

# IS THE CONSTITUTION IN HARM'S WAY? SUBSTANTIVE DUE PROCESS AND CRIMINAL LAW.

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## I. Introduction

For quite some time, scholars have debated whether or not there are any constitutional limits to substantive criminal law.<sup>1</sup> Although the Court has cautiously resisted the chance to constitutionalize criminal law overtly, it has been delving into substantive criminal law since the turn of the twentieth century.<sup>2</sup> To be sure, the Court often disguises these forays as cases about substantive due process generally, and privacy, specifically.

Indeed, beginning with *Meyer v. Nebraska*<sup>3</sup> in 1923 through the recent case of *Lawrence v. Texas*<sup>4</sup> in 2004, the Court has been deciding cases about the limits of criminal law. The confusion—that most people do not think the Court has ever adopted any constitutional theory on substantive criminal law—stems from the Court's own decisions. None of the decisions explicitly reference traditional canons of criminal law; none of them rely on academic or philosophical justifications for criminalization; none of them acknowledge the limits of criminal sanctions as an independent constitutional value. Rather, these decisions rely on more rhetorical, lofty values such as privacy or liberty.

That *Lawrence* was a landmark case is beyond doubt. *Lawrence* substantially and profoundly advanced the cause of gay rights; it will have its critics from the right and supporters from the left, all debating the morality of homosexuality and the

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<sup>1</sup> See e.g., Louis D. Bilionis, *Process, the Constitution, and Substantive Criminal Law*, 96 MICH. L. REV. 1269, 1272-99 (1998); Markus Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509 (2004).

<sup>2</sup> See *Powell v. Texas*, 392 U.S. 514, 533 (1968) (“*Robinson v. California*, 370 U.S. 660 (1962)] so viewed brings this Court but a very small way into the substantive criminal law. And unless *Robinson* is so viewed it is difficult to see any limiting principle that would serve to prevent this Court from becoming, under the aegis of the Cruel and Unusual Punishment Clause, the ultimate arbiter of the standards of criminal responsibility, in diverse areas of the criminal law, throughout the country.”).

<sup>3</sup> 262 U.S. 390 (1923).

<sup>4</sup> 539 U.S. 558 (2003).

propriety of granting it any constitutional protection.<sup>5</sup> But, to relegate *Lawrence* to a case *just* about homosexual rights would severely diffuse its breadth.

It is understandable, however, why analysts would limit *Lawrence* and its progeny. The substantive due process cases have created a “sex is different” mantra,<sup>6</sup> much like the “death is different” mantra under the Eighth Amendment.<sup>7</sup> *Lawrence* is the best example. *Lawrence* was the first substantive due process case that did not rely on the existence of any specific fundamental right but, rather, categorized the conduct at issue—homosexual sodomy—as falling under the general umbrella of protected sexual intimacy.<sup>8</sup> Had there been a fundamental right at stake, the government could not have infringed on that right “unless the infringement is narrowly tailored to serve a compelling state interest.”<sup>9</sup> On the other hand, because the right at issue was not fundamental, the government needed only show “a reasonable relation to a legitimate state interest to justify the [regulation].”<sup>10</sup>

It was the latter test that did all the work in *Lawrence*. The opinion held that the State’s justification was not reasonably related to the State interest. In doing so, *Lawrence* tied together and reaffirmed (or recast, depending on one’s views) the previous substantive due process cases and their elevation of sexual intimacy and relationship-defining conduct as virtually untouchable.<sup>11</sup>

Casting *Lawrence* as a case about sexual intimacy improperly limits its scope, and a better, more objective alternative, should be considered when deciding the constitutional validity of criminal statutes. The alternative is the now familiar harm principle, first championed by Mill and recently revived by Hart, Feinberg, and others.

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<sup>5</sup> See Kevin Ryan, *A Flawed Performance*, 29 FALL VT. B.J. 5 (2003).

<sup>6</sup> See generally, JEAN COHEN, *REGULATING INTIMACY*, (2002); RICHARD POSNER, *SEX AND REASON*, (1992); Raymond Ku, *Swingers: Morality Legislation and the Limits of State Police Power*, 12 ST. THOMAS L. REV. 1 n.4-6 (1999) (citing various sources and cases which view sexual autonomy as an independently protected right).

<sup>7</sup> See e.g., *Harmelin v. Michigan*, 501 U.S. 957, 994 (1991) (“Proportionality review is one of several respects in which we have held that ‘death is different,’ and have imposed protections that the Constitution nowhere else provides”).

<sup>8</sup> See Randy Barnett, *Justice Kennedy’s Libertarian Revolution: Lawrence v. Texas*, *Cato Supreme Court Review 2002-2003*, available at: <http://www.cato.org/pubs/scr2003/revolution.pdf>.

