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# Constitutionalizing the Harm Principle

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## I Introduction

In this paper, I argue that a constitutionalized Harm Principle could ensure that people are not jailed unless they deserve it. I do not aim to outline every possible type of bad consequence beyond harm that might be sufficiently serious to justify criminalization. Instead, I focus on criminalization that is backed up with jail terms and I argue that wrongful harm to others provides the only moral and constitutional justification for sending people to jail. Imprisonment harms the prisoner, and so she should not be imprisoned unless she has caused proportionate harm to others. I argue that the sufficient conditions for sending an offender to jail are: (1) that the offender's actions have (or risk) bad consequences that are sufficiently harmful to make her commensurately deserving of penal detention; and (2) that the offender culpably (that is, with a state of mind somewhere along the intentional/reckless/gross negligence continuum)<sup>1</sup> chose (aimed or attempted) to bring about those bad consequences or did so with reckless indifference. The lawmaker would need to demonstrate from the *ex ante* perspective that proposed offenses carrying jail sentences are a proportionate and fair way of dealing with the wrongs involved. Because jail (including short sentences of a few days) involves hard treatment (seriously harmful consequences for the prisoner) harm to others would be the only bad consequence of sufficient weight to justify a jail sentence. Jailing people for wrongful

behavior that has harmless consequences would be an unjust and disproportionate response.<sup>2</sup> According to the Harm Principle, harm to others provides a good justification for criminalization when it is likely to be effective in preventing (eliminating, reducing) harm to persons other than the harmdoer.

The question for the purposes of constitutionalizing the Harm Principle is not about what the state may or may not criminalize, but rather it is about when it may legitimately deprive a person of her liberty by means of penal detention. I argue that the Harm Principle should be recognized as a constitutional principle of justice to prevent the government from depriving offenders of their liberty for engaging in harmless wrongdoing. My discussion focuses on the legitimacy of sending people to jail without good reason, rather than on the wider issue of the legitimacy of criminalization. I argue that intentional/reckless/gross negligence harm doing to others provides an objective moral justification for sending a wrongdoer to jail.<sup>3</sup> Jailing a person who harms others can be reconciled with justice and fairness so long as she has caused objective harm and the harm is sufficiently serious to warrant penal detention. I also aim to demonstrate that the courts are equipped to ascertain the harmfulness of conduct for this purpose. Coupled with this, I show that the courts have in the past recognized the proportionality requirement as a constitutional principle of justice and thus could do so in the future with reference to the objective standards supplied by the Harm Principle and moral culpability.

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## II Wrongful Harm as an Objective Justification for Penal Detention

Fairness (or just deserts) in the penal detention context is a deontological constraint. Although the general aim of the criminal law is to deter and prevent wrongdoing to others, deterrence through the communication of censure supplies only a prudential reason for obedience.<sup>4</sup> More importantly, it does not supply an objective (or critical) moral justification for individualized criminalization and punishment. The moral justification for labeling a wrongdoer's actions as criminal and for sending her to jail when her actions have sufficiently harmful consequences is that she deserves to be punished when she wrongfully brings about bad consequences for others. The fact that she and others like her may be deterred from engaging in similar wrongdoing is an instrumental *aim* or *function* of the institution of punishment and criminalization rather than an objective moral justification for it. The instrumental<sup>5</sup> *crime prevention* function of criminalization and punishment is fair and just to the extent that it is necessary to have institutions and mechanisms such as the police, the courts, the criminal law, and prison sentences to protect genuine human interests.<sup>6</sup> This may explain the legitimacy of having a system of criminalization and punishment, but it does not explain when that system should be used and to what extent it should be used. To determine whether it is fair to criminalize conduct or to use a jail sentence to enforce an instance of criminalization, the lawmaker has to consider why a given activity is worthy of criminalization and punishment.

John Tasioulas argues that Andrew von Hirsch's theory of punishment is a hybrid theory incorporating both consequential (crime prevention) and deontological (just deserts) elements and thus is not a workable theory.<sup>7</sup> However, the correct reading of von Hirsch's theory is that it uses consequential and deontological theories independently to *explain* and *justify* distinct aspects of the institution of punishment. Consequentialism, as used by von Hirsch, merely *explains* the legitimate aim or function of the institution of punishment, that is, the instrumental *aim* to deter and prevent criminal wrongdoing generally. It also explains the aim of having a system of criminalization and punishment in place to deal with individual wrongdoing. Meanwhile, the deontological constraint adopted by both von Hirsch and myself (just deserts for individual wrongdoing) *justifies* individualized punishment in objective moral terms: it provides

an objective *moral justification* for criminalization and punishment at the individual level. Von Hirsch argues that it is the offender's moral wrongdoing that provides the moral justification for invoking the institution of punishment in individual cases.<sup>8</sup> Inflicting individual just deserts on wrongdoers might indirectly achieve the prudential aim of convincing others not to engage in similar wrongdoing, but it is individual wrongdoing that justifies individualized punishment.

According to this philosophy, an individual's actions will be deserving of punishment when those actions aim to bring about bad consequences for others. The lawmaker can demonstrate that criminalization and punishment are fair responses by pointing to the wrongfulness and harmfulness of an offender's actions. It is the *potential* harmfulness of certain bad consequences that flow from agents' intentional actions that make it fair to prohibit agents from doing such actions and also for stating in advance that those who do so may go to jail should their actions result in sufficiently harmful consequences. The legislature has to presume that some people will bring about bad consequences with a certain state of mind, and therefore must draft appropriate offenses, sentences, and defenses for the courts to apply from an *ex post* perspective. It presumes from an *ex ante* perspective that those who intentionally or recklessly harm others without an excuse or justification ought to be punished. From the *ex ante* perspective, the lawmaker relies on the generalization that intentional and unjustifiable/inexcusable harm doing is wrongful. The lawmaker is not concerned with whether a particular individual is guilty, because that is an *ex post* trial consideration. The lawmaker has to demonstrate that the conduct is not only morally wrongful, but also sufficiently serious to warrant penal detention rather than a fine (and this is satisfied by considering the harmfulness of the bad consequences). Mere objective wrongdoing (intention to bring about a bad consequence) in itself would not be sufficient to justify sending someone to jail. For example, false promising is wrongful but we would not want to jail all those who make false promises.<sup>9</sup> It would be fair and just to use penal detention only to punish false promising that aims to bring about certain harmful consequences for others and only when those consequences are sufficiently harmful to justify attaching a jail term to the offense.

This approach gives the legislature guidance about what it can fairly criminalize and how to grade or label that criminalization. The lawmaker might satisfy the bad consequences constraint by referring to harm or to other objectively bad consequences (for example, wrongful privacy violations that might not necessarily result in harm) to demonstrate that it is fair to invoke the criminal law. Nonetheless, if the legislature wants to underwrite its criminalization decisions with harmful jail sentences, it will have to demonstrate that the potential bad consequences would be of a harmful kind. I have argued elsewhere that exhibitionism can have bad consequences in that it can violate a non-consenting person's right not to be forced to receive non-public information in public places.<sup>10</sup> When a person culpably aims to copulate in a public bus knowing (or recklessly indifferent to the fact) that it will bring about the bad consequence of invading the other passengers' rights to be let alone and to avoid this type of unwanted intimate information, an objective justification is available to demonstrate that it is fair to invoke the criminal law. However, because the bad consequence does not result in harm, it would not be fair to allow the state to use penal detention to punish this type of criminal wrongdoing. The appropriate response would be to use penal fines or community service orders. As we will see below, the same applies to trivial harms such as littering.

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The decision to use imprisonment as a form of punishment must be justified in moral terms to the affected parties, the offender and the victim. Instrumentally, third parties will also get the message not to do the proscribed act and this may serve the aim of crime prevention. If  $x$  intentionally rapes  $y$ , criminalization and punishment through imprisonment can be justified to  $x$  in terms that can be reconciled with fairness and justice, because  $x$  deserves to be punished for his harmful choice.<sup>11</sup> The objective reasons we can offer to  $x$  to explain why it is just and fair to send him to jail for rap-

ing  $y$  are: that he deserves hard treatment for *choosing* to inflict hard treatment (harm) on his victim by raping her and because he knew (or was recklessly indifferent to the fact) that he was bringing about bad consequences of a harmful kind for her. The gradation of that offense as a serious crime can be dialectically defended in rational discussions with both him and his victim. If the public is to have confidence in the criminal justice system, the victim's rights must be taken seriously, which means the offender must be subjected to proportionate hard treatment by way of penal detention.

Fairness also means that it is important that harm and culpability arguments accord with objectivity.<sup>12</sup> Objective principles have a universal application.<sup>13</sup> It would be inequitable to criminalize conduct just because the majority claims that it is harmful. Furthermore, it would be unjust to use strict liability or negligence standards for attributing blame in the criminal law area just so long as the majority claims that such standards are fair. Positive morality is majority sanction, with the public being the "great sophist now as truly as in the times of Plato."<sup>14</sup> The majority is usually interested only in what appears to be persuasive, not in what is rigorously rational (sound normative arguments that are susceptible to reason).<sup>15</sup> In the current zero-tolerance climate, the majority is often persuaded by non-objective criminalization arguments. A legislator could not objectively justify criminalizing lesbians and gay men merely because of their status, because the legislator would not be able to demonstrate that such people deserve censure. Why? Because same-sex sexual conduct does not in fact result in bad consequences of an objective kind. Nor is it morally wrongful in an objective sense.<sup>16</sup>

The fairness constraint means that lawmakers must be able to justify their criminalization and punishment decisions in objective moral terms. This can be done when lawmakers are able to point to objectively bad consequences such as privacy violations flowing from exhibitionism or other actions that result in (or risk) harm. If  $x$  shoots (or attempts to shoot)  $y$ , this can be empirically ascertained and its actual harmfulness (or potential harmfulness in the case of attempts) can be assessed in objective terms. Coupled with this, because the bad consequence is of a harmful kind, attaching a jail sentence to the offense would be a proportionate response. The fairness requirement is satisfied when objective moral reasons can be produced to demonstrate that it is just to send someone to jail. Clearly, intentionally aiming to bring about harm to others is behavior that is deserving of criminalization and it is possible to explain publicly its inherent wrongness to those being criminalized

in terms that they would be hard put to deny.<sup>17</sup> Claims about the objective wrongness of intentionally or recklessly harming others can be justified with maximally supportive arguments<sup>18</sup> that derive from the public deliberative process.<sup>19</sup>

It would not be difficult to demonstrate that it is morally right and just to jail a rapist in order to punish him because it is clear that the rapist's decision intentionally to bring about such bad consequences for his fellow human is inherently wrong. When a person intentionally aims to bring about such dire consequences for others it is his

moral culpability and the badness of the consequences (harm in this case) that provide us with objective criteria for rationally defending the decision to use imprisonment to protect the interests of victims. The legislature may criminalize harmless wrongdoing, but if it wants to take the extra step of sending the wrongdoer to jail it has to show that the bad consequences resulted in or risked sufficiently serious harm. Of course, any sentence should also be proportionate with the offender's culpability and the harmfulness of his wrongdoing.

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### III Distinguishing Criminal Harm from Private Law Harm: Culpability and Collective Enforcement

Does the above discussion mean that all intentional harms should carry jail terms? John Kleinig notes that harm per se does not really explain why some harms are criminalizable while others are not.<sup>20</sup> He suggests that moral culpability could play an important role in drawing a distinction between criminalizable wrongs and other wrongs, but notes that in some cases (such as intentionally breaching a contract) intentional harm doing is remedied through the use of the private law.<sup>21</sup> Glanville Williams once said that he was not able to distinguish crimes from other types of legal wrongs. Williams concluded that: "[a] crime is an act capable of being followed by criminal proceedings having a criminal outcome."<sup>22</sup> There are various moral overlaps between crimes and torts.<sup>23</sup> It is not the degree of harm (or other objectively bad consequence) alone that determines whether conduct should be criminalized rather than regulated through private law. Some torts involve greater harm than criminal conduct. The negligent train driver is likely to cause greater harm than someone who deliberately drives her car over a single pedestrian. Similarly, one negligent banker<sup>24</sup> could cause more harm than a thousand pickpockets.<sup>25</sup> The lawmaker has to consider the degree of moral blameworthiness involved to determine whether the activities are sufficiently serious to warrant criminal condemnation or a private law response.

There will always be some overlap. The private law also aims to prevent certain unwanted (usually harmful) bad consequences but compensates the wronged party.<sup>26</sup> Although a perfect line cannot be drawn, civil wrongs

are distinguishable from crimes primarily because of the degree of culpability involved. Jean Hampton,<sup>27</sup> like Andrew von Hirsch,<sup>28</sup> and Andrew Ashworth,<sup>29</sup> argues that the degree of moral culpability accompanying the harm doing is important for drawing a distinction between torts and crimes. Torts usually involve negligent harm doing, whereas crimes involve intentional, reckless, or grossly negligent harm doing. Nevertheless, the degree of harm and culpability involved in some private wrongs could be sufficient to ground a case for criminalization (intentional defamation, intentional breaches of contracts without excuse or justification, and so forth), but wrongful harm does not necessarily have to be criminalized. It is important to note that the Harm Principle provides a necessary but not sufficient condition for criminalization.<sup>30</sup> The fact that some harmful intentional wrongs are dealt with through the civil law helps to reduce the extent of criminalization. Ensuring that criminalization decisions meet the requirements of fairness is not about telling the lawmakers what they *should* criminalize, but what they *may* criminalize.<sup>31</sup> The criminal law should be used only as a last resort to prevent reasonably grave wrongs.

If lawmakers want to use the criminal law rather than a civil law response, then they have to show why the conduct is worthy of criminal condemnation. Having said that, it is important to note that in some cases, the normative case for criminalization will be so compelling that the state will be *morally compelled* to invoke the criminal law to protect the legitimate interests of its citizens. For example, in the 1990s lawmakers were morally com-

pelled to criminalize marital rape.<sup>32</sup> It is the gravity and character of the badness and harmfulness of intentional marital rape that makes it a moral issue that cannot be left to the parties concerned to resolve, especially in a humane society that cares for its members.<sup>33</sup> Furthermore, these types of serious harms require a criminal law response rather than a private law response because “it would not be reasonable to expect one person to take proceedings on [her] own responsibility to put a stop to it, but . . . it should be taken on as the responsibility of the community at large.”<sup>34</sup> Historically, publicness and the idea of the community being harmed have been used for identifying crimes. This approach is, however, not valid for distinguishing crimes from torts, because it is clear that many private wrongs also harm the community.<sup>35</sup> The focus should be on whether the state has an obligation to use the criminal law because of the gravity and character of the harm involved, and the degree of culpability involved. In less serious cases, the only sufficient condition for invoking the criminal law and penal detention is wrongful *harm*.

