530.
94. *See* Bilionis, *supra* note 5.
95. *See, e.g.*, *id.* at 1271.
96. *See* Stuntz, *supra* note 1, at 579.

still refused to take the path of constitutionalizing substantive criminal law.[97]

In his recent book,[98] Douglas Husak proposes additional external constraints to limit overcriminalization, drawing on an existing constitutional doctrine of judicial review as a conceptual framework for regulating substantive criminal law.[99] Since the right not to be punished is important but not fundamental, Husak's theory adopts the doctrine of intermediate scrutiny, under which a legislature could criminalize activity only under three conditions: if the government interest in doing so is substantial, the prohibition directly advances that government interest, and the government's objective is no more extensive than necessary to achieve its purpose.[100]

However, Husak concedes that, in the context of criminal law, courts are not institutionally competent to make substantive judgments that the doctrine itself requires, such as determining whether certain forms of conduct warrant criminal condemnation, whether noncriminal approaches are less restrictive than criminal laws, and whether particular statutes serve important expressive functions.[101] Indeed, while at the theoretical level these constraints on criminal law are coherent and plausible, at the practical level they run into difficulties when substantive content is applied to them. The following section draws on existing proposals to limit the scope of substantive criminal law by turning to the concept of human dignity.

II. HUMAN DIGNITY: THE CONCEPTUAL FRAMEWORK

A. Debating Human Dignity's Jurisprudential Role

Human dignity is a unique concept in American jurisprudence; while it is not an enumerated constitutional right, many courts and commentators suggest that it is a fundamental value, underlying many other constitutional rights.[102] Moreover, in recent years, the U.S. Supreme Court has increasingly invoked this concept in a wide array of its constitutional decisions.[103]

While the notion of human dignity has received increasing judicial and scholarly attention,[104] American scholars sharply disagree over its role in

---

97. *See* Brown, *supra* note 9.

98. HUSAK, *supra* note 4, at 55, 82-83.

99. *Id.* at 128-32.

100. *Id.* at 128, 132.

101. *Id.* at 130-31.

102. *See* Parent, *supra* note 25, at 47, 71.

103. *See* Henry, *supra* note 27, at 171.

104. *See* Jeremy Waldron, *Dignity, Rights, and Responsibilities*, 43 ARIZ. L. REV. 1108, 1118 (2011).

American constitutional jurisprudence.[105] Various scholars focus on the central role of human dignity within the constitutional jurisprudence of fundamental rights, with several going so far as to hail it as one of the fundamental constitutional values in American jurisprudence.[106] Noting that "human dignity . . . underlies our constitutional rights to privacy, liberty, protection against unreasonable search and seizure, protection against cruel and unusual punishment and other express rights and guarantees,"[107] scholars further stress that human dignity is one of "those very great political values that define our constitutional morality."[108] Legal theorist Ronald Dworkin offers perhaps the most far-reaching approach to the role of human dignity in American jurisprudence, suggesting that "the principles of human dignity . . . are embodied in the Constitution and are now common ground in America."[109]

However, while human dignity is a crucial component in many moral theories, its precise meaning and application in American jurisprudence is not always agreed upon.[110] Christopher McCrudden, for example, is wary of the term's increasing popularity in constitutional discourse, strongly criticizing the use of this concept in the context of American constitutional law.[111] McCrudden notes that what distinguishes this notion from similarly elusive concepts in American jurisprudences—such as liberty—is the fact that human dignity is not a part of the U.S. Constitution, raising doubts as to whether it actually plays a significant role in American law or carries any practical legal implications in American jurisprudence.[112] Moreover, argues McCrudden, as human dignity is susceptible to strikingly different readings, it is unable to offer a workable legal standard and therefore should not be applicable in legal decisions and constitutional jurisprudence.[113]

While human dignity is a murky theoretical concept, its increasing invocation by the U.S Supreme Court suggests that it cannot be ignored. Before turning to consider U.S. Supreme Court human dignity jurisprudence, it is important to understand the philosophical theories underlying the legal basis for human dignity.

---

105. *See* Henry, *supra* note 27, at 175.

106. *See id.*; Parent, *supra* note 25.

107. *See* Maxine Goodman, *Human Dignity in Supreme Court Constitutional Jurisprudence*, 84 NEB. L. REV. 740, 753 (2006).

108. *See* Parent, *supra* note 25, at 47, 71.

109. *See* Ronald Dworkin, *Three Questions for America*, N.Y. REV. BOOKS (Sep. 21, 2006), *available at* http://www.nybooks.com/articles/archives/2006/sep/21/three-questions-for-america/.

110. *See* Henry, *supra* note 27, at 172.

111. *See, e.g.*, Christopher McCrudden, *Human Dignity and Judicial Interpretation of Human Rights*, 19 EUR. J. INT'L L. 655, 712 (2008).

112. *See, e.g.*, *id.* at 695.

113. *See, e.g.*, *id.* at 706.

B. Human Dignity in Philosophical Theories

Philosophical theories concerning normative ethics have traditionally encompassed two competing traditions: deontology, which is based on the individual's moral rights and obligations,[114] and consequentialism (or utilitarianism), which focuses on the consequences of actions and on evaluating which actions most contribute to human happiness.[115] Deontology's fundamental premise is that liberty, autonomy, and human dignity are basic rights, whose restriction requires special justifications.[116] The German philosopher Immanuel Kant is considered by many scholars to be the founder of the modern concept of human dignity.[117] According to Kant, morality is based on a universal and impartial law of rationality, best captured in his famous Categorical Imperative, demanding that a person should "[a]ct in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end."[118]

Kant's theory embodies the view that all human beings deserve to be treated as free, autonomous agents because they have the distinct capacity to adhere to moral reasoning and thought, which includes the ability to make rational choices regarding what is deeply valuable or worthy.[119] Kant therefore contended that humanity, so far as it is capable of morality, is the only thing which has dignity, and that this capacity provides every person an intrinsic dignity that every other person must respect.[120]

---

[114]. BLACK'S LAW DICTIONARY 468 (8th ed. 1999). *See generally* SHELLY KAGAN, NORMATIVE ETHICS 70-78 (1998) (discussing deontology's basic tenets and noting that deontology is a way of thinking about morality that speaks in terms of moral rights and wrongs that are resistant to consequentialist considerations about what would produce the best outcome).

[115]. BLACK'S LAW DICTIONARY 324 (8th ed. 1999); *see, e.g.*, Samuel Freeman, *Utilitarianism, Deontology, and the Priority of Right*, 23 PHIL. & PUB. AFF. 313, 323 (1994) (noting that good consequences refer to social welfare as defined independently of any moral concepts or principles).

[116]. *See* Tom Lininger, *Reconceptualizing Confrontation After* Davis, 85 TEX. L. REV. 271, 292 (2006) (noting that "[a]pplying Kantian principles to political philosophy, government should enact laws and policies that maximize individual autonomy and that respect the inherent dignity of all people").

[117]. *See, e.g.*, ALLEN W. WOOD, KANTIAN ETHICS 215 (2008); Peter Branden Bayer, *Sacrifice and Sacred Honor: Why the Constitution is a "Suicide Pact,"* 20 WM. & MARY BILL RTS. J. 287, 348-51 (2011); McCrudden, *supra* note 111, at 659.

[118]. *See* Immanuel Kant, *The Groundwork of the Metaphysics of Morals* § 4:439, *in* PRACTICAL PHILOSOPHY 41, 88 (Mary J. Gregor ed. & trans., 1996) (1785).

[119]. *See* R. George Wright, *Treating Persons as Ends in Themselves: The Legal Implications of a Kantian Principle*, 36 U. RICH. L. REV. 271, 274 (2002).

[120]. IMMANUEL KANT, GROUNDING FOR THE METAPHYSICS OF MORALS 41 (James W. Ellington trans., Hackett Publ'g Co. 3d ed. 1993) (1785); *see also* WOOD, *supra* note 117, at

According to Kant, autonomy is the basis for human dignity, and that free will consists of the ability of humans to choose their goals or actions, together with the capacity to distinguish good actions (respectful of others' rights) from bad ones (disrespectful of others' rights).[121] Kant argues that "the dignity of humanity consists…in the capacity to give universal law."[122] In other words, individuals' human dignity derives from the capacity for autonomous choices. Moreover, according to Kant, dignity is "absolute inner worth," unconditional and incomparable, because rational beings' autonomy is unconditional, and therefore respect must be given to these human beings unconditionally.[123]

The notion of human dignity entails both the right to demand dignity and the state's concomitant duty to respect an individual's dignity.[124] The fundamental notion of autonomy therefore grounds both the dignity of human beings and their obligations to respect the dignity of others.[125] The notions of respect and dignity are therefore the essence of the Kantian approach: every human being both owes and is owed respect to others.[126]

Two of the most important American political and moral thinkers follow Kantian views on autonomy and dignity, representing contemporary views on human dignity under a deontological theory. John Rawls offers a reinterpretation of Kant's conception of personal autonomy and the categorical imperative, suggesting that autonomy gives rise to obligations of respect.[127] In his "Principles of Justice," Rawls describes the Liberty Principle as establishing equal basic liberties for all citizens, such as freedoms of conscience, association, and expression, as well as democratic rights.[128] These basic liberties have a special status and are prioritized over other rights.[129]

Legal theorist Ronald Dworkin also embraces Kantian approaches, suggesting that human dignity represents the ideology of both human rights and liberal constitutionalism.[130] Under this account, dignity and equality are

---

94.

121. KANT, *supra* note 120, at 44-45; *see also* David G. Owen, *Expectations in Tort*, 43 ARIZ. ST. L.J. 1287, 1287 (2011).

122. *See* Kant, *supra* note 118, § 4:412, at 65-66, § 4:441, at 89-90, § 4:429, at 79-80*; see also* Kim Treiger-Bar-Am, *In Defense of Autonomy: An Ethic of Care*, 3 N.Y.U. J.L. & LIBERTY 548 (2008).

123. Immanuel Kant, *The Metaphysics of Morals* §§ 6:222, 6:435, *in* PRACTICAL PHILOSOPHY 557-58 (Mary J. Gregor ed. & trans., 1996) (1797).

124. *See* Waldron, *supra* note 104, at 1110-11.

125. McCrudden, *supra* note 111, at 659-60.

126. *See id.* at 665.

127. *See* JOHN RAWLS, A THEORY OF JUSTICE 519 (1971).

128. *Id.* at 60-61.

129. *Id.*

130. *See* RONALD DWORKIN, FREEDOM'S LAW 24-26 (1996) (discussing the conditions of moral membership in a political community).

viewed as the primary moral justifications for all legal rights, and human dignity is one type of individual human right.[131] Most importantly, Dworkin is perhaps the first American theorist to link human dignity with the U.S. Constitution,[132] viewing equality and dignity as the primary basis for a moral reading of the American Constitution.[133]

Traditionally, the contrasting philosophical approach to liberal Kantian theories has been consequentialism or utilitarianism, which focuses on promoting overall social welfare rather than an individual's fundamental rights.[134] According to consequentialism, certain circumstances justify violating human dignity if doing so preserves more dignity than the dignity that was violated.[135] Deterrence-based theories of punishment hold that rational actions must aim at advancing the overall well-being of society, which is the only value and social good a society ought to promote, often at the expense of fairness to the individual.[136] Naturally, the notion of human dignity does not play a significant role under such theories, where society's dignity may outweigh an individual's right to dignity.