<sup>9</sup> *Washington v. Glucksberg*, 521 U.S. 702, 721 (1997).

<sup>10</sup> *Id.* at 722.

<sup>11</sup> See Wilson Huhn, *The Jurisprudential Revolution: Unlocking Human Potential in Grutter and Lawrence*, 12 Wm. & MARY BILL RTS. J. 65, 77 (2003) (noting that *Lawrence* held, *inter alia*, that the “Right to Privacy includes ‘certain intimate conduct’ not because the sexual act itself usually occurs in private, but because the central importance of sexual relationships in people’s lives.”).

The harm principle has played a vital but unacknowledged role in these very same privacy-oriented cases. The concept of requiring harm to justify criminal law has been a prevalent feature of these decisions, though never an explicit reason for striking down legislation. Perhaps it was nowhere as prevalent as in *Lawrence*, where it was necessary to overcome the heavy burden of demonstrating the irrationality of traditional, morals-based legislation.

This paper will argue that the criminal law substantive due process cases, when read together, advance a constitutional harm principle. In this context, *Lawrence* was not a break from tradition; it was simply an extension of the harm principle.

Part I will establish some background by way of an overview of the harm principle. This section will discuss the philosophic underpinnings of the harm principle and demonstrate that the criminal law cases did not adopt unsubstantiated and unsupported concepts but rather applied widely accepted philosophical and criminological theories.

Part II will then begin to trace the path of criminal law in the Supreme Court through *Lawrence*, summarizing the substantive due process cases that involved criminal laws and highlighting the role harm played in the decision. Embedded within the rhetoric of privacy and liberty is a constitutional allegiance to a variant of the harm principle and an understanding that criminalization may not be a narrowly tailored scheme reasonably related to the government's interest.<sup>12</sup>

Part III will argue that there are valid constitutional and policy reasons for making harm the starting point for determining the constitutional validity of criminal laws. In the end, I hope to show not that "sex is different," but rather that the harm principle should be the explicit guiding idea behind *all* criminal law.

## **II. The Harm Principle**

The harm principle first took root in the work of John Stuart Mill:

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<sup>12</sup> I avoid applying this theory to other constitutional clauses, although it could apply. However, other constitutional clauses often have unique histories and different values at stake. For example, the First Amendment has a rich drafting history and subsequent case history. Additionally, there is unique scholarship which addresses criminological theories such as harm in this context. *See e.g.*, 2 JOEL FEINBERG, *THE MORAL LIMITS OF CRIMINAL LAW: OFFENSE TO OTHERS* (1986) [hereinafter FEINBERG, *OFFENSE TO OTHERS*].

That principle is that the sole end for which mankind is warranted, individually or collectively, in interfering with the liberty of action of any of their number is self-protection. That the only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others.<sup>13</sup>

Although Mill's theory seemed simple enough, it was more complicated than it appeared<sup>14</sup> and was soon attacked by James Fitzjames Stephen.<sup>15</sup> Stephen argued that some actions are "so gross and outrageous" in their nature that they must be punished severely.<sup>16</sup>

After the rich contributions of both Mill and Stephen, contemporary discourse on the harm principle was rekindled by a more recent exchange of ideas. Here in the United States, it was triggered by obscenity cases in the Supreme Court and the drafting of the Model Penal Code.<sup>17</sup> In England, the debate over the criminal enforcement of morality was reignited when the Committee on Homosexual Offences and Prostitution created the "Wolfenden Report," which recommended the decriminalization of homosexual acts conducted privately among consenting adults.<sup>18</sup>

The Wolfenden Report prompted Lord Patrick Devlin to respond and denounce the committee's recommendations in a lecture titled *The Enforcement of Morals*.<sup>19</sup> This lecture in turn instigated a response from H.L.A. Hart in his lecture and book, *Law, Liberty, and Morality*.<sup>20</sup> Thus came about the Hart-Devlin debate and the renaissance of 20<sup>th</sup> century harm principle. In the 1980's, Joel Feinberg joined the debate with his

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<sup>13</sup> JOHN STUART MILL, ON LIBERTY, 9 (1859).

<sup>14</sup> Bernard Harcourt, *The Collapse of the Harm Principle*, 90 J. CRIM. L. & CRIMINOLOGY 109, 121 (1999).

<sup>15</sup> JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY (1873).

<sup>16</sup> *Id.* at 163.

<sup>17</sup> Harcourt, *supra* note 14, at 122 (footnotes omitted).

<sup>18</sup> *Id.* at 122; see Report of the Committee on Homosexual Offences and Prostitution, 1957 Cmnd. 247 [hereinafter *Wolfenden Report*].

<sup>19</sup> PATRICK DEVLIN, THE ENFORCEMENT OF MORALS (1965). See also *Wolfenden Report*, *supra* note 18 at 122.