The damage caused by a negligent train driver is every bit as grave as the harm caused by a single rape, but unless the harm has been caused by at least gross negligence, its gravity alone will not be sufficient to justify a criminal law response. Furthermore, the harmfulness of the consequences that flow from intentional defamation or from breaches of contractual duties means that such wrongs could be criminalized, but the character/badness of the harm is not sufficient to *compel* the state to criminalize these types of wrongs. Although it would not be fair to ask a person to commence proceedings on her own account to seek retribution for being raped (not only because it affects us all indirectly, but also because of the unequal bargaining position between the rapist and the victim), it would not be unreasonable to ask a person to commence proceedings on her own account to seek compensation for losses flowing from a breach of contract. In the end, only a crude line can be drawn.

Sandra Marshall and Antony Duff discuss the overlap between harm to individuals and harm to the community.<sup>36</sup> They suggest that punishment should be considered in the context of the wrongdoer’s relationship with the wider community as well as with the individual victim. By making the wrong done to a “rape victim ‘ours,’ rather than merely ‘hers’; in thus understanding it as an attack on ‘our’ good, not merely on her individual good: we do not turn our attention *away* from the wrong that

she has suffered, towards some distinct ‘public’ good. Rather, we share *in* the very wrong that she has suffered: it is not ‘our’ wrong *instead of* hers; it is ‘our’ wrong *because* it is a wrong done to her, as one of us—as a fellow member of our community whose identity and whose good is found within that community.”<sup>37</sup> Likewise, C. K. Allen is essentially correct in holding that: “Crime is crime because it consists in wrongdoing which directly and in *serious degree* threatens the security or well-being of society, and because it is not safe to leave it *redressable only by compensation* of the party injured.”<sup>38</sup> Hence, although the Harm Principle provides a sufficient condition for justifying criminalization and punishment decisions, in some cases the legislature will be compelled to act if the culpable harm doing is of a nature that makes it necessary for the state to act to protect the potential victim. However, in many other cases the state will be free to use its discretion to regulate unwanted intentional harm doing by using private law.

Distinguishing wrongs that *ought* to be criminalized from those that *may* be criminalized is a matter of drawing a line somewhere between the continuum of culpability and the continuum of the character and seriousness of the harm. There is also a continuum of fairness of enforcement because, in some cases, as a matter of justice and/or practicality it would be unfair to ask individuals to take action to seek retribution for certain harms against them. The practicality argument is especially relevant in the case of collective harms, such as littering. Littering may not be harmful in isolation, but in aggregate, widespread littering would cause more harm to a city the size of New York than a few incidences of other serious individual harms such as homicide.<sup>39</sup> Because littering impacts our collective interests it would not be feasible or reasonable to expect one person to commence proceedings on her own initiative to put a stop to it, as it would be unfair to ask individuals randomly to shoulder the burden of protecting our collective interests. Instead, the community at large (by means of public institutions, such as the police, courts, government—and public mechanisms, such as criminal law and punishment) is responsible for protecting our collective interests (preventing littering, tax evasion, and so forth). Notwithstanding the above discussion, all we need to keep in mind for present purposes is that the *sufficient condition* of wrongful harm has to be satisfied if penal detention is to be justified in moral and constitutional terms.

## IV The Objectivity of the Moral Culpability Element

Let us look at the objectivity of moral culpability as an element of the moral justification for criminalization and penal detention. I use the term *wrongfulness* to refer to culpability and the term *wrongness* to refer to moral impermissibility.<sup>40</sup> Under the Harm Principle, it is culpability accompanied with harmful consequences (or attempted harm and/or risked harm)<sup>41</sup> that explains wrongness—that is, the criminal impermissibility or the criminalizableness of the harmful action. After all, we do not criminalize and punish mere accidents because bad consequences alone do not constitute wrongness. As Thomas Nagel notes:

[T]he essence of evil is that it should *repel* us. If something is evil [in other words, harmful], our actions should be guided, if they are guided at all, toward its elimination rather than toward its maintenance. That is what evil means. So when we *aim* at evil [that is, toward harm doing] we are swimming head-on against the normative current. Our action is guided by the goal at every point in the direction diametrically opposite to that which the value of that goal points. To put it another way, if we *aim* [to harm others] we make what we do in the first instance a positive rather than negative function of it. At every point, the *intentional function* is simply the normative reversed, and from the point of view of the agent, this produces an acute sense of moral dislocation.<sup>42</sup>

Culpability (wrongfulness) is sufficient to explain the objective wrongness of intentional harm doing, because it is wrong to *aim* to bring about inherently bad consequences (harm) for one's fellow humans.<sup>43</sup> The same cannot be said about intentionally aiming to bring about good or neutral consequences. Intentional harm doing provides a sound objective justification for using penal detention so long as the further fairness requirements of fair labeling and proportional punishment<sup>44</sup> are also taken into consideration. In other words, the crime should be labeled and punished according to its seriousness.<sup>45</sup> It is fair to punish those who deliberately harm others because harm doing produces inherently bad consequences for those who are harmed. It violates the genuine individual rights of the victims. The harm-doer aims for bad consequences and it can be explained to her in rational terms that her harm doing was wrongful, bad, and deserving of proportional punishment which may include jail time in the right circumstances.<sup>46</sup>

Even though culpability helps to explain both moral wrongdoing and legal fault, culpability alone does not equal moral wrongness. For example, if lawmakers en-

act an offense prohibiting lesbians from kissing in public places, this would not mean that culpable lesbian kissing in public places is morally wrong in any objective sense. If a couple of lesbians decided to kiss in public to protest the law, they would culpably break the law in legal positivistic terms because they intentionally chose to kiss in public knowing that it was a criminal offense to do so. But they would not be morally blameworthy, because such a law is not reconcilable with the requirements of fairness, as lesbian kissing does not *aim* to produce inherently bad consequences.<sup>47</sup> The wrongness requirement cannot be satisfied by merely satisfying the legal culpability requirement. The requirement can be satisfied, in contrast, by *harm* because harm is *prima facie* a bad consequence, whether it is brought about by the intentional action of a moral agent or by an accident or natural disaster. When a person deliberately aims to harm others or recklessly brings about harm for others, it can fairly be said that she deserves normative reproach and criminal condemnation for her wicked intentions and for any resulting or risked harm. The same cannot be said about a person who aims to bring about a good or neutral consequence such as lesbians who shock and enlighten the bigot by kissing in public places. Thus, culpability is an element of wrongness only when the consequence that is aimed for is *prima facie* bad.

The rule *actus non facit reum nisi mens sit rea* ("an act does not make a person legally liable unless the mind is legally blameworthy") does not merely explain why a person is legally blameworthy for a particular bad consequence from the *ex post* trial perspective, but also helps to explain the moral wrongness of certain activities from the *ex ante* criminalization perspective. In the above example, the kissing lesbians are legally culpable to the extent that they intentionally violated the law that banned lesbian kissing, knowing that it was a crime to do so. However, the lesbians are not morally condemnable, as opposed to being responsible for bringing about the consequence, because they did not aim to bring about any objectively bad consequence.<sup>48</sup> In such a case, all the lawmaker can say is that they are legally liable for kissing in public because they chose to break the law and did in fact break the law. This is no different from enacting a law to prohibit young men from helping little old ladies onto public buses with their shopping. If a young man helps a little old lady onto the bus with her shopping, he would not only be morally re-

sponsible for assisting her but also legally liable under such a law. Nonetheless, being responsible for helping the elderly means that he should receive moral praise not moral condemnation, for he aimed to bring about a good consequence. The point here is that aiming for good moral consequences is not worthy of normative reproach or criminal condemnation.

There is a difference between being responsible for bringing a consequence about and being morally culpable and condemnable for the particular consequence that was brought about.<sup>49</sup> Furthermore, aiming for bad consequences of a *harmless* kind will not be sufficient for jailing people, even though such conduct could be regulated with penal fines in the right circumstances.

The deontological constraints on penal detention here require that the consequences flowing from the actions that are to be punished by means of penal detention be harmful (the objective harm constraint); that those bad consequences be brought about culpably (the objective wrongfulness constraint); and that the harm be sufficiently serious to warrant a *prima facie* jail term (the proportionality constraint). To clearly identify the harmfulness of the potential consequences is important because in the real world it is consequences (or potential consequences) that give the legislature guidance about whether certain actions deserve criminal condemnation and whether that condemnation should involve a jail term.

## V The Moral Dimensions of Constitutional Rights

How might harm work as a constitutional constraint? The Harm Principle can be distinguished from constitutional rights in a number of ways. The most important differences for present purposes are twofold. First, the Harm Principle proposes a broad right to freedom to engage in any conduct that does not harm others, whereas constitutional rights protect specific freedoms such as the right to free speech. A constitutional right is not as broad as the general normative claim to freedom found in the Harm Principle. If the conduct does not involve the exercise of one of the specific rights and freedoms found in the relevant constitutional document, then it will not be protected from criminalization. The decriminalization of passive panhandling in open places in the United States<sup>50</sup> and Canada<sup>51</sup> was possible only because it was held to involve an exercise of the specific freedom of speech right. Second, constitutional rights have legal force. Constitutional rights legally bind legislatures and can be used to strike down substantive criminal laws that interfere with specific freedoms such as the right to privacy and free speech.

Generally, constitutional rights have to be interpreted morally if they are to have meaning. Such rights can only be reconciled with justice if they are interpreted in a way that achieves the general moral purpose or aim that the right was intended to serve. Of course, providing a full normative theory of how constitutions should be read is beyond the scope of this paper. Instead, I draw on and develop Ronald Dworkin's thesis, which holds that constitutional rights have to be interpreted by considering not only precedent but also the underlying moral prin-

ciples.<sup>52</sup> I make specific reference to a number of cases that have achieved justice by adopting such an approach.<sup>53</sup> Hermeneutically, Dworkin has provided a convincing explanation as to why it is necessary and fair to refer to moral principles when interpreting constitutional rights.<sup>54</sup> The fundamentally important rights that have been constitutionalized in the United States, Europe, and Canada are objective moral rights that have normative authority.<sup>55</sup> Such rights can only be taken seriously if objective moral reasons of greater weight are produced to justify overriding them. For instance, a panhandler's right to express freely her condition of poverty by sitting passively in an open street with a hat in front of her is not absolute, but it should not be overridden unless there is an objective moral justification that outweighs her constitutionalized moral right to freedom of expression.<sup>56</sup> Something other than a mere non-objective claim of harm is needed to justify overriding fundamental moral rights that have been constitutionalized.<sup>57</sup> Constitutionalized rights such as the right to free speech, the right not to be unduly deprived of liberty, the right to privacy,<sup>58</sup> and so on provide *prima facie* objective reasons for not criminalizing certain activities, and therefore such rights should not be trumped by considerations of positive morality. Hence, both decisions to criminalize and decisions to override human rights are fair only when objective justifications can be produced. If this were not the case, it would hardly be worth constitutionalizing the Harm Principle. The Harm Principle should be constitutionalized as a *sufficient condition* for using imprisonment as a form of punishment. If the state wants to send a person to jail, then it should demonstrate

that her conduct resulted in objective harm. If this condition cannot be met, then some other form of punishment should be used.

A normative reading of the U. S. Constitution requires judges to decide cases by choosing the interpretation that accords with the underlying principles of morality that are the Bill of Rights' *raison d'être*. Human rights are deontological constraints and as far as they have been constitutionalized, judges have to interpret them with reference to the moral rationale of the right, evolving societal standards, precedent, and past practice. The judge will be constrained not only by the text of the Constitution, but also by the moral aim of the right being interpreted. If a judge's interpretation of a given right is too far removed from the general moral purpose that the right was designed to serve, then it will lack validity. Justice and fairness will be achieved when the interpretation of the right's normative scope can be reconciled with its intrinsic moral aim. For example, if the general moral rationale for the Eighth Amendment of the Constitution is to ensure fair punishment, then there is no reason why that right should not be interpreted expansively to protect people from all kinds of unjust and oppressive state punishment. It makes no sense to rely on semantics to interpret the right narrowly in order to circumvent the general moral aim that the right was designed to achieve. The U.S. Supreme Court has repeatedly referred to moral principles to achieve the moral aims of various constitutional rights. For example, it took this approach when it construed a general privacy right from the First Amendment, the Eighth Amendment, the Fourteenth Amendment, and the Fifth Amendment, and sections 9[3] and 10[1] of Article I of the Constitution.<sup>59</sup>

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In the United States, Canada, and Europe<sup>60</sup> the due process right has been interpreted so as to require that substantive criminal laws be impartial and reasonable in content.<sup>61</sup> In the United States, the right of privacy delineated in *Griswold v. Connecticut* was not an enumerated right; rather, it was constructed from the privacy interests that are implicit in the First, Third, Fourth, Fifth, and Ninth Amendments.<sup>62</sup> In *Roe v. Wade* the Court said

that the "right of privacy, whether it be founded in the Fourteenth Amendment's concept of personal liberty and restrictions upon state action, as we feel it is, or, as the District Court determined, in the Ninth Amendment's reservation of rights to the people, is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."<sup>63</sup> The privacy constraint has been used to protect personal decisions relating to marriage,<sup>64</sup> child rearing and education,<sup>65</sup> contraception,<sup>66</sup> and so forth. Articles 5 and 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms and Sections 7 and 8 of the Canadian Charter also protect similar personal interests. The unifying theme for the general presumption of liberty found in these provisions is based on John Stuart Mill's idea that individuals should have a private sphere in which they are free to make decisions about their personal affairs without state intervention and free from unwarranted, unsolicited intervention by other uninvited individuals.<sup>67</sup>

