August 13, 2012

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

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ABSTRACT

The American criminal justice system is under tremendous pressures, increasingly collapsing under its heavy weight, thus requiring inevitable change. One notable feature responsible for this broken system is over-criminalization: the scope of criminal law is constantly expanding, making individuals liable to conviction and punishment for an ever-wider range of behaviors. One area where over-criminalization is most notable concerns victimless crimes, namely, individuals who engage in consensual conduct, which inflict only harm on themselves but not on third parties, such as prostitution, pornography, sadomasochism, gambling, and most notably, drug crimes.

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

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

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INTRODUCTION

The American criminal justice system is increasingly collapsing under its heavy weight, thus calling for a thorough re-evaluation.\(^1\) The system’s illnesses encompass various aspects of the criminal process, including failings in criminal procedure and in substantive criminal law.\(^2\) Indeed, perhaps the feature most responsible for this broken system is what scholars have dubbed “the over-criminalization phenomenon,”\(^3\) in which a growing number of individuals are liable to conviction for an ever-wider range of behaviors.\(^4\)

In criticizing the criminal justice system in its current form, scholars have mainly focused on procedure, process and sentencing policies, giving less attention to criminal law theory and substantive criminal law. In contrast with criminal procedure, which is thoroughly constitutionalized, constitutional law places no constraints on its content, and courts have never developed significant constitutional doctrines for checking legislatures’ crime-creation choices.\(^5\) Despite occasional calls to adopt constitutional constraints on substantive criminal law, scholarly proposals have had no practical effect, as courts have failed to develop significant constitutional doctrines for checking legislatures’ criminalization choices.\(^6\)

However, the broken criminal justice system is in tension with one of the fundamental principles of American constitutional jurisprudence, namely, the protection, under the Constitution, of individual liberties and freedom from government intrusion into the private lives of individuals. The stringent criminal process, with its substantive

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\(^2\) Id.


and procedural shortcomings, carries tremendous power to jeopardize basic principles of liberty and justice for all defendants. Unfortunately, the current criminal justice system falls short of satisfying these constitutional commitments.

Another notable feature of substantive criminal law is the lack of a coherent theory of criminalization. Scholars have acknowledged that at the theoretical level, criminal law is inconsistent, lacking clear conceptual boundaries to criminalization. Scholars have further argued that legislatures do not abide by a consistent set of principles regarding what matters are appropriate for criminalization, employing the criminal law purely as a tool for achieving whatever end majorities choose to pursue.

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

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

Indeed, one area where over-criminalization is most notable concerns victimless crimes. Traditionally dubbed “vice or morals crimes”, these offenses involve individuals who engage in consensual conduct which inflict harm on themselves, but not on third parties. Such conduct includes a variety of crimes, ranging from consensual sexual activities such as prostitution and sadomasochism, to non-sexual vices such as gambling and drugs. The traditional justification for criminalizing conduct that is essentially

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7 See, OVERCRIMINALIZATION, supra note 4.
9 Id.
10 Id
11 See, OVERCRIMINALIZATION, supra note 4.
harmless to others has strongly relied upon the state’s need to enforce morality, a position most commonly associated with the famous Hart-Devlin debate.\textsuperscript{12}

However, legal moralism as a justification for criminalization was explicitly rejected in the U.S. Supreme Court’s landmark decision in \textit{Lawrence v. Texas}, which struck down as unconstitutional Texas’s sodomy law.\textsuperscript{13} \textit{Lawrence} ostensibly adopts the Millian harm principle, standing for the proposition that a state is not justified in criminalizing a conduct unless it inflicts harm to others. In his \textit{Lawrence} dissent, Justice Scalia predicted that the decision would lead to the invalidation of “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity” and ultimately result in a “massive disruption of the current social order.” He further suggested that even laws criminalizing heroin use are suspect under the holding.\textsuperscript{14} But Scalia’s dire warnings have not materialized: \textit{Lawrence} is not viewed as a criminal law opinion, thus failing to affect any substantive changes in criminal law in general and in the context of victimless crimes in particular. Various victimless crimes are still intact and the harm principle has not been able to limit their scope.\textsuperscript{15} Moreover, \textit{Lawrence} stands for the proposition that in the area of sex vices implicating privacy, autonomy and liberty concerns, the state cannot criminalize conduct unless harm to others is established. However, \textit{Lawrence} has not been expanded to include limitations on other forms of consensual conducts outside the realm of sex crimes, affecting other aspects of individuals’ autonomous choices, mainly drug use.

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

Human dignity has been a recurrent theme in the U.S. Supreme Court constitutional jurisprudence. While under International law, human dignity is a specific right, it is not an enumerated right in the U.S. Constitution, but rather viewed as a

\textsuperscript{12} See, Alice Ristroph, Third Wave of Legal Moralism, 42 Ariz. St. L. J. 1151, 1154-62 (2011)
\textsuperscript{13} Lawrence v. Texas, 539 U.S. 558, at 577-78.
\textsuperscript{14} Lawrence v. Texas, 539 U.S. 590-92
\textsuperscript{15} See, Kelly Strader, Lawrence’s Criminal Law, 16 Berkeley J. Crim. L. 41 (2011) (hereinafter: Strader)
fundamental value, underlying other constitutional rights. While in recent years the Court has invoked human dignity in a growing number of constitutional cases, it has done so in strikingly different ways, illustrating that there is no single approach to the concept of human dignity.

One concept of human dignity invoked by the Court implicates a liberal theory, which rests on the deontological principles of freedom and autonomy (hereinafter: liberty as dignity). This concept is best articulated in the Supreme Court decisions in Casey v. Planned Parenthood and Lawrence v. Texas, suggesting that in the Fourteenth Amendment the government protects “choices central to personal dignity…(such as) the right to define one’s own concept of existence, of meaning, of the universe and of the mystery of human life.” This account suggests that the government may not criminalize any conduct that interferes with “choices central to personal dignity.” A key question after Lawrence is what type of choices are central to personal dignity, and in particular whether these choices extend beyond the realm of procreation and sexual preferences to encompass additional forms of personal choices, such as the right to harm oneself.

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

The Court, however, has never resolved the tensions between these contrasting accounts. A few scholars have proposed using human dignity as a constitutional constraint to limit the scope of criminal law. However, this proposal relies solely on the

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19 Id
20 Id
21 See, Dubber, supra note 7
concept of liberty as dignity, while disregarding the contrasting account of human dignity as communitarian virtue, which the Court has emphasized in recent opinions. While scholars have noted that human dignity is multifaceted, they have not proposed a test that would determine which account of human dignity prevails in cases where two concepts clash, and in which circumstances one concept of human dignity outweighs the other. Furthermore, while the Court has invoked human dignity in the context of constitutional law, it has not yet extended this concept to substantive criminal law.  

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

The criminal regulation of drugs offers a potent test case to apply the proposed theory, as drugs are “the” most notable victimless crime. The criminalization of all forms of recreational drugs along with the “tough on crime” policy adopted by American criminal law towards drug crimes take up a significant amount of the nation’s limited resources and dominate the criminal justice system. Therefore, this Article focuses mainly on drug prohibitions by applying the proposed rules to draw distinctions between types of drug crimes.

The Article proceeds as follows: Part I examines previous attempts to limit overcriminalization in general and victimless crimes in particular. It demonstrates that the harm principle has not offered a sufficient substantive constraint to limit the scope of criminal law, and that constitutional law has not placed any external limitations on substantive criminal law. Considering the empirical failure of the harm principle, and its normative inability to foster substantive limits on criminalization of victimless crimes,

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this section concludes that the concept of human dignity might offer an alternative means to accomplish that goal.

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

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

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

I. ATTEMPTS TO LIMIT OVERCRIMINALIZATION

Criminal law scholars have vehemently criticized the continuous expansion of substantive criminal law, warning against the costs and burdens incurred by the criminal justice system, as well as against the dangers it poses to individual defendants. Scholars note that there are too many broadly worded criminal statutes, covering a wide range of behaviors, which do not justify the use of the coercive power of the state through its extensive employment of the stringent criminal law weapon. This problem is particularly salient in three categories of crimes: offenses of risk prevention or crimes of endangerment, such as drugs; ancillary offenses, which function as surrogates for the prosecution of primary or core crimes unlikely to result in prosecution; and overlapping

24 See, Luna, supra note 3, See, also, Sun Beale, supra note 3
25 See, generally, OVERCRIMINALIZATION, supra note 4, at 3-54
crimes, namely, recriminalizing the same crimes over and over again.\textsuperscript{26} As scholars have already addressed the various aspects of overcriminalization,\textsuperscript{27} this Article examines an alternative means to limit the size and scope of criminal law.

A comprehensive theory of criminalization, elaborating the substantive requirements of any criminal statute, could be a natural candidate for limiting the scope of substantive criminal law. However, a notable feature of substantive criminal law is the lack of a comprehensive theory of criminalization, in the absence of which legislatures are free to continue to expand criminal law by enacting more offenses and criminalizing additional types of behaviors.\textsuperscript{28} Without a comprehensive theory, the necessary components of new crimes are left undefined and the boundary between criminal conduct and conduct that ought to remain beyond the scope of criminalization blurred.

A. The Harm Principle’s Empirical Failure

Following John Stuart Mill’s famous articulation of the “harm principle”, many scholars posit that under contemporary jurisprudence, harm to others is the key predicate for criminalization.\textsuperscript{29} The underlying view of the harm principle is utilitarian in essence, measuring an action’s social utility and overall societal advantages of criminalization against its costs and unintended consequences.\textsuperscript{30} The judicial recognition of the harm principle as the core justification for criminalization is best demonstrated in the U.S. Supreme Court’s landmark decision in \textit{Lawrence v. Texas}. While numerous different readings have been offered to Justice Kennedy’s majority holding in \textit{Lawrence}, the harm principle plays a crucial role under all of them, as \textit{Lawrence} has been read to stand for the proposition that the harm principle is the key justification for criminalizing consensual conduct between adults. In other words, when adults engage in fully consensual conducts in the privacy of their homes, the state is unjustified in criminalizing these conducts.