Another popular moral theory, communitarian virtue ethics, stands in sharp contrast both to Kantian views and consequentialist theories.[137] The foundational roots of virtue ethics can be traced to the work of the Greek philosopher Aristotle,[138] who developed the idea that human flourishing consists in the exercise of certain virtues and is the ultimate goal for all persons.[139] Virtue ethics emphasizes moral character, in contrast to deontology, which focuses on duties or rules, and utilitarianism, which

---

131. *See id.* at 1-38.

132. *See id.* at 24, 26.

133. *See* RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272-74 (1977).

134. Erik Luna, *Punishment Theory, Holism, and the Procedural Concept of Restorative Justice*, 2003 UTAH L. REV. 205, 208 (2003).

135. *Id.* at 208-09.

136. *Id.*

137. *See* NOEL STEWART, ETHICS: AN INTRODUCTION TO MORAL PHILOSOPHY 54 (2009); *see also* PHILIPPA FOOT, VIRTUES AND VICES AND OTHER ESSAYS IN MORAL PHILOSOPHY 8-14 (1978); MARY GLENDON, RIGHTS TALK: THE IMPOVERISHMENT OF POLITICAL DISCOURSE 1-17 (1991); ALASDAIR MACINTYRE, AFTER VIRTUE: A STUDY IN MORAL THEORY 239 (1982); MICHAEL J. SANDEL, LIBERALISM AND THE LIMITS OF JUSTICE 1-17 (1982); Martha C. Nussbaum, *Non-Relative Virtues: An Aristotelian Approach, in* 13 MIDWEST STUDIES IN PHILOSOPHY 32, 33 (Peter A. French et al. eds., 1988); Sherman J. Clark, *Law as Communitarian Virtue Ethics*, 53 BUFF. L. REV. 757 (2005).

138. *See* ARISTOTLE, NICHOMACHEAN ETHICS (J.A.K. Thomson trans., 1976) (n.d.); ROGER CRISP & MICHAEL SLOTE, INTRODUCTION TO VIRTUE ETHICS 1, 2 (Roger Crisp & Michael Slote eds., 1997); *see also* ROSALIND HURSTHOUSE, ON VIRTUE ETHICS 8 (1999).

139. *See* Ekow N. Yankah, *Virtue's Domain*, 2009 U. ILL. L. REV. 1167, 1168-69 (2009).

focuses on consequences of action.[140] Virtue ethics focuses on what we should *do* to be "right" rather than how we should *be* to be happy.[141]

Virtue ethics theory is closely linked to the notion of human dignity. For example, Mary Ann Glendon offers arguments rooted in the importance of human dignity to justify a policy imperative that addresses injustices against the poor.[142] Until recently, the vast majority of literature on virtue ethics did not examine the role of community in the construction of character or the connection between character and law.[143] Rather, as a philosophical moral theory, the natural focus of virtue ethics has been on personal virtue rather than a virtuous society.[144]

However, scholars have recently started to identify connections among virtue ethics, philosophy, and law.[145] While virtue ethics jurisprudence examines how the law can help make virtuous individuals, it also has implications for the proper ends of legislation: if the purpose of law is to make citizens virtuous, how does it affect the content of the laws?[146] There have been several endeavors to apply virtue ethics to the law.[147] Kyron Huigens, for example, has suggested that virtue ethics might provide a way of thinking about questions of criminal responsibility.[148] As well, Huigens suggests that the purpose of law is "to promote the greater good of humanity," and "[t]he criminal law serves that end by promoting virtue . . . by inquiring into the quality of practical judgment displayed by the accused in his actions." [149] What grounds liability is the offender's "faulty reasoning," and what the criminal law "condemns" is "not just harm, but the lack of judgment that results in harm."[150]

Some scholars suggest that a commitment to virtue is more compatible with communitarian approaches than with liberal autonomy-based

---

[140]. *See* Ronald J. Colombo, *Toward a Nexus of Virtue*, 69 WASH. & LEE L. REV. 3, 9-10 (2012).

[141]. *See* Rosalind Hursthouse, *Normative Virtue Ethics, in* HOW SHOULD ONE LIVE? 19, 20-25 (Roger Crisp ed., 1996) (discussing the basic tenants of virtue ethics).

[142]. *See* MARY ANN GLENDON, A WORLD MADE NEW: ELEANOR ROOSEVELT AND THE UNIVERSAL DECLARATION OF HUMAN RIGHTS 144-46 (2002).

[143]. *See* Clark, *supra* note 137, at 761-62.

[144]. *See id.*

[145]. *See* Yankah, *supra* note 139, at 1169.

[146]. *See* Lawrence B. Solum, *Virtue Jurisprudence: A Virtue-Centered Theory of Judging*, 34 METAPHILOSOPHY 177, 181 (2003).

[147]. *See* Heidi Li Feldman, *Prudence, Benevolence, and Negligence: Virtue Ethics and Tort Law*, 74 CHI.-KENT L. REV. 1431, 1432-33 (2000); Kyron Huigens, *Virtue and Criminal Negligence*, 1 BUFF. CRIM. L. REV. 431 (1998); Dan M. Kahan & Martha C. Nussbaum, *Two Conceptions of Emotion in Criminal Law*, 96 COLUM. L. REV. 269, 291 (1996).

[148]. *See, e.g.*, Kyron Huigens, *Virtue and Inculpation*, 108 HARV. L. REV. 1423, 1423-25 (1995).

[149]. *Id.* at 1425.

[150]. *Id.* at 1424.

considerations.[151] Sherman Clark, for example, suggests incorporating virtue ethics theory into law by acknowledging that the central aim of law is happiness for the people governed by it.[152] He further argues that promoting communitarian character is the route to achieve this well-being.[153] As such, Clark contends that legal discourse ought to examine the connection between law and public character and the ways in which law plays a role in the construction of community identity.[154] While communities should develop character traits in keeping with their own history and culture, there will be circumstances under which they will need to cultivate other traits necessary for their well-being.[155]

Other theorists have argued that virtue ethics is also compatible with liberalism.[156] Martha Nussbaum offers another version of applying a virtue-based theory to the legal context, relying on the concept of human dignity to develop a theory of social justice, which is based on the concept of capabilities approach.[157] Under Nussbaum's view, every person possesses full and equal human dignity—unless in a permanent vegetative condition or otherwise cut off from striving and sentience.[158] A life worthy of human dignity, Nussbaum contends, requires a minimum of certain central capabilities.[159] She then proposes a list of ten components essential for minimal social justice, including life, bodily health, and bodily integrity.[160]

But what does the above philosophical controversy have to do with human dignity jurisprudence as developed in judicial opinions? The following section demonstrates that these contrasting philosophical theories are closely linked to the various ways in which the U.S. Supreme Court invokes the notion of human dignity.

C. Human Dignity in the U.S. Supreme Court

The U.S. Supreme Court has at times conceived both liberty and communitarian virtue as forms of dignity.[161] These different accounts create

---

151. *See* Clark, *supra* note 137, at 771-72; Yankah, *supra* note 139, at 1168.

152. See Clark, *supra* note 137, at 771.

153. *Id.* at 771-72.

154. *Id.* at 772.

155. *Id.* at 787.

156. *See* Martha C. Nussbaum, *Aristotelian Social Democracy, in* LIBERALISM AND THE GOOD 203 (R. Douglass et al. eds., 1990).

157. *See* Martha C. Nussbaum & Rosalind Dixon, *Children's Rights and Capabilities Approach: The Question of Special Priority,* 97 CORNELL L. REV. 549, 557 (2012).

158. *Id.* at 557-58.

159. *Id.* at 558.

160. MARTHA C. NUSSBAUM, CREATING CAPABILITIES: THE HUMAN DEVELOPMENT APPROACH 33-34 (2011).

161. *Compare* Thornburgh v. Am. Coll. of Obstetricians & Gynecologists, 476 U.S.

a fundamental distinction between using human dignity to promote individual autonomy and the communitarian account of human dignity as representing a virtuous society.

D. Liberty as Dignity

In an important line of cases, the Court has invoked the concept of dignity to promote individualistic approaches, supporting individuals' rights to exercise autonomous choices in matters pertaining to their self-fulfillment and self-realization.[162] One notable example concerns the reproductive or abortion cases: the Court first relied on the concept of liberty as dignity to protect a woman's autonomous choice to have an abortion by striking down certain provisions of the Pennsylvania Abortion Control Act, in its 1986 decision in *Thornburgh v. American College of Obstetricians and Gynecologists*.[163] Writing for the majority, Justice Blackmun stated that

> [f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision—with the guidance of her physician and within the limits specified in *Roe*—whether to end her pregnancy. A woman's right to make that choice freely is fundamental.[164]

In *Planned Parenthood of Southeastern Pennsylvania v. Casey,* the Court broadened its concept of human dignity to embody an individual's autonomous choice, self-fulfillment, and self-realization.[165] In the oft-quoted "mystery of life" passage, Justice O'Connor, writing for the Court, stated that:

> Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so

---

747 (1986) (*overruled in part by* Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833 (1992)) (striking down certain provisions of the Pennsylvania Abortion Control Act based on protecting women's free choices and the significance of these choices to human dignity), *with* Trop v. Dulles, 356 U.S. 86, 100 (1957) (stating that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man . . . . The Amendment must draw its meaning from the evolving standards of decency that mark the progress of a maturing society."). While scholars have identified additional concepts of human dignity, this paper focuses solely on these two.

162. *See Casey*, 505 U.S. at 833; *Thornburgh*, 476 U.S. at 772.

163. *Thornburgh*, 476 U.S. at 772.

164. *Id.*

165. *Casey*, 505 U.S. at 851.

> fundamentally affecting a person as the decision whether to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.[166]

While the Court's concept of human dignity in *Thornburgh* encompassed the view that a woman's right to abortion is as important and constitutionally protected as other "personal decisions relating to marriage, procreation, contraception, family relationship, child rearing and education," the *Casey* Court expanded its constitutional protection to additional autonomous choices central to the right to define one's own concept of existence, self-fulfillment, self-realization, and the "mystery of life."[167]

A second line of cases concerns sexual choices, particularly same-sex relationships, as best illustrated in the Court's landmark decision in *Lawrence v. Texas.*[168] Citing the above "mystery of life" passage from *Casey*, the *Lawrence* Court invoked the concept of liberty as dignity to strike down Texas's anti-sodomy law as violating the Fourteenth Amendment's right to due process,[169] stating that "adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons . . . . The liberty protected by the Constitution allows homosexual persons the right to make this choice."[170] Commentators have noted that the *Lawrence* decision "may presage a new jurisprudence" that places constitutional limits on a state's power to criminalize any activity that is "somehow connected with efforts to 'define one's own concept of existence, of meaning, of the universe, and of the mystery of human life.'"[171]

Lawrence's open-ended language may have far-reaching implications: the Court's invocation of the concept of liberty as dignity closely follows Kantian approaches by acknowledging that human dignity is a crucial feature of human life. Consequently, a broad reading of the *Lawrence* holding suggests that under the Fourteenth Amendment, the government

---

166. *Id.* (quoting Eisenstadt v. Baird, 405 U.S. 438, 453 (1972); Prince v. Massachusetts, 321 U.S. 158, 166 (1944)) (internal citations omitted).

167. *Id.*

168. Lawrence v. Texas, 539 U.S. 558, 574 (2003).

169. *Id.* at 567.