<sup>20</sup> H.L.A. HART, LAW, LIBERTY AND MORALITY, 16 (1963).

highly influential four-volume treatise, *The Moral Limits of Criminal Law*.<sup>21</sup> These three jurists defined the contours of the harm principle as we now know it.

### A. The Hart-Devlin Debate

In response to growing dissatisfaction with the treatment of both prostitution and homosexuality in England, the Wolfenden committee was appointed to reevaluate the state of the laws.<sup>22</sup> As to homosexuality, it recommended, “practices between consenting adults in private should no longer be a crime.”<sup>23</sup> As to prostitution, it recommended that “though it should not itself be made illegal, legislation should be passed ‘to drive it off the streets’ on the ground that public soliciting was an offensive nuisance to ordinary citizens.”<sup>24</sup> The reasoning supporting both findings was the committee’s belief that the function of criminal law was,

To preserve public order and decency, to protect the citizen from what is offensive or injurious, and to provide sufficient safeguards against exploitation and corruption of others, particularly those who are specially vulnerable.<sup>25</sup>

The report specified that there is a sphere of private morality that the law should not invade.<sup>26</sup> It noted that the purpose of the law is not “to intervene in the private lives of citizens.”<sup>27</sup> The report concluded that the law should not “seek to enforce any particular pattern of behaviour (sic) further than is necessary to carry out the purposes we have outlined.”<sup>28</sup>

Devlin heartily disagreed. In his lecture, he argued that criminal law should enforce morality.<sup>29</sup> He began by acknowledging that one could conceive of a criminal system whose laws are not based on morality, and where the State justifies its sanctions

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<sup>21</sup> 1 JOEL FEINBERG, *THE MORAL LIMITS OF CRIMINAL LAW, HARM TO OTHERS* (1984) [hereinafter FEINBERG, *HARM TO OTHERS*]; FEINBERG, *OFFENSE TO OTHERS*, *supra* note 12; 3 JOEL FEINBERG, *THE MORAL LIMITS OF CRIMINAL LAW, HARM TO SELF* (1986) [hereinafter FEINBERG, *HARM TO SELF*]; 4 JOEL FEINBERG, *THE MORAL LIMITS OF CRIMINAL LAW, HARMLESS WRONGDOING* (1988) [hereinafter FEINBERG, *HARMLESS WRONGDOING*].

<sup>22</sup> HART, *supra* note 20, at 13. Their report was published in 1957. Wolfenden report, *supra* note 18.

<sup>23</sup> HART, *supra* note 20, at 13; Wolfenden report, *supra* note 18, para 62.

<sup>24</sup> HART, *supra* note 20, at 13; Wolfenden report, *supra* note 18.

<sup>25</sup> Wolfenden Report, *supra* note 18, para 13.

<sup>26</sup> *Id.* at para 62.

<sup>27</sup> *Id.*

<sup>28</sup> *Id.*

<sup>29</sup> DEVLIN, *supra* note 19, at 2.

by other means.<sup>30</sup> However, the possibility that such a system could exist did not negate the idea that a society could still base its laws on morality.

Devlin argued that there is a public morality, which he called a “moral structure.”<sup>31</sup> He believed that a society must have its own collective ideas, including a collective morality, which bonded individuals into a community together.<sup>32</sup> Given that society is inherently governed by a moral code, “society may use the law to preserve morality in the same way as it uses it to safeguard anything else that is essential to its existence.”<sup>33</sup>

Devlin also offered a methodology for ascertaining how society defines morality: the reasonable man standard.<sup>34</sup> “Immorality,” according to Devlin, is what every reasonable person would consider to be immoral.<sup>35</sup>

Finally, Devlin discussed what should limit or guide a society in exercising this power to govern morality. He argued that only when the society is harmed should it act in collective judgment.<sup>36</sup> Although this argument sounds like a variant of the harm principle, Devlin believed that “[a]ny immorality is capable of affecting society injuriously and in effect to a greater or lesser extent it usually does[.]”<sup>37</sup> That is to say, he considered immorality harmful.

The ambiguities in Devlin’s argument did not go unnoticed.<sup>38</sup> One writer, Bernard Harcourt, asserted that the source of the problem “stemmed from the fact that Devlin defined public morality in terms of harm to society.”<sup>39</sup> According to Harcourt, Devlin’s argument suggested that the preservation of society itself was the justification for enforcing morality.<sup>40</sup> One problem with this reasoning was that Devlin failed to

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<sup>30</sup> *Id.* at 5.

<sup>31</sup> *Id.* at 9.

<sup>32</sup> *Id.* at 10.

<sup>33</sup> *Id.* at 11.

<sup>34</sup> *Id.* at 15.

<sup>35</sup> *Id.* at 15.

<sup>36</sup> *Id.* at 8.

<sup>37</sup> *Id.* at 15.