However, the practical effects of endorsing the harm principle have been limited, raising doubts concerning its actual ability to limit criminal law in general and criminalization of victimless crimes in particular. Indeed, the harm principle’s failure to

\textsuperscript{26} \textit{Id}, at 36-41
\textsuperscript{27} \textit{Id}
\textsuperscript{28} \textit{See}, Brown, \textit{supra note 9}. \textit{See}, also, OVERCRIMINALIZATION, \textit{supra note 4} at 58
\textsuperscript{29} \textit{See}, Joel Feinberg, Harm to Others at 105-18 (1986)
\textsuperscript{30} \textit{Id}
offer a comprehensive account for criminalization is twofold: from an empirical perspective, it has not been able to limit criminalization, and has also resulted in expanding the scope of criminal law;\(^3\) from a normative perspective, the harm principle is unable to limit criminalization because it does not articulate the substantive content of its normative component. However, little has been offered by scholars to address these challenges, and the search for the missing component to supplement the harm principle has not been successful yet.

Viewed as a victory through a libertarian lens, little attention has been given to the practical ramifications of the harm principle. Despite what seemed to be a revolutionary holding, fueled by Justice Scalia’s “parade of horrible” dissent and his slippery slope style warning that *Lawrence* signals the end of all morals statutes, *Lawrence* has surprisingly not resulted in far reaching practical implications on the scope of criminal law. While *Lawrence* is understood to be a landmark constitutional law decision, its effects on the criminal law in general and on the criminalization of victimless crimes in particular have been rather modest.\(^3\)

While the harm principle is deeply rooted in a libertarian view, focusing on individuals’ rights to liberty, autonomy and privacy, an unintended consequence of the alleged “victory” of the harm principle has been its excessive use to justify a broad range of criminal bans, resulting in an illiberal criminal law.\(^3\) Today, the harm principle serves not only to justify criminal regulation but also to expand it—a surprising consequence given that the harm principle was initially viewed as a mechanism to limit criminal law by rejecting moral arguments that supported criminalization to uphold morality per se.\(^3\) The expansive reading of the harm principle, however, has resulted in turning an ostensibly liberal idea into a conservative concept, which is too readily able to generate harm arguments to justify expansive prohibitions that previously had only moralism rationales.\(^3\) Scholars have concluded that: “The concept of ‘harm’ itself so eludes

\(^3\) See, Strader, supra note 16
\(^3\) See, Steven D. Smith Is The Harm Principle Illiberal? 51 Am. J. Juris 1 (2006)
\(^3\) See, e.g. Meir Dan Cohen, Thinking Criminal Law, 28 Cardozo L. Rev. 2419, 2422.
\(^3\) Id.
definition that it has been employed to describe all manner of conduct with no tangible or emotional injury, no victim, and no significant risk creation.”

1. Victimless Crimes After Lawrence v. Texas

Applying the harm principle in the context of victimless crimes further sharpens its empirical failure, because the justifications for the continued criminalization of victimless crimes appear dubious after Lawrence v. Texas. Victimless crimes are consensual activities that take place between adults, inflicting only harm to those who engage in them, but no harm on third parties. These include activities such as gambling, use of recreational drugs, prostitution, pornography, sodomy, polygamy, incest and sadomasochism.

In theory, adopting the Millian harm principle should have resulted in the decriminalization of all forms of victimless crimes. Under Lawrence’s rationale, if harm to others is not inflicted, and individuals engage in consensual activities, individuals ought to enjoy a right to choose to engage in those activities, even if they inflict harm upon themselves. The right to consent to harm, either self-inflicted or at the hands of third parties is grounded in the fundamental right to autonomy, liberty and most importantly, human dignity. A libertarian approach requires the government to refrain from intervening in individuals’ free choices, including choices that the government may view as harmful, injurious or simply “bad”. In addition, the government needs a specific justification to restrict an individual’s right to choose to engage in activities, which may harm them in some way.

However, the Court’s decision in Lawrence has not resulted in a comprehensive overhaul of all victimless crimes, nor has the Lawrence decision had much practical effect on substantive criminal law. To name a few examples: Prostitution is still criminalized in all states but Nevada; the laws in all jurisdictions refuse to allow the defense of consent to engage in sadomasochistic sexual practices that result in severe injuries; polygamy is still a criminal offense in all states; and while pornography is

36 See, Brown, supra note 9
37 See, generally, Bergelson, supra note 24
38 See, Dubber, supra note 7
39 See, generally, Strader, supra note 16
heavily regulated but legal, the law still criminalizes obscenity, based on its offensiveness to certain segments of society.

But the most notable example concerning the continued criminalization of victimless crimes is the use and possession of recreational drugs. Recent years have seen a push in the direction of decriminalizing use and possession for self-use of marijuana. This change has come about in the wake of several developments: first, legalizing the use of medical marijuana with a doctor’s recommendation; second, in some states and in many local jurisdictions possession and use of small quantities of marijuana is no longer a crime but rather a misdemeanor, punishable by a fine; and lastly, many jurisdictions have significantly relaxed their law enforcement practices concerning self-use and possession of marijuana, making it the lowest enforcement priority.  

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

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

41 Id, at 280
42 Id.
44 See, Blumenson and Nilsen, supra note 44
B. The Harm Principle’s Normative Failure

The harm principle is unable to limit the scope of criminalization because its definition lacks some essential normative components. Under the harm principle, the main trend has been to de-moralize criminal law both in regard to criminalization and to punishment. According to this utilitarian view, crime is just one source of harm among many other harmful activities, therefore diminishing the significance of the moral component in crime and blurring the distinction between criminal law and other areas of law. While the harm principle ostensibly ought to play an important role in every criminalization decision in a post-Lawrence era, criminal law theorists have long recognized that this principle, in itself, is insufficient to justify criminal regulation. Moreover, utilitarianism’s main flaw, as scholars have noted, is its failure to give adequate weight to the dignity of persons.45

Conceding that the harm principle ought to be supplemented with an additional normative component, establishing the perpetrator’s guilt and justifying his punishment requires the adoption of an additional component, which stems from moral principles and philosophical theories of rights and wrongdoing.46 One of the most comprehensive works on the limits of the harm principle is offered in Joel Feinberg’s four-volume series on justifications for criminalization. However, a crucial question remains under Feinberg’s account: acknowledging that the harm principle consists of both a set back to interests as well as establishing the perpetrator’s wrongdoing calls for supplementing the harm principle with a separate theory of rights, namely, a theory that would provide substantive content to the wrongdoing element.

As harm arguments get broader, more far-reaching, and speculative, assessing those claims gets more complicated. Reconciling between competing harms thus requires a normative evaluation, which is inherently dependent on the moral theory one embraces. Furthermore, criminal law today is far from neutral and inherently includes an additional normative component, which rests on a moral theory of rights. Under this view, the criminal law ought to encompass moral judgments and fundamental societal values, which are common to all societies. Moreover, this normative moral dimension is not only

46 See, Feinberg, supra note 32
an inevitable component of any criminal law theory but also the distinctive feature that separates criminal law from civil law.

Several scholars have proposed the adoption of a rights-based perspective that departs from the harm principle and focuses on human dignity as the key justification for criminalization.\(^{47}\) Another proposal is offered by Michael Moore, who contends that the harm principle is unable to explain why the criminal law punishes omissions and harmless wrongdoing on one hand, but refuses to punish harmful acts that are not morally wrong on the other.\(^{48}\) The law punishes omissions because moral obligations require individuals to help; harmless wrongdoing justifies punishment because while nobody is actually harmed the act is still morally wrong; and harmful acts that are not wrongful do not justify punishment because there is simply no culpable wrongdoing. Rejecting the sole reliance on the harm principle, Moore contends that the focus of justified criminal legislation ought to be moral wrongdoing, not harms. Moore further argues that his modified version of legal moralism as justification for criminalization is compatible with liberal theories, in prohibiting the use of criminal law in cases of moral paternalism.\(^{49}\)

Douglas Husak advocates the adoption of the wrongdoing component as one of the internal limitations on criminalization, in addition to nontrivial harm and the desert requirement.\(^{50}\) However, while Husak concedes that the wrongdoing component calls for adopting a separate moral theory of rights, his work does not provide this supplemental theory, perhaps owing to the lack of consensus on what type of theory ought to be adopted.\(^{51}\) As a libertarian, Husak would have advocated a theory focusing on individuals’ free choices, liberty and autonomy. However, with an extensive liberal theory having failed to promote instrumental change in criminal law and many forms of activities that interfere with individuals’ freedoms still criminalized, the wrongdoing component is unable to constrain overcriminalization. While liberals favor individual rights such as liberty and autonomy as long as there is no harm to third parties, conservatives would advocate a moral theory of rights that focuses on paternalistic


\(^{49}\) Id

\(^{50}\) See, OVERCRIMINALIZATION, supra note 4, at 55, 92-100

\(^{51}\) Id, at 71
justifications favoring the protection of individuals from their own choices on the grounds that they harm themselves.

C. The Unconstitutional Nature of Criminal Law

Another potential mechanism that could be used to constrain overcriminalization is constitutional law: The doctrine of judicial review authorizes the judiciary to review state legislative enactments, allowing federal judges to strike down legislation, which is incompatible with the U.S Constitution.  

However, while constitutional law has successfully placed significant limits on criminal procedure, it has left substantive criminal law almost completely beyond constitutional scrutiny. Commentators have long noted that substantive criminal law is not constitutionalized, namely, constitutional law places no constraints on the content of substantive criminal law. While constitutional doctrines have influenced the development of criminal procedure, constitutional law has not played a significant role in the realm of substantive criminal law.

In his landmark paper, William Stuntz discusses three possible solutions to the problem of over-criminalization: limiting prosecutorial discretion, ending legislative monopoly on crime definition; and constitutionalizing criminal law, which he favors. While more than a decade has passed since the publication of Stuntz’s work, courts have not developed significant constitutional doctrines for checking legislatures’ crime creation choices, and the law has refused to take the path of constitutionalizing substantive criminal law.