170. *Id.*

171. Nelsen Lund & John O. McGinnis, Lawrence v. Texas *and Judicial Hubris*, 102 MICH. L. REV. 1555, 1583 (2004) (quoting *Casey*, 505 U.S. at 851).

may not criminalize any conduct that interferes with an individual's "choices central to personal dignity," thereby making any criminal law that unjustifiably interferes with such choices subject to constitutional scrutiny.

Moreover, the crux of the *Lawrence* decision is the adoption of the harm principle, namely, harm to third parties, as the main justification for exercising the state's power to limit individuals' autonomous choices.[172] Another direct implication of the Court's concept of liberty as dignity is its focus on dignity as an individualistic right, rather than a social one. Most importantly, it is individual people, as opposed to states, societies or institutions, who are entitled to enjoy the protection of the fundamental value of human dignity.

Adopting the concept of liberty as dignity is contingent on the capacity for making autonomous choices, which excludes young children and mentally incapacitated individuals, for example. If, in addition, drug addicts are also deemed not to have the capacity to make autonomous choices to harm themselves, criminal prohibitions that protect individuals with impaired capacity from their own harmful choices would need to be upheld simply because such persons lack the preliminary conditions for exercising autonomous choices. Moreover, if the Court went even further and extended its constitutional protection to additional types of autonomous choices, these could include other forms of exercising one's right to dignity and liberty, such as physician-assisted suicide and the use of recreational drugs.

A broad reading of *Lawrence* suggests that under the Fourteenth Amendment, the government may not criminalize any conduct that interferes with individuals' "choices central to personal dignity."[173] Why, then, is the Court willing to adopt a liberal approach supporting individuals' rights to freedom and autonomous choices in matters pertaining to reproductive and sexual choices, but not in other contexts, such as drugs? One explanation concerns the harm principle: while reproductive and sexual choices are inherently harmless to third parties, other personal life choices, for example, using recreational drugs, are potentially harmful to others; thus, the latter case justifies criminalization based on a utilitarian account while the former does not. In addition, reproductive and sexual choices are a crucial component of self-fulfillment and self-realization, while the use of recreational drugs is not.[174] An argument can be made that recreational drug use does not implicate fundamental issues where societal perceptions evolve over time or require the protection of a socially disadvantaged minority group. In sum, *Lawrence's* open-ended "mystery of

---

172. *Lawrence*, 539 U.S. at 572.

173. *Id.*

174. *See* Yale Kamisar, *Forward: Can* Glucksberg *Survive* Lawrence*?* 106 MICH. L. REV. 1453, 1467 (2008).

life" passage remains an unsolved mystery, as the precise scope and contour of the Court's liberty as dignity concept still remains to be seen.

E. Communitarian Virtue as Dignity

A contrasting concept of human dignity invoked by the U.S Supreme Court is closely related to the philosophical theory of virtue ethics. In a series of decisions, the Court has invoked the concept of communitarian virtue as dignity to advance its views on an American society that is civilized, decent, and virtuous.[175] Taken together, these cases suggest that there are some fundamental standards of decency that command the government's protection of the dignity of individuals, and they are best captured in the notion of communitarian virtue. This line of cases is most notable in three main contexts: the Court's Eighth Amendment jurisprudence, particularly in the death penalty and prisoners' rights cases; the Court's Fourth Amendment jurisprudence; and its abortion jurisprudence.[176]

F. Human Dignity and the Death Penalty

A communitarian virtue account of human dignity is particularly prominent in the Court's interpretation of the Eighth Amendment's Cruel and Unusual Punishment Clause. Chief Justice Warren's 1958 decision in *Trop v. Dulles* stressed that "[t]he basic concept underlying the Eighth Amendment is nothing less than the dignity of man," and the prohibition against cruel and unusual punishment "draw[s] its meaning from the evolving standards of decency that mark the progress of a maturing society," emphasizing that these standards embody those that currently prevail in society.[177]

While the death penalty is not categorically unconstitutional under the Eighth Amendment, the Court significantly confined the types of situations in which this unique punishment can be imposed. The Court's limiting principle states that the death penalty must "be limited to those offenders who commit "a narrow category of the most serious crimes" and whose extreme culpability makes them "the most deserving of execution."[178] The Court applied this limiting principle in a trilogy of Eighth Amendment cases, in which it held that the death penalty is unconstitutional in cases involving the mentally retarded,[179] juveniles,[180] and rapists.[181] For juveniles

---

[175]. *See, e.g.*, Roper v. Simmons, 543 U.S. 551, 578 (2005); Trop v. Dulles, 356 U.S. 86 (1957).

[176]. Henry, *supra* note 27, at 222-23.

[177]. *Trop*, 356 U.S. at 100-01.

[178]. Atkins v. Virginia, 536 U.S. 304, 319 (2002).

[179]. *Id.*

and the mentally retarded, the Court held that the death penalty violates the Eighth Amendment because the offender has a diminished personal responsibility for the crime.[182] In cases of rape, the Court relied on the consensus against imposing the death penalty for child rape and on the "evolving standards of decency that mark the progress of a maturing society," which required that the use of the death penalty be restricted to cases resulting in death.[183]

The notion of human dignity plays a key role in the Court's restriction of the death penalty in these specific categories of cases. In *Roper v. Simmons*, Justice Kennedy stressed that human dignity lies at the foundation of the Eighth Amendment and elevated the value of human dignity to the level of an intrinsic constitutional value.[184] Moreover, he argued that the Constitution rests upon "innovative principles original to the American experience, such as . . . specific guarantees for the accused in criminal cases; and broad provisions to secure individual freedom and preserve human dignity" and that "[t]hese doctrines and guarantees are central to the American experience and remain essential to [Americans'] self-definition and national identity."[185] In *Kennedy v. Louisiana*, Justice Kennedy stressed that "[e]volving standards of decency must embrace and express respect for the dignity of the person, and the punishment of criminals must conform to that rule."[186] In grounding the value of human dignity as a general constitutional right, along with individual freedom rights, Justice Kennedy took an important step in the direction of incorporating the value of human dignity into the Constitution itself, making it a fundamental value that underlies other constitutional rights, such as defendants' criminal procedure guarantees.

Justice Brennan's concurrence in *Furman v. Georgia* also emphasizes the value of human dignity as grounded in the constitutional prohibition of "cruel and unusual punishment."[187] Justice Brennan notes that the Clause "prohibits the infliction of uncivilized and inhuman punishments."[188] The State, he adds, even as it punishes, must treat its members with respect for their intrinsic worth as human beings; "[a] punishment is 'cruel and unusual,' therefore, if it does not comport with human dignity."[189] Brennan further notes that "the primary principle is that a punishment must not be so

---

180. *Roper*, 543 U.S. 551.
181. Louisiana v. Kennedy, 554 U.S. 407 (2008).
182. *See Roper*, 543 U.S. at 570; *Atkins*, 536 U.S. at 318.
183. *Kennedy*, 554 U.S. at 447.
184. *Roper*, 543 U.S. at 578.
185. *Id.*
186. *Kennedy*, 554 U.S. at 420 (2008).
187. Furman v. Georgia, 408 U.S. 238, 270 (1972) (Brennan, J., concurring).
188. *Id.*
189. *Id.*

severe as to be degrading to the dignity of human beings," and that the extreme severity of a punishment makes it degrading to the dignity of human beings beyond the presence of pain, such as punishments that inflict torture.[190]

G. Human Dignity and Prisoners' Rights

In a line of cases involving prisoners' rights, the U.S. Supreme Court also relies on the value of human dignity to hold certain prison practices unconstitutional under the Eighth Amendment. In *Hope v. Pelzer*, the Court held unconstitutional a form of punishment that included handcuffing an inmate to a hitching post for seven hours in the sun without access to a bathroom.[191] Justice Stevens, writing for the Court, contends that several forms of corporal punishment violate the Eighth Amendment and offend contemporary concepts of decency and human dignity.[192] Citing Chief Justice Warren's famous quote from *Trop v. Dulles,* that the "basic concept underlying the Eighth Amendment is nothing less than the dignity of man,"[193] Justice Stevens holds that hitching a prisoner to a post for an extended period of time in a position that was painful, under circumstances that were both degrading and dangerous, was a way of treatment "antithetical to human dignity," and that using such a form of punishment to discipline a disruptive prisoner violates the Eighth Amendment.[194]

A recent pronunciation of the Court's view of human dignity as embodying the value of communitarian virtue is demonstrated in the 2011 *Brown v. Plata* decision. The landmark decision stemmed from two class action lawsuits concerning overcrowded prisons in California: the *Plata* class action, alleging unconstitutional failure to provide adequate medical care, and the *Coleman* class action, alleging inadequate mental health care.[195] In *Coleman v. Schwarzenegger* a three-judge court issued a release order of prisoners over California's objection; Justice Kennedy subsequently upheld the order, stressing the pivotal role human dignity plays in securing the fundamental human rights of inmates.[196] He noted that "prisoners may be deprived of rights that are fundamental to liberty, [but they] retain the essence of human dignity inherent in all persons . . . [that] animates the Eighth Amendment prohibition against cruel and unusual

---

190. *Id.* at 271.

191. Hope v. Pelzer, 536 U.S. 730, 741 (2002).

192. *Id.* at 737 (quoting Gates v. Collier, 501 F.2d 1291, 1306 (5th Cir. 1974)).

193. *Id.* at 738 (quoting Trop v. Dulles, 356 U.S. 86, 100 (1958)).

194. *Id.* at 745.

195. *See* Mary D. Fan, *Beyond Budget-Cut Criminal Justice: The Future of Penal Law*, 90 N.C. L. REV. 581, 610 (2012).

196. Brown v. Plata, 131 S. Ct. 1910, 1922 (2011).

punishment."[197] When a state facility deprives its citizens of basic sustenance, be it food or medical care, it acts in a manner "incompatible with the concept of human dignity and has no place in civilized society."[198]

In the Court's decision in *Ashcroft v. al-Kidd,* involving the constitutionality of the detention of material witnesses in terrorism investigations, Justice Ginsburg wrote a concurring opinion, detailing in pertinent part:

> Ostensibly held only to secure his testimony, al-Kidd was confined in three different detention centers during his 16 days' incarceration, kept in high-security cells lit 24 hours a day, strip-searched and subjected to body-cavity inspections on more than one occasion, and handcuffed and shackled about his wrists, legs, and waist.[199]

Referring to these as "brutal conditions of confinement," Ginsburg further stressed that al-Kidd's ordeal was "a grim reminder of the need to install safeguards against disrespect for human dignity, constraints that will control officialdom even in perilous times."[200] Invoking the communitarian concept of dignity in the "war on terrorism" further strengthens the Justices' increasing reliance on this value.