<sup>38</sup> Harcourt, *supra* note 14, at 124.

<sup>39</sup> *Id.* at 124.

<sup>40</sup> *Id.* at 125; see Aaron Rappaport, *Beyond Personhood and Autonomy: Moral Theory and the Premises of Privacy*, 2001 UTAH L. REV. 441, 492 (2001) (arguing that Devlin could be interpreted as saying that “social cohesion is not valuable for all societies, but it is valuable for any society worth preserving”); Jeffrie Murphy, *Legal Moralism and Liberalism*, 37 ARIZ. L. REV. 73, 76 (1995) (“Devlin is thus able to construct the following argument: the criminal law is legitimately concerned with the preservation of

explain how such harm could empirically be measured.<sup>41</sup> In the extreme, Devlin’s argument justifies enforcing morality “for the sake of morality.”<sup>42</sup>

Deeply unsatisfied by Devlin’s attempt to justify “morals” legislation, Hart responded with a strong rebuke.<sup>43</sup> Hart’s lectures revolved around the defense of Mill’s *On Liberty*. He took Devlin, and even Stephen, to task. To be sure, Hart was not prepared to support Mill outright.<sup>44</sup> Rather, the only issue he addressed was the enforcement of morality.<sup>45</sup>

Hart posited that morality is not the only justification for certain acts, which, on their face, seemed to cause no individual harm (*e.g.* euthanasia, where one party consents to his own killing).<sup>46</sup> Hart believed that those rules could be explained and justified by paternalism.<sup>47</sup> He also subscribed to the notion that public nuisance was a worthy justification, independent of morality, for crimes such as bigamy.<sup>48</sup> Finally, Hart was disturbed by Devlin’s assumption that certain acts, such as sexually immoral ones, have the ability to hurt society generally. He criticized Devlin by asserting, “there is again no evidence to support, and much to refute, the theory that those who deviate from conventional sexual morality are in other ways hostile to society.”<sup>49</sup> Ultimately, the only substantial difference between Hart and Devlin is that “Hart focused on harm to the individual, whereas Devlin focused on harm to society as a whole.”<sup>50</sup>

## **B. The Debate Continues: Enter Feinberg**

Joel Feinberg wrote a four-volume treatise on the harm principle. His work was more elaborate and detailed than Hart or Devlin and has been the subject of countless

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society, violations of a society's shared morality tend (like treason) to undermine society even in cases where these violations have no direct personal victims, and thus the criminal law may legitimately prohibit such violations in those cases where the majority judges this to be a prudent course of action.”).

<sup>41</sup> Harcourt, *supra* note 14, at 127.

<sup>42</sup> *Id.* at 128.

<sup>43</sup> HART, *supra* note 20.

<sup>44</sup> *Id.* at 5.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.* at 31.

<sup>47</sup> *Id.* at 31.

<sup>48</sup> “The example of bigamy shows the need to distinguish between the immorality of a practice and its aspect as a public offensive act or nuisance.” *Id.* at 43.

<sup>49</sup> *Id.* at 50-51.

<sup>50</sup> Harcourt, *supra*, note 14, at 125; *see* FEINBERG, HARMLESS WRONGDOING, *supra* note 21, at 8 (“Patrick Devlin’s social disintegration theses cites as his basic reason for ‘enforcing morality’ the *harm he expects would otherwise come to the public interest* in social cohesion.”) (emphasis added).

articles and books.<sup>51</sup> Although Feinberg acknowledged that his work was not meant to meld perfectly with constitutional doctrine, it has come close.<sup>52</sup>

Feinberg's aim was to make the best case for Liberalism,<sup>53</sup> which, as he defined it, believes, "the harm and offense principles, duly clarified and qualified, between them exhaust the class of good reasons for criminal prohibitions."<sup>54</sup> The other two common liberty-limiting principles often advanced as justifications for criminal prohibitions, legal paternalism and legal moralism, are not then proper foundations for criminal sanctions.<sup>55</sup> Feinberg limited his inquiry to the criminal law, as opposed to, for example, Mill, who was concerned with any exercise of power over an individual.<sup>56</sup> Feinberg did so because he believed, "the technique of direct prohibition through penal legislation, *on the whole*, is a more drastic and serious thing than its main alternatives, if only because criminal punishment (usually imprisonment) is a more frightening evil" than civil penalties.<sup>57</sup>

In *Harm to Others*, Feinberg defines what it means to cause harm to a person. He establishes three possible interpretations of harm. Harm in the first sense refers to damage, such as breaking a window.<sup>58</sup> Harm in the second sense refers to a setback to interest, an interest being "all those things in which one has a stake" and a set-back being "what thwarts [a person's interests] to his detriment."<sup>59</sup> Harm in the third sense refers to wrongdoing, which is when one person's "indefensible (unjustifiable and inexcusable) conduct violates the other's right."<sup>60</sup> The harm principle, according to Feinberg, is invoked only when both of the last two senses of harm are present:

The sense of "harm" as that term is used in the harm principle  
must represent the overlap of senses two and three: only setbacks

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<sup>51</sup> "In its impact on contemporary analytic philosophy, few works can compare. Practically everyone who thinks or writes about liberalism, legal moralism, autonomy, paternalism, coercion, and a host of other concepts in moral, legal, and political philosophy owes a debt to Feinberg's *Moral Limits*." Stuart Green, *Introduction: Feinberg's Moral Limits, and Beyond*, 5 BUFF. CRIM. L. REV. 1 (2001).