In his recent book, Douglas Husak proposes additional external constraints to limit overcriminalization, drawing on an existing constitutional doctrine of judicial review as a conceptual framework for regulating substantive criminal law. Since the right not to be punished is important but not fundamental, Husak’s theory adopts the doctrine of intermediate scrutiny under which a legislature could criminalize activity only

52 See, Dubber, supra note 7
53 See, Bilionis, supra note 6.
54 See, Stuntz, supra note 1, at 579
55 See, Brown, supra note 9
56 Id, at 55, 82-83
57 Id, at 128-132
under three conditions: if the government interest in doing so is substantial; the prohibition directly advances that government interest; and the government's objective is no more extensive than necessary to achieve its purpose.\(^{58}\)

However, Husak concedes that in the context of criminal law, courts are not institutionally competent to make substantive judgments that the doctrine itself requires, for example, determining whether certain forms of conduct warrant criminal condemnation, whether noncriminal approaches are less restrictive than criminal laws, and whether particular statues serve important expressive functions.\(^{59}\) Indeed, while at the theoretical level these constraints on criminal law are coherent and plausible, at the practical level they run into difficulties when substantive content is applied to them. The following section draws on existing proposals to limit the scope of substantive criminal law by turning to the concept of human dignity.

**II. HUMAN DIGNITY: THE CONCEPTUAL FRAMEWORK**

**A. Debating Human Dignity’s Jurisprudential Role**

Human dignity is a unique concept in American jurisprudence: while it is not an enumerated constitutional right, many courts and commentators suggest that it is a fundamental value, underlining many other constitutional rights.\(^{60}\) Moreover, in recent years, the U.S. Supreme Court has increasingly invoked this concept in a wide array of its constitutional decisions.\(^{61}\)

While the notion of human dignity has received increasing judicial and scholarly attention,\(^{62}\) American scholars sharply disagree over its role in American constitutional jurisprudence.\(^{63}\) Various scholars focus on the central role of human dignity within the constitutional jurisprudence of fundamental rights, several going so far as to hail it as one of the fundamental constitutional values in American jurisprudence. Noting that: “human dignity…underlies our constitutional rights to privacy, liberty, protection against

\(^{58}\) Id Husak, at 128, 132
\(^{59}\) Id Husak, at 130-131
\(^{60}\) See, Parent, supra note 17, at 47, 71.
\(^{61}\) See, Henry, supra note 20
\(^{62}\) See, Jeremy Waldron, Dignity, Rights and Responsibilities, 43 Ariz. L. Rev. 1108, at 1118 (2011)
\(^{63}\) See, Henry, supra note 20
unreasonable search and seizure, protection against cruel and unusual punishment and other express rights and guarantees.” 64 Scholars further stress that human dignity is one of “those very great political values that define our constitutional morality”. 65 Legal theorist Ronald Dworkin offers perhaps the most far-reaching approach to the role of human dignity in American jurisprudence, suggesting that: “the principles of human dignity…are embodied in the Constitution and are not common ground in America.” 66

However, other commentators are wary of the term’s increasing popularity in constitutional discourse, strongly criticizing the use of this concept in the context of American constitutional law. 67 While human dignity is a crucial component in many moral theories, its precise meaning for the purposes of American jurisprudence is not always agreed upon. Critics note that what distinguishes this notion from similarly elusive concepts in American jurisprudence, such as liberty, is the fact that human dignity is not a part of the U.S. Constitution, raising doubts as to whether it actually plays a significant role in American law or carries any practical legal implications in American jurisprudence. Critics further contend that as human dignity is susceptible to strikingly different readings, it is unable to offer a workable legal standard and therefore ought not be applicable in legal decisions and constitutional jurisprudence. 68

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

B. Human Dignity in Philosophical Theories

Philosophical theories concerning normative ethics have traditionally encompassed two competing traditions: deontology, which is based on the individual’s

65 See, Parent, supra note 17, at 47, 71. (Michael J. Meyer & William A. Parent Eds. (1992)
68 Id, MaCruden.
moral rights and obligations, and consequentialism (or utilitarianism), which focuses on the consequences of actions and on evaluating which actions most contribute to human happiness. Deontology’s fundamental premise is that liberty, autonomy and human dignity are basic rights, whose restriction requires special justifications. The German philosopher Immanuel Kant is considered by many scholars to be the founder of the modern concept of human dignity. According to Kant, morality is based on a universal and impartial law of rationality, best captured in his famous Categorical Imperative, demanding that a person should “Act in such a way that you always treat humanity, whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.”

Kant’s theory embodies the view that all human beings deserve to be treated as free, autonomous agents because they have the distinct capacity to adhere to moral reasoning and thought, which includes the ability to make rational choices regarding what is deeply valuable or worthy. Kant therefore contended that “humanity so far as it is capable of morality, is the only thing which has dignity”, and that this capacity provides every person an “intrinsic dignity that every other person must respect”. This unique attribute demands that “to the extent that they are capable of free and autonomous thinking and of genuine moral deliberation, people possess dignity, or worth, as ends in themselves.”

According to Kant, autonomy is the basis for human dignity, and that free will consists of the ability of humans to choose their goals or actions, together with the capacity to distinguish good actions (respectful of others’ rights) from bad ones (disrespectful of others’ rights). Kant argues that: “the dignity of humanity consists…in the capacity to give universal law.” In other words, individuals’ human dignity derives from the capacity for autonomous choices. Moreover, according to Kant, dignity is “absolute inner worth”, unconditional and incomparable, because rational beings’

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69 Deontology is rooted in the works of philosophers such as Immanuel Kant.
70 Consequentialist theories are mainly associated with the work of philosophers such as John Stuart Mill and Jeremy Bentham.
72 See, Waldron, supra note 69
73 See, Kant, supra note 78, 4:412, at 65-66, § 4:441, at 89-90, § 4:429, at 79-80. See also, 3 N.Y.U.J.L.& Liberty 548
autonomy is unconditional, and therefore respect must be given to these human beings unconditionally. 74

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

Two of the most important American political and moral thinkers follow Kantian views on autonomy and dignity, representing contemporary views on human dignity under a deontological theory: John Rawls offers a reinterpretation of Kant’s conception of personal autonomy and the categorical imperative, suggesting that autonomy gives rise to obligations of respect.75 In his “Principles of Justice,” Rawls describes the Liberty Principle as establishing equal basic liberties for all citizens, freedoms of conscience, association, and expression as well as democratic rights. These basic liberties have a special status and are prioritized over other rights.76

Legal theorist Ronald Dworkin also embraces Kantian approaches, suggesting that human dignity represents the ideology of both human rights and liberal constitutionalism. Under this account, dignity and equality are viewed as the primary moral justifications for all legal rights, and human dignity is one type of an individual human right.77 Most importantly, Dworkin is perhaps the first American theorist to link human dignity with the U.S. Constitution,78 viewing equality and dignity as the primary basis for a moral reading of the American Constitution.79

Traditionally, the contrasting philosophical approach to liberal Kantian theories was consequentialism or utilitarianism, which focuses on promoting overall social welfare, rather than an individual’s fundamental rights. Deterrent-based theories of punishment hold that rational actions must aim at advancing the overall well being of society, which is the only value and social good a society ought to promote, often at the

75 See, John Rawls, Theory of Justice at 179, 519 (1971)
76 Id
78 See, Dworkin, supra note 73, at 24, 26
79 See, Dworkin, Taking Rights Seriously, at 272-78.
expense of fairness to the individual. Naturally, the notion of human dignity does not play a significant role under such theories, where society’s dignity may outweigh an individual’s dignitary right. According to consequentialism, certain circumstances justify violating human dignity if doing so preserves more dignity than the dignity that was violated.

Another popular moral theory, communitarian virtue ethics, stands in sharp contrast both to Kantian views and consequentialist theories. The foundational roots of virtue ethics can be traced to the work of the Greek philosopher Aristotle, who developed the idea that human flourishing consists in the exercise of certain virtues and is the ultimate goal for all persons. Virtue ethics emphasizes moral character, in contrast to deontology, which focuses on duties or rules, and to utilitarianism, which focuses on consequences of action. Virtue ethics focuses on what we should do to be “right”, rather than how we should be to be happy.

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

80 See, NOEL STEWART, ETHICS: AN INTRODUCTION TO MORAL PHILOSOPHY 54, 54 (2009)
84 See, Clark, supra note 87 at
However, scholars have recently started to identify connections among virtue ethics, philosophy, and law. While virtue ethics jurisprudence examines how the law can help make virtuous individuals, it also has implications for the proper ends of legislation: if the purpose of law is to make citizens virtuous, how does it affect the content of the laws? There have been several endeavors to apply virtue ethics to the law. Kyron Huigens, for example, has suggested that virtue ethics might provide a way of thinking about questions of criminal responsibility. Huigens suggests that the purpose of law is “to promote the greater good of humanity,” and “[t]he criminal law serves that end by promoting virtue… by inquiring into the quality of practical judgment displayed by the accused in his actions… what grounds liability is the offender's “faulty reasoning,” and what the criminal law “condemns” is “not just harm, but the lack of judgment that results in harm.”

Some scholars suggest that a commitment to virtue is more compatible with communitarian approaches than with liberal autonomy-based considerations. Sherman Clark, for example, suggests incorporating virtue ethics theory into law by acknowledging that the central aim of law is the happiness of the people governed by it. He further argues that promoting communitarian character is the route to achieve this well-being. Therefore, Clark contends that legal discourse ought to examine the connection between law and public character and the ways in which law plays a role in the construction of community identity. While communities should develop character traits in keeping with their own history and culture, there will be circumstances under which they will need to cultivate other traits for their well-being.

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86 See, Yankah, supra note 89
91 See, Clark, supra note 87, 757 at 771 (2005)
Other theorists have argued that virtue ethics is also compatible with liberalism.\textsuperscript{92} Martha Nussbaum offers another version of applying a virtue-based theory to the legal context, relying on the concept of human dignity to develop a theory of social justice, which is based on the concept of capabilities approach.\textsuperscript{93} Under Nussbaum’s view, every person possesses full and equal human dignity--unless in a permanent vegetative condition or otherwise cut off from striving and sentience. A life worthy of human dignity, contends Nussbaum, requires a minimum of certain central capabilities. She then proposes a list of ten components essential for minimal social justice, including life, bodily health, and bodily integrity.\textsuperscript{94}

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

\section{C. Human Dignity in the U.S. Supreme Court}

The U.S. Supreme Court has at times conceived both liberty and communitarian virtue as forms of dignity.\textsuperscript{95} These different accounts create a fundamental distinction between using human dignity to promote individual autonomy and the communitarian account of human dignity as representing a virtuous society.