H. Human Dignity and the Fourth Amendment

The U.S. Supreme Court has also invoked human dignity as communitarian virtue in the context of searches and seizures that demonstrate a cognizable level of executive abuse of power as that which shocks the conscience. In these cases the searches were particularly extreme, involving body searches to extract evidence of a crime. The "shocks the conscience" test was first adopted in the 1957 case of *Rochin v. California,* in which the Court held that the forced pumping of a suspect's stomach was enough to offend Due Process as conduct that "shocks the conscience" and violates the "decencies of civilized conduct."[201] The significance of the *Rochin* decision lies in recognizing the individual's interest in securing his right to human dignity by holding the search and seizure unconstitutional under the Due Process Clause.[202]

Police conduct that "shocks the conscience" has led to a series of similar claims by defendants who argued that law enforcement's search and seizure practices violated the Due Process Clause based on that

---

197. *Id.* at 1928.
198. *Id.*
199. Ashcroft v. al-Kidd, 131 S. Ct. 2074, 2089 (2011) (Ginsburg, J., concurring).
200. *Id.*
201. Rochin v. California, 342 U.S. 165, 172-73 (1952).
202. *See id.* at 174.

characterization. In *Schmerber v. California* the Court noted that "[t]he overriding function of the Fourth Amendment is to protect personal privacy and dignity against unwarranted intrusion by the State."[203] The Court further identified a list of factors that create a balancing test between the individual's rights to privacy, dignity, and bodily integrity, and the government's interest in obtaining evidence.[204] Based on this balancing test, the Court ruled that taking a blood sample from an injured and intoxicated arrestee over his objection violated neither the Fourth nor the Fourteenth Amendment.[205] In contrast, in *Winston v. Lee* the Court refused to authorize surgery to remove a bullet from a suspect's body because it involved "an 'extensive' intrusion on respondent's personal privacy and bodily integrity," and the state's interest in obtaining the bullet was not high enough to justify such an invasion.[206] The extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity is therefore an important factor in this balancing test.

I. A Balancing Test: Reconciling Between Contrasting Concepts of Dignity

While the Court has increasingly invoked human dignity in its constitutional law cases, it has failed to reach a consensus on the substantive meaning of this value, and has yet to invoke human dignity in the context of substantive criminal law.[207] Similarly, commentators have neither agreed on the specific content of human dignity in criminal cases nor have elaborated on what understanding of the notion ought to prevail in cases where conflicting readings of human dignity may apply.[208] Vera Bergelson, for example, advocates the use of the notion of human dignity as an additional component in criminalizing consensual conduct that inflicts harm to others, suggesting that conducts involving disregard of one's dignity should be criminalized only when they are combined with a setback to interests protected by criminal law.[209] Bergelson's approach, however, leaves open the question of when, and under what circumstances, do certain behaviors in fact amount to disregard of an individual's human dignity. Moreover, since Bergelson's proposal rests upon the flawed premise that the notion of human dignity has only one agreed upon meaning, it does not address the need to balance between different readings of the notion of human dignity in cases where conflicting understandings may apply.

---

203. Schmerber v. California, 384 U.S. 757, 767 (1966).
204. *Id.* at 769-70.
205. *Id.* at 772.
206. Winston v. Lee, 470 U.S. 753, 764, 767 (1985).
207. *See, e.g.*, Dubber, *supra* note 6, at 557.
208. *See, e.g.*, Henry, *supra* note 27, at 189-90; Rao, *supra* note 26, at 191-92.
209. *See* Bergelson, *supra* note 13, at 219-220.

Therefore, this proposal further sharpens the need for developing a balancing test that would reconcile between potentially conflicting readings of human dignity.

A close examination of the Court's human dignity jurisprudence reveals that while the Court uses contrasting concepts of human dignity in different categories of cases, it remains unclear what type of balancing test it has ultimately adopted, and whether the same balancing test applies in all contexts.

The Abortion Context

Scholars have noted that when the individual concept of dignity as liberty and autonomy directly conflicts with a communitarian concept, a clash results in those cases in which societal perceptions strongly condemn conduct that an individual's liberty and dignity demand be protected under the law.[210] Judicial decisions have demonstrated that in contentious cases, the legal enforcement of societal standards and communitarian norms often outweigh individual free choices.[211] These judicial decisions are grounded in an implicit balancing test adopted by the Court in specific cases, representing the Court's view of the proper balance between an individual's liberty rights and the societal norms and communitarian demands of a democratic society.[212]

The abortion context provides the most notable pronunciation of the Court explicitly privileging communitarian values over individual liberty and autonomy. In the its 2007 decision in *Gonzales v. Carhart*, the U.S. Supreme Court held that the Partial-Birth Abortion Ban Act of 2003 was constitutional.[213] Whereas the Court in *Planned Parenthood of Southeastern Pennsylvania v. Casey* weighed a woman's individual right to choose abortion against the state's interest in respecting potential human life,[214] the *Carhart* Court upheld the prohibition, avoiding this balancing test by categorically privileging a communitarian concept of human dignity, one that emphasizes a "decent society's respect for the dignity of human life" over a woman's liberty as dignity interests to choose abortion.[215] The *Carhart* decision demonstrates clear judicial preference of dignity as communitarian virtue, trumping the competing concept of liberty and autonomy as dignity.

While scholars have identified the contrasting concepts of human dignity invoked by the Court, they have yet to develop a balancing test such

---

210. *See* Rao, *supra* note 26, at 204.
211. *See id.* at 226.
212. *See id.* at 223-26; *see also* Henry, *supra* note 27, at 228.
213. Gonzales v. Carhart, 550 U.S. 124, 168 (2007).
214. Planned Parenthood of Se. Pa. v. Casey, 505 U.S. 833, 846 (1992).
215. *See* Henry, *supra* note 27, at 228.

as the one proposed in the remainder of this Article, examining which values and rights ought to override an individual's exercise of autonomy. A broad reading of communitarian virtue as dignity would result in privileging a host of societal rights and values over individual liberties, consistent with the Court's position in *Carhart*. However, a narrower reading of communitarian virtue would result in acknowledging only limited circumstances under which societal values outweigh individual choices and liberties. In contrast to the *Carhart* Court's support for a broad reading of communitarian virtue as dignity, the alternative approach advocated here critiques this judicial preference by suggesting that it is incompatible with the fundamental values and rights underlining the U.S. Constitution. The following section lays out the guidelines for an appropriate balance between competing concepts of human dignity.

III. RULES TO LIMIT CRIMINALIZATION OF VICTIMLESS CRIMES

Adopting a balancing test between conflicting concepts of human dignity requires articulating basic rules to serve as legislative guidelines for proposals to constrain the scope of certain categories of victimless crimes. These rules are applicable only in the context of victimless crimes, namely, after the activity in question is determined to be consensual, inflicting only harm to self. The principle underlying these rules is that the concept of human dignity merely supplements, rather than replaces, the harm principle, which is an essential existing constraint to criminalization. Harm to others is the paradigmatic example of the rights of others not to be harmed outweighing an individual's right to exercise one's liberties. The harm principle thus provides the main justification for the state's restriction on individual liberty: when a conduct demonstrates a culpable and wrongful violation of another's interests, the state is justified in criminalizing this conduct and imposing proportionate penalties. Put differently, individuals are entitled to exercise free autonomous choices regarding how to best live their lives, provided they do not inflict harm on *other* individuals.

A. Liberty as Dignity Generally Outweighs Communitarian Virtue

Existing prohibitions on victimless crimes are grounded on the premise that individuals' consent to harm themselves ought to be legally limited and that choice-based theory is not a sufficient condition to preclude criminal liability.[216] Under this prevailing view, the law upholds sanctions for various types of criminal offenses that inflict harms on consenting individuals, such as drug activity, gambling, and prostitution

[216]. *See* Bergelson, *supra* note 13, at 185.

prohibitions.[217] This approach justifies using the government's coercive power to criminalize activities in which consenting adults wish to engage, even though these activities inflict no harm on others, but only harm to self. This view, however, fails to grant sufficient protection to one's right to liberty as dignity, a right that favors autonomous choices as individuals see fit.

In contrast to this position, the proposed primary rule is that the concept of liberty as dignity generally outweighs the concept of dignity as communitarian virtue. This is the default rule that should apply as a legislative guideline while considering the constitutionality of any victimless crime. Moreover, any caveat that would supplement this general rule by articulating the limited circumstances under which another more important value outweighs this fundamental rule is only secondary in importance.

The bold assertion that liberty as dignity generally outweighs the competing view of communitarian virtue as dignity begs the question: why? What are the justifications for privileging one concept of dignity over another? One answer rests with a basic premise underlying a liberal democratic government: a state needs special justifications to inflict punishment on individuals because the criminal law infringes on individuals' fundamental freedoms and liberty interests and only culpable, wrongful harms *on others* trumps the right to enjoy these liberties, providing good reasons for the state to interfere with those liberties by imposing criminal penalties.[218] A related consideration supporting the aforementioned rule is the understanding that criminal law is a stringent weapon to be used only as a last resort. In other words, an alternative means of regulation ought to be considered when the objectives of a social policy may be achieved through methods less violative of individuals' freedoms and liberties, and less drastic than the severe criminal sanction.

Furthermore, favoring the concept of liberty as dignity over the competing concept of communitarian virtue as dignity also requires rejecting paternalism as a justification for criminalization. The aforementioned rule adopts John Stuart Mill's famous articulation of the harm principle, stating 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. His own good, either physical or moral, is not a sufficient warrant."[219]

Mill's statement further sharpens the role of paternalism in criminalizing consensual conducts, inflicting only harm to self but not to

---

[217]. *Id.* at 197; *see* Erik Luna, *Principled Enforcement of Penal Codes,* 4 BUFF. CRIM. L. REV. 515, 521-22 (2000).

[218]. *See* HUSAK, *supra* note 4, at 96-98.

[219]. *See* JOHN STUART MILL, ON LIBERTY 68 (Gertrude Himmelfarb ed., Penguin Books 1974) (1859).

others. Paternalism is the intervention in an individual's personal freedoms aimed at furthering his own good, as opposed to another's well-being.[220] Scholars distinguish "hard" or "strong" from "soft" or "weak" paternalism, with the latter involving the restriction of an individual's self-regarding conduct where the conduct is not substantially voluntary, and the former the restriction of an individual's self-regarding conduct where the conduct is substantially voluntary.[221]

Legal theorist Joel Feinberg categorically rejects the use of legal paternalism as a justification for criminalization, arguing that "a person's right of self-determination, being sovereign, takes precedence even over his own good."[222] Feinberg rejects the alternative that "we must balance the person's right against his good and weigh them," contending that "paternalistic reasons never have any weight on the scales at all."[223] Other scholars assert that circumstances exist under which the need to protect individuals from harming themselves outweighs their autonomous freedom of choice to do so.[224] For example, legal theorist R.A. Duff asserts that in certain circumstances it is legally justified to criminalize conduct that denies or radically fails to respect the humanity of those against or on whom they are perpetrated, even if this involves infringing on individuals' autonomy, and even if such criminalization is not justified under the harm to others principle.[225] The role of legal paternalism carries practical implications that go beyond this theoretical debate; recall that current laws refuse to adopt Mill's and Feinberg's categorical rejection of legal paternalism. As described earlier, existing prohibitions on victimless conducts essentially rely on paternalistic justifications to uphold crimes that inflict no direct harm to others.[226]

The above primary rule generally rejects paternalism as a justification for criminal prohibitions on victimless crimes. It holds that criminalization is unwarranted when individuals engage in consensual activities that inflict no harm on others, because such paternalism imposes majoritarian moral preferences and prevailing views concerning morality on society at large, therefore limiting individuals' liberty to make their own choices about how best to live their lives.

Another explanation supporting the proposed rule rests with grounding human dignity as a constitutional right, which is embodied in the U.S.

---

220. *See* Eyal Zamir, *The Efficiency of Paternalism*, 84 VA. L. REV. 229, 236 (1998).