A number of American cases have dismissed positive morality as a justification for overriding the privacy right. The privacy cases, *inter alia*, demonstrate that the courts have repeatedly drawn on not only precedent and the text of the Constitution, but also on objective moral principles such as the Harm Principle when interpreting the scope of fundamental rights.<sup>68</sup> For instance, in *Ravin v. State* a law against private marijuana use was struck down for breaching the petitioner's privacy rights.<sup>69</sup> The court held that the privacy protection is absolute only "when private activity will not endanger or harm the general public."<sup>70</sup> Other courts have noted that the right to privacy derives primarily from "the long-standing importance in our Anglo-American legal tradition of personal autonomy and the right of self-determination."<sup>71</sup> The majority in *Wisconsin v. Yoder* held that there is no longer an assumption "that today's majority is 'right' and the Amish and others like them are 'wrong.' A way of life that is odd or even erratic but interferes with no rights or interests of others is not to be condemned because it is different."<sup>72</sup> More significantly, in *Commonwealth v. Bonadio* the court constructed an objective justification based on harm and personal autonomy to strike down a law criminalizing homosexuals:

[T]he harm principle requires liberty of tastes and pursuits; of framing the plan of our life to suit our own character; of doing as we like, subject to such consequences as may follow: without impediment from our fellow creatures, so long as what we do does not *harm* them, even though they should think our conduct foolish, perverse, or wrong. [F]rom this liberty of each individual, follows the liberty, within the same limits of combination among individuals; freedom to unite,

for any purpose not involving *harm to others*. . . . With respect to regulation of morals, the police power should properly be exercised to protect each individual's right to be free from interference in defining and pursuing his own morality but not to enforce a *majority morality* on persons whose conduct does not *harm others*. "No harm to the secular interests of the community is involved in atypical sex practice in private between consenting adult partners." This philosophy, as applied to the issue of regulation of sexual morality presently before the court, or employed to delimit the police power generally, properly circumscribes state power over the individual.<sup>73</sup>

In *Lawrence v. Texas* the U.S. Supreme Court also made moral and evaluative judgments when it interpreted the due process right as protecting atypical sex practices in private between consenting adult partners.<sup>74</sup> In that case, the majority overruled *Bowers v. Hardwick*<sup>75</sup> and held that: "It is a promise of the Constitution that there is a realm of personal liberty, which the government may not enter."<sup>76</sup> The majority opined that the intimate adult consensual conduct at issue (homosexual relations) was covered by that liberty. The majority did not interpret the liberty interest involved as a fundamental liberty. What it did was apply a standard that falls somewhere between the *strict scrutiny* and the *rational basis review* standards.<sup>77</sup> In the U.S., a law that punishes a person who exercises his or her fundamental liberties is upheld only where it can be shown that it is narrowly tailored to achieve its policy goal (that is, narrowly tailored to achieve a *compelling* government purpose). Under the rationally related test, a challenged law will be upheld if it is substantially related to a legitimate government purpose. "The legitimate government purpose need not be the actual objective of the legislation—only its conceivable objective. Since only those laws that lack a conceivable legitimate purpose will fail this test, courts almost never find a law to be unconstitutional when non-fundamental liberties are burdened."<sup>78</sup> Importantly, non-objective accounts of harm have been enough to satisfy this requirement.

In *Lawrence v. Texas* the majority stated that: "[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual."<sup>79</sup> It also applied a rational basis test (legitimate governmental interest test) with the traditional fundamental privacy right in mind, but it did not apply a strict scrutiny test (compelling state interest test).<sup>80</sup> It held that the petitioners' threshold liberty interest could be overridden only if the legislature could show that it would further a legitimate state interest. *Lawrence* was a case where the Court rightly interpreted (through a moral reading) that the activities involved fell within the moral purview of the privacy right, and where the Court's moral

reading also found that the state could not demonstrate that it has a substantial interest in having the exercise of that right overridden. The significance of the courts to look (even though inadvertently and somewhat instinctively) for objective reasons<sup>81</sup> for justifying criminalization decisions that interfere with fundamental rights cannot be overstated, because the current bench of the Supreme Court is dominated by judges who tend to use a very unconvincing form of originalism to produce results that are totally out of keeping with the moral rationale of the rights being interpreted.<sup>82</sup>

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*"It is a promise of the Constitution that there is a realm of personal liberty, which the government may not enter."*

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Numerous judicial decisions have held that a governing majority's belief (positive morality) that certain sexual behavior is immoral and unacceptable is sufficient to override the mere liberty interests.<sup>83</sup> This is achieved simply by declaring that the offending conduct does not involve the exercise of a fundamental interest as opposed to a mere liberty. In many cases in the United States the right to privacy has proved to be rather hollow, because courts can easily rely on positive morality considerations when the conduct is deemed not to involve an exercise of privacy. Many cases are declared to involve a mere liberty right as opposed to a fundamental right, which means that the state has only to demonstrate a substantial interest in criminalizing the conduct at issue. Denying an adulterous police officer a promotion (surely a person's love life is a private matter!) has been deemed not to involve privacy.<sup>84</sup> Similarly, attending nude dancing in private clubs has been deemed not to involve the right to privacy and has been criminalized on the basis that it furthered "a substantial government interest in protecting order and morality."<sup>85</sup> In *Williams v. Pryor*<sup>86</sup> a law banning the sale of sex toys was upheld because the court held that it was substantially related to the legitimate government purpose of protecting public (positive) morality.

Nevertheless, the aforementioned activities such as possessing sex toys and attending strip clubs would have been protected if the privacy right had been interpreted with reference to its underlying moral rationale, as these activities do not have bad consequences for non-consent-

ing others and clearly involve nothing more than *personal decisions* of an intimate nature. It is important to note, however, that interpreting rights with reference to moral principles does not give the Supreme Court *carte blanche* to create new rights by protecting conduct that clearly could not be interpreted as coming within the moral purview of the right being interpreted. For example, the Court could not interpret the privacy right so as to stretch it to protect an artist from being criminalized for producing an offensive public display, as clearly this type of activity is of a public rather than private nature.<sup>87</sup>

Some commentators in the United States have argued that the constitutional right to privacy, which has been interpreted to cover a very wide range of activities, has been used to constitutionalize the Harm Principle.<sup>88</sup> This assessment is erroneous. The right to privacy is no substitute for the Harm Principle. The privacy right has been interpreted expansively, but it has not been interpreted as a general freedom “to do whatever you like so long as it does not harm others.” Randy Barnett has argued that the privacy right was given such an expansive interpretation in *Lawrence v. Texas* that it effectively constitutionalized the Harm Principle.<sup>89</sup> But this overlooks the fact that the protection expounded in a line of privacy cases, not only in the United States but also in Canada and Europe,<sup>90</sup> has been based on the narrow concept of privacy. The harmfulness or harmlessness of the conduct (that is, the fact that it usually involves a personal decision that affects only the *private interests* of the decision maker) has influenced many of the privacy cases, but it has not been the unifying theme. Instead, the unifying element has been the specific idea of personal liberty (that is, the freedom to make private decisions that are personal and that have no consequences for others) rather than freedom more generally conceptualized. Coupled with this, even a liberal moral reading would not permit the privacy right to be stretched to protect decisions of a non-private nature. A moral reading means that the court is bound not only by judicial precedent, the main structures of the constitutional arrangement, and the text of the Constitution, but also by the moral aim of the right being interpreted.

The right of privacy or personal liberty that has been constructed from the Supreme Court’s moral interpretation<sup>91</sup> of the Fourteenth Amendment’s concept of personal liberty and the Ninth Amendment’s reservation of rights to the people cannot be stretched to protect harmless activities of a public nature, because such a

broad interpretation would clearly make having a constitution meaningless. The Court is not a legislature and it is *constrained* by the moral rationale of the right being interpreted. The prohibited activity must have a normative connection with the moral rationale of the right that is being used to protect it. A privacy right would not protect public (non-private) acts such as handing out food to vagrants,<sup>92</sup> panhandling passively in confined public spaces,<sup>93</sup> and so forth, because these activities are not intrinsically connected with the normative concept of privacy. Outside the range of situations that could be interpreted as involving personal and intimate decisions (or conduct that takes place in a private dwelling), the legislature could criminalize and punish whatever it liked. *Lawrence* cannot be stretched to incorporate the Harm Principle, because there is no normative connection between privacy and many trivial wrongs of a public nature. The *moral scope and purpose* of constitutionalized rights, the history, precedent and the text of the constitution act as firm constraints against rights being constructed from thin air. If we are going to constitutionalize the Harm Principle, we need to pin it to something better than an overstretched privacy right.

I am not arguing that the Harm Principle should be constitutionalized entirely, because the government may have good reasons for criminalizing many activities that do not fall within the purview of harm including public exhibitionism and so forth.<sup>94</sup> Furthermore, the legislature is an elected body and needs a certain degree of discretion to deal with a wide range of unwanted conduct—such discretion might include using regulatory fines to deal with harmless wrongdoing.<sup>95</sup> It would be unworkable to allow the courts to second guess every criminalization decision. Instead, the courts’ role (beyond those activities that are protected because they involve the exercise of specific freedoms such as speech, privacy, etc.) should be limited to considering criminalization decisions that have certain potentially severe consequences, (that is, crimes that carry jail terms). Although I welcome the approach taken in the privacy cases, I believe it should supplement the more general right not to be unfairly jailed—not to be, in other words, deprived of your physical freedom of movement.<sup>96</sup> This is a more general right as it protects people from being subjected to unjust state punishment. Imprisonment has consequences that are vastly more harmful than being made to pay penal fines and therefore constitutional constraints are important.

## VI Harm as a Constitutional Requirement

I now turn my attention to the Canadian case law, as the courts there have made some very useful observations about using the Harm Principle as a constitutional constraint. In *Malmo-Levine*<sup>97</sup> the appellant challenged a marijuana prohibition under section 7 of the Canadian Charter of Rights and Freedoms, which holds that: “[e]veryone has the right to life, liberty and security of the person and the right not to be deprived of those rights except in accordance with the principles of fundamental justice.”<sup>98</sup> In *Malmo-Levine* the appellants were convicted under the Narcotic Control Act, R.S.C. 1985 (Can.), for possessing marijuana for personal use.<sup>99</sup> A conviction under the legislation did not carry a mandatory prison term, but the possibility of imprisonment is enough to satisfy the deprivation of liberty requirements found in section 7 of the Canadian Charter. The question focused on whether such a deprivation of liberty contravened a principle of fundamental justice.<sup>100</sup> The question before the court was whether the inclusion of cannabis in the Narcotic Control Act, R.S.C. 1985 (Can.), as far as it related to the personal possession and use contrary to sections 3(1) and (2) of the act, violated the defendant’s constitutional right “to life, liberty and the security of the person” and the right not to be deprived thereof “except in accordance with the principles of fundamental justice” as set out in section 7 of the Canadian Charter.<sup>101</sup> The court held that the risk of imprisonment was enough to activate the “liberty” interest under section 7. The analysis then proceeded to consider whether the deprivation of liberty was contrary to a “principle of fundamental justice.”

The appellants argued that the Harm Principle constituted a principle of fundamental justice. It was argued that the deprivation of liberty contravened the Harm Principle because possessing small amounts of marijuana for personal use poses no risk of harm to others.<sup>102</sup> Basically, the appellants were arguing that the state should not deprive people of their liberty via imprisonment without good reason and that harm to others would be the only sufficient reason for sending someone to jail. In the court’s opinion, Justice Braidwood set down the test for determining whether a principle constitutes a principle of fundamental justice within the meaning of section 7 of the Canadian Charter.<sup>103</sup> Braidwood summed the test up as involving at least three qualities: (1) it is a legal principle; (2) it is precise; and (3) there is a consensus among reasonable people that it is vital to our

system of justice.<sup>104</sup> Arguably, Braidwood’s approach is broadly reconcilable with Dworkin’s *law as integrity* method.<sup>105</sup> In moral terms, the Harm Principle is a principle of justice because it is an objective<sup>106</sup> standard for ensuring that penal detention accords with the requirements of fairness and justice. Speaking for the court, Justice Braidwood held:

I conclude that on the basis of all of these sources—common law, Law Reform Commissions, the federalism cases, Charter litigation—that the “Harm Principle” is indeed a principle of fundamental justice within the meaning of s. 7. It is a legal principle and it is concise. Moreover, there is a consensus among reasonable people that it is vital to our system of justice. Indeed, I think that it is common sense that you don’t go to jail unless there is a potential that your activities will cause harm to others.<sup>107</sup>

Braidwood’s interpretation of the Canadian *deprivation of liberty* right draws on moral principles such as the Harm Principle to produce a just result that is reconcilable with the overall moral rationale of that right. Unfortunately, the Supreme Court of Canada overruled the lower court’s finding that the Harm Principle is a principle of fundamental justice within the meaning of section 7. The majority in the Supreme Court of Canada was of the view that Harm Principle was “not the constitutional standard for what conduct may or may not be the subject of the criminal law for the purposes of s. 7.”<sup>108</sup> It was of the view that conduct would not necessarily have to pose a risk of harm to others to be criminalized. The majority held that the Harm Principle was not a principle of fundamental justice<sup>109</sup> because: “[t]he justification for State intervention cannot be reduced to a single factor—harm—but is a much more complex matter.”<sup>110</sup> The court cited H. L. A. Hart who said: “[e]ven where there is harm to others in the most literal sense, there may well be other principles limiting the extent to which harmful activities should be repressed by law. So there are multiple criteria, not a single criterion, determining when human liberty may be restricted.”<sup>111</sup> The majority conflated criminalization per se with criminalization that is backed up with jail terms, and then referred to a number of old offenses carrying disproportionate jail terms to justify upholding the marijuana prohibition. In other words, it used unjust laws with unjust sentences to justify another unjust law.