\subsection{1. Liberty as Dignity}

In an important line of cases, the Court has invoked the concept of dignity to promote individualistic approaches, supporting individuals’ rights to exercise autonomous choices in matters pertaining to their self-fulfillment and self-realization. One notable example concerns the reproductive or abortion cases: The Court first relied on the concept of liberty as dignity to protect a woman’s autonomous choice in having an abortion to strike down certain provisions of a Pennsylvania Abortion Control Act in its

\textsuperscript{92} See, Martha Nussbaum, Aristotelian Social Democracy, in Liberalism and the Good 203 (R. Douglass et al. eds., 1990)
\textsuperscript{93} See, Nussbaum and Dixon, 97 Cornell L. Rev. 549
\textsuperscript{94} Nussbaum, Creating Capabilities The Human Development Approach (2011) at 33-34
\textsuperscript{95} Scholars identify additional concepts of human dignity, but this paper focuses solely these two.
1986 decision in *Thornburgh v. American College of Obstetricians and Gynecologists*. Writing for the majority, Justice Blackmun stated that: “[f]ew decisions are more personal and intimate, more properly private, or more basic to individual dignity and autonomy, than a woman's decision - with the guidance of her physician and within the limits specified in *Roe* - whether to end her pregnancy. A woman's right to make that choice freely is fundamental.” In *Planned Parenthood of Southeastern Pennsylvania v. Casey*, the Court later broadened its concept of human dignity to embody an individual’s autonomous choice, self-fulfillment and realization. In the oft-quoted “mystery of life” passage, Justice O’Connor, writing for the Court, stated that:

“Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education .... Our cases recognize ‘the right of the individual, married or single, to be free from unwarranted government intrusions into matters so fundamentally affecting a person as the decision whether to bear or beget a child.’ ... Our precedents ‘have respected the private realm of family life, which the state cannot enter.’ ... These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.”

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

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97 505 U.S. 833 (1992)
A second line of cases concerns sexual choices, particularly same sex relationships, as best illustrated in the Court landmark decision in *Lawrence v. Texas*. Citing the above “mystery of life” passage from *Casey*, the *Lawrence* Court invoked the concept of liberty as dignity to strike down Texas’s sodomy law as violating the Fourteenth Amendment to due process, stating that: “adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their dignity as free persons…The liberty protected by the constitution allows homosexual persons the right to make this choice”. Commentators have noted that the *Lawrence* decision “may presage a new jurisprudence” that places constitutional limits on a state’s power to criminalize any activity that is “somehow connected with efforts to “define one’s own concept of existence, of meaning, of the universe, and of the mystery of human life”.

*Lawrence’s* open-ended language may have far-reaching implications: The Court’s invocation of the concept of liberty as dignity closely follows Kantian approaches by acknowledging that human dignity is a crucial feature of human life. Consequently, a broad reading of the above holding suggests that under the Fourteenth Amendment the government may not criminalize any conduct that interferes with an individual’s “choices central to personal dignity”, thereby making any criminal law that unjustifiably interferes with such choices subject to constitutional scrutiny.

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

Adopting the concept of liberty as dignity is contingent on the capacity for making autonomous choices, from which young children and mentally incapacitated

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99 Lawrence v. Texas, 539 U.S. at 567
individuals, for example, are excluded. If, in addition, drug addicts are also deemed not to have the capacity to make autonomous choices to harm themselves, criminal prohibitions that protect individuals with impaired capacity from their own harmful choices would need to be upheld simply because the preliminary conditions for exercising autonomous choices are lacking. Moreover, if the Court went even further and extended its constitutional protection to additional types of autonomous choices, these could include other forms of exercising one’s right to dignity and liberty, such as physician-assisted suicide and the use of recreational drugs.

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

2. Communitarian Virtue as Dignity

A contrasting concept of human dignity invoked by the U.S Supreme Court is closely related to the philosophical theory of virtue ethics. In a series of decisions, the Court has invoked the concept of communitarian virtue as dignity to advance its views on an American society that is civilized, decent and virtuous. Taken together, these cases

suggest that there are some fundamental standards of decency that command the
government’s protection of the dignity of individuals, and they are best captured in the
notion of communitarian virtue. This line of cases is most notable in three main contexts:
the court’s Eighth Amendment jurisprudence, particularly in the death penalty and
prisoners’ right cases; the Court’s Fourth Amendment jurisprudence; and its abortion
jurisprudence.\textsuperscript{102}

\textbf{a) Human Dignity and the Death Penalty}

A communitarian virtue account of human dignity is particularly prominent in the
Court’s interpretation of the Eighth Amendment's Cruel and Unusual Punishment Clause.
underlying the Eighth Amendment is nothing less than the dignity of man”, and that the
prohibition against “cruel and unusual punishment “draw[s] its meaning from the
evolving standards of decency that mark the progress of a maturing society”,
emphasizing that these standards embody those that currently prevail in society.\textsuperscript{103}

While the death penalty is not categorically unconstitutional under the Eighth
Amendment, the Court significantly confined the categories of instances in which this
unique punishment can be imposed. The Court’s limiting principle states that the death
penalty must “be limited to those offenders who commit ‘a narrow category of the most
serious crimes' and whose extreme culpability makes them ‘the most deserving of
execution.”\textsuperscript{104} The Court applied this limiting principle in a trilogy of Eighth Amendment
cases, in which it held that the death penalty is unconstitutional in cases involving the
mentally retarded (\textit{Atkins v. Virginia}\textsuperscript{105}), juveniles (\textit{Roper v. Simmons}\textsuperscript{106}), and rapists.
For juveniles and the mentally retarded, the Court held that the death penalty violates the
Eighth amendment because the offender has a diminished personal responsibility for the
crime. In cases of rape, the Court relied on the consensus against imposing the death
penalty for child rape and on the “evolving standards of decency that mark the progress

\textsuperscript{102} See, Henry, supra note 20, at 222
\textsuperscript{103} 356 U.S. 86, 101 (1958)
\textsuperscript{104} 536 U.S. 304, 319 (2002)
\textsuperscript{105} 536 U.S. 304 (2002)
\textsuperscript{106} 543 U.S. 551 (2005)
of a maturing society” which required that the use of the death penalty be restricted to
cases resulting in death. 107

The notion of human dignity plays a key role in the Court’s restriction of the
death penalty in these specific categories of cases. In Roper v. Simmons Justice Kennedy
stresses that human dignity lies at the foundation of the Eighth Amendment and elevates
the value of human dignity to the level of an intrinsic constitutional value,108 stating that
the Constitution rests upon “innovative principles original to the American experience
such as… specific guarantees for the accused in criminal cases; and broad provisions to
secure individual freedoms and preserving human dignity, stressing that that these
doctrines and guarantees that are central to the American experience and remain essential
to Americans’ self-definition and national identity”.109 In Kennedy v. Louisiana Justice
Kennedy stresses that: “Evolving standards of decency must embrace and express respect
for the dignity of the person, and the punishment of criminals must conform to that
rule.”110 In grounding the value of human dignity as a general constitutional right, along
with individual freedom rights, Justice Kennedy takes an important step in the direction
of incorporating the value of human dignity into the Constitution itself, making it a
fundamental value that underlies other constitutional rights such as defendants’ criminal
procedure guarantees.111

Justice Brennan’s concurrence in Furman v. Georgia also emphasizes the value of
human dignity as grounded in the constitutional prohibition of “cruel and unusual
punishment”. Justice Brennan notes that the Clause “prohibits the infliction of uncivilized
and inhuman punishments. The State, even as it punishes, must treat its members with
respect for their intrinsic worth as human beings. A punishment is ‘cruel and unusual,’
therefore, if it does not comport with human dignity.” Brennan further notes that “the
primary principle is that a punishment must not be so severe as to be degrading to the
dignity of human beings”, and that the extreme severity of a punishment makes it

108 See, Daley, supra note 18, at 404
109 Roper v. Simmons, 543 U.S. 551, at 578
111 See, Daley, supra note 18, at 404
degrading to the dignity of human beings beyond the presence of pain, such as punishments that inflict torture. 112

b) Human Dignity and Prisoners’ Rights

In a line of cases involving prisoners’ rights, the U.S. Supreme Court also relies on the value of human dignity to hold certain prison practices unconstitutional under the Eighth Amendment. In Hope v. Pelzer, the Court held unconstitutional a form of punishment that included handcuffing an inmate to a hitching post for seven hours in the sun without access to a bathroom. Justice Stevens, writing for the Court, contends that several forms of corporal punishment violate the Eighth Amendment and offend contemporary concepts of decency and human dignity.113 Citing Chief Justice Warren’s famous quote from Trop v. Dulles that the “basic concept underlying the Eighth Amendment is nothing less than the dignity of man”, Justice Stevens holds that hitching a prisoner to a post for an extended period of time in a position that was painful, and under circumstances that were both degrading and dangerous, was a way of treatment which was “antithetical to human dignity”, and that such a form of punishment to discipline a disruptive prisoner violates the Eighth Amendment. 114

A recent pronunciation of the Court’s view of human dignity as embodying the value of communitarian virtue is demonstrated in the 2011 Brown v. Plata decision. The landmark decision stems from two class action lawsuits concerning overcrowded prisons in California: the Plata class action, alleging unconstitutional failure to provide adequate medical care, and the Coleman class action, alleging adequate mental health care. 115 In Coleman v. Schwarzenegger a three-judge court issued a release order of prisoners over California’s objection: Justice Kennedy upheld the order, stressing the pivotal role human dignity plays in securing the fundamental human rights of inmates, and noting that: “Prisoners may be deprived of rights that are fundamental to liberty, but they nevertheless retain the essence of human dignity inherent in all persons...(that) animate the Eighth Amendment prohibition against cruel and unusual punishment... When a state facility deprives its citizens of basic sustenance, be it food or medical care, it acts in a manner

113 Id, quoting Gates v. Collier, 501 F. 2d 1291, at 1306
“incompatible with the concept of human dignity and has no place in civilized society”.