<sup>52</sup> FEINBERG, *HARM TO OTHERS*, *supra* note 21 at 4-5 (1985).

<sup>53</sup> *Id.* at 15.

<sup>54</sup> *Id.* at 26.

<sup>55</sup> *Id.* at 14-15.

<sup>56</sup> *Id.* at 3, 22-25.

<sup>57</sup> *Id.* at 23 (emphasis in original).

<sup>58</sup> *Id.* at 32.

<sup>59</sup> *Id.* at 33-34.

<sup>60</sup> *Id.* at 34-35.

of interests that are wrongs, and wrongs that are setbacks to interests, are to count as harms in the appropriate sense.<sup>61</sup>

Feinberg believed that the harm principle as a guiding theory in criminal law could not “support the prohibition of actions that cause harms without violating rights.”<sup>62</sup> To the extent that Feinberg elaborated on the application of the harm principle to specific cases, I will address in the text when appropriate.

In *Offense to Others*, Feinberg argued that the only other legitimate liberty limiting principle which can support criminal sanctions is the offense principle, which holds that criminal penalties are justified when the prohibition “is necessary to prevent serious offense to persons other than the actor and would be an effective means to that end if enacted.”<sup>63</sup> *Offense to Others* correlates with First Amendment doctrine and, thus, is outside the scope of this paper. The substantive due process cases are not concerned with offense; they are concerned with harm and morality.

From the first two volumes, Feinberg moved to *Harm to Self* where he set out to refute the idea that legal paternalism is a valid basis for criminal sanctions. Legal paternalism, according to Feinberg, is the idea that criminal penalties are justified when the prohibition “is necessary to prevent harm (physical, psychological, or economic) to the actor himself.”<sup>64</sup> Feinberg identified various types of paternalistic laws: there is active (which requires an act, such as wearing a seatbelt) and passive (which forbids an act, such as taking drugs);<sup>65</sup> there is mixed (justified partly by protecting suffering at ones own hand and partly for other reasons) and unmixed (justified only by preventing self-harm);<sup>66</sup> and, finally, direct (which regulates single-party cases, such as suicide) and indirect (which regulates two-party cases, such as euthanasia).<sup>67</sup>

He also further delimited paternalism into “hard paternalism” and “soft paternalism.” Feinberg rejected hard paternalism, which calls for criminal sanctions when “it is necessary to protect competent adults, against their will, from the harmful

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<sup>61</sup> *Id.* at 36.

<sup>62</sup> *Id.*

<sup>63</sup> FEINBERG, *HARM TO SELF*, *supra* note 21, at xvi-xvii.

<sup>64</sup> *Id.* at xvii.

<sup>65</sup> *Id.* at 8.

<sup>66</sup> *Id.* at 9

<sup>67</sup> *Id.* at 9-10. Feinberg also describes a fourth pair, harm-preventing paternalism and benefit-promoting paternalism, which are dealt with in other sections. *Id.* at 8.

consequences even of their fully voluntary choices and undertakings.”<sup>68</sup> On the other hand, he accepted the view of soft paternalism, which justifies measures taken by the State to prevent “self-regarding” harm “*when but only when* that conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not.”<sup>69</sup> He accepted this version of paternalism because he felt soft paternalism was “really no kind of paternalism at all.”<sup>70</sup> He adopted this view for two reasons. First, he understood that in two-party cases (e.g. euthanasia) soft paternalism produces the same result as the harm principle because they are, for all intents and purposes, protecting identical interests.<sup>71</sup> Second, in one-party cases, he once again understood both the harm principle and soft paternalism to counsel, at most, for non-punitive state interference when the choice to act was seemingly nonvoluntary (e.g. drug induced) because “[a person’s] drug-deluded self is *not* his ‘real self,’ and his frenzied desire is *not* his ‘real choice,’ so we may defend him against these threats to his autonomous self, which is quite another thing than throttling that autonomous self with external coercion.”<sup>72</sup>

Finally, in *Harmless Wrongdoing*, Feinberg argued that legal moralism is an improper justification for criminal sanctions. Legal moralism holds that, “[i]t can be morally legitimate for the state, by means of criminal law, to prohibit certain types of action that cause neither harm nor offense to anyone, on the grounds that such actions constitute or cause evils of other (‘free-floating’) <sup>73</sup> kinds.”<sup>74</sup> Feinberg directed his criticism at pure legal moralists who view evil “quite apart from its causal relations to harm and offense” and who base criminal sanctions solely on “the inherent character of

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<sup>68</sup> *Id.* at 12.