The majority referred to a narrow range of problematic counterexamples in an attempt to demonstrate that

criminalization and penal detention have not been limited to harmful conduct. But it did not analyze these crimes to ascertain whether they might now be inconsistent with section 7 of the Canadian Charter. The majority stated:

Cannibalism is an offense (s. 182) that does not harm another sentient being, but that is nevertheless prohibited on the basis of fundamental social and ethical considerations. Bestiality (s. 160) and cruelty to animals (s. 446) are examples of crimes that rest on their offensiveness to deeply held social values rather than on Mill's "Harm Principle". . . . A duel fought by consenting adults is an example of a crime where the victim is no less culpable than the perpetrator, and there is no harm that is not consented to, but the prohibition (s. 71 of the *Code*) is nevertheless integral to our ideas of civilized society. . . . Similarly, in *R. v. F.* (R.P.) (1996), 105 C.C.C. (3d) 435, the Nova Scotia Court of Appeal upheld the prohibition of incest under s. 155 of the *Criminal Code* despite a Charter challenge by five consenting adults.<sup>112</sup>

These counterexamples are not as convincing as the majority suggests. I have argued elsewhere that consent has its limits and that a person may not consent to gross harm.<sup>113</sup> Therefore, dueling would come within the purview of the Harm Principle. Bestiality would not set back the interests of others and therefore psychiatric and therapeutic treatment should be made available to assist those who engage in this type of abnormal conduct. Similar treatment programs should be available for consenting adults who engage in incest. Any harm here would be self-harm, and paternalism does not provide a sound basis for criminalization let alone a justification for sending people to prison.<sup>114</sup> Jail is a form of serious harm so it makes sense not to inflict further harm on self-harmers. The Supreme Court majority in *Malmo* focused not only on the fact that harmless activities such as incest, bestiality, and blasphemous libel had been criminalized, but also noted that offenses such as bestiality and incest carry penalties of up to fourteen years imprisonment.<sup>115</sup> Instead of using these unjust pre-Charter laws to justify maintaining other unjust laws, the majority should have scrutinized the justice and fairness of imposing long jail terms in such cases.

As for cannibalism, it would come within the purview of the Harm Principle as it causes harm in the great majority of cases<sup>116</sup> by interfering with the living relatives' interests.<sup>117</sup> Certainly, if a corpse basher or cannibal kills to gain access to a corpse, then the normal law of murder would be relevant. Although corpse bashing and cannibalism evoke powerful emotional reactions, the actual objective consequences are not too different from cremating a person after death or allowing a person to

donate her organs to science after death. In some cases it would be necessary to detain the cannibal if there is evidence that she poses a danger to the community, but in other cases a compulsory psychiatric confinement order might be sufficient. Sometimes the wrongdoer who interferes with a corpse may not be suffering from any mental ailment. For example, in England a group of animal rights activists removed the remains of an elderly lady from her grave in order to intimidate and harass her living relatives because the relatives were breeding guinea pigs for scientific research.<sup>118</sup> This type of interference would come within the purview of the Harm Principle because it harms the living family members.

Joel Feinberg argues that when people are subjected to forms of psychological distress that are "severe, prolonged, or constantly repeated, the mental suffering they cause may become obsessive and incapacitating, and therefore harmful."<sup>119</sup> Even in those cases in which no one has been harmed, because, say, the dead person died from natural causes and had no relatives or friends to suffer the consequences of learning that their loved one's corpse had been bashed or eaten, the defendant could be convicted because the criminal law criminalizes the standard case. As I argue below, conduct does not have to cause actual harm to come within the purview of the Harm Principle. It will come within the purview of the Harm Principle if it is conduct that causes harm in the standard case. Arguably, the great majority of people would have friends and relatives who would care were someone to interfere with their corpse.

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*Harm is the only bad consequence that can counterbalance the harmful consequences involved for those who are jailed.*

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Justice Arbour, dissenting in *Malmo-Levine*, held that the Harm Principle is not the only good justification for criminalizing conduct, but it is the only good justification for jailing people. She was of the view that the lawmaker had the power to criminalize marijuana possession, but that it was an overreach of that power to impose a jail term for mere possession. Under her line of reasoning the lawmaker could have imposed a hefty fine for possession of marijuana, but not a jail term. This approach is correct because harm is the only bad consequence that

can counterbalance the harmful consequences involved for those who are jailed. There may be other objective justifications for criminalizing conduct, but in the case of imprisonment the justification needs to demonstrate not only that the bad consequences of the wrongdoer's actions make her deserving of criminalization, but also that those consequences were of a kind that would justify a jail term.

Justices LeBel and Deschamps, also in dissent in *Malmo*, held that the marijuana prohibition was a disproportionate response to the societal problems at issue and, thus, was arbitrary.<sup>120</sup> Jailing a person for merely possessing marijuana for personal use contravenes the objective harm constraint, the objective wrongfulness constraint, and the proportionality constraint. One could use this dissenting argument to compare the Canadian judicial appraisal of imprisonment to the constitutional status of imprisonment in the United States. In terms of understanding imprisonment (a physical deprivation of liberty) in the United States, it is better to refer to the Eighth Amendment of the Constitution than to the Due Process Clause. The Eighth Amendment, if read morally, could be invoked to strike down laws that carry prison sentences for wrongs that do not result in harm to others. This is because harming a person by subjecting her to the hard treatment that is involved in serving a jail term would be a disproportionate response unless the wrongdoer inflicted equivalent harm on others.<sup>121</sup>

The Eighth Amendment should be interpreted in a way that accords with its overall moral aim or purpose. The Amendment's overall moral aim is to ensure that the state does not inflict unjust, oppressive, or disproportional punishments on its citizens. In *Solem v. Helm*, the Eighth Amendment was interpreted with reference to its underlying moral rationale in order to achieve the type of just result that the right to fair punishment was intended to achieve. In that case, the respondent was convicted for writing a "no account" check for \$100. The usual maximum punishment for that crime would have been five years imprisonment and a \$5,000 fine. Respondent, however, was sentenced to life imprisonment without the option of parole under South Dakota's recidivist statute because he had a number of prior convictions. The Supreme Court held that the "Eighth Amendment's proscription of cruel and unusual punishments prohibits not only barbaric punishments, but also sentences that are disproportionate to the crime committed."<sup>122</sup>

In this decision the Court did not pluck the right not to be punished disproportionately out of thin air, but rather referred to the pre-constitutional history of the right,<sup>123</sup> the Framers' original intention, the text of the Constitu-

tion, a number of precedents spanning over a century,<sup>124</sup> and the underlying moral rationale for the right before holding that: "The principle of proportionality is deeply rooted in common-law jurisprudence. It was expressed in Magna Carta, applied by the English courts for centuries, and repeated in the English Bill of Rights in language that was adopted in the Eighth Amendment. When the Framers of the Eighth Amendment adopted this language, they adopted the principle of proportionality that was implicit in it."<sup>125</sup>

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*The Eighth Amendment's overall moral aim is to ensure that the state does not inflict unjust, oppressive, or disproportional punishments on its citizens.*

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The Court's historical analysis in *Solem v. Helm* is every bit as convincing as the historical analysis that was used by Justice Scalia in *District of Columbia v. Heller* to interpret the Second Amendment as providing individuals with a right to possess guns in their homes.<sup>126</sup> However, the majority in a number of recent cases<sup>127</sup> has ignored precedent—the historical basis of the proportionality requirement and its underlying moral rationale—and thus have produced unjust results that cannot be reconciled with the general aim of the Eighth Amendment. In *Harmelin v. Michigan*, the court held that the Eighth Amendment allowed a state to impose a life sentence without the possibility of parole for the possession of 672 grams of cocaine.<sup>128</sup> In that case, Justice Scalia failed to follow *Solem v. Helm* and engaged in a game of semantics to argue that there was no historical foundation for the right. In particular, Justice Scalia argued that the text of the Constitution did not expressly mention prison sentences and therefore they were not covered by the proportionality requirement.

Justice Scalia's reasoning cannot be reconciled with the moral purpose of the right not to be punished disproportionately or with the idea of having a constitution. Coupled with this, Justice Scalia's historical analysis is not as convincing as that expounded in *Solem v. Helm*. In *Solem*, the Court noted that: "It would be anomalous indeed if the lesser punishment of a fine and the greater punishment of death were both subject to proportionality

analysis, but the intermediate punishment of imprisonment were not. There is also no historical support for such an exception. The common-law principle incorporated into the Eighth Amendment clearly applied to prison terms.<sup>129</sup> There is clearly no foundation for the contention that the principle of proportionality does not apply to prison sentences. Neither the text of the Eighth Amendment, its normative basis, nor the history behind it supports such an exception. The death penalty, fines, and imprisonment were all common forms of punishment when the Eighth Amendment was drafted. What makes these common forms of punishment unusual or cruel? Fines and prison sentences are unusual and cruel when the severity of the penalty is greater than the gravity of the crime. Likewise, the death penalty is unusual when it is used for offenses that do not involve killing. "Even one day in prison would be a cruel and unusual punishment for the 'crime' of having a common cold."<sup>130</sup>

Interestingly, Justice Scalia does not always stick to his narrow form of originalism.<sup>131</sup> In *District of Columbia v. Heller*,<sup>132</sup> Justice Scalia writing for the majority struck down a law prohibiting gun possession, but held that a person would not be allowed to possess guns in sensitive places such as government buildings, schools, and universities. He came to this conclusion even though there is nothing in the text of the twenty-seven words in the Second Amendment to justify this limitation. In earlier times, older boys in rural areas would have taken a rifle to school without question. Justice Scalia relied on scant precedent to dress up this exception, but the reality is that Justice Scalia interpreted the Second Amendment

as providing such an exception by considering the wider normative implications of allowing guns in such places. While Justice Scalia does not explicitly adopt the "evolving standards of decency" standard, this type of moral reasoning is implicit in his evaluative judgment about the need to keep guns out of sensitive places.

It is impossible to interpret rights by referring to a purely originalist historical analysis. Justice White explicitly recognizes this in his dissenting opinion in *Harmelin v. Michigan* when he notes that: "[t]he scope of the prohibition against cruel and unusual punishments has long understood the limitations of a purely historical analysis. . . . When it comes to the Eighth Amendment, the Court must employ a flexible and dynamic interpretation."<sup>133</sup> Justice White notes that the court has recognized that a punishment may violate the Eighth Amendment if it is contrary to the "evolving standards of decency that mark the progress of a maturing society. . . . In evaluating a punishment under this test, we have looked not to our own conceptions of decency, but to those of modern American society as a whole in determining what standards have 'evolved.'"<sup>134</sup> It is not clear how future cases will be decided, but it is worth noting that in *Kennedy v. Louisiana* the majority also adopted the "evolving standards of decency" standard to produce a just result.<sup>135</sup> The *Solem* decision shows that it is possible to use moral principles to interpret the scope of the Eighth Amendment without engaging in judicial activism or inventing new rights or sub-rights that have no normative connection with the amendment.

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## VII Can Courts Determine Objective Accounts of Harm?

How much harm is sufficient to justify a jail term? I will focus here on the objective criterion of harm rather on the objective moral criterion of culpability,<sup>136</sup> because the courts will not have to consider culpability to determine whether a criminal law should be struck down for imposing an unjust prison sentence. Instead the courts will assess the fairness of the given jail term by referring to putative intention and harmfulness of the potentially bad consequences involved. As I noted above, moral culpability is putative at the *ex ante* criminalization and punishment stage. The legislator or review judge makes a generalization about the wrongness of actions that *culpably* aim to bring about bad consequences. Hence, were the U.S. Supreme Court to consider the justice of

criminalizing and jailing people for rape, all it would need to do to satisfy the moral culpability requirement is rely on the general presumption that intentionally or recklessly raping others is wrongful. It would then turn to the harm element to examine empirical evidence to ascertain whether rape does in fact harm others. Courts reviewing violations of human or constitutional rights would not consider individual culpability, as individual guilt is an *ex post* trial consideration that tells us nothing about whether sentences are just from the *ex ante* criminalization perspective.

Harm is the objective element that would be more important in these cases, as the court would use it as a criterion to decide the constitutionality of laws impos-

ing jail terms. In contrast, culpability is an element of criminalization regardless of whether the bad consequences are harmful (e.g., culpably engaging in harmless exhibitionism on a public bus is *prima facie* criminalizable, even though a prison sentence would not be a proportionate form of punishment because of the harmlessness of the crime). When harm is the objective element used for assessment, even gross negligence will be sufficient *mens rea* to justify a jail sentence so long as the bad consequences are sufficiently harmful.<sup>137</sup> In many cases in which there is no harm, there will also be no moral wrongdoing. Were a petitioner trying to get a law struck down that jailed those who merely possessed marijuana for personal use, he or she would point to the fact that it does not harm others and therefore does not wrong them. Even though the possessor intentionally possesses the substance, her conduct does not affect others' rights. In other cases, the conduct will be harmful but only in a trivial sense.

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*To determine the length of a sentence, the lawmaker would consider the harmfulness of the conduct and the degree of culpability that the offender manifested in bringing the harm about.*

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These examples lead to a series of key questions. How grave does the objective harm have to be to justify a jail term? In other words what is the threshold of harm for sending someone to jail? So far we have considered the threshold for using a prison sentence, now we will turn to the question of the length of that prison sentence.

To determine the length of a sentence, the lawmaker would consider the harmfulness of the conduct and the degree of culpability that the offender manifested in bringing the harm about. Thus, a crude formula might be: *culpability* × *bad consequence*, that is,  $C \times BC$ . Or, in the case of jail sentences:  $C \times \text{Harm (H)} = \text{sentence length}$ .<sup>138</sup> Culpability would have three values: (1) recklessness and gross negligence (Duff's "'practical indifference' which can be manifested both in choosing to take an unreasonable risk, and in failing to notice an obvious risk or in acting on an unreasonable belief that there is no risk"<sup>139</sup>); (2) gross recklessness (those who choose to take

a risk); and (3) full intention (purpose). In this reverse order, full intention would have the higher wrongfulness value of 3, with mere recklessness having the lower value of 1. I am of the view that gross negligence is sufficient to satisfy the culpability requirement, but that mere negligence is not. I will not go into detail here, but by mere negligence I mean pure accidents rather than the type of accidents that occur in circumstances where the wrongdoer should have been aware that she was risking danger for others.