In its decision in Ashcroft v. Al-Kidd, involving the constitutionality of the detention of material witnesses in terrorism investigations, Justice Ginsburg writes:

“Ostensibly held only to secure his testimony, al-Kidd was confined in three different detention centers during his 16 days’ incarceration, kept in high-security cells lit 24 hours a day, strip-searched and subjected to body-cavity inspections on more than one occasion, and handcuffed and shackled about his wrists, legs, and waist.” Referring to these as “brutal conditions of confinement” Ginsburg further stresses that Al-Kidd’s ordeal is “a grim reminder of the need to install safeguards against disrespect for human dignity, constraints that will control officialdom even in perilous times” Invoking the communitarian concept of dignity in the “war on terrorism” further strengthens the Justices’ increasing reliance on this value.

c) Human dignity and the Fourth Amendment

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

Police conduct that “shocks the conscience” has led to a series of similar claims by defendants who argued that law enforcement’s search and seizures practices violated the Due Process Clause based on that characterization. In Schmerber v. California the court noted that “[t]he overriding function of the Fourth Amendment is to protect

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118 131 S. Ct. at 2089
119 Rochin v. California 342 U.S. 165, 174
120 342 U.S. 165, at 174 (1952)
personal privacy and dignity against unwarranted intrusion by the State.”\textsuperscript{121} The Court further identified a list of factors that create a balancing test between the individual’s rights to privacy, dignity and bodily integrity and the government’s interest in obtaining evidence. Based on this balancing test the Court ruled that taking a blood sample from an injured and intoxicated arrestee over his objection violated neither the Fourth nor the Fourteenth Amendment. In contrast, in \textit{Winston v. Lee} the Court refused to authorize surgery to remove a bullet from a suspect’s body because it involved “an extensive intrusion on respondent’s personal privacy and bodily integrity”, and the state’s interest in obtaining the bullet was not high enough.\textsuperscript{122} The extent of intrusion upon the individual's dignitary interests in personal privacy and bodily integrity is therefore an important factor in this balancing test.

\section*{D. A Balancing Test: Reconciling Between Contrasting Concepts of Dignity}

While the Court has increasingly invoked human dignity in its constitutional law cases, it has failed to reach a consensus on the substantive meaning of this value, and it has yet to invoke it in the context of substantive criminal law.\textsuperscript{123} But most importantly, while the Court uses contrasting concepts of human dignity in different categories of cases, it remains unclear what type of balancing test is adopted, and whether the same balancing test applies in all contexts.

\subsection*{1. The Abortion Context}

Scholars have noted that when the individual concept of dignity as liberty and autonomy directly conflicts with a communitarian one, a clash results in those cases in which societal perceptions strongly condemn a conduct that an individual’s liberty and dignity demand be protected under the law.\textsuperscript{124} Judicial decisions have demonstrated that in contentious cases, the legal enforcement of societal standards and communitarian norms often result in outweighing individual free choices.\textsuperscript{125} These judicial decisions are grounded in an implicit balancing test adopted by the Court in specific cases, representing

\begin{footnotes}
\item[121] Schmerber 384 U.S. 757, 767 (1966)
\item[122] Winston v. Lee 470 U.S. 753 (1985)
\item[123] See, e.g. Dubber, supra note 7.
\item[124] See, Rao, supra note 19.
\item[125] See, Rao, supra note 19, at 225-26
\end{footnotes}
the Court’s view of the proper balance between an individual’s liberty rights and the societal norms and communitarian demands of a democratic society.\textsuperscript{126}

The abortion context provides the most notable pronunciation of the Court explicitly privileging communitarian values over individual liberty and autonomy. In the U.S Supreme Court’s 2007 decision in \textit{Gonzels v. Carhart}, the Court held that the Partial-Birth Abortion Ban Act of 2003 was constitutional. While in \textit{Casey v. Planned Parenthood} the Court weighed a woman’s individual right to choose abortion against the state’s interest in respecting potential human life,\textsuperscript{127} the \textit{Carhart} Court upheld the prohibition, avoiding this balancing test by categorically privileging a communitarian concept of human dignity, one that emphasizes a “decent society’s respect for the dignity of human life” over a woman’s liberty as dignity interests to choose abortion.\textsuperscript{128} The \textit{Carhart} decision demonstrates clear judicial preference of dignity as communitarian virtue, trumping the competing concept of liberty and autonomy as dignity.

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

\textsuperscript{126} See, Rao, \textit{supra note} 19, at 223-26, See, also, Henry, \textit{supra note} 20, at 228
\textsuperscript{127} 505 U.S. 833 (1992)
\textsuperscript{128} See, Henry, \textit{supra note} 20, at 228
III. Rules to Limit Criminalization of Victimless Crimes

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

A. Liberty as Dignity Generally Outweighs Communitarian Virtue

Existing prohibitions on victimless crimes are grounded on the premise that individuals’ consent to harm themselves ought to be legally limited and that choice-based theory is not a sufficient condition to preclude criminal liability.\(^\text{129}\) Under this prevailing view, the law upholds various types of criminal offenses that inflict harms on consenting individuals, such as drugs, gambling and prostitution prohibitions.\(^\text{130}\) This approach justifies using the government’s coercive power to criminalize activities that consenting adults wish to engage in, even though these activities inflict no harm on others, but only harm to self. This view, however, fails to grant sufficient protection to one’s right to liberty as dignity, a right that favors autonomous choices as individuals see fit.

In contrast to this position, the proposed primary rule is that the concept of liberty as dignity generally outweighs the concept of dignity as communitarian virtue. This is the default rule that ought to apply as a legislative guideline while considering the

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129 See, Bergelson, supra note 24.
130 Id
constitutionality of any victimless crime. Moreover, any caveat that would supplement this general rule by articulating the limited circumstances under which another more important value outweighs this fundamental rule is only secondary in importance.

The bold assertion that liberty as dignity generally outweighs the competing view of communitarian virtue as dignity begs the question: why? What are the justifications for privileging one concept of dignity over another? One answer rests with a basic premise underlying a liberal democratic government: under this view a state needs special justifications to inflict punishment on individuals because the criminal law infringes on individuals’ fundamental freedoms and liberty interests and only culpable, wrongful harms on others trumps the right to enjoy these liberties, providing good reasons for the state to interfere with those liberties by imposing criminal penalties.131 A related consideration supporting the aforementioned rule is the understanding that criminal law is a stringent weapon to be used only as a last resort. In other words, an alternative means of regulation ought to be considered when the objectives of a social policy may be achieved through methods less violative of individuals’ freedoms and liberties and less drastic than the severe criminal sanction.

Furthermore, favoring the concept of liberty as dignity over the competing concept of communitarian virtue as dignity also requires rejecting paternalism as a justification for criminalization. The aforementioned rule adopts John Stuart Mill’s famous articulation of the harm principle, stating that: “the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant”.132

Mill’s statement further sharpens the role of paternalism in criminalizing consensual conducts, inflicting only harm to self but not to others. Paternalism is the intervention in an individual’s personal freedoms aimed at furthering his own good, as opposed to another’s well being.133 Scholars distinguish “hard” (or “strong”) from “soft” (or “weak”) paternalism, with the latter involving the restriction of an individual’s self-

131 See, e.g., OVERCRIMINALIZATION, supra note 4 at 96-98
regarding conduct where the conduct is not substantially voluntary, and the former the restriction of an individuals’ self-regarding conduct where the conduct is substantially voluntary. 134

Legal theorist Joel Feinberg categorically rejects the use of legal paternalism as a justification for criminalization, arguing that: “a person’s right of self-determination, being sovereign, takes precedence even over his own good”.135 Feinberg rejects the alternative that “we must balance the person’s right against his good and weigh them”, contending that “paternalistic reasons never have any weight on the scales at all”.136 Other scholars assert that circumstances exist under which the need to protect individuals from harming themselves outweighs their autonomous free choices to do so.137 Legal theorist R.A. Duff asserts that in certain circumstances it is legally justified to criminalize forms of conducts that deny or radically fail to respect the humanity of those against or on whom they are perpetrated, even if this involves infringing on individuals’ autonomy, and even if such criminalization is not justified under the harm to others principle.138 The role of legal paternalism carries practical implications that go beyond this theoretical debate: Recall that current laws refuse to adopt Mill’s and Feinberg’s categorical rejection of legal paternalism. As described earlier, existing prohibitions on victimless conducts essentially rely on paternalistic justifications to uphold crimes that inflict no direct harm to others.139

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

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

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135 See, HARM TO OTHERS, supra note 32, at 61.
136 Feinberg, Id.
138 See, Duff at 26-27
139 See, supra, section. 1, see, also, infra, Part III, A.
the paternalistic view that the state is obligated to intervene and restrict individual free choices in order to promote a sweeping view of communitarian norms and societal values is deeply antithetical to American constitutionalism. But the purpose of the U.S. Constitution is to secure individual personal rights, and human dignity is indeed such a right. The main purpose of the American Constitution is to protect and secure individuals’ freedoms and liberties. The Declaration of Independence and Bill of Rights protect individual liberties of free choice on private matters by providing rights considered to be inviolable. These values and principles represent the core of the nation’s founding ideology, rejecting excessive government interference guided by majoritarian views that impose their moral beliefs on others.\(^{140}\)

Scholars have identified a list of constitutional rights enumerated in the U.S. Constitution.\(^{141}\) These include eight categories of constitutional rights which the Supreme Court has invoked and which are part of the Bill of rights: Fourteenth Amendment substantive Due Process Claims, Fourteenth Amendment equal protection claims, Fifth Amendment self-incrimination claims, Fourth Amendment search and seizure claims, Eighth Amendment cruel and unusual punishment claims, Fourteenth Amendment right to die claims, Fourteenth Amendment procedural due process claims, and First Amendment freedom of expression claims.\(^{142}\)

Privileging values such as liberty, freedom, individualism and autonomy over advancing societal or communitarian values and rights, the U.S. Constitution is not simply about promoting communitarian values and societal interests. Rather, its main focus is securing personal individual rights. Furthermore, the main obligation of the government towards its citizens is to refrain from violating their right to human dignity. The government is unjustified in criminalizing an activity that infringes on individuals’ right to engage in behavior they see fit, provided that they do not harm anyone but themselves. Moreover, criminal harm is harm to a person, not a community.\(^{143}\) Scholars

\(^{140}\) See, Michael Anthony Lawrence, Reviving a Natural Right: The Freedom of Autonomy, 42 Williamette L. Rev. 123 (2006)

\(^{141}\) See, Goodman, supra note 71

\(^{142}\) Id.