221. *See* Thaddeus Mason Pope, *Counting the Dragon's Teeth and Claws: The Definition of Hard Paternalism*, 20 GA. ST. U. L. REV. 659, 661-62 (2004).

222. *See* FEINBERG, *supra* note 43, at 61.

223. *Id.* at 26.

224. *See, e.g.*, R.A. Duff, *Harms and Wrongs*, 5 BUFF. CRIM. L. REV. 13 (2001).

225. *See id.* at 26-27.

226. *See supra* Part I; *see also infra* Part III.

Constitution.[227] Adopting the paternalistic view that the state is obligated to intervene and restrict individual free choices in order to promote a sweeping view of communitarian norms and societal values is deeply antithetical to American constitutionalism. Arguably, one of the purposes of the U.S. Constitution is to *secure individual personal rights,* and human dignity is indeed such a right. The Declaration of Independence and Bill of Rights protect individual liberties of free choice on private matters by providing rights considered to be inviolable. These values and principles represent the core of the nation's founding ideology, rejecting excessive government interference guided by majoritarian views that impose their moral beliefs on others.[228]

Scholars have identified a list of constitutional rights enumerated in the U.S. Constitution.[229] These include eight categories of constitutional rights, which the Supreme Court has invoked and which are part of the Bill of Rights: Fourteenth Amendment substantive due process claims; Fourteenth Amendment equal protection claims; Fifth Amendment self-incrimination claims; Fourth Amendment search and seizure claims; Eighth Amendment cruel and unusual punishment claims; Fourteenth Amendment right to die claims; Fourteenth Amendment procedural due process claims; and First Amendment freedom of expression claims.[230]

Privileging values such as liberty, freedom, individualism and autonomy over advancing societal or communitarian values and rights, the U.S. Constitution is not simply aimed at promoting communitarian values and societal interests. Rather, one of its important goals is securing personal individual rights. Commentators have long suggested that the notion of human dignity may play a significant part in the context of substantive criminal law.[231] Markus Dubber, for example, argues that the government's important role in protecting individual rights suggests an obligation towards its citizens to refrain from violating their right to human dignity.[232] Dubber further contends that the government is unjustified in criminalizing an activity that infringes on individuals' right to engage in behavior they see fit, provided that they do not harm anyone but themselves.[233] Moreover, he posits that criminal harm is harm to a person, not a community, and that in light of this individual account of constitutional human rights, conduct that

---

227. *See* Dworkin, *supra* note 109, at 24, 26; *see also* RONALD DWORKIN, JUSTICE FOR HEDGEHOGS 191-218, 255-75 (2011).

228. *See* Michael Anthony Lawrence, *Reviving a Natural Right: The Freedom of Autonomy*, 42 WILLAMETTE L. REV. 123, 136 (2006).

229. *See* Goodman, *supra* note 107, at 757.

230. *Id.* at 757.

231. *See* David A. J. Richards, *Human Rights and the Moral Foundations of the Substantive Criminal Law*, 13 GA. L. REV. 1395 (1979).

232. *See* Dubber, *supra* note 6, at 515-17, 568-69.

233. *Id.* at 568.

qualifies as harmless cannot be criminalized in a constitutional regime of criminal law.[234]

While privileging individual freedoms is typically associated with a Kantian liberal account, it is not necessarily inconsistent with a communitarian virtue account. Indeed, the pursuit of liberty, freedom, privacy and autonomy are fundamental American values, and the promise of "liberty and justice for all," embodied in the Constitution, ought to result in privileging the right to consent to harming oneself.[235]

Second, privileging the concept of liberty as dignity is justified on the grounds that it secures a negative right, while the competing concept of communitarian virtue as dignity promotes positive rights, which are generally foreign to the U.S. Constitution. Indeed, the vast majority of rights enumerated in the Constitution are viewed as negative.[236] A negative approach to human dignity requires the state to *refrain* from interfering with individuals' exercise of their liberties and freedoms as long as individuals do not inflict harm on others by violating their interests.[237] A constitutional regime grounded in a negative rights approach embraces a non-interference norm as the rule, requiring the government to abstain from intervening in individuals' autonomy concerning their life choices (as opposed to requiring the government to intervene in promoting their well-being).[238]

In a recent empirical study, David Law and Mila Versteeg examined the globalization of constitutional law and compared constitutions around the world. The study identified several types of rights; the first list consists of "first-generation," negative, civil/political rights.[239] These include the right to life; the prohibitions of torture, arbitrary arrest and detention; freedom of movement; the right not to be expelled; Habeas corpus; the presumption of innocence; the right to appeal; the prohibition of ex post facto laws; the rights to public trial, to remain silent, to counsel, and to judicial review; and the prohibition of the death penalty.[240] A second list consists of "second-generation," positive, socioeconomic rights, including rights such as workers' rights, rights to basic physical needs, the right to adequate standard of living, and rights to food, housing, water, health and education.[241] A third list consists of "third-generation," community/group

---

234. *Id.*

235. *See* 4 U.S.C. § 4 (2006).

236. *See* Rex D. Glensy, *The Right to Dignity*, 43 COLUM. HUM. RTS. L. REV. 65, 120 (2011).

237. David S. Law & Mila Versteeg, *The Evolution and Ideology of Global Constitutionalism*, 99 CALIF. L. REV. 1163, 1224 (2011).

238. *Id.*

239. *Id.* at 1191.

240. *Id.* at 1223.

241. *Id.* at 1193.

rights, such as rights for the elderly and handicapped, women's rights, and rights for the family, children, victims of crimes, and prisoners.[242]

Law and Versteeg suggest that constitutions can be divided across ideological lines. Some are characterized as libertarian, with a focus on limiting the government's ability to deprive individuals of their physical freedom or to inflict bodily harm.[243] This goal is achieved mainly through enshrining the judicial system with extensive authority to protect individuals' liberties and freedoms.[244] Such constitutions represent a common law tradition of negative liberty and are grounded in some form of negative restriction on government power, creating a space of private autonomy and liberty with which the government may not interfere.[245]

In sharp contrast, Law and Versteeg argue that the second type of constitutions is statist in nature, providing the state with a broad range of powers and positive responsibilities.[246] These constitutions empower, or even obligate, the government to provide for the welfare of its citizens, adopting a far more active role for the state. Law and Versteeg further argue that while libertarian constitutions are premised on the goal of protecting individual liberties and freedoms against the tyranny of government, they rest on the premise that the government's role is promoting the welfare of society as a whole.[247] The comparative analysis also found that liberal constitutions are characteristic of democratic regimes with a common law tradition, while statist constitutions typically characterize undemocratic regimes with a civil law tradition.[248] Such analysis further confirms that the U.S. Constitution represents the classical liberal Constitution, one that adopts negative restriction on state power, focusing on limiting or preventing actions against the individual by the state.[249]

The above study supports the proposition that the concept of liberty as dignity should generally outweigh the competing concept of communitarian virtue as dignity. As a libertarian constitution, the U.S. Constitution explicitly privileges a negative approach that favors a non-interference duty on the government.[250] Viewed through this lens, the U.S. Constitution is therefore more compatible with the concept of liberty and autonomy as dignity than with the contrasting view of communitarian virtue as dignity.

---

242. *Id.*
243. *Id.* at 1170.
244. *Id.* at 1170, 1224.
245. *Id.*
246. *Id.* at 1170.
247. *Id.* at 1225.
248. *Id.* at 1226-29.
249. *Id.* at 1224.
250. *See* Glensy, *supra* note 236, at 120-21.

B. Circumstances Where Communitarian Virtue Prevails

Adopting a position that individuals are free to harm themselves under all circumstances is an unwarranted and overbroad legal change. Since no rule is absolute, clear boundaries must be set between individuals' right to harm themselves and the state's interest in limiting this right to promote fundamental societal values. The above primary rule, which rejects a "hard" form of communitarian virtue as dignity, leaves open the question of whether there ought to be some narrowly defined circumstances in which some "weaker" form of communitarian virtue as dignity outweighs individuals' autonomous choices to engage in activities that harm themselves.

The proposed secondary rule advocates a more nuanced account of communitarian values, one that recognizes the autonomous right of individuals to engage in consensual activities that may harm themselves, while at the same time adopting a legal boundary to limit such a choice where specific forms of risk are identified. This approach recognizes that there are competing values that directly clash with individuals' right to enjoy fundamental liberties and exercise autonomous choices. It further recognizes that these competing values ought to be weighed and properly balanced against each other in specific categories of cases. This balancing act results in acknowledging that in certain circumstances, the law ought to intervene by placing some constraints on the lives of individuals whose choices might endanger their other fundamental rights.

A balancing test that weighs individuals' liberty rights against competing societal interests is a common component in many foreign constitutional schemes.[251] Constitutional balance typically adopts a proportionality review in which the main mechanism is a means-end analysis.[252] For example, the Canadian balancing test provides that:

> First, the measures adopted must be carefully designed to achieve the objective in question. They must not be arbitrary, unfair or based on irrational considerations. In short, they must be rationally connected to the objective. Second, the means, even if rationally connected to the objective in this first sense, should impair "as little as possible" the right or freedom in question. Third, there must be a proportionality between the effects of the measures which are responsible for limiting the Charter right or

---

[251]. *See* Neomi Rao, *On the Use and Abuse of Dignity in Constitutional Law*, 14 COLUM. J. EUR. L. 201, 232-33 (2008).

[252]. *See* David S. Law, *Generic Constitutional Law*, 89 MINN. L. REV. 652, 697 (2005).

> freedom, and the objective which has been identified as of "sufficient importance."[253]

The law must define under what narrow circumstances the right to autonomy and liberty should be balanced against competing fundamental rights. The circumstances under which communitarian virtue as dignity outweighs liberty as dignity include two types. The first type embodies situations in which the fundamental premise underlying the right to choose freely is absent, namely, when individuals lack the capacity for making free choices. These individuals mainly include minors and others whose capacity to choose is significantly impaired due to a physical or mental condition.[254] The second type includes activities that significantly endanger inalienable rights, namely, the right to life and to bodily integrity, including protection against serious life-threatening or permanent injuries.[255]

C. Impaired Capacity to Exercise Autonomy

One type of circumstance that justifies limiting individuals' liberty is impaired capacity to exercise autonomous choices.[256] Indeed, a prerequisite for exercising the right to liberty is the capacity to enjoy it. Recall that the Kantian ideas of liberty and dignity hold that individuals have the right to direct their own lives and a duty to respect others by not interfering with their choices.[257] However, this vision is premised on the assumption that all individuals are free, equal, self-governing agents who make free choices and have the full capacity to do so.[258]

In the case of children or incompetent individuals, however, the entire justification for this broad view of autonomy collapses. Those individuals with diminished capacities need the law's protection from making choices that would harm them.[259] While the purpose of liberalism is to allow individuals to exercise their moral and rational powers, it also requires that they possess those powers to some minimum degree.[260]

---

253. *See* R. v. Oakes, [1986] 1 S.C.R. 103, 105-06 (Can.).

254. *See* DOUGLAS HUSAK, DRUGS AND RIGHTS 90-117 (1992).

255. *Id.* at 100-17.

256. *See* Richard C. Boldt, *The Construction of Responsibility in the Criminal Law*, 140 U. PENN. L. REV. 2245, 2307 (1992); Richard J. Bonnie, *The Virtues of Pragmatism in Drug Policy*, 13 J. HEALTH CARE L. & POL'Y 7, 21-22 (2010).

257. *See* Koppelman, *supra* note 78, at 284.