<sup>69</sup> *Id.*

<sup>70</sup> *Id.* at 16.

<sup>71</sup> *Id.* at 12-14.

<sup>72</sup> *Id.* at 14-15 (emphasis in original).

<sup>73</sup> By free-floating, Feinberg was referring to things that are evil in it of themselves, such as an act which is immoral, even though the act causes no harm or offense. FEINBERG, *HARMLESS WRONGDOING*, *supra* note 21, at 3-4, 20-25.

<sup>74</sup> *Id.* at 27. Harm, in this sense, can take on two meanings. By not harming someone, the definition either refers to an act which does not set back anyone’s interest or, alternatively, an act which does set back one’s interest but does not, however, wrong them. *Id.* at xxviii-xxix. Contrast these meanings with the definition of harm from the harm principle: setbacks of interests that are wrongs, and wrongs that are setbacks to interests. Feinberg later redefines legal moralism as stating, “it is always a good reason in support of criminalization that it prevents non-grievance evils or harmless immoralities.” *Id.* at 324 (emphasis omitted).

the evil itself.”<sup>75</sup> Feinberg contrasted this with other forms of legal moralism that wish to criminalize acts that are free-floating evils, not because of their inherent evilness but because they would eventually cause some social harm.<sup>76</sup>

### **III. Tracing the Harm Principle: Explicit and Implicit Application in Criminal Substantive Due Process Cases**

This brief background of the harm principle sets a context for the manner in which the Supreme Court has dealt with criminal law in a constitutional sense. Over the past century the Supreme Court has developed a constitutional doctrine of criminal law. Surveying these cases highlights the development of this doctrine and the main principles upon which the Supreme Court relied in rendering its decisions. Although the path of criminal law is often discussed in terms of substantive due process, the harm principle has been a driving force behind the Court’s reasoning in these criminal law cases.

#### **A. Initial Discussions of the Harm Principle in Criminal Law Cases**

Analysis of (non-economic) substantive due process<sup>77</sup> begins with two cases, *Meyer v. Nebraska*<sup>78</sup> and *Pierce v. Society of Sisters*.<sup>79</sup> The Supreme Court later classified both cases as First Amendment cases,<sup>80</sup> but they are often cited as the

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<sup>75</sup> *Id.* at 8.

<sup>76</sup> *Id.* at 10.

<sup>77</sup> Non-economic substantive due process is but one facet of the substantive due process cases. The other is substantive due process and economic regulations, usually analyzing the rise and fall of *Lochner v. New York*, 198 U.S. 45 (1905). See GERALD GUNTHER AND KATHLEEN SULLIVAN, CONSTITUTIONAL LAW, ch. 8 § 2 (13th ed. 1997). That the Court eschewed any role in economics based legislation, but retained a strong role in non-economics based legislation in the infamous footnote four of *U.S. v. Carolene Products Co.*, 304 U.S. 144, 152-53 n.4 (1938), is of no moment. The rejection of *Lochner* can be “understood as a recognition that existing property and economic rights are themselves created and maintained by law, and legislatures, therefore, should have greater freedom in reallocating those rights.” *Ku*, *supra* note 6, at 30. Thus, “while the judiciary would defer to the legislature with respect to economic legislation, searching judicial inquiry would be appropriate in other circumstances.” *Id.*

<sup>78</sup> 262 U.S. 390 (1923).

<sup>79</sup> 268 U.S. 510 (1925).

<sup>80</sup> *Griswold v. Connecticut*, 381 U.S. 479, 482-82 (1965); see also *Poe v. Ullman*, 367 U.S. 497, 544 (1961) (Harlan, J., Concurring) (“today [*Meyer* and *Pierce*] would probably have gone by reference to the concepts of freedom of expression and conscience assured against state action by the Fourteenth Amendment, concepts that are derived from the explicit guarantees of the First Amendment”).

beginning of the substantive due process revolution, so it is worth analyzing the cases in this light.<sup>81</sup>

1. *Meyer v. Nebraska*

*Meyer* involved a challenge to a criminal law that prohibited teaching students any subject in a language other than English before eighth grade.<sup>82</sup> The petitioner in *Meyer* was arrested, tried, and convicted of violating the statute at issue.<sup>83</sup> The crime was classified as a misdemeanor, and the penalty was “a fine of not less than twenty-five dollars (\$25), nor more than one hundred dollars (\$100), or [confinement] in the county jail for any period not exceeding thirty days for each offense.”<sup>84</sup> Although *Griswold* later classified *Meyer* as a First Amendment case, the Court began its analysis by determining whether the statute unreasonably infringed upon the petitioner’s Fourteenth Amendment liberty interest.<sup>85</sup>