\(^{143}\) See, Dubber, supra note 7, at 568
note that in light of this individual account of constitutional human rights, conduct that qualifies as harmless cannot be criminalized in a constitutional regime of criminal law.\footnote{Id., Dubber, at 568}

While privileging individual freedoms is typically associated with a Kantian liberal account, it is not necessarily inconsistent with a communitarian virtue account. Indeed, the pursuit of liberty, freedom, privacy and autonomy are fundamental American values, and the promise of “liberty and justice for all,” embodied in the Constitution, ought to result in privileging the right to choose to consent to harming oneself.\footnote{See, The Pledge of Allegiance}

Second, privileging the concept of liberty as dignity is justified on the grounds that it secures a negative right, while the competing concept of communitarian virtue as dignity promotes positive rights, which are generally foreign to the U.S. Constitution. Indeed, the vast majority of rights enumerated in the Constitution are viewed as negative.\footnote{See, Glensy, \textit{supra note} 104} A negative approach to human dignity requires the state to \textit{refrain} from interfering with individuals’ exercise of their liberties and freedoms as long as they do not inflict harm on others by violating their interests. A constitutional regime grounded in a negative rights approach embraces a non-interference norm as the rule, requiring the government to abstain from intervening in individuals’ autonomy concerning their life choices (as opposed to requiring the government to intervene in promoting their well being).

In a recent empirical study, David Law and Meela Versteeg examine the globalization of constitutional law and compare constitutions around the world. The study identifies several types of rights: the first list consists of “first-generation” negative, civil/political rights. These include the right to life, the prohibitions of torture, arbitrary arrest and detention; freedom of movement; the right not to be expelled, Habeas corpus, the presumption of innocence, the right to appeal, the prohibition of ex post facto laws, the rights to public trial, to remain silent, to counsel, and to judicial review; and the prohibition of the death penalty.\footnote{David S. Law & Mila Versteeg, \textit{The Evolution and Ideology of Global Constitutionalism}, 99 Cal. L. Rev. 1163, 1223 (2011)} A second list consists of “second-generation”, or positive, socioeconomic rights. These include rights such as workers rights, rights to basic physical needs, the right to adequate standard of living, and rights to food, housing,
water, health and education. 148 A third list consists of “third-generation”, or community/group rights, such as rights for the elderly and handicapped, women’s rights, and rights for the family, children, victims of crimes and prisoners. 149

Law and Versteeg suggest that constitutions can be divided across ideological lines: some are characterized as libertarian, with a focus on limiting the government’s ability to deprive individuals of their physical freedom or to inflict bodily harm. This goal is achieved mainly through enshrining the judicial system with extensive authority to protect individuals’ liberties and freedoms. 150 Such constitutions represent a common law tradition of negative liberty and are grounded in some form of negative restriction on government power, creating a space of private autonomy and liberty with which the government may not interfere. 151

In sharp contrast, Law and Versteeg argue that the second type of constitutions is statist in nature, providing the state with a broad range of powers and positive responsibilities. 152 These constitutions empower, or even obligate, the government to provide for the welfare of its citizens, adopting a far more active role for the state. Law and Versteeg further argue that while libertarian types of constitutions are premised on the goal of protecting individual liberties and freedoms against the tyranny of government, they rest on the premise that the government’s role is promoting the welfare of society as a whole. The comparative analysis also found that liberal constitutions are characteristic of democratic regimes with a common law tradition, while statist constitutions typically characterize undemocratic regimes with a civil law tradition. 153

Viewed through the aforementioned ideological divide, the U.S. Constitution represents the paradigmatic libertarian constitution, one that adopts a negative approach to rights and that requires the state to intervene in restricting individuals’ freedoms,

146 Id, at 1193
149 Id at 1193
150 Id, at 1170, 1224
151 Id
152 Id, at 1170
153 Id, at 1226-1229. For example, the most “Libertarian” constitutions include countries with a common law tradition, most notably, the U.S. and the United Kingdom, while the most “Statist” constitutions include European social welfare countries as well as socialist and communist regimes.
liberties and human dignity beyond those necessary measures required to secure some fundamental rights.

But most importantly, libertarian constitutions are more compatible with the concept of liberty and autonomy as dignity than are statist constitutions, which require state action to foster the respect for communitarian norms. As this view is antithetical to the U.S. Constitution, which explicitly privileges a negative approach that favors a non-interference duty on the government, liberty as dignity should outweigh the competing concept of communitarian virtue as dignity.

B. Circumstances Where Communitarian Virtue Prevails

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

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

154 See, Glensey, supra note 104, at 111-12
A balancing test that weighs individuals’ liberty rights against competing societal interests is a common component in many foreign constitutional schemes. Constitutional balance typically adopts a proportionality review, whose main mechanism is a means-end analysis. For example, the Canadian balancing test provides that: 1) the measures adopted must be carefully designed to achieve the objective in question, and must be rationally connected to that objective; 2) the means should impair “as little as possible” the right or freedom in question; and 3) there must be a proportionality between the effects of the measures responsible for limiting the right or freedom, and the objective which has been identified as of “sufficient importance.”

Conceding that the right to autonomy and liberty may be balanced against competing fundamental rights requires that the law define what these narrow circumstances are. The circumstances under which communitarian virtue as dignity outweighs liberty as dignity include two types: first, when the fundamental premise underlying the right to choose freely is absent, namely, when individuals lack the capacity for making free choices. These mainly include minors and individuals whose capacity to choose is significantly impaired due to a physical or mental condition. Second, activities that significantly endanger inalienable rights, namely, the right to life and to bodily integrity, including protection against serious life threatening or permanent injuries.

1. Impaired Capacity to Exercise Autonomy

One type of circumstance that justifies limiting individuals’ liberty is impaired capacity to exercise autonomous choices. Indeed, a prerequisite for exercising the right to liberty is the capacity to enjoy it. Recall that the Kantian ideas of liberty and dignity hold that individuals have the right to direct their own lives and a duty to respect others by not interfering with their choices. However, this vision is premised on the assumption that

156 See, David S. Law, Generic Constitutional Law, 89 Minn. L. Rev. 652, 697 (2005)
158 Id
159 See, Koppelman, supra note 48, at 284
all individuals are free, equal self-governing agents who make free choices and have the full capacity to do so.  

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

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

2. Endangering the Right to Life

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

While the right to life is one of the most basic human rights, invoking it in American jurisprudence is often associated with the controversy over abortion, a

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161 Id.
162 Id.
163 See, DOUGLAS HUSAK, DRUGS AND RIGHTS, at 100-117 (1992)
rhetorical link that obfuscates the centrality of the latter as a fundamental general human right, irrespective and independent of the abortion context. Furthermore, this link often results in failing to consider the general implications of the right to life in other contexts, such as the criminal law. One notable example of the significance of the right to life is found in the context of international law, where this right is considered fundamental.\(^{166}\) Numerous international documents, declarations and treaties state that every person has an inalienable right to life, liberty and privacy, which are crucial components of happiness and well-being.\(^{167}\)

The following discussion adopts the position that the right to life is a fundamental human right. This Article takes no position on the scope and contours of the right to life in the abortion context, specifically concerning the question of whether a fetus is considered a “person” under the Fourteenth Amendment.\(^{168}\) The Article focuses solely on the implications of human dignity jurisprudence in the context of consensual activities between adults, addressing the constitutional right to life only as it pertains to existing criminal prohibitions on victimless crimes.

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

In light of this narrow caveat to the general right to liberty and autonomy, the proposed rule passes the proportionality review noted earlier: the continued


\(^{168}\) Roe v. Wade 410 U.S. 113 (1973)
criminalization of life threatening activities is designed to secure the right to life and bodily integrity, and since criminalization is confined only to activities that risk this right, the rules preserve the right to liberty and offer a proportionality between the effects of criminalization and the fundamental right to life.

The government’s requirement to protect the right to life and bodily integrity relies on a “softer” or “weaker” version of communitarian virtue as dignity. As every civilized society cherishes the value of human life, it is required to uphold it. This rationale provides the justification for society’s coercive intervention, in the form of criminal regulation, to prevent individuals from engaging in dangerous activities that risk the right to life and bodily integrity.

C. Distinguishing Between Different Types of Dangerous Activities

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

Answering this question rests on capturing the fundamental differences between permissible and criminal risky activities. One possible distinction is that prohibited activities are more dangerous than their legal counterparts.\(^{169}\) Under this reasoning, the principle of autonomy protects the right to engage in dangerous activities unless the risk exceeds a certain threshold, at which point the protection afforded by the principle of autonomy is outweighed by the need to prevent individuals from harming themselves.\(^{170}\)

Take, for example, the ancient practice of gladiators fighting to the death. The main purpose of the game -- killing the opponent -- is what justifies the prohibition on such fights. In contrast, while harm is also likely to occur in sports such as boxing, it is incidental to the game, which accounts for its legality. One drawback to this distinction is that it requires the adoption of a test to determine how to define this threshold of risk as well as which risky activities exceed that threshold.