258. *See* Samuel Freeman, *Liberalism, Inalienability, and Rights of Drug Use, in* DRUGS AND THE LIMITS OF LIBERALISM: MORAL AND LEGAL ISSUES 110, 117-118 (Pablo De Greiff ed., 1999).

259. *Id.*

260. *Id.*

What, then, should the standard be for determining that specific individuals have impaired or diminished capacities to harm themselves? The answer depends on how broadly diminished capacity is defined, and on the stringency of the requirements for determining lack of capacity. In cases of drug addiction, it is unclear whether such addiction qualifies as a condition that completely deprives addicts of the capacity to exercise autonomous choices.[261] The Article revisits this question in Section IV.

C. Endangering the Right to Life

Another circumstance which warrants communitarian virtue as dignity outweighing liberty as dignity concerns activities that pose significant risks to life and bodily integrity. The right to life is one of the most fundamental constitutional rights, grounded in the Fifth and Fourteenth Amendments.[262] While negative rights, such as criminal procedure rights, require the government to *refrain* from taking certain forms of actions, the right to life and bodily integrity requires the government and its citizens both to refrain from taking actions that would significantly endanger one's inalienable right to life and bodily integrity and to take affirmative actions to ensure that this right is properly secured.

While the right to life is one of the most basic human rights, invoking it in American jurisprudence is often associated with the controversy over abortion,[263] a rhetorical link that obfuscates the centrality of the latter as a fundamental general human right, irrespective and independent of the abortion context. Furthermore, this link often results in failing to consider the general implications of the right to life in other contexts, such as the criminal law. One notable example of the significance of the right to life is found in the context of international law, where this right is considered fundamental. [264] Numerous international documents, declarations, and treaties state that every person has an inalienable right to life, liberty, and privacy, which are crucial components of happiness and well-being.[265]

The following discussion adopts the position that the right to life is a fundamental human right.[266] The importance of the right to life makes it the

---

261. *See* HUSAK, *supra* note 254, at 100-17.

262. *See* U.S. CONST. amend. V; U.S. CONST. amend. XIV § 1.

263. Roe v. Wade, 410 U.S. 113 (1973)*; see also* Raymond B. Marcin, *God's Littlest Children and the Right to Live: The Case for a Positivist Pro-Life Overturning of* Roe*,* 25 J. CONTEMP. HEALTH L. & POL'Y 38 (2008).

264. *See* Alexander Tsesis, *Self-Government and the Declaration of Independence*, 97 CORNELL L. REV. 693, 697 (2012).

265. *See* THE RIGHT TO LIFE IN INTERNATIONAL LAW (Bertrand G. Ramcharan ed., 1985); *see also* Paolo G. Carozza, *"My Friend is a Stranger": The Death Penalty and the Global Commune of Human Rights*, 81 TEX. L. REV. 1031 (2003).

266. This Article takes no position on the scope and contours of the right to life in the

focal point of the proposed rule under which activities that significantly endanger the right to life and bodily integrity ought to remain criminally prohibited, even when engaged in by consenting individuals. The proposed balancing test requires privileging the state's need to protect the right to life and bodily integrity over the competing value of liberty and dignity rights to exercise autonomous choices, thus drawing a reasonable boundary between justified and unjustified criminalization. While the primary rule prohibits the state from criminalizing consensual activities that would violate liberty and dignity rights, the secondary rule allows for only those activities that put the right to life or bodily integrity in significant danger to be criminalized.

In light of this narrow caveat to the general right to liberty and autonomy, the proposed rule passes the proportionality review noted earlier. Indeed, the continued criminalization of life threatening activities is designed to secure the right to life and bodily integrity. Since criminalization is confined only to activities that risk this right, the rules preserve the right to liberty and offer a proportionality between the effects of criminalization and the fundamental right to life. Moreover, the government's requirement to protect the right to life and bodily integrity relies on a "softer" or "weaker" version of communitarian virtue as dignity. As every civilized society cherishes the value of human life, it is required to uphold it. This rationale provides the justification for society's coercive intervention, in the form of criminal regulation, to prevent individuals from engaging in dangerous activities that risk the right to life and bodily integrity.

D. Distinguishing Between Different Types of Dangerous Activities

One potential critique of the proposed rules is that they are unable to draw clear conceptual boundaries between illegal and permissible types of activities that endanger the right to life and bodily integrity. Given the range of risky activities, which endanger lives but are perfectly legal, why should the law selectively criminalize certain of these activities while allowing other equally dangerous ones?

Answering this question rests on capturing the fundamental differences between permissible and criminally risky activities. One possible distinction is that prohibited activities are more dangerous than their legal

---

abortion context, specifically concerning the question of whether a fetus is considered a "person" under the Fourteenth Amendment. The Article focuses solely on the implications of human dignity jurisprudence in the context of consensual activities between adults, addressing the constitutional right to life only as it pertains to existing criminal prohibitions on victimless crimes.

counterparts.[267] Under this reasoning, the principle of autonomy protects the right to engage in dangerous activities unless the risk exceeds a certain threshold, at which point the protection afforded by the principle of autonomy is outweighed by the need to prevent individuals from harming themselves.[268] Take, for example, the ancient practice of gladiators fighting to the death. The main purpose of the game—killing the opponent—is what justifies the prohibition on such fights. In contrast, while harm is also likely to occur in sports such as boxing, harm is simply incidental to the game, which accounts for its legality. One drawback to this distinction is that it requires the adoption of a test to determine how to define this threshold of risk as well as which risky activities exceed that threshold.

Another factor that distinguishes between different types of dangerous activities is the relative importance of the activity in question.[269] Ostensibly, important risky activities deserve the protection of autonomy while unimportant ones do not. For example, engaging in competitive sports is significant to peoples' lives, and thus ought to be protected by autonomy, even if it carries some risks to the players. Another related factor is that legal activities cause a net balance of utility, whereas prohibited activities do not.[270] Claiming that the benefits of engaging in competitive sports outweigh the risks to the players is not an objective determination but one that requires a normative evaluation, which is contingent on non-neutral moral judgments about societal values. While boxing, football and other risky sports pose significant risks to human life and bodily integrity, they are nonetheless highly regulated activities, which are performed in closely-supervised environments under strict rules and regulations. In contrast, illegal dangerous activities, such as using recreational drugs, are performed in unsupervised, unregulated private settings, which make alternative forms of regulation impossible. Therefore, engaging in life-threatening activities in unregulated settings justifies the state's criminal regulation of these activities to secure the fundamental right life and bodily integrity.

E. Constitutional Implications

Recall that currently, substantive criminal law survives constitutional scrutiny.[271] While courts apply the strict scrutiny test to evaluate the constitutionality of laws implicating fundamental rights such as free speech, criminal prohibitions are perceived as implicating only non-fundamental rights; therefore, courts assess their constitutionality under the rational basis

---

267. *See* HUSAK, *supra* note 254, at 94-100.

268. *Id.* at 90-100.

269. *Id.* at 98.

270. *See* Cheryl Hanna, *Sex is Not a Sport: Consent and Violence in Criminal Law*, 42 B.C. L. REV. 239, 249-50 (2001).

271. *See supra* Part I.C.

test under which the state only needs to show a conceivable legitimate purpose to enact the law in question, allowing most criminal prohibitions to pass constitutional scrutiny.[272]

Several scholars have suggested that individuals have a constitutional right against excessive punishment. Douglas Husak, for example, suggests that all criminal prohibitions implicate the fundamental right *not* to be punished, and that all criminal laws ought to be assessed against the intermediate scrutiny standard of judicial review.[273] Under Husak's proposal, the state must show that the law in question aims at a substantial state interest, directly advances that interest, and is no more extensive than necessary to achieve this objective.[274] While subjecting all criminal prohibitions to the intermediate level of judicial scrutiny may be viewed as a welcome direction in limiting the scope of criminalization, it defines the right in question—a general right not to be punished—too broadly, making the proposal too radical.

In contrast, the aforementioned rules define the right in question more narrowly, applying the proposal only in the limited context of victimless crimes, thus arguably making the application of the heightened standard of judicial review potentially less objectionable. The proposal's key idea is to base the right to engage in consensual conducts that do not inflict harm on third parties on the right to dignity as liberty and autonomy. Conceding that the right to dignity is a fundamental right ought to result in subjecting all criminal prohibitions that limit this right to a heightened standard of judicial review rather than to the current deferential rational basis test.

To survive the more stringent intermediate standard of judicial review, the state would need to demonstrate that criminal prohibitions on victimless crimes are aimed at substantial state interests, that they advance those interests, and that criminalization is not more extensive than necessary to achieve the substantial state interest.[275] Balancing between individuals' right to liberty as dignity and the competing state interest to criminalize behaviors inflicting only harm to self would result in striking down criminal prohibitions in those categories of cases that do not significantly endanger individuals' right to life or bodily integrity.

IV. APPLYING THE PROPOSAL TO RECREATIONAL DRUG PROHIBITIONS

The following section focuses on one notable implication of the above theory by applying the proposed rules to recreational drug prohibitions.

---

272. *See* HUSAK, *supra* note 4, at 123-25.
273. *See id.* at 123-28.
274. *See id.* at 132-53.
275. *See id.*

A. Why Drug Crimes?

Why should a proposal to limit the scope of victimless crimes specifically aim at drug crimes rather than at other types of victimless crimes such as prostitution or gambling? Scholars criticizing the problem of overcriminalization in general, and the unjustified criminalization of victimless crimes in particular, often provide examples of obsolete criminal statutes, which demonstrate remnants of legal moralism that are unwarranted in a post-*Lawrence* era.[276] Sara Sun Beale, for example, notes that despite the contemporary approach that sexual morality ought to remain beyond the scope of criminal regulation, a large number of states still criminalize fornication and adultery, and most states criminalize prostitution.[277] However, these offenses are rarely enforced and represent a miniscule percentage of cases that reach the criminal justice system.[278]

In sharp contrast, the most notable victimless offenses—drug crimes—account for an enormous number of criminal convictions and incarcerated individuals in the country's overcrowded prisons.[279] Furthermore, the use of "soft" drugs such as marijuana is prevalent among many Americans, turning all users into potential criminals.[280] According to estimates, while over 700,000 people are arrested every year for marijuana possession, over 100 million Americans actually use the drug.[281] This is a troubling finding, given that the prevalence of drug use increasingly expands the coercive powers and authorities of the government, in excess to measures used outside the drugs context.[282] In practical terms, this expansion means more stops and arrests, more invasions of privacy in the form of home searches, and more intrusive bodily searches and pat downs.[283] Scholars contend that the expansive "war on drugs" has resulted in "drugs exceptionalism", under which the enforcement of drug crimes often precludes the protection of the same defendants' rights regularly granted to other offenders.[284] Moreover, drug laws carry a notably disparate impact on racial and national minorities, groups who are most affected by the continued criminalization of drugs.[285]

In light of this reality, focusing on recreational drug prohibitions as paradigmatic examples of victimless crime rests on the premise that a change in substantive drug laws would have a dramatic impact on the

---

276. *See* Strader, *supra* note 21.
277. *See* Beale, *supra* note 3.
278. *See id.* at 756-57.
279. *See* HUSAK, *supra* note 4, at 16.
280. *See id.* at 29.
281. *See* Blumenson & Nilsen, *supra* note 65; Blumenson & Nilsen, *supra* note 73.
282. *See* Eric Luna, *Drug Exceptionalism*, 47 VILL. L. REV. 753 (2002).
283. *See* Yankah, *supra* note 67, at 8.
284. *See* Luna, *supra* note 3.
285. *See* HUSAK, *supra* note 4, at 16.

criminal justice system, including significant decreases both in criminal convictions as well as in the country's prison population. The following discussion argues that applying the proposed rules in the drug context would have the greatest effect on the criminal justice system by significantly limiting criminalization.