The Court listed the various reasons that were argued in support of the legislation: 1) it promoted civic development by squashing knowledge of foreign languages and ideals; 2) English should be the mother tongue of all children; and 3) public safety was imperiled because children were hindered from becoming citizens “of the most useful type.”<sup>86</sup> The Court recognized that “the state may do much, go very far, indeed, in order to improve the quality of its citizens, physically, mentally and morally.”<sup>87</sup> However, the Court cautioned that such aims could not be achieved by unconstitutional methods.<sup>88</sup> The legislation conflicted with the right of an individual to teach and the right of a parent to hire someone to teach his or her children.<sup>89</sup> In balancing the purpose of the legislation against the rights at stake, the Court concluded

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<sup>81</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003); Thomas L. Hinds, *Morality Enforcement through the Criminal Law and the Modern Doctrine of Substantive Due Process*, 126 U. PA. L. REV. 344, 360 (1977); GUNTHER, *supra* note 77, ch. 8 § 3.

<sup>82</sup> *Meyer v. Nebraska*, 262 U.S. 390, 397 (1923).

<sup>83</sup> *Id.* at 396.

<sup>84</sup> *Id.* at 397.

<sup>85</sup> *Id.* at 399.

<sup>86</sup> *Id.* at 401.

<sup>87</sup> *Id.*

<sup>88</sup> *Id.*

<sup>89</sup> *Id.* at 400.

that the statute “exceed[ed] the limitations upon the power of the state and conflict[ed] with rights assured to plaintiff in error.”<sup>90</sup>

The case can be read for its reliance on ideas similar to the harm principle. The Court stressed that there was no harmful conduct at issue. It held, “[m]ere knowledge of the German language *cannot reasonably be regarded as harmful. Heretofore it has been commonly looked upon as helpful and desirable.*”<sup>91</sup> The Court stressed that the right to learn and teach had been “long freely enjoyed” and that there was no emergency that rendered knowledge of a foreign language “so clearly harmful” as to justify its criminalization.<sup>92</sup>

In its decision, the Court expressed its belief that criminal law is appropriate only to prevent harm. If there is no harm attached to the conduct at issue, then the constitutional balance will tip in favor of the rights of the individual. For example, the Court noted that children were not individually harmed by learning a foreign language, implying that direct harm to minors is a proper basis for criminalization.<sup>93</sup> This is a well supported proposition.<sup>94</sup> The Court’s reasoning appears to rest on the harm principle, as argued by Feinberg, Hart and Mill; however, it also hinted that if the harm had been detrimental to the public welfare generally, this factor might have warranted criminal sanctions.<sup>95</sup> This argument is similar to Devlin’s notion that harms to society could properly be criminalized. However, because the Court found that “mere knowledge of German” was not harmful to the public welfare, the Court failed to elaborate upon the method for measuring social harm.

Furthermore, the Court stressed that what was inappropriate was not state regulation of public schools, but the criminalization of certain acts relating to public schools. For instance, the states have the power to promulgate reasonable regulations for schools, including requiring instruction in English, or other curriculum mandates, provided that criminal penalties are not used to promote compliance.<sup>96</sup>

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<sup>90</sup> *Id.* at 402.

<sup>91</sup> *Id.* at 400 (emphasis added).

<sup>92</sup> *Id.* at 403.

<sup>93</sup> *Id.* at 400.

<sup>94</sup> See *e.g.* *Prince v. Massachusetts*, 321 U.S. 158, 166-167 (1944) (“the state has a wide range of power for limiting parental freedom and authority in things affecting the child’s welfare”).

<sup>95</sup> *Meyer*, 262 U.S. at 390.

<sup>96</sup> See *Adams v. Tanner*, 244 U.S. 590 (1917)

This too, while not an elaborate articulation of the limits of criminalization, is at the very least, a foundational principle concerning the interplay between civil regulation and criminal prohibition. If there is no harm attached to the conduct at issue, then the constitutional balance will tip in favor of civil regulation and against criminal sanction. This balance mirrors Feinberg's assertion that the harm principle is geared solely towards the criminal law.<sup>97</sup>

## 2. *Pierce v. Society of Sisters*

*Pierce* involved an act requiring parents to send their children to public schools.<sup>98</sup> Failure so to do was declared a misdemeanor.<sup>99</sup> One of the appellees, the Society of Sisters, cared for orphans and educated youth.<sup>100</sup> The case was not about the Society of Sisters' right to run a business, although the Court did note that the business would be harmed if enforcement of the measure were not enjoined.<sup>101</sup> Rather, the case fell under the protections enumerated in *Meyer* of "the liberty of parents and guardians to direct the upbringing and education of children under their control."<sup>102</sup>