\(^{169}\) See, DRUGS AND RIGHTS, supra note 184, at 94-100

\(^{170}\) Id, at 90-100
Another factor that distinguishes between different types of dangerous activities is the relative importance of the activity in question.\textsuperscript{171} Ostensibly, important risky activities deserve the protection of autonomy while unimportant ones do not. For example, engaging in competitive sports is significant to peoples’ lives, and thus ought to be protected by autonomy even if it carries some risks to the players. Another related factor is that legal activities cause a net balance of utility, whereas prohibited activities do not. Claiming that the benefits of engaging in competitive sports outweigh the risks to the players is not an objective determination but one that requires a normative evaluation, which is contingent on non-neutral moral judgments about societal values.

While boxing, football and other risky sports pose significant risks to human life and bodily integrity, they are nonetheless highly regulated activities, which are performed in closely supervised environments under strict rules and regulations. In contrast, illegal dangerous activities, such as using recreational drugs, are performed in unsupervised, unregulated private settings, which make alternative forms of regulation impossible. Therefore, engaging in life-threatening activities in unregulated settings justifies the state’s criminal regulation of these activities to secure the fundamental right life and bodily integrity.

\textbf{D. Constitutional Implications}

Recall that currently, substantive criminal law survives constitutional scrutiny.\textsuperscript{172} While courts apply the strict scrutiny test to evaluate the constitutionality of laws implicating fundamental rights such as free speech, criminal prohibitions are perceived as implicating only non-fundamental rights; therefore, courts assess their constitutionality under the rational basis test under which the state only needs to show a conceivable legitimate purpose to enact the law in question, allowing most criminal prohibitions to pass constitutional scrutiny.\textsuperscript{173}

Several scholars have suggested that individuals have a constitutional right against excessive punishment: Douglas Husak, for example, suggests that all criminal prohibitions implicate the fundamental right \textit{not} to be punished, and that all criminal laws

\begin{footnotesize}
\textsuperscript{171} Id, at 98
\textsuperscript{172} See, Part I. C.
\textsuperscript{173} See, Husak, \textit{supra note} 4, at 124
\end{footnotesize}
ought to be assessed against the intermediate scrutiny standard of judicial review.174 Under Husak’s proposal, the state must show that the law in question aims at a substantial state interest, directly advances that interest, and is no more extensive than necessary to achieve this objective.175 While subjecting all criminal prohibitions to the intermediate level of judicial scrutiny may be viewed as a welcome direction in limiting the scope of criminalization, it defines the right in question -- a general right not to be punished -- too broadly, making the proposal too radical.

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

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

IV. Applying the Proposal to Recreational Drug Prohibitions

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

174 See, Husak, supra note 4, at 123-28
175 See, Husak, supra note 4, at 132-53
A. Why Drug Crimes?

Why should a proposal to limit the scope of victimless crimes specifically aim at drug crimes, rather than other types of victimless crimes such as prostitution or gambling? Scholars criticizing the problem of overcriminalization in general, and the unjustified criminalization of victimless crimes in particular, often provide examples of obsolete criminal statutes, which demonstrate remnants of legal moralism that are unwarranted in a post-Lawrence era.\textsuperscript{176} Sara Sun Beale, for example, notes that despite the contemporary approach that sexual morality ought to remain beyond the scope of criminal regulation, a large number of states still criminalize fornication and adultery, and most states criminalize prostitution.\textsuperscript{177} However, these offenses are rarely enforced and represent a miniscule percentage of cases that reach the criminal justice system.

In sharp contrast, the most notable victimless offenses -- drug crimes -- account for the enormous number of criminal convictions and incarcerated individuals in the country’s overcrowded prisons.\textsuperscript{178} Furthermore, the use of “soft” drugs such as marijuana is prevalent among many Americans, turning all users into potential criminals.\textsuperscript{179} According to estimates, while over 700,000 people are arrested every year for marijuana possession, over 100 million Americans actually use the drug.\textsuperscript{180} This is a troubling finding given that the prevalence of drug use increasingly expands the coercive powers and authorities of the government and in excess to measures used outside the drugs context.\textsuperscript{181} In practical terms, this expansion means more stops and arrests, invasions of privacy in the form of home searches and intrusive bodily searches and pat downs.\textsuperscript{182} Scholars contend that the expansive “war on drugs” has resulted in “drugs exceptionalism”, under which the enforcement of drug crimes often precludes the protection of defendants’ rights, regularly granted to other offenders.\textsuperscript{183}

\textsuperscript{176} See, Strader, supra note 16
\textsuperscript{177} See, Beale, supra note 3
\textsuperscript{178} See, OVERCRIMINALIZATION.
\textsuperscript{179} Id.
\textsuperscript{180} See, Blumenson & Nilson, supra note 44 and supra note 45.
\textsuperscript{181} See, Eric Luna, Drug Exceptionalism, 47 Vill. L. Rev. 753 (2002)
\textsuperscript{182} See, Yankah, supra note 144, at 8
\textsuperscript{183} See, Luna, supra note 203.
laws carry a notable disparate impact on racial and national minorities, who are most affected by the continued criminalization of drugs.\textsuperscript{184} In light of this reality, focusing on recreational drug prohibitions as paradigmatic examples of victimless crime rests on the premise that a change in substantive drug laws would have a dramatic impact on the criminal justice system, including significant decreases both in criminal convictions as well as in the country’s prison population. The following discussion argues that applying the proposed rules in the drug context would have the greatest effect on the criminal justice system by significantly limiting criminalization.

\textbf{B. A Consequentialist Critique of Drug prohibition}

The increasing dissatisfaction of scholars, policy makers, and the public at large with the government’s continuous “war on drugs” in the last forty years has resulted in voluminous writings concerning the numerous drawbacks in criminalizing the use and possession of recreational drugs, mainly marijuana.\textsuperscript{185} However, the focus of this growing critique is typically not grounded in libertarian theories concerning individuals’ rights and autonomous choices to use recreational drugs, but rather in the dominant paradigms of consequentialist accounts of drug prohibitions, namely, in a cost/benefit analysis as the main justification for decriminalizing drugs use and possession.\textsuperscript{186}

While the prohibition against the recreational use of drugs has historically been linked to moral reprobation, infused with racial and ethnic overtones, the most prevalent arguments raised today against drug prohibitions rest on the utilitarian Law and Economic critique.\textsuperscript{187} In sharp contrast to sexual vices, such as same-sex sexual relationships, where normative, rights-based claims have been made to reject criminal bans on private consensual conducts, much less focus has been devoted to such arguments in the context of drug laws.

\textsuperscript{184} See, OVERCRIMINALIZATION, supra note 4, at 16
\textsuperscript{186} See, Koppelman, supra note 48.
In light of the prevalence of utilitarian harm arguments in American jurisprudence, modern proponents of the continued criminalization of recreational drugs do not ground their support for drug prohibitions on moral justifications.\textsuperscript{188} Instead, they rely on harm-based arguments to advocate a blanket prohibition of all types of drugs.\textsuperscript{189} The common reasons used to justify such a prohibition include the harmful impact of drugs on one’s health,\textsuperscript{190} the need to protect children from the harmful effects of drugs,\textsuperscript{191} the prevalence of drug-related crime and the argument that “soft” drugs lead to “hard” ones.\textsuperscript{192} Three types of crime are associated with drugs: systemic crimes resulting from the reliance on black markets to purchase drugs; economic crimes, resulting from the need to obtain money to purchase drugs; and crimes linked to the psychopharmacological effects of drugs.\textsuperscript{193} Moreover, to strengthen their position, proponents of prohibition advance economic-based justifications to criminalize drug use, contending that it places heavy burdens and financial costs on society.\textsuperscript{194}

Opponents contend that scientific evidence raises significant doubts regarding the harms of soft drugs such as marijuana.\textsuperscript{195} Furthermore, legal drugs, mainly alcohol, can be more harmful than marijuana and yet are not criminalized.\textsuperscript{196} Soft Drug use is also less dangerous than a wide array of other harmful but legal activities, such as contact sports.\textsuperscript{197} Critics also reject the asserted link between drugs and crime, contending that the amount of systemic crime would be reduced by decriminalization; that many economic crimes are caused not by drugs themselves but by drug prohibitions; that criminalization is not an effective way to reduce economic crimes; and that research doesn’t support the claim that drug use encourages violent behavior.\textsuperscript{198}

\begin{flushleft}
\textsuperscript{188} See, generally, Peter de Marneffe, Against Drug Legalization, in Douglas Husak and Peter de Marneffe, at 109-131 (2005)
\textsuperscript{190} See, Husak and de Marneffe, supra note 211, at 41-53 (2005)
\textsuperscript{191} Id. at 53- 64
\textsuperscript{192} Id, at 64-71
\textsuperscript{193} Id. at 66- 70
\textsuperscript{194} Id.
\textsuperscript{195} See, Mitch Earlywine: Understanding Marijuana: A New Look at the Scientific Evidence, 143-144 (Oxford University Press, 2002)
\textsuperscript{196} See, Husak and De Marneffe, supra note 211, at 42- 53
\textsuperscript{197} Id.
\textsuperscript{198} See, Husak and de Marneffe, supra note 211 at 67 - 71
\end{flushleft}
C. Deontological Critique of Drug Prohibition

In their focus on the enormous financial costs that the “War on Drugs” put on the criminal justice system, scholars criticizing drug prohibition sometimes fail to fully consider a normative rights-based perspective.\(^\text{199}\) Political and philosophical theorists, however, contend that drug laws are inherently suspect from a liberal perspective: in a free society, individuals should be allowed to make their own choices about using harmful substances without government intervention, and the onus is placed on the government to justify the interference with this personal liberty.\(^\text{200}\)

Joel Feinberg, David A.J. Richards, Douglas Husak and Michael Moore are among the most prominent theorists advocating the decriminalization of drugs, based on the theory that liberalism is committed to protecting individuals’ right to use recreational drugs.\(^\text{201}\) These liberal theorists and others contend that in light of ample scientific doubts regarding the harmful effects of drugs, the presumption of freedom ought to prevail since the evidentiary burden of proof lies with the state.\(^\text{202}\)