Harm cannot be divided into three broad categories, because it varies significantly in degree and character. For instance, is physical assault worse than causing someone economic harm? What if the physical harm is minor and the economic harm is great? Harm also affects different people in different ways (that is, some people might prefer a black eye to having their new uninsured Bentley motorcar destroyed by vandals). The best we can do here is to make some basic generalizations about standard cases. Harm could be divided up into crude categories with murder having a value of 10 and littering, at the other end of the scale, having a value of 1.<sup>140</sup> Deciding which of the ten categories to slot a given harm into would not be easy, but it certainly would not be impossible. I use the idea of categories rather than the metaphor of fixed rungs on a ladder because, like culpability, the harmfulness of a given bad consequence will be a matter of degree. It may very well fall between two rungs on the metaphoric ladder. There are many variables that need to be considered to determine how to categorize a particular harm. Economic harm could be measured to some extent by the value of the loss suffered by the victim in monetary terms, but we would also have to factor in other variables such as physical violence and intimidation. For example, if the economic harm was brought about in violent circumstances, as is the case with armed robbery. Furthermore, physical violence against others can be measured to some degree by the extent of the physical injuries involved, though again we would have to consider other variables such as the psychological consequences that flow from certain physical attacks such as those that normally result from rape.<sup>141</sup>

A harmfulness grid would provide the lawmaker with general guidance, but in the end many decisions would be determined as a matter of degree within a particular category of harm. A sentencing grid would allow the lawmaker to consider all the variables and theorize about where to slot a particular harm in each case. Each decision would need to be supported with sound normative reasons and empirical evidence. A fur-

ther variable that affects the harmfulness inquiry is the cumulative impact of certain harms. For instance, a single instance of littering does not pose a serious threat to the ecological balance that we benefit from collectively, but it would if everyone were to litter. If we consider the scale above with harms ranging from 1 to 10, with littering and similar harms at the bottom of the scale, it is arguable that when  $x$  intentionally litters by dropping a soda can on the sidewalk she causes insignificant harm—harm that would fall between categories 1 and 2 on the harm scale<sup>142</sup> ( $C3 \times H1 = 4$ ). Although  $x$  has full intention, the harmfulness of her conduct is too insignificant to justify sending her to jail. But if the harmfulness of her littering is so trivial, why criminalize littering at all?

Harm does not have to be serious in an *individualized sense* to warrant a criminal law response rather than a private law response. Beyond the most obvious crimes that set back our individual interests, there are legions of others that set back our collective interests. It would be plausible to argue that we have a collective interest in avoiding serious pollution. When many individuals litter, our collective interests are set back. Hyman Gross points out: “[s]ocial life, particularly in the complex form of civilized societies, creates many dependencies among members of a community.”<sup>143</sup> The welfare of members of a community is dependent on each member of that community exercising a certain amount of restraint and precaution when pursuing his or her legitimate aims. It is also dependent on the members of the community cooperating to achieve certain common objectives.<sup>144</sup> Collective interests normally fall into one of two categories of interests: community or governmental. Community interests include those interests that are vital to individual welfare such as preserving health systems, national security, and the environment.<sup>145</sup> Meanwhile, preventing violations of governmental interests includes preventing tax evasion, maintaining the court system, preventing customs violations, and preventing the corruption of government officials.<sup>146</sup> We all have an individual stake in both community and governmental interests.

Feinberg notes: “[t]he maintenance or advancement of a specific government interest may be highly dilute in any given citizen’s personal hierarchy. I am not seriously harmed by a single act of contempt of court or tax evasion, though if such acts become general, various government operations that are as essential to my welfare as public health and economic prosperity would no longer be possible.”<sup>147</sup> Single acts of environmental vandalism, littering, and tax evasion not only invade

a community interest in a cumulative sense, but also have harmful implications for individuals. As Feinberg explains, “[b]ribing of a public official harms me only indirectly or remotely, but it threatens direct harm insofar as it endangers the operation of government systems in whose efficient normal functioning we all have a stake.”<sup>148</sup>

Littering is criminalizable because the aggregate harm that would be caused by mass littering would be serious. In the modern world, there is ample evidence about global warming and the dangers posed by environmental vandalism. Were everyone in New York permitted to litter, this would have a greater impact on the collective interests of New Yorkers than, say, twenty extra homicides per year. The offense of littering should not carry a jail sentence, however, because an individual should be held responsible only for her or his contribution to the overall harm. Although the aggregate harm of littering would be rather high on the harm scale, only a negligible share of that harm can be imputed to the individual who litters.<sup>149</sup> There is no doubt that tax evasion also results in harm because it sets back our collective and individual interests. It sets back our collective interests in that there will be less money for public amenities such as hospitals and schools, and it sets back our individual interests in that those who are honest suffer an economic loss by having to pay more to cover the eventual shortfall.<sup>150</sup>

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*Harm does not have to be serious in an individualized sense to warrant a criminal law response rather than a private law response.*

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Unlike littering, tax evasion could justify a jail sentence, because by looking at the tax evader’s individual economic gain it is possible to impute a measurable share of the aggregate social harm to that individual contributor. As it is not possible to measure her real contribution to the overall harm, the value of the tax evader’s economic *gain* should be used to set a proportionate sentence. The courts should treat like cases alike. The jail sentence for tax evasion should be similar to those for normal theft cases, even though the theft involved

in tax evasion does not impact on individual interests. Furthermore, if the tax evasion was for twenty dollars, then there should be no jail sentence as a person would not normally be sent to jail for stealing twenty dollars from an individual as opposed to the state. In the end, it is a matter of degree and the lawmaker would have to demonstrate—at least in crude terms, though not with mathematical precision—that the wrongdoer’s gain was a sufficient contribution to the aggregate harm for the purposes of imposing a jail sentence.<sup>151</sup> The length of the jail term should be proportionate to the extent of the economic value of the theft in individualized terms, as even the tax evasion of ten million dollars would not set back our collective interests in any measurable way.

It is not possible to determine the fairness of the length of a sentence with any exactitude, nor is it possible to determine with precision when a wrong is serious enough to justify a jail sentence. If a sentence is justified in accordance with the potential offender’s culpability and the harmfulness of her actions, what degree of each is required to warrant a short jail term? The shortest jail sentences might be between one and three days. Even three days in prison would be seriously harmful for those who are locked up. Therefore, the culpable harm doing would have to be reasonably serious to warrant even a short jail term. I doubt that shoplifting would justify a short jail term, but if we add the variable of repeat offending then it might be fair to resort to the use of a jail sentence. From the *ex ante* perspective, the lawmaker could state that this is a trivial harm, but if a person chooses to recidivate, she could expect jail time eventually. Here again we face the problem of where to draw the line. After all, retribution in a just society is not as simple as an eye for an eye.

I have argued that a person should not be jailed unless her wrongdoing has harmful (or potentially harmful) consequences. If we accept this proposition, then we are able to provide the courts with a realistic and manageable standard for reviewing offenses that carry jail terms. Most constitutional judges could distinguish objective harm from a conventional harm. Determining whether conduct involves sufficient objective harm for the purposes overriding a criminal statute that carries a jail term is not too different from determining whether panhandling involves an exercise of one’s right to freedom of expression. The harm analysis carried out by the learned trial judge in *Malmo-Levine* and followed by Justice Arbour in dissent in the Supreme Court of Canada<sup>152</sup> is particularly impressive in this respect. On the basis of the evidence put before the court, the trial judge found that moderate long-term use of marijuana by a healthy

adult was not harmful, that there is no conclusive evidence to show that it causes irreversible organic or mental damage to the user (except in relation to the lungs), and that marijuana is not a highly reinforcing type of drug, like heroin or cocaine. Furthermore, the trial judge said that there was no evidence of a causal relationship between marijuana use and criminality. The trial judge also noted that the health costs related to marijuana use are small in comparison to those costs associated with tobacco and alcohol consumption.<sup>153</sup> Coupled with this, these types of costs are remote harms. I have argued elsewhere that any objective harm has to be fairly imputable to the person being criminalized (for present purposes, the person being deprived of her liberty via imprisonment) if the Harm Principle is to be satisfied.<sup>154</sup> The *Malmo-Levine* trial judge reviewed an Australian government report completed in 1994<sup>155</sup> and noted that marijuana use harmed the health of only a minority of users, including persons with pre-existing diseases such as cardiovascular disease, respiratory disease, and schizophrenia or other drug dependencies, as well as pregnant women.<sup>156</sup> To the extent that the objective harm is only *self-harm* it is not criminalizable.

The U.S. Supreme Court has also demonstrated some skill in drawing the line in these types of cases. In *Solem v. Helm*, the Supreme Court held that a court’s proportionality analysis under the Eighth Amendment should be guided by objective criteria including the gravity of the offense and the severity of the sentence; the sentences imposed in similar cases; and whether more serious crimes have been treated more leniently.<sup>157</sup> It also held that courts are competent to judge the gravity of an offense and could do so by considering the harm caused or threatened and the culpability of the putative offender.<sup>158</sup> The Court noted that: “There are generally accepted criteria for comparing the severity of different crimes, despite the difficulties courts face in attempting to draw distinctions between similar crimes.”<sup>159</sup> The problem of knowing where to draw the moral line, although troubling, does not arise merely in the area of deciding the justice of penal punishment.<sup>160</sup> The Court also referred to other objective variables such as violence, the overall magnitude of the harm involved, whether the wrong was of an inchoate nature, culpability, accessory, and principal. The Court summed up these variables by noting: “This list is by no means exhaustive. It simply illustrates that there are generally accepted criteria for comparing the severity of different crimes on a broad scale, despite the difficulties courts face in attempting to draw distinctions between similar crimes.”<sup>161</sup>

## VIII Is Actual Harm Necessary?

Do we need actual tangible harm to justify imposing a jail sentence? In some cases the victim may never discover the harm, but this does not alter the fact that the bad act has been committed with bad intentions. John Gardner and Stephen Shute use Kant's second formulation of the Categorical Imperative to identify the wrongness of rape by deception.<sup>162</sup> They argue that rape is harmless in certain circumstances even though this sounds oxymoronic. They postulate that in some cases the rape victim will not know that she has been raped and will never find out (assuming, for example, that she was inebriated to the point of unconsciousness during the rape and that the wrongdoer used a prophylactic). According to Gardner and Shute, this is physiologically possible because not all rapes involve damaging or painful force that would "inevitably bring it to light later."<sup>163</sup> They observe, "those who have drawn attention to the phenomena of 'date rape' have highlighted [that] one may be raped while sexually aroused, even while sexually aroused by the attentions of the rapist, and one may be aroused, of course, while drunk or drugged."<sup>164</sup> They postulate that the victim's life does not change for the worse in such circumstances, because the victim would have no feelings about the rape since she would not remember the actual physical violation.

Gardner and Shute argue that rape is harmless when it does not cause any physical damage<sup>165</sup> and when it is not brought home to the victim. However, this is not a general proposition. Its application is limited to special cases such as rape by deception. More generally, harm does not have to be brought home to the individual victim involved for it to come within the purview of the Harm Principle. Hence, there is no need for a victim to discover the hidden harm for it to be criminalizable. But it will have to be discovered by someone if it is to be labeled as criminal conduct from an *ex post* perspective in a trial court. In the real world, conduct can be criminalized from an *ex ante* perspective so long as it is conduct that normally poses a risk of real harm to others, but an individual's harm doing can be brought within the purview of the criminal law only from an *ex post* perspective according to the facts of the particular case.

Undetected rapes are harmless in that the victim has not discovered the wrongful harm, but "[i]n no jurisdictions known to us is it true that rape is a crime only when harmful. Even the pure [so-called undetected

harmless rape] case is classified as rape, and criminally so. One could sideline it by saying that the Harm Principle is a rule of thumb, and tolerates some departures from its standard. One could also sideline the pure case by observing that the Harm Principle's standard is met if the class of criminalized acts is a class the members of which tend to cause harm, and that is true of rape in spite of the possibility of the case. . . . The test is passed by the pure case of rape with flying colors. If the act in this case were not criminalized then, assuming at least partial efficiency on the part of the law, people's rights to sexual autonomy would more often be violated."<sup>166</sup>

The core moral justification for punishment and criminalization in such cases is moral culpability. Actual harm is not needed for the purposes of invoking the criminal law. For example, inchoate liability aims to criminalize and punish conduct "in so far as it has an appropriate causal relationship to a primary harm, as making the occurrence of harm more likely; and the culpability of someone committing an inchoate offense, in so far as it involves more than the willful performance of conduct defined by law as criminal, will consist essentially in her awareness of that relationship—in the fact that she knowingly, and avoidably, does what makes the occurrence of a primary harm more likely."<sup>167</sup> The subjectivist argument for criminalizing attempts is that those who attempt to commit a criminal harm are morally no less culpable than those who succeed in doing so. For instance, if *x* shoots at *n* with the intention of killing *n*, but misses, she is no less culpable than if she had succeeded in killing *n*. There is no doubt that deliberately creating this type of danger should be criminalized and punished with a jail term. Coupled with this, the moral culpability element is sufficient to warrant a jail sentence when the harm aimed for is very serious. The wrongfulness element is present, but the bad consequence element is not satisfied. The controversy is in deciding if and to what extent any sentence should be discounted in cases in which the culpable offender has not caused *any* harm. Should moral luck play a role in grading and labeling offenses? Clearly, in those cases in which the attempted harm was of a trivial nature, moral culpability alone would not be sufficient to justify jail sentences.

In many cases the harm aimed for is sufficiently serious to justify a jail sentence.<sup>168</sup> Nevertheless, the absence

of harm doing cannot be completely ignored when determining the gravity of attempts. Retribution is about inflicting hard treatment on those who have wronged others. Proportionality means that both harm and culpability need to be considered when grading offenses and setting sentences. The objective element of harm should be considered along with moral culpability when grading attempts. Not only is the type of harm that was aimed for by the attempter important for determining the gravity of the attempt, but it is also important in retributive terms. There is a difference between attempted shoplifting and attempted murder. The potential harm gives the legislature guidance about where the sentence tariff should be set. Furthermore, the overall normative impact of the wrongdoing has to be considered if we are to ensure that the wrongdoer gets her just deserts and nothing more. A proportionate and fair sentence should reflect the gravity of the harm doing and the wrongdoing against the victim.