B. A Consequentialist Critique of Drug Prohibition

The increasing dissatisfaction of scholars, policy makers, and the public at large with the government's continuous "war on drugs" in the last forty years has resulted in voluminous writings concerning the numerous drawbacks in criminalizing the use and possession of recreational drugs, mainly marijuana.[286] However, the focus of this growing critique is typically not grounded in libertarian theories concerning individuals' rights and autonomous choices to use recreational drugs, but rather in the dominant paradigms of consequentialist accounts of drug prohibitions, namely, in a cost/benefit analysis as the main justification for decriminalizing drug use and possession.[287]

While the prohibition against the recreational use of drugs has historically been linked to moral reprobation, infused with racial and ethnic overtones, the most prevalent arguments raised today against drug prohibitions rest on the utilitarian law and economic critique.[288] Arguably, in sharp contrast to other areas involving victimless crimes, such as the criminal regulation of sexual practices including same-sex sexual relationships, where normative, rights-based claims have been made to reject criminal bans on private consensual conducts, much less focus has been devoted to such arguments in the context of drug laws.

In light of the prevalence of utilitarian harm arguments in American jurisprudence, modern proponents of the continued criminalization of recreational drugs do not ground their support for drug prohibitions on moral justifications.[289] Instead, they rely on harm-based arguments to advocate a blanket prohibition of all types of drugs.[290] The common reasons

---

[286]. *See, e.g.*, DAVID BOYUM & PETER REUTER, AN ANALYTIC ASSESSMENT OF U.S. DRUG POLICY (2005); MARK A. R. KLEIMAN, AGAINST EXCESS: DRUG POLICY FOR RESULTS (1992); ROBERT J. MACCOUN & PETER REUTER, DRUG WAR HERESIES: LEARNING FROM OTHER VICES, TIMES, AND PLACES 24-25 (2001).

[287]. *See* Koppelman, *supra* note 78.

[288]. *See generally* Richard A. Posner, *An Economic Theory of the Criminal Law*, 85 COLUM. L. REV. 1193 (1985) (contending that criminal sanctions, particularly when they take the form of imprisonment or death, are costly, yet they appear to be the optimal method of deterring most pure coercive transactions).

[289]. *See generally* DOUGLAS HUSAK & PETER DE MARNEFFE, THE LEGALIZATION OF DRUGS 109-31 (2005).

[290]. *See* OFFICE OF NAT'L DRUG CONTROL POLICY, EXEC. OFFICE OF THE PRESIDENT,

used to justify such a prohibition include the harmful impact of drugs on one's health,[291] the need to protect children from the harmful effects of drugs,[292] the prevalence of drug-related crimes, and the argument that "soft" drugs lead to "hard" ones.[293] Moreover, to strengthen their position, proponents of prohibition advance economic-based justifications to criminalize drug use, contending that it places heavy burdens and financial costs on society.[294]

Opponents contend that scientific evidence raises significant doubts regarding the harms of soft drugs, such as marijuana.[295] As well, legal drugs—predominantly alcohol—can be more harmful than marijuana and yet are not criminalized.[296] Furthermore, some soft drug use is thought to be less dangerous than a wide array of other harmful but legal activities, such as contact sports.[297] Critics also reject the asserted link between drugs and crime, contending that the amount of systemic crime would be reduced by decriminalization; that many economic crimes are caused not by drugs themselves but by drug prohibitions; that criminalization is not an effective way to reduce economic crimes; and that research does not support the claim that drug use encourages violent behavior.[298]

C. Deontological Critique of Drug Prohibition

In their focus on the enormous financial costs that the "war on drugs" put on the criminal justice system, scholars criticizing drug prohibition sometimes fail to fully consider a normative rights-based perspective.[299] Political and philosophical theorists, however, contend that drug laws are inherently suspect from a liberal perspective: in a free society, individuals should be allowed to make their own choices about using harmful substances without government intervention, and the onus is placed on the government to justify the interference with this personal liberty.[300]

NATIONAL DRUG CONTROL STRATEGY iii (2010).

[291]. *See* HUSAK & DE MARNEFFE, *supra* note 289, at 41-53.

[292]. *Id.* at 53-64.

[293]. *Id.* at 64-71; *see* David Garland, *Criminology, Crime Control, and "The American Difference*,*"* 69 U. COLO. L. REV. 1137, 1142 (1998).

[294]. *See* Dan M. Kahan, *The Cognitively Illiberal State*, 60 STAN. L. REV. 115, 132-33 (2007).

[295]. *See* MITCH EARLEYWINE, UNDERSTANDING MARIJUANA: A NEW LOOK AT THE SCIENTIFIC EVIDENCE 143-44 (Oxford Univ. Press 2002).

[296]. *See* HUSAK & DE MARNEFFE, *supra* note 289, at 42-53.

[297]. *Id.* at 42-53.

[298]. *Id.* at 67-71.

[299]. *See* Koppelman, *supra* note 78, at 281-82.

[300]. *See* HUSAK & DE MARNEFFE, *supra* note 289, at 84-95.

Joel Feinberg, David A.J. Richards, Douglas Husak and Michael Moore are among the most prominent theorists advocating for the decriminalization of drugs, based on the theory that liberalism is committed to protecting individuals' rights to use recreational drugs.[301] These liberal theorists and others contend that in light of ample scientific doubts regarding the harmful effects of drugs, the presumption of freedom ought to prevail since the evidentiary burden of proof lies with the state.[302]

In his landmark book, David A.J. Richards contends that a liberal-based criminal justice system is premised on an autonomy-based concept, requiring the state to respect individuals' ability to determine the meaning of their lives.[303] Richards argues that one's right to autonomous choice requires that the state refrain from criminalizing drug use as a means to enforce some choices over others.[304] Douglas Husak advocates for the decriminalization of all types of drug use and possession. He reframes the core question in the debate as to whether the use of a given drug should be criminalized, rather than whether drug use should be decriminalized.[305] Moreover, Husak contends that no good argument in favor of criminalizing drug use has yet been made to justify criminalization.[306]

Michael Moore further provides a strong argument against the criminalization of taking recreational drugs based on individuals' right to liberty. He contends that a legislator may criminalize only that which he may condemn as morally wrong, and generally speaking, there is no breach of any moral obligation in taking recreational drugs.[307] Moore further argues that since criminalization demands punishment, those who do no wrong cannot be punished, therefore drug taking, as a self-defining choice, should be protected by the basic right to liberty.[308]

While these types of arguments are well known, they have not taken hold among legislatures, which has consequently resulted in a failure to promote fundamental changes in existing drug laws.[309] Moreover, despite a

---

[301]. *See* Freeman, *supra* note 258, at 114-15.

[302]. *See* Kahan, *supra* note 294, at 132-33.

[303]. *See* DAVID A. J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW: AN ESSAY ON HUMAN RIGHTS AND OVERCRIMINALIZATION 172 (1982).

[304]. *Id*. at 169-73.

[305]. *See, e.g.*, HUSAK, *supra* note 254; HUSAK & DE MARNEFFE, *supra* note 289; Douglas Husak, *Predicting the Future: A Bad Reason to Criminalize Drug Use,* 2009 UTAH L. REV. 105, 105-06 (2009).

[306]. *See* Husak, *Predicting the Future*, *supra* note 305, at 105.

[307]. *See* MOORE, *supra* note 86, at 792. Moore acknowledges, however, one exception to his objection to criminalizing recreational drug taking: the obligation not to commit moral suicide, which translates into the obligation not to take drugs regularly enough that people lose their moral personality. *Id.* at 793.

[308]. *Id.* at 792, 794.

[309]. *See* Michael M. O'Hear, *Federalism and Drug Control*, 57 VAND. L. REV. 783, 802-03 (2004).

growing trend showing increasing support for the decriminalization of marijuana,[310] arguably no comprehensive change has occurred yet in societal attitudes toward drug use in general—and marijuana use in particular—as significant parts of the public continue to support criminal prohibitions on all types of drugs, including marijuana.[311]

D. Applying the Proposed Rules

One reason that may account for the failure to promote fundamental change in American drug laws is the lack of a theoretical agreement among different communities about the appropriate legal line to draw between different types of recreational drugs. This view further suggests that the criminal law ought to consider a middle ground between individuals' liberty rights and fundamental societal values and interests. This middle ground may require some points of agreement among competing philosophical theories. Ekow Yankah, for example, contends that the decriminalization of marijuana is practically possible because advocates of decriminalization can theoretically agree on a philosophical starting point, ideally resulting in consensus between liberals and non-liberals.[312] For liberals, the criminalization of marijuana is unjustified because it interferes with one's freedom and autonomy.[313] For virtue-based theorists, the criminalization of marijuana is unjustified because it results in diminishing society's well-being, therefore weakening, rather than fostering a virtuous society.[314]

The following section carves out clear distinctions between different types of drugs and different types of drug-related activities. A main feature of current drug laws is their all-encompassing prohibition, a position that fails to appreciate the sharp distinctions between fundamentally distinct types of drugs based on their varying effects. Recall that under current drug laws, offenders are incarcerated for possession and use of all types of drugs, including marijuana.[315] While a growing number of states allow personal use of marijuana with a doctor's recommendation, and many local jurisdictions have relaxed their penalties for marijuana use and possession of small amounts of this drug, the complete decriminalization of marijuana

---

[310]. *See* Joseph Carroll, *Who Supports Marijuana Legalization?*, GALLUP (Nov. 1, 2005), *available at* http://www.gallup.com/poll/19561/Who-Supports-Marijuana-Legalization. aspx.

[311]. *See In the States*, N.Y. TIMES, http://elections.nytimes.com/2012/in-the-states (last visited Feb. 6, 2013). While Washington State and Colorado have recently legalized the possession of up to 1 ounce of marijuana, voters in other states, such as Oregon, rejected similar measures proposed in recent ballots. *Id.*

[312]. *See* Yankah, *supra* note 67.

[313]. *See id.* at 4, 12-14.

[314]. *See id.* at 17-19.

[315]. *See* HUSAK, *supra* note 4, at 29.

has not taken place at the federal level, and only two states currently legalize the possession, for recreational purposes, of less than one ounce of marijuana.[316]

1. Distinguishing "Soft" Drugs from "Hard" Drugs

The distinction between different types of drugs in American drug laws rests on classifying all drugs into five schedules, depending on the combination of three factors: their medicinal value, potential for abuse and psychological and physical effects.[317] This classification does not recognize a distinction between "soft" and "hard" drugs. For example, the Controlled Substances Act places both marijuana and heroin under Schedule I, the most severely restricted category, as drugs that have a high potential for abuse and no recognized medical use, while cocaine is designated as a Schedule II substance.[318]

Commentators have long criticized the Controlled Substances Act's classification method[319]: William Stuntz, for example, has suggested a distinction between "serious" and "less serious" drug offenses, based not only on the nature of the crime—distribution versus possession—but also by the seriousness of the drug itself, which means distinguishing marijuana and similarly 'soft' drugs from 'hard' drugs like cocaine or heroin.[320] However, such proposals for alternative methods of distinguishing between different types of drugs based on their relative harmful effects have generally failed to take hold among legislatures and, more specifically, Congress has rejected proposals to reschedule marijuana.[321]

In contrast with American drug laws, foreign countries such as the Netherlands differentiate between drugs based on their potential harm.[322] The proposed rules advocate this distinction, under which "soft" drugs include all products of the cannabis plant, including not only marijuana but

---

316. *See* Richard Boldt, *Drug Policy in Context: Rhetoric and Practice in the United States and in the United Kingdom*, 62 S.C. L. REV. 261, 339-48 (2010); *see also In the States*, *supra* note 311.