In his landmark book, David A.J Richards contends that a liberal-based criminal justice system is premised on an autonomy-based concept, requiring the state to respect individuals’ ability to determine the meaning of their lives.\(^\text{203}\) Richards argues that one’s right to autonomous choice requires that the state refrain from criminalizing drug use as a means to enforce some choices over others.\(^\text{204}\) Douglas Husak advocates the decriminalization of all types of drug use and possession: Husak reframes the core question in the debate as to whether the use of a given drug should be criminalized, rather than whether drug use should be decriminalized.\(^\text{205}\) Moreover, Husak contends that no

\(^{199}\) See, Koppelman, supra note 48 at 281-82
\(^{200}\) See, Husak and De Marneffe, supra note 211, at 84-95
\(^{201}\) See, Drugs and the limits of Liberalism, ed. Pablo De Greif, at p. 114-115
\(^{202}\) See, supra note 217 Kahan, at 132-33 (2007)
\(^{204}\) Id, at 169-173
\(^{205}\) See, e.g. DRUGS AND RIGHTS, supra note 184, Husak and de Marneffe, supra note 211, Douglas Husak, Predicting the Future: A Bad Reason to Criminalize Drug Use, 2009 Utah L. Rev. 105 (2009)
good argument in favor of criminalizing drug use has yet been made to justify criminalization. 206

While these types of arguments are well known, they have not taken hold among legislatures, failing to promote fundamental changes in existing drug laws. Moreover, despite a growing trend showing increasing support for the decriminalization of marijuana, no comprehensive change has occurred in societal attitudes toward drug use in general, and marijuana use in particular, as the vast majority of the public still supports criminal prohibitions on all types of drugs, including marijuana.207

D. Applying the Proposed Rules

One reason that may account for the failure to promote fundamental change in American drug laws is the lack of a theoretical agreement among different communities about the appropriate legal line drawing between different types of recreational drugs. This view further suggests that the criminal law ought to consider a middle ground between individuals’ liberty rights and fundamental societal values and interests. This middle ground may require some points of agreement among competing philosophical theories. Ekow Yankah, for example, contends that the decriminalization of marijuana is practically possible because advocates of decriminalization can theoretically agree on a philosophical starting point, ideally resulting in consensus between liberals and non-liberals. For liberals, the criminalization of marijuana is unjustified because it interferes with one’s freedom and autonomy.208 For virtue-based theorists, the criminalization of marijuana is unjustified because it undermines, rather than promotes, a virtuous society, decreasing its overall well-being. 209

The following section carves out clear distinctions between different types of drugs and different types of drug-related activities. A main feature of current drug laws is their all-encompassing prohibition, a position that fails to appreciate the sharp distinctions between fundamentally distinct types of drugs based on their varying effects.

208 See, Yankah, supra note 144, at 4, 12-14
209 See, Yankah, id, at 17-19
Recall that under current drug laws, offenders are incarcerated for possession and use of all types of drugs, including marijuana.\textsuperscript{210} While about 16 states allow personal use of marijuana with a doctor’s recommendation, and many local jurisdictions have relaxed their penalties for marijuana use and possession of small amounts of this drug, the complete decriminalization of marijuana has not taken place at the federal level or in any state.\textsuperscript{211}

1. Distinguishing “soft” Drugs from “Hard” Drugs

The distinction between “soft” and “hard” drugs has been rejected in American drug laws, which treats all drugs as equally dangerous: Surprisingly, the Controlled Substances Act places both marijuana and heroine in the gravest category as drugs that have a high potential for abuse and no recognized medical use, while cocaine is designated as a Schedule II substance.\textsuperscript{212} In contrast, foreign countries such as the Netherlands differentiate between drugs based on their potential harm.\textsuperscript{213} The proposed rules advocate this distinction, under which “soft” drugs include all products of the cannabis plant, including not only marijuana but also hashish, while “hard” drugs include heroine, cocaine, amphetamines and other chemically produced recreational drugs.

The above line drawing is based on the fundamental distinction between decriminalization of recreational drugs and their legalization.\textsuperscript{214} Decriminalization entails abolishing criminal prohibitions on using and possessing recreational drugs. Legalization, however, involves not merely lifting prohibitory bans on drug use but also abolishing the prohibitions on the production and sale of drugs.\textsuperscript{215} Given this distinction, the proposed rules advocate only the decriminalization of victimless crimes but not their legalization, therefore excluding drug trafficking from their scope.

Moreover, the proposed rules are based on individuals’ rights to liberty, autonomy and dignity. Freely exercising these rights, which is this Article’s main focus, is unrelated to drug trafficking because criminal prohibitions on producing and selling drugs do not

\textsuperscript{210} See, OVERCRIMINALIZATION, supra note 4 at 29
\textsuperscript{212} 21 U.S.C. 812 (2012) Controlled Substance Act
\textsuperscript{214} See, Husak and de Marneffe, supra note 211 at 96
\textsuperscript{215} Id
violates individuals’ autonomous choice to use them. Also, proposals to legalize the production and sale of recreational drugs are based on utilitarian arguments, mainly focusing on the economic gains which legalization would provide in the form of tax revenues. In contrast, the proposed rules do not advocate decriminalization based on economics but on advancing a more just criminal justice system by drawing on the value of human dignity.\textsuperscript{216}

\textbf{2. Decriminalizing “Soft” Drugs}

A key issue concerning the decriminalization of use and possession of “soft” drugs based on the concept of liberty as dignity concerns the question of addiction. Addiction and substance abuse undercut the justification behind decriminalization: drug addicts do not exercise autonomous choices when using drugs, because the addiction effectively controls their lives.\textsuperscript{217} Scientific evidence, however, shows that “soft” drugs are not physically addictive, debunking the claim that “soft” drugs impair one’s capacity to exercise autonomous choices and making the case for decriminalization.\textsuperscript{218} Put differently, the limited caveat supporting the government’s obligation to secure individuals’ right to life or bodily integrity is not demonstrated in the case of use of “soft” drugs.

\textbf{3. Continued Criminalization of “Hard” Drugs}

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

\begin{footnotesize}
\begin{enumerate}
\item Id., at 97
\item See, Koppelman, \textit{supra} note 48, at 285
\item Id
\end{enumerate}
\end{footnotesize}
The abuse of “hard” drugs not only pose health risks, but also creates a significant risk of death. Take heroine, for example: Injecting is a particularly common route of administration among heroin users. Injecting heroin can contribute to the clogging of the blood vessels that lead to the lungs, liver, kidneys, and brain.\textsuperscript{219} Moreover, repeated IV injections can cause vascular sclerosis and lead the injectors to inject subcutaneously or intramuscularly, resulting in a series of infections, which may become lethal.\textsuperscript{220} HIV and other types of infections such as hepatitis, along with depression of the immune system, are also serious concerns among injection drug users.\textsuperscript{221} Take, also, cocaine use: The cardiovascular system is the system most often adversely affected by cocaine use, which increases the risk of coronary artery disease.\textsuperscript{222} Studies suggest that cocaine users may often die suddenly as a result of having varying lethal doses of cocaine.\textsuperscript{223} While these medical complications may vary depending on the individual, frequency of use, amount of dosage, and prior medical attributes, it is clear that abuse of “hard” drugs significantly endangers individuals’ lives, therefore justifying their continued criminalization.

The significant risks of addiction associated with “hard” but not “soft” drugs are another factor supporting the proposed distinction between these drugs, thus explaining why only criminalization of the former is justified. The implications of the addiction factor are twofold: Highly addictive drugs pose risks to bodily integrity and increase the likelihood of drug abuse and overdose, further supporting their continued criminalization. Moreover, in contrast with other risky activities, such as contact sports, drug use cannot be supervised or regulated through alternative and less intrusive means.

Liberal theorists have struggled with the question of whether choosing a life of regular drug use can qualify as a self-defining choice.\textsuperscript{224} Legal theorist Michael Moore, for example, contends that recreational drug use ought to be protected by the right to liberty, while a life of total addiction conflicts with one’s rationality and autonomy.\textsuperscript{225}

\begin{footnotes}
\item[221] Id.
\item[222] Medical complications of Cocaine, The University of Arizona. Available at: http://www.methoide.fcm.arizona.edu/inocenter/index.cfm?stid=212
\item[223] Id.
\item[224] See, DRUGS AND RIGHTS, supra note 184 at 100-117 (Cambridge University Press, 1992)
\item[225] See, supra note 225, Michael Moore, Liberty and Drugs, p. 61-109
\end{footnotes}
Samuel Freeman agrees, suggesting that liberalism would permit regulation of only those drugs that: “permanently or indefinitely impair our capacities for rational and moral agency”. The question of prohibition, then, depends on whether a particular drug is so addictive as to deprive individuals of their ability to make free autonomous choices.

E. Constitutionality Under the Intermediate Scrutiny Standard

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

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

“Hard” drugs are addictive, increase the likelihood of abuse and overdose, and inflict significant health risks on users, thus justifying criminalization as a means to preserve individuals’ right to life and bodily integrity. Furthermore, the harms of “hard” drugs extend to others, with many users resorting to criminal activities to feed their

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226 See, Freeman, supra note 181 at 110, 127
227 See, Part I. C
228 See, Blumenson and Nilsen, supra note 46.
229 See, Husak, supra note 4 at 176
Moreover, the risks of “hard” drugs often involve children, who are often neglected by their addicted parent(s). These state interests, in addition to the deterrent effect of criminalization, are sufficiently significant to justify prohibitions on “hard” drugs. Finally, in light of the substantial risks that “hard” drugs pose, criminal prohibitions are not an excessive measure to reduce the likelihood of these risks.

Conclusion

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

This Article has proposed one mechanism to limit overcriminalization of victimless crimes, particularly drug crimes, by using the notion of human dignity as a constitutional constraint on criminalization. It has demonstrated that the law needs to adopt a balancing test to reconcile conflicting understandings of human dignity and that, in light of the key role that liberty plays in American jurisprudence, the concept of liberty as dignity ought to outweigh the competing interest of communitarian virtue as dignity. The rule requires that the state not interfere with individuals’ autonomous free choices regarding how to best live their lives. Favoring this concept of dignity further requires the state to decriminalize consensual conducts between adults, even if they inflict harm upon the participants, provided that they are harmless to third parties.

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

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230 See, Husak and de Marneffe, supra note 211 at 111-118
231 Id.