Clearly, shooting at another with the intention to kill is attempted murder and is gravely wrong, but the harm

doing is reduced to endangerment when a bullet miss its intended victim. The attempted murderer risked the life of his victim, but due to a futile attempt no harm has eventuated. As I noted above, many variables need to be considered when grading offenses and assigning sentences. In the case of attempted murder the victim would be left distressed if nothing else.<sup>169</sup> But the fact remains that the overall negative normative impact of an attempted murder is significantly less than that of a completed murder, and therefore attempts should be graded as less serious to reflect this. Failing to consider the overall normative impact of the wrongdoing for the victim would allow the victim to benefit from moral luck (escape harm) and receive full retribution as if she had been harmed. This type of distortion would not only prevent the offender from benefiting from moral luck, but also force her to suffer retribution for consequences that did not eventuate. Fairness and justice means that it makes sense to consider the overall normative impact of the wrongdoing (its consequences) and make appropriate discounts for inchoate offenses.

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## IX Concluding Remarks

Clearly, one of the most fundamental rights that have been enshrined in a number of constitutional documents is the right not to be unfairly punished. Even an originalist reading of the U.S. Constitution cannot deny that this right exists. It exists, and it requires a dynamic normative interpretation if the moral aim of the right is to be achieved. The Supreme Court has recognized that punishment may violate the proportionality requirement in the Eighth Amendment in normative terms if it is contrary to the “evolving standards of decency that mark the progress of a maturing society.” The Court has stated, “In evaluating a punishment under this test, ‘we have looked not to our own conceptions of decency, but to those of modern American society as a whole’ in determining what standards have ‘evolved,’ . . . and thus have focused not on ‘the subjective views of individual Justices,’ but on ‘objective factors to the maximum possible extent,’ . . . . It is this type of objective factor which forms the basis for the tripartite proportionality analysis set forth in *Solem*.”<sup>170</sup> However, this standard is not likely to be adopted for non-capital<sup>171</sup> punishments until we see a composition on the bench similar to that of the Warren Court.

The objective criteria used in *Solem* included: (1) the harmfulness of the crime in comparison to the punish-

ment, (2) the sentences imposed in the jurisdiction for similarly grave offenses, and (3) whether other jurisdictions imposed a lesser sentence for the same crime. I have argued that the core objective constraint is harm. Harm is objective because sentences imposed within the jurisdiction or in other jurisdictions might be equally unfair. As I noted above, the majority in *Malmo-Levine* in the Supreme Court of Canada relied on disproportionate sentences as expressed in other cases to justify upholding a disproportionate sentence for marijuana possession for personal use. However, the proportionality constraint on unjust sentencing has two limbs, ordinal and cardinal proportionality.<sup>172</sup> Ordinal proportionality ensures equality by mandating that persons convicted of comparable crimes with similar criminal records receive comparable sentences. Meanwhile, cardinal proportionality considers the fairness of a given sentence from the *ex ante* criminalization perspective by setting sentences in accordance with the harmfulness and culpableness of the potential wrongdoing. The United States Supreme Court has also demonstrated some skill in drawing the line in sentencing cases by considering both ordinal and cardinal proportionality. In *Solem v. Helm* the Court held that a court’s proportionality analysis under the Eighth

Amendment should be guided by objective criteria including the gravity of the offense and the severity of the sentence (cardinal proportionality); the sentences imposed in similar cases (ordinal proportionality); and whether more serious crimes have been treated more leniently.<sup>173</sup> *Malmo-Levine* failed to consider both cardinal and ordinal proportionality.

Using objective harm to draw a line will not be easy in borderline cases. For instance, it would not be easy to determine whether the trivial harm involved in shoplifting warrants a very short jail term, so the court will have to be left some room for a margin for error. Nevertheless, the courts would have no difficulty in identifying sentences that are unjust in more than a trivial sense. If a person was given five years for stealing a pair of shoes, then clearly the Supreme Court could identify the disproportionality between the harmfulness of the wrong and the sentence imposed. The Court could also determine proportionality adequately in cases where harmless conduct is subject to jail sentences. In other words, the Court would not have to engage in judicial activism or stretch the meaning of the Eighth Amendment in order to strike down laws jailing people for possessing sex toys, feeding homeless people, attending strip clubs, etc. Likewise, it would not have to invent any new rights or stretch the meaning of the Eighth Amendment to be able to determine the injustice of the 'three strikes and you are out' type sentences.

In *Rammel v. Estelle*, the Supreme Court upheld a life sentence for fraud crimes involving a sum of \$230.<sup>174</sup> Meanwhile, in *Harmelin v. Michigan*, the Court upheld a life sentence without the possibility of parole for possession of 672 grams of cocaine. In *Lockyer v. Andrade*, it upheld two consecutive twenty-five-year sentences

imposed under California's three-strikes law for shoplifting offenses involving the theft of \$150 worth of videotapes.<sup>175</sup> If the House of Lords, in 1689, could determine that a "fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant [given the harm involved], against magna charta, the common right of the subject, and against the law of the land,"<sup>176</sup> then it is difficult to believe that the U.S. Supreme Court in the twenty-first century does not have the expertise to interpret the Eighth Amendment in a way that is reconcilable with its *raison d'être*. The moral judgments that are required to interpret it in a way that achieves the aim of preventing the state from imposing unjust punishments are not controversial. These types of evaluative judgments are no different from those adopted to determine the scope of the free speech and privacy rights. The staunchest originalist might deny that the right to privacy has validity, but he or she could not deny that determining whether a person has a right to free speech and whether that right is overridden for a compelling state reason involves some kind of moral assessment. The constitutional interpretation of the right to fair punishment as outlined above is more evident in the Constitution than the privacy right, and it should be recognized as providing a general right not to be unfairly punished. To continue to misinterpret this right in order to circumvent its moral aim is wrong when such a reading is so utterly out of keeping with objective morality, modern standards, and the right's meaning. To impose such an interpretation is inconsistent with our constitutional sense of personal liberty and our respect for the rule of law.

## NOTES

1 Antony Duff draws a helpful, though not a perfectly clear line, through this gray area: "What makes a reckless agent more culpable, more fully responsible for the risk she creates, is that she displays a gross indifference to that particular risk or to the particular interests which she threatens: negligence, however, involves a less specific kind of carelessness or inattention which does not relate the agent closely, as an agent, to the risk which she creates. To show that I recklessly endangered someone's life it must be shown that my action manifested a culpable indifference to her life: but negligently endangering her life need involve only a lack of attention to what I am doing—not a specific indifference to that particular risk." Gross negligence is a form of recklessness, whereas mere negligence would not be sufficient to satisfy the *mens rea*

requirement. See R. A. Duff, *Intention, Agency and Criminal Liability* (Oxford, UK: Basil Blackwell, 1990), 165.

2 The relevant fairness constraint here is proportionality in punishment. See generally, Andrew von Hirsch and Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* (Oxford, UK: Oxford University Press, 2005). The United States Supreme Court has recognized the proportionality fairness constraint for close to a century in both non-capital and capital punishment cases, see *Weems v. United States*, 217 U.S. 349 (1910); *Robinson v. California*, 360 U.S. 660 (1962); and *Solem v. Helm*, 463 U.S. 277 (1983). Cf. *Harmelin v. Michigan*, 501 U.S. 957 (1991), in which the majority erroneously refused to follow a century of precedent. The principle has also been taken seriously in a number of capital punishment cases, see *Wood-*

son v. North Carolina, 428 U.S. 280 (1976); *Coker v. Georgia*, 433 U.S. 584 (1977); and *Kennedy v. Louisiana*, 554 U.S. \_\_\_\_ (2008).

3 The theory of objectivity on which this article relies is set out *in extenso* in Christine M. Korsgaard, "The Reasons We Can Share: An Attack on the Distinction Between Agent-Relative and Agent-Neutral Values", *Social Philosophy and Policy* 10, no. 1 (1993): 24-51. For an account of the type of reasoning process that would be adopted by the individual inter-subjective thinkers, see Nicholas Rescher, *Objectivity: The Obligations of Impersonal Reason* (Notre Dame, IN: University of Notre Dame Press, 1997). Also, Gerald Postema, "Objectivity Fit for Law," in *Objectivity in Law and Morals*, ed. Brian Leiter (Cambridge, UK: Cambridge University Press, 2001), 99-143.

4 Andrew von Hirsch, *Censure and Sanctions* (Oxford, UK: Oxford University Press, 1993). See also J. R. Lucas, *On Justice* (Oxford, UK: Clarendon Press, 1980).

5 The general consequential forward-looking justification (crime prevention) for having an institution of punishment and criminalization is not an objective moral justification for individualized criminalization and punishment. However, it does provide a liberal democracy with a general justification for having a system of criminalization and punishment. This general utilitarian forward-looking justification, while inherently good because it generally aims at preserving human well-being, is distinct and independent from the justification for individualized criminalization and punishment, which is based on just deserts for individual wrongdoing. Just deserts is a backward-looking justification concerning retribution for individual wrongdoing (from the *ex ante* perspective the backward looking process is only putative, as the lawmaker asks what if *x* brings about consequence *y*). Michael Moore argues that retributive punishment in itself is inherently good regardless of whether it also prevents crime. See Michael Moore, *Placing Blame: A General Theory of the Criminal Law*, (Oxford, UK: Clarendon Press, 1997), 83-188. In contrast, I argue that retributive punishment is not inherently good, but rather it is *right and fair* (*right* not *good*) to inflict proportionate retribution on those who have wronged others.

6 On the goodness of preventing harm to humans, see generally Rescher, *Objectivity: The Obligations of Impersonal Reason*.

7 John Tasioulas, "Punishment and Repentance," *Philosophy* 81 (2006): 279, 285-91.

8 See generally, von Hirsch, *Censure and Sanctions*.

9 For example, we would not want to criminalize a husband for falsely promising his wife that he would not go to the pub on the way home from work. False promising is wrongful in deontological terms, but it will not necessarily result in any significant harm. See Dennis J. Baker, "The Harm Principle vs. Kantian Criteria for Ensuring Fair, Principled and Just Criminalization," *Australian Journal of Legal Philosophy* 33 (2008): 66, 94-98.

10 Dennis J. Baker, "The Sense and Nonsense of Criminalizing Transfers of Obscene Materials," *Singapore Law Review* 26 (2008). See also *R. v. Gibson* [1991] 1 All E.R. 649, in which the defendant was convicted for outraging public decency by displaying in an art gallery earrings made out of human fetuses. Although the display shocked some, it could hardly be said to have harmed them. See also Thomas Nagel, "Concealment

and Exposure," *Philosophy and Public Affairs* 27, no. 1 (1998): 3; and Andrew von Hirsch and Andrew P. Simester, *Inciivilities: Regulating Offensive Behavior* (Oxford, UK: Hart Publishing, 2006), 115 *et seq.* On the distinction between harm and mere offense, see Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others, Vol. II* (New York: Oxford University Press, 1985).

11 See J. R. Lucas, *Responsibility* (Oxford, UK: Clarendon Press, 1993), 284.

12 "In cultivating objectivity [the inter-subjective actor] will, accordingly, care for what is convincing to others—or, rather, would be so if they were suitably situated. If I care for objectivity, then only those things should be convincing to me that would be convincing to others—those things of which I can reasonably say that they would and should be convincing to anybody who would be 'in my shoes'. We enter (even if merely hypothetically) into a public forum of discussion (of dialectics if you will) where we must see it as incumbent on ourselves to put what we maintain in a way that others (insofar as reasonable) would be hard put to deny." Rescher, *Objectivity: The Obligations of Impersonal Reason*, 16.

13 See Ronald Dworkin, *Taking Rights Seriously* (King's Lynn: Duckworth, 1977), 22 *et seq.*

14 Harold N. Lee, "Morals, Morality, and Ethics: Suggested Terminology," *International Journal of Ethics* 38, no. 4 (1928): 450, 465.

15 See also Jean E. Hampton, *The Authority of Reason* (Cambridge, UK: Cambridge University Press, 1998).

16 "If I can argue for my own position only by citing the beliefs of others ('everyone knows homosexuality is a sin') you will conclude that I am parroting and not relying on moral conviction of my own. With the possible (though complex) exception of deity, there is no moral authority to which I can appeal and so automatically make my position a moral one. I have reasons, though of course I may have been taught these reasons by others." Dworkin, *Taking Rights Seriously*, 250.

17 See generally, Rescher, *Objectivity: The Obligations of Impersonal Reason*.

18 Postema, "Objectivity Fit for Law," 121.

19 Korsgaard, "The Reasons We Can Share: An Attack on the Distinction Between Agent-Relative and Agent-Neutral Values," 24-51.

20 John Kleinig, "Criminally Harming Others," *Criminal Justice Ethics* 5 (1986): 3-10.

21 *Id.*, 6.

22 Glanville L. Williams, "The Definition of a Crime," *Current Legal Problems* 8 (1955): 107, 130.

23 To some extent this is attributable to the way in which the criminal and civil law evolved out of a single body of law. For a convenient and compendious overview of the criminal law's historical development and its relation to tort law, see Carleton Kemp Allen, *Legal Duties* (Oxford, UK: Clarendon Press, 1931), 221-52; J. A. Jolowicz, *Lectures on Jurisprudence* (London: Athlone Press, 1963), 344-58.

24 I have the "credit crunch" in mind. James Gobert and Maurice Punch provide the earlier example of Barings Bank

collapse. "Before its collapse, Barings Bank was sending sums of money to Nick Leeson in Singapore for amounts that in some instances exceeded both the bank's assets as well as the limits set by the Bank of England." James Gobert and Maurice Punch, *Rethinking Corporate Crime* (London: Butterworths LexisNexis, 2003), 19.

25 Allen, *Legal Duties*, 255.

26 Kleinig, "Criminally Harming Others."

27 Jean E. Hampton, "Liberalism, Retribution and Criminality," in *In Harms Way: Essays in Honor of Joel Feinberg*, ed. Jules L. Coleman and Allen Buchanan (Cambridge, UK: Cambridge University Press, 1994), 176 *et seq.*

28 See von Hirsch, *Censure and Sanctions*, 10.

29 "'Result-crimes,' and many other crimes, impose liability on the basis of conduct which is preliminary to the infliction of harm, merely because of the intention with which the person acted." Andrew Ashworth, "Taking the Consequences," in *Action and Value in Criminal Law*, ed. Stephen Shute, John Gardner, and Jeremy Horder (Oxford, UK: Clarendon Press, 1993), 116.