317. *See* Comprehensive Drug Abuse Prevention and Control Act of 1970, Pub. L. No. 91-513, 84 Stat. 1236 (1970) (codified as amended at 21 U.S.C. §§ 801-971).

318. Controlled Substances Act, 21 U.S.C. § 812 (Supp. 2011).

319. *See, e.g.*, Blumenson & Nilsen, *supra* note 73, at 47-59; Robert A. Mikos, *On the Limits of Supremacy: Medical Marijuana and the States' Overlooked Power to Legalize Federal Crime*, 62 VAND. L. REV. 1421, 1433 (2009).

320. *See* William J. Stuntz, *O.J. Simpson, Bill Clinton, and the Transubstantive Fourth Amendment*, 114 HARV. L. REV. 842, 870 (2001).

321. *See* Mikos, *supra* note 319, at 1434.

322. *See* Laura L. Hirschfeld, *Legal Drugs? Not Without Legal Reform: The Impact of Drug Legalization on Employers under Current Theories of Enterprise Liability*, 7 CORNELL J. L. & PUB. POL'Y 757, 773-79 (1998).

also hashish, while "hard" drugs include heroin, cocaine, amphetamines, and other chemically produced recreational drugs.

The above line-drawing is based on the fundamental distinction between decriminalization of recreational drugs and their legalization.[323] Decriminalization entails abolishing criminal prohibitions on using and possessing recreational drugs.[324] Legalization, however, involves not merely lifting prohibitory bans on drug use but also abolishing the prohibitions on the production and sale of drugs.[325] Given this distinction, the proposed rules advocate only the decriminalization of victimless crimes but not their legalization, therefore excluding drug trafficking from their scope.

Moreover, the proposed rules are based on individuals' rights to liberty, autonomy and dignity. Freely exercising these rights, which is this Article's main focus, is unrelated to drug trafficking because criminal prohibitions on producing and selling drugs do not violate individuals' autonomous choices to use them. Also, proposals to legalize the production and sale of recreational drugs are based on utilitarian arguments, mainly focusing on the economic gains which legalization would provide in the form of tax revenues. To the contrary, the proposed rules do not advocate for decriminalization based on economics, but instead for advancing a more just criminal justice system by drawing on the value of human dignity.[326]

2. Decriminalizing "Soft" Drugs

A key issue concerning the decriminalization of use and possession of "soft" drugs, based on the concept of liberty as dignity, concerns the question of addiction. Addiction and substance abuse undercut the justification behind decriminalization; drug addicts do not exercise autonomous choices when using drugs, because the addiction effectively controls their lives.[327] Scientific evidence, however, shows that "soft" drugs are not physically addictive, debunking the claim that "soft" drugs impair one's capacity to exercise autonomous choices and advancing the case for decriminalization.[328] Put differently, the limited caveat supporting the government's obligation to secure individuals' right to life or bodily integrity is not demonstrated in the case of use of "soft" drugs.

---

323. *See* HUSAK & DE MARNEFFE, *supra* note 289, at 96.
324. *See id.*
325. *Id.*
326. *See id.* at 97.
327. *See* Koppelman, *supra* note 78, at 285.
328. *See* Blumenson & Nilsen, *supra* note 73, at 65-70.

3. Continued Criminalization of "Hard" Drugs

Advocating for the full decriminalization of use and possession of all types of drugs presents a challenge in light of two factors characterizing "hard" drugs: the significant harms and injuries incurred by users, and the addiction element. Recall that the secondary proposed rule, serving as a limiting caveat to the primary one, advocates for the continued criminalization of victimless crimes only when certain activities are exercised by individuals whose capacity to make autonomous choices is impaired or when the activities in question significantly endanger the right to life or bodily integrity. "Hard" drugs present the paradigmatic case where these two features are present, which justifies the application of the caveat—they are both extremely dangerous, significantly putting individuals' right to life at risk, and highly addictive, thus undermining the justification of protecting individuals' autonomous choices.

The abuse of "hard" drugs not only poses health risks, but also creates a significant risk of death. For example, injecting heroin is a particularly common route of administration among heroin users, and can contribute to the clogging of the blood vessels that lead to the lungs, liver, kidneys, and brain.[329] Moreover, repeated intravenous injections can cause vascular sclerosis and lead the injectors to inject subcutaneously or intramuscularly, resulting in a series of infections, which may become lethal.[330] HIV and other types of infections, such as hepatitis, along with depression of the immune system, are also serious concerns among injection drug users.[331] As well, cocaine use presents significant health issues; the cardiovascular system is the system most often adversely affected by cocaine, which increases the risk of coronary artery disease.[332] Studies suggest that cocaine users may often die suddenly as a result of having varying lethal doses of the substance in their systems.[333] While these medical complications may vary depending on the individual, frequency of use, amount of dosage, and prior medical attributes, it is clear that abuse of many "hard" drugs significantly endangers individuals' lives, therefore justifying their continued criminalization.

---

[329]. Nat'l Inst. on Drug Abuse, Pub. No. 05-4165, Research Report Series: Heroin: Abuse and Addiction (2005), *available at* http://www.drugabuse.gov/publications/research-reports/heroin-abuse-addiction; Nat'l Inst. on Drug Abuse, Drug Facts: Heroin (2010), http://www.drugabuse.gov/publications/drugfacts/heroin.

[330]. *See Health Effects of Heroin: Medical Complications*, METHOIDE, http://www.methoide.fcm.arizona.edu/infocenter/index.cfm?stid=214.

[331]. *Id.*

[332]. *Health Effects of Cocaine: Medical Complications*, METHOIDE, http://www.methoide.fcm.arizona.edu/infocenter/index.cfm?stid=212.

[333]. *Id.*

The significant risks of addiction associated with "hard" but not "soft" drugs are another factor supporting the proposed distinction between the two, thus explaining why only criminalization of the former is justified. The implications of the addiction factor are twofold: highly addictive drugs pose risks to bodily integrity and increase the likelihood of drug abuse and overdose, further supporting their continued criminalization. Moreover, in contrast with other risky activities, such as contact sports, recreational drug use is not supervised or regulated through alternative and less intrusive means. One of the notable drawbacks in criminalizing all types of drugs is that except for cases involving proscribed drugs for medicinal purposes, the state cannot effectively regulate or supervise drug use.[334]

Liberal theorists have struggled with the question of whether choosing a life of regular drug use can qualify as a self-defining choice.[335] Legal theorist Michael Moore, for example, contends that recreational drug use ought to be protected by the right to liberty, while a life of total addiction conflicts with one's rationality and autonomy.[336] Samuel Freeman agrees, suggesting that liberalism would permit regulation of only those drugs that "permanently or indefinitely impair our capacities for rational and moral agency."[337] The question of prohibition, then, depends on whether a particular drug is so addictive as to deprive individuals of their abilities to make free autonomous choices.

E. Constitutionality under the Intermediate Scrutiny Standard

Recall that the proposed rules are based on the premise that victimless crimes implicate the fundamental right to dignity and therefore ought to be subjected to heightened constitutional scrutiny.[338] While current drug prohibitions survive constitutional scrutiny under the deferential rational basis review, they are likely to fail to meet the requirements of the more stringent intermediate judicial review standard.[339] In a post-*Lawrence* era, where demonstrating the presence of harm to others is a predicate for criminal prohibitions, states will have a hard time demonstrating that criminalizing the use of "soft" drugs serves a substantial state interest, that the prohibition advances this interest, and that criminalization is not too excessive to accomplish it.

---

334. *See* David M. Jaros, *Perfecting Criminal Markets*, 112 COLUM. L. REV. 1947, 1957 (2012).

335. *See* HUSAK, *supra* note 254, at 100-17.

336. *See* Michael S. Moore, *Liberty and Drugs, in* THE LIMITS OF LIBERALISM 61-109 (Pablo De Greiff ed., 1999).

337. *See* Freeman, *supra* note 258, at 110, 127.

338. *See supra* Part I.C.

339. *See* Blumenson & Nilsen, *supra* note 65.

Under the "substantial state interest" requirement, a state would need to demonstrate that the prohibition of the use of "soft" drugs is designed to reduce a substantial risk and the likelihood of ultimate harm—a requirement that would be hard to meet given the current scientific research indicating that "soft" drugs are not addictive and do not lead to death or other bodily injury.[340] In contrast, even under the intermediate judicial scrutiny standard, the continued criminalization of "hard" drugs will likely survive constitutional scrutiny because states will be able to demonstrate a significant interest in upholding these criminal prohibitions, and consequently reducing substantial risks and the likelihood of ultimate harm.

"Hard" drugs are addictive, increase the likelihood of abuse and overdose, and inflict significant health risks on users, thus justifying criminalization as a means to preserve individuals' rights to life and bodily integrity. Furthermore, the harms of "hard" drugs extend to others because many users resort to criminal activities to feed their habit.[341] Moreover, the risks of "hard" drugs often involve children, who are often neglected by their addicted parent(s).[342] These state interests, in addition to the deterrent effect of criminalization, are sufficiently significant to justify prohibitions on "hard' drugs. Finally, in light of the substantial risks that "hard" drugs pose, criminal prohibitions are not an excessive measure to reduce the likelihood of these risks.

CONCLUSION

While scholars disagree about the legal means that should be employed to accomplish change, few dispute the urgent need for change in the criminal justice system. In light of this reality, the time is ripe for revisiting both substantive criminal law's "hands-off" approach to adopting constitutional constraints on criminal statutes, as well as for reconsidering the role that substantive criminal law may play in limiting the scope of criminalization.

This Article has proposed one mechanism to limit overcriminalization of victimless crimes, particularly drug crimes, by using the notion of human dignity as a constitutional constraint on criminalization. It has demonstrated that the law needs to adopt a balancing test to reconcile conflicting understandings of human dignity and that, in light of the key role that liberty plays in American jurisprudence, the concept of liberty as dignity ought to outweigh the competing interest of communitarian virtue as dignity. The proposed rule requires that the state not interfere with individuals' autonomous free choices regarding how to best live their lives.

---

340. *See* HUSAK, *supra* note 4, at 176.
341. *See* HUSAK & DE MARNEFFE, *supra* note 289, at 111-18.
342. *Id.* at 111-18.

Favoring this concept of dignity further requires the state to decriminalize consensual conducts between adults, even if they inflict harm upon the participants, provided that they are harmless to third parties.

Conceding that no rule is absolute, the Article has identified the limited circumstances under which communitarian virtue as dignity may outweigh individuals' liberty interests, requiring the continued criminalization of consensual activities that pose significant risks to individuals, because the key right to life outweighs individuals' liberty interests in engaging in potentially fatal activities. Adopting such a balancing test should pass constitutional muster under the intermediate scrutiny standard.