30 "It is important to point out that these proposed coercion-legitimizing principles do not even purport to state necessary and sufficient conditions for justified state coercion. A liberty-limiting principle does not state a *sufficient condition* because in a given case its purportedly relevant reason might not weigh heavily enough on the scales to outbalance the standing presumption in favor of liberty. That presumption is not only supported by moral and utilitarian considerations of a general kind; it is also likely to be buttressed in particular cases by appeal to the practical costs." Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others, Vol. I* (New York: Oxford University Press, 1984), 10, 187-90.

31 Feinberg, *Harm to Others*, 4, 10.

32 Marital rape was criminalized in some jurisdictions only in the 1990s. See *R. v. R.* [1991] 4 All E.R. 481. See also the discussion in Nicola Lacey, Celia Wells, and Oliver Quick, *Reconstructing Criminal Law*, 3<sup>rd</sup> ed. (London: LexisNexis, 2003), 487 *et seq.*

33 "It makes a great difference to the victim whether the community takes his wrong seriously, or passes it off as of no consequence. If he sees the man who cared nothing for him go scot-free, he is given to understand that society cares nothing for him either. But if the wrongdoer is made to see the error of his ways, the man to whom the wrong was done sees his rights vindicated, and is assured that society cares for him, even if one of its members does not, and will uphold his rights in face of assault and injury." Lucas, *Responsibility*, 104.

34 This is Lord Denning's test for ascertaining public nuisances. See his judgment in *Attorney-General v. PYA Quarries* [1957] 2 Q.B. 169.

35 Surely the "credit crunch" is a public matter, even though most of the bad behavior will be dressed up as private law wrongs. Long ago, Brett noted that the "negligent mismanagement of a company's affairs brings about a widespread and severe calamity." See Peter Brett, *An Inquiry Into Criminal Guilt* (London: Sweet & Maxwell Ltd., 1963), 6-7.

36 S. E. Marshall and R. A. Duff, "Criminalization and Sharing Wrongs," *Canadian Journal of Law and Jurisprudence* 11 (1998): 20-21.

37 *Id.*

38 Allen, *Legal Duties*, 233-35.

39 I discuss these types of harms further in Section IV of this essay.

40 Matthew Kramer makes a similar distinction between culpability and wrongness. See Matthew H. Kramer, *Where Law and Morality Meet* (Oxford, UK: Oxford University Press, 2004), 250.

41 See generally, Itzhak Kugler, *Direct and Oblique Intention in the Criminal Law: An Inquiry into Degrees of Blameworthiness* (Bodmin, Cornwall: Ashgate, 2002), 1-57.

42 Thomas Nagel, *The View From Nowhere* (New York: Oxford University Press, 1986), 182. See also Ronald D. Milo, *Immorality* (Princeton, NJ: Princeton University Press, 1984).

43 This type of moral claim is essentially self-evident. See W. D. Ross, *The Right and the Good* (Oxford, UK: Oxford University Press, 1930), 29. Charles Fried notes that: "harming an innocent person is wrong. Whatever may be the problems about intention in other contexts, intention as the mode of application clearly complements the substantive content of the norm." That choosing to harm others "should be subject to this norm also works to explain the logic of the norm, its categorical force." Charles Fried, *Right and Wrong* (Cambridge, MA: Harvard University Press, 1979), 31. See also Georg Henrik von Wright, *Norm and Action: A Logical Enquiry* (London: Routledge & Kegan Paul, 1963). Joseph Raz notes that: "[C]ausing harm entails by its very meaning that the action is *prima facie* wrong, it is a normative concept acquiring its specific meaning from the moral theory within which it is embedded." Joseph Raz, *The Morality of Freedom* (Oxford, UK: Clarendon Press, 1986), 414.

44 See von Hirsch and Ashworth, *Proportionate Sentencing: Exploring the Principles*, 4. With respect to fair labeling more generally, see Andrew Ashworth, *Principles of Criminal Law*, 4<sup>th</sup> ed. (Oxford, UK: Oxford University Press, 2003), 89-92.

45 Feinberg uses a balancing process to decide whether the harm is ultimately of a kind that warrants a criminal law response. See Feinberg, *Harm to Others*, 215-17.

46 H. L. A. Hart, *Punishment and Responsibility: Essays in the Philosophy of Law* (Oxford, UK: Clarendon Press, 1968), 181-82.

47 See Georg Henrik von Wright, *The Varieties of Goodness* (London: Routledge & Kegan Paul, 1963), 114-35.

48 Jean Hampton notes: "Our anger at [culpable wrongdoers] is a function of the fact that we see them as knowingly aligning themselves against morality. We despise their allegiance. Their knowledge which makes them culpable. Our anger, however, is defused if we discover that their action did not arise out of this hateful allegiance, e.g. if it was performed in ignorance of the prohibition against it, or by accident." Jean E. Hampton, "The Nature of Morality," *Social Philosophy and Policy* 7, no. 1 (1989): 22, 42.

- 49 "In a nutshell, the view is that a culpable agent is one who chooses to defy what she knows to be an authoritative moral command in the name of the satisfaction of one or more of her wishes, whose satisfaction the command forbids. She is disobedient in the face of knowledge that obedience is expected, and a rebel in the sense that she is attempting to establish something more to her liking as authoritative over her decision-making, rather than these moral commands." Jean E. Hampton, "Mens Rea," *Social Philosophy and Policy* 7, no. 2 (1990): 1, 15.
- 50 *Loper v. New York City Police Dept.*, 802 F. Supp. 1029, 1042 (S.D.N.Y. 1992); *Benefit v. Cambridge*, 424 Mass. 918 (1997).
- 51 *Federated Anti-Poverty Groups of British Columbia v. Vancouver (City)* [2002] B.C.S.C. 105.
- 52 See generally, Ronald Dworkin, *Freedom's Law: The Moral Reading of the American Constitution* (New York: Oxford University Press, 1996).
- 53 The relevant examples for present purposes include, *Solem v. Helm*, 463 U.S. 277 (1983); *Robinson v. California*, 360 U.S. 660, 667 (1962); the Canadian case, *R. v. Malmo-Levine*, [2000] B.C.C.A. 335 and *Kennedy*, 554 U.S. \_\_\_ (2008).
- 54 Dworkin focuses on the core human rights, but moral and evaluative judgments clearly permeate constitutional interpretation more generally. See Michael C. Dorf, "Truth, Justice, and the American Constitution," *Columbia Law Review* 97 (1997): 133.
- 55 Rights such as free speech and privacy clearly have a universalizable objective basis. The rights found in constitutions such as that of the United States, are constitutionalized (or codified) normative principles. See Dworkin, *Taking Rights Seriously*, 90-94; 101-49; Ronald Dworkin, *A Matter of Principle* (Cambridge, MA: Harvard University Press, 1985), 33 *et seq.* See also Graham Walker, *Moral Foundations of Constitutional Thought* (Princeton: Princeton University Press, 1990); and Onora O'Neill, *Towards Justice and Virtue: A Constructive Account of Practical Reasoning* (Cambridge, UK: Cambridge University Press, 1996).
- 56 As for the specific act of panhandling and free speech, see Helen Hershkoff and Adam S. Cohen, "Begging to Differ: The First Amendment and the Right to Beg," *Harvard Law Review* 104 (1991): 896.
- 57 For some examples of non-objective harm arguments, see Patrick Devlin, *The Enforcement of Morals*, (Oxford, UK: Oxford University Press, 1965); also Bernard E. Harcourt, "Collapse of the Harm Principle," *Journal of Criminal Law and Criminology* 90, (1999-2000): 109.
- 58 See Articles 12, 18, and 19 of the *Universal Declaration of Human Rights*, GA Res. 217 A (III), UN Doc. A/810 (1948).
- 59 See Stephen Shute, "With and Without Constitutional Restraints: A Comparison Between the Criminal Law of England and America," *Buffalo Criminal Law Review* 1 (1998): 329.
- 60 Article 8 of the *European Convention for the Protection of Human Rights and Fundamental Freedoms*, November 4, 1950, 213 U.N.T.S. 222 (entered into force generally on September 3, 1953).
- 61 *Lawrence v. Texas*, 539 U.S. 558 (2003); and *R. v. Malmo-Levine*, [2003] S.C.C. 74.
- 62 381 U.S. 479, 484 (1965).
- 63 410 U.S. 113, 153 (1973).
- 64 *Loving v. Virginia*, 388 U.S. 1 (1967).
- 65 *Prince v. Massachusetts*, 321 U.S. 158 (1944); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).
- 66 *Griswold v. Connecticut*, 381 U.S. 479; *Eisenstadt v. Baird*, 405 U.S. 438 (1972).
- 67 See *Armstrong v. State* 989 P. 2d 364, 372-74 (1999), in which it was noted that: "John Stuart Mill recognized this fundamental right of self-determination and personal autonomy as both a limitation on the power of the government and as principle of preeminent deference to the individual. He stated: '[T]he 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.'"
- 68 See for example, *Moran v. MGH Institute of Health Professionals*, 15 Mass. L. Rptr. 417 (2002); *The Matter of Conservatorship of Groves*, 109 S.W. 3d 317, 328 (2003); and *Richards v. State*, 743 S.W. 2d 747, 751 (1987), in which Justice Levy, dissenting, quoted Mill before concluding that: "if we uphold the authority of the state to punish one's failure to use a seat-belt, we are one more step on our way to an Orwellian society in which the State can punish merely for smoking cigarettes, for not brushing one's teeth, or for being foolish."
- 69 537 P. 2d 494 (Alaska 1975).
- 70 *Id.* See also *Cruzan v. Harmon*, 760 S.W. 2d 408, 417 (1988).
- 71 *Thor v. Superior Court*, 855 P. 2d 375, 380 (1993); *Commonwealth v. Bonadio* 415 A. 2d 47, 96-98 (1980).
- 72 406 U. S. 205, 224 (1972). See also Jeffrey S. Koehlinger, "Substantive Due Process Analysis and the Lockean Liberal Tradition: Rethinking the Modern Privacy Cases," *Indiana Law Journal* 65 (1990): 723.
- 73 415 A. 2d 47, 96-98 (1980).
- 74 *Lawrence*, 539 U.S. 558. While the judges in these cases do not always turn their minds to the distinction between objective and positive morality, they do seem to be engaging in a deliberative process that in many cases has allowed them to reach a conclusion that is reconcilable with fairness and justice.
- 75 478 U.S. 186 (1986).
- 76 *Lawrence*, 539 U.S. at 578.
- 77 Personal communication with the Hon. Associate Justice Ruth Bader Ginsburg of the United States Supreme Court, Cambridge University Law School, at the Faculty of Law Reception following the Sir David Williams Annual Lecture, May 9, 2005. I asked Justice Ginsburg which test was applied in *Lawrence v. Texas*. Justice Ginsburg said that: "there is no need to apply one or the other as they operate on a sliding scale." Justice Ginsburg was of the view that *Lawrence* sat on

the upper end of the “rational basis” scale and on the lower end of the “strict scrutiny” scale.

78 Douglas Husak, “Limitations on Criminalization,” in *Criminal Law Theory: Doctrines of the General Part*, ed. Stephen Shute and Andrew P. Simester (Oxford, UK: Oxford University Press, 2002), 17-25.

79 *Lawrence*, 539 U.S. at 578.

80 *Lawrence*, 539 U.S. 558.

81 In the Eighth Amendment context, the courts have tried to achieve objectivity by applying “evolving standards of decency that mark the progress of a maturing society” standard. See *Trop v. Dulles*, 356 U.S. 86, (1958) and *Solem*, 463 U.S. 277. This approach was approved recently in *Kennedy*, 554 U.S. \_\_\_ (2008), even though the Supreme Court is currently dominated by originalists.

82 See for example, *Harmelin v. Michigan*, 501 U.S. 957 (1991); *Locker v. Andrade*, 538 U.S. 63 (2003).

83 *Lawrence*, 539 U.S., at 589 (2003) (per Scalia J). I do not describe these judges as conservatives, as conservative political doctrine is about less state control and regulation—not more.

84 *Sherman v. Henry*, 928 S.W. 2d 464 (Tex. 1996).

85 *Barnes v. Glen Theatre Inc.*, 501 U.S. 560, 569 (1991).

86 240 F. 3d 944 (2001), 949. Notably, similar rights have been overridden in Canada and Europe to uphold positive morality. See, for example, *De Wilde, Ooms Versyp v. Belgium* (1971) 1 E.H.R.R. 373 at para. 68. See also *R. v. Malmö-Levine*, [2003] S.C.C. 74.

87 See for example, *R. v. Gibson* [1991] 1 All E.R. 649 where the artist used human fetuses as a part of an art exhibition. However, this type of conduct would come within the moral aim of the free speech right. Whether or not it would be protected would depend on the further moral question of whether the state has a compelling interest in preventing such displays.

88 Cf. Randy E. Barnett, “Justice Kennedy’s Libertarian Revolution: *Lawrence v. Texas*,” *Cato Supreme Court Review* (2002-2003): 21. See also Randy E. Barnett, “The Proper Scope of the Police Power,” *Notre Dame Law Review* 79 (2004): 429, 486.

89 Randy E. Barnett, “Justice Kennedy’s Libertarian Revolution: *Lawrence v. Texas*,” 32-41.

90 See, generally, Don Stuart, *Charter Justice in Canadian Criminal Law* (Toronto: Thomson Carswell, 2005).

91 The wider moral aim of the right of privacy is to protect personal autonomy, sovereignty over one’s personal affairs. Conduct such as that protected in *Lawrence* clearly comes within the original moral aim of the right and is protected by a moral reading of that right. As Dworkin notes: “[I]t hardly follows that those concrete rights—including the right to abortion—are more remote from their textual beginnings than are concrete rights—such as the right to burn a flag—that are derived by arguments that do not employ names for rights of middling abstraction.” Dworkin also argues: “According to the moral reading, these rights must be understood in the way their language most naturally suggests: they refer to abstract moral principles and incorporate these by reference, as limits

on government’s power”. Dworkin, *Freedom’s Law: The Moral Reading of the American Constitution*, 80, 7.

92 Randal C. Archibold, “Las Vegas Makes It Illegal to Feed Homeless in Parks,” *New York Times*, July 28, 2006. In Las Vegas a person can be jailed for up to six months for handing out food to homeless people in the city’s parks. The law has been used against charities that operate mobile soup kitchens.

93 *Young v. New York Transit Authority* 903 F 2d 146 (2d Cir. 1990).

94 See Baker, “The Sense and Nonsense of Criminalizing Transfers of Obscene Materials.”

95 Parking fines spring to mind—although illegal parking could fall within the purview of the harm principle because it causes co-ordination problems. See Moore, *Placing Blame*, 185 et passim.

96 This does not mean that the courts could not use other rights such as freedom of expression, privacy, and so forth to strike down laws that criminalize harmless wrongdoing, if those wrongs come within the moral purview of such rights.

97 [2003] S.C.C. 74.

98 *Constitution Act 1982*, Canadian Charter of Rights and Freedoms, sec. 7 part 1, sec 2(b).

99 *R. v. Malmö-Levine*, [2000] B.C.C.A. 335.

100 *Id.*

101 *Id.*

102 *Id.*

103 *Id.*, at para. 49 et passim.

104 *Id.*, citing *Rodriguez v. British Columbia (Attorney-General)*, [1993] 3 S.C.R. 519 at 590-591, 607 (per Sopinka J).

105 Braidwood draws on morality, precedent, the structure of constitutional argument in this area, and on a putative public inter-subjective deliberation about the public acceptability of the Harm Principle as a principle of fundamental justice. For Dworkin, objectivity hinges on personal conviction. However, my argument here adopts an inter-subjective deliberation approach. Cf. Dworkin, *A Matter of Principle*, 33 et seq.

106 A public deliberation process would demonstrate the objectivity of the claim that the Harm Principle is a fundamental principle of justice for the purpose of depriving people of their liberty via imprisonment. See Korsgaard, “The Reasons We Can Share: An Attack on the Distinction Between Agent-Relative and Agent-Neutral Values”, 24-51.

107 *R. v. Malmö-Levine*, [2000] B.C.C.A. 335 per totam curiam.

108 *R. v. Malmö-Levine*, [2003] S.C.C., at para. 111.

109 *Malmö-Levine*, [2003] S.C.C. 74 at para. 114. Likewise, it was held that there is no “sufficient consensus that the Harm Principle is vital or fundamental to our societal notion of criminal justice.”

110 *R. v. Malmö-Levine*, [2003] S.C.C., at para. 109.

111 *Id.* citing H. L. A. Hart, “Immorality and Treason,” *The Listener*, 162-63 (1959).

112 *R. v. Malmø-Levine*, [2003] S.C.C., at para. 117.

113 Dennis J. Baker, "The Moral Limits of Consent as a Defense in the Criminal Law," *New Criminal Law Review* 11, no. 4 (2008 forthcoming).

114 Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self, Vol. III* (New York: Oxford University Press, 1986). See also Richard J. Arneson, "Joel Feinberg and the Justifications of Hard Paternalism," *Legal Theory* 11, no. 3 (2005): 259; and Russ Shafer-Landau, "Liberalism and Paternalism," *Legal Theory* 11, no. 3 (2005): 169.

115 *Canadian Criminal Code 1985*, sec. 155(2) and 160. Blasphemous libel carries a penalty of up to two years imprisonment.

116 I have argued elsewhere that we do not need actual harm in every case. As long as the conduct normally results in harm then it will come within the purview of the Harm Principle. Baker, "The Harm Principle vs. Kantian Criteria for Ensuring Fair, Principled and Just Criminalization," 79-84. See also the discussion in the next section of this paper.

117 For alternative views on the wrongness of harming the dead, see Joan C. Callahan, "On Harming the Dead," *Ethics* 97, no. 2 (1989): 342; Dorothy Grover, "Posthumous Harm," *The Philosophical Quarterly* 39, no. 156 (1989): 334; and Barbara Baum Levenbook, "Harming Someone After His Death," *Ethics* 94, no. 3 (1984): 407.

118 Nick Britten, "Pensioner's Body Stolen by Animal Rights Group is Found," *The Daily Telegraph* (London), May 4, 2005.

119 Feinberg, *Harm to Others*, 46.

120 Their Honors expounded: "[T]he harm that marijuana consumption may cause seems rather mild on the evidence we have. In contrast, the harm and the problems connected with the form of criminalization chosen by Parliament seem plain and important. . . . Jailing people for the offense of simple possession seems consistent with the perception that the law, as it stands, amounts to some sort of legislative overreach to the apprehended problems associated with marijuana consumption . . . . The fundamental liberty interest has been infringed by the adoption and implementation of a legislative response which is disproportionate to the societal problems at issue." *R. v. Malmø-Levine*, [2003] SCC, at para. 280. The same would apply in Europe. See generally, Evelyn Ellis, *The Principle of Proportionality in the Laws of Europe* (Oxford, UK: Hart Publishing, 2000).

121 See *Solem*, 463 U.S. 277; *Robinson*, 360 U.S. 660 (1962).

122 *Solem*, 463 U.S. 277, 284-90.

123 In *Solem*, 463 US at 286, the Court convincingly and logically demonstrated that historically the *proportionality* requirement applied to all forms of state punishment. It noted that: "The English Bill of Rights repeated the principle of proportionality in language that was later adopted in the Eighth Amendment: 'excessive Baile ought not to be required nor excessive Fines imposed nor cruell and unusuall Punishments inflicted.' 1 *W. & M.*, sess. 2, ch. 2 (1689). Although the precise scope of this provision is uncertain, it at least incorporated 'the longstanding principle of English law that the punishment . . . should not be, by reason of its excessive length or severity, greatly disproportionate to the offense charged.'" *R. Perry*, *Sources of Our Liberties* 236 (1959); see 4 *W. Blackstone*,

*Commentaries* (1769), vol 4, 16-19: ". . . (in condemning 'punishments of unreasonable severity,' uses 'cruel' to mean severe or excessive). Indeed, barely three months after the Bill of Rights was adopted, the House of Lords declared that a 'fine of thirty thousand pounds, imposed by the court of King's Bench upon the earl of Devon, was excessive and exorbitant, against magna charta, the common right of the subject, and against the law of the land.' *Earl of Devon's Case*, 11 *State Trials* 133, 136 (1689)."

124 *Weems v. United States*, 217 U.S. 349 (1910); *Robinson*, 360 U.S. 660 (1962); *Hutto v. Davis*, 454 U.S. 370, 374, (1982); *Woodson*, 428 U.S. 280 (1976); *Coker v. Georgia*, 433 U.S. 584 (1977), 592; *Enmund v. Florida*, 458 U.S. 782 (1982); *Hutto v. Finney*, 437 U.S. 678, 685 (1978); *Ingraham v. Wright*, 430 U.S. 651, 667 (1977); and *Gregg v. Georgia*, 428 U.S. 153, 171-172 (1976).

125 *Solem*, 463 US 277, 284-86 (1983).

126 554 U.S. \_\_\_\_ (2008). A detailed comparative analysis is beyond the scope of this paper.

127 *Harmelin*, 501 U.S. 957; *Lockyer v. Andrade*, 538 U.S. 63 (2003).

128 501 U.S. 957 (1991).

129 463 U.S. at 289-90, citing *Hodges v. Humkin*, 80 Eng. Rep. 1015 (K. B. 1615).

130 *Robinson*, 360 U.S. at 667 (1962).

131 See, for example, the discussion in Jack M. Balkin and Sanford Levinson, "Understanding the Constitutional Revolution," *Virginia Law Review* 87, no. 6 (2001): 1045.

132 554 U.S. \_\_\_\_ (2008).

133 *Harmelin v. Michigan*, 501 U.S. 957, 1014-1015 (1991).

134 *Id.*

135 *Kennedy*, 554 U.S. \_\_\_\_ (2008).

136 Of course, recklessness and gross negligence as a condition of criminal liability will only be reconcilable with an objective account of justice and morality if the *subjectivist* approach is adopted. For an overview of the type of subjectivist account I have in mind, see Duff, *Intention, Agency and Criminal Liability*, 157 *et seq.* Duff's approach seems to base culpability on what a *rational* human should have known was dangerous more so than on what a reasonable person (in a conventional sense) should have known was dangerous. This approach achieves justice by excluding mere negligence as opposed to culpable indifference as a basis for criminal liability. Negligent dangerous driving would be caught, so long as it involved culpable indifference rather than mere accidental negligence.

137 *R. v. Adomako* [1995] 1 A.C. 171.

138 See, generally, von Hirsch and Ashworth, *Proportionate Sentencing: Exploring the Principles*; and Robert Nozick, *Philosophical Explanations* (Oxford, UK: Clarendon Press, 1981), 363-97.

139 Duff, *Intention, Agency and Criminal Liability*, 160-61.

140 See, for example, the *Minnesota Sentencing Guidelines and Commentary*, (Minnesota: Minnesota Sentencing Guidelines Commission, 2008) <<http://www.msgc.state.mn.us/guide->

lines/guide08.pdf>; also Richard S. Frase, "State Sentencing Guidelines Still Going Strong," *Judicature* 78 (1994-1995): 173.

141 There are many kinds of violence which impact different needs and interests. See, for example, the discussion in Johan Galtung, "Cultural Violence," *Journal of Peace Research* 27, no. 3 (1990): 291, 292.

142 That is, between categories 1 and 2 on the harmfulness scale because this is harmful enough in aggregate to warrant a criminal law response, but too trivial when individualized to warrant a jail sentence. I would expect shoplifting to fall between categories 2 and 3 on the harm scale, with common assault possibly falling between categories 3 and 4 and going upwards depending on the extent of any injuries or aggravating factors. Robbery might sit between categories 6 and 7, with rape sitting between categories 7 and 8. Clearly, conduct such as murder, terrorism, and genocide, would sit right at the top of the harmfulness scale. Although this idea needs to be developed further, and supplemented with many more examples, and deeper analysis, I tentatively suggest that a jail term would be appropriate only for conduct that has a bad consequence that falls between categories 3 and 4 on the harm scale. Any harm below this would be too borderline to warrant imposing a jail sentence. Many variables will determine to which category a particular harm belongs. The variables of intention and recklessness will play a significant role in serious crimes.

143 Hyman Gross, *A Theory of Criminal Justice* (New York: Oxford University Press, 1979), 119-21.

144 *Id.*

145 *Id.*

146 *Id.*

147 Feinberg, *Harm to Others*, 63-64.

148 *Id.*

149 Dennis J. Baker, "The Moral Limits of Criminalizing Remote Harms," *New Criminal Law Review* 10, no. 3 (2007): 371.

150 Von Hirsch notes that punishing individual wrongdoing cannot be explained in terms of obtaining an unfair advantage, but suggests that some offenses "might plausibly be explained in terms of unjustified advantage. Tax evasion is an example: it seems to involve taking more than one's share." Von Hirsch, *Censure and Sanctions*, 8; see also von Wright, *The Varieties of Goodness*, 216. However, von Hirsch notes that the unfair advantage test does not offer much guidance on whether to jail a tax evader. Here I suggest that any jail time should be proportionate to the wrongdoer's individual gain, rather than her contribution to the loss caused by aggregate harm of many people evading tax because her contribution to the aggregate harm would be too trivial to measure.

151 This type of theft does not involve violence and does not impact directly on the interests of others, so these variables would have to be considered when considering whether jail is warranted. In this respect, Feinberg's Standard Harms Analysis could also be instructive. Feinberg, *Harm to Others*, 215-16.

152 *R. v. Malmo-Levine*, [2003] S.C.C. 74.

153 *R. v. Malmo-Levine* [2000] BCCA 335.

154 Dennis J. Baker, "The Moral Limits of Criminalizing Remote Harms."

155 Wayne Hall, Nadia Solowij, and Jim Lemon, *National Drug Strategy: The Health and Psychological Consequences of Cannabis Use* (Canberra: Australian Government Publishing Service, 1994).

156 *R. v. Malmo-Levine* [2000] BCCA, at para. 20-21.

157 *Solem*, 463 U.S. at 290-94.

158 *Solem*, 463 U.S. at 292.

159 *Id.*

160 *Id.*, citing a number of examples where the Court was called on to make similar evaluative assessments.

161 *Id.*

162 John Gardner and Stephen Shute, "The Wrongness of Rape," in *Oxford Essays in Jurisprudence*, ed. Jeremy Horder, 4th ser. (Oxford, UK: Oxford University Press, 2000), 193-97.

163 *Id.*

164 Gardner and Shute, "The Wrongness of Rape," 196.

165 Physical harm does not necessarily have to cause damage, especially in the case of sexual contact. Non-consensual sexual contact including mere touching is an invasive form of harassment and intimidation and clearly would come within Feinberg's definition of harm.

166 *Id.*, 215-16.

167 "However, whilst not denying that this may be the appropriate way to understand many inchoate offenses, the latter view will give a different account of others, particularly those involving an intention directed towards a primary harm. For in such cases, on the latter view, the wrongness of the conduct consists in its intentional, not merely causal, relationship to some primary harm; and the culpability depends also on the way in which she directs her action towards that harm." R. A. Duff, *Criminal Attempts* (Oxford, UK: Clarendon Press, 1996), 132-33.

168 It may not be too controversial to suggest that crimes such as attempted rape, murder, arson, car theft, and so forth justify jail sentences.

169 The victim, having avoided harm, would no doubt also feel relieved.

170 This type of test can be read as a normative standard. See *Harmelin*, 501 U.S. at 1014-15 per Justice White in dissent.

171 The current bench has endorsed this standard for capital punishment cases. *Kennedy*, 554 U.S. (2008).

172 Von Hirsch, *Censure and Sanctions*.

173 *Solem v. Helm*, 463 U.S. 277, 290-294 (1983).

174 445 U.S. 263 (1980).

175 538 U.S. 63 (2003).

176 *Earl of Devon's Case*, 11 State Trials 133, 136 (1689).