The Court's analysis mirrored the reasoning in *Meyer*. The Court held, "Appellees are engaged in a kind of undertaking *not inherently harmful*, but long regarded as useful and meritorious."<sup>103</sup> Once again, by implying that had the conduct been harmful it may have been the subject of criminalization, the Court's reasoning echoed the foundational principles of Mill, Hart, Feinberg and even Devlin. The Court again noted the distinction between civil regulation and criminal enforcement, reasoning that there was no question that the State could regulate attendance, curriculum, facilities, and teachers.<sup>104</sup>

*Meyer* and *Pierce* together provide a strong baseline from which one can begin to measure the constitutionality of criminal sanctions. While these cases are often viewed as creating a foundation for the right to privacy, their analysis equally expresses

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<sup>97</sup> See FEINBERG, HARM TO OTHERS, *supra* note 21, at 23; see also *supra* notes 55-57 and accompanying text.

<sup>98</sup> *Pierce v. Society of Sisters*, 268 U.S. 510 (1925).

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 532.

<sup>101</sup> *Id.*

<sup>102</sup> *Id.* at 534-35.

<sup>103</sup> *Id.* at 534.

<sup>104</sup> *Id.*

a limiting principle of criminal law. Both cases contain the cornerstone of the harm doctrine: some harm must be present in the conduct at issue before it can be criminalized.<sup>105</sup>

The Court had adopted Feinberg's harm rationale, which dictated that the harm principle was a limiting principle only with respect to criminal laws, rather than Mill's harm rationale, which applied to any governmental regulation.<sup>106</sup> These cases, however, left unexamined which definition the Court will apply to harm – the individual harm of Mill, Hart, and Feinberg, or the social harm of Stephen and Devlin.

### **B. Implicit Use of the Harm Principle in Modern Criminal Substantive Due Process Cases**

The harm principle reappeared in later Supreme Court decisions. It did so first in a dissent in *Poe v. Ullman*, where Justice Harlan rejected morality as justification for the criminal statute later struck down by *Griswold v. Connecticut*.<sup>107</sup> The harm principle also impacted both the reasoning and the result in *Roe v. Wade*, where the Court struggled with harms to society, to mother, and to the potential for new life.<sup>108</sup> Finally, it has been most recently applied in the cases of *Bowers v. Hardwick*, *Washington v. Glucksberg*, and *Lawrence v. Texas*.<sup>109</sup>

#### 1. *Poe v. Ullman*

*Poe* involved a challenge to a Connecticut statute ultimately struck down in *Griswold*.<sup>110</sup> The Court in *Poe* refused to reach the issue of constitutionality because the case was not justiciable.<sup>111</sup> Justice Harlan dissented, penning a lengthy attack on the Connecticut statute. Though Justice Harlan's view would eventually come to prevalence,<sup>112</sup> his reasoning lay dormant for decades until the *Lawrence* Court adopted it.

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<sup>105</sup> For an extensive overview of the Court's understanding of harmful conduct at this time (mainly in reference to the Commerce Clause) see generally EDWARD LEVI, AN INTRODUCTION TO LEGAL REASONING, 57-102 (1968).

<sup>106</sup> FEINBERG, HARM TO OTHERS, *supra* note 21, at 3, 22-25.

<sup>107</sup> *Poe*, 367 U.S. 497, 523 (1961); *Griswold*, 381 U.S. 479 (1965).

<sup>108</sup> 410 U.S. 113 (1973).

<sup>109</sup> *Bowers*, 478 U.S. 186 (1986); *Glucksberg*, 521 U.S. 702 (1997); *Lawrence*, 539 U.S. 558 (2003).

<sup>110</sup> *Griswold*, 381 U.S. at 479.

<sup>111</sup> *Poe*, 367 U.S. at 508.

<sup>112</sup> See *Griswold*, 381 U.S. at 483.

Justice Harlan’s dissent followed the contours of the harm principle. He began by noting that the only justification the State had made in support of the legislation was the immorality of contraception and the immorality of the acts (fornication and adultery) that would result if contraception were legalized.<sup>113</sup> Justice Harlan further noted that the State was doing much more than passing judgment on the morality or immorality of the acts in question.<sup>114</sup> The justification offered by the State had far-reaching consequences for a variety of other laws and regulations.<sup>115</sup> What troubled Justice Harlan was the State’s assertion of “the right to enforce its moral judgment by intruding upon the most intimate details of the marital relation with the full power of the criminal law.”<sup>116</sup> This reasoning is reflective of the harm principle: mere morality is not sufficient to criminalize certain conduct.<sup>117</sup> It can be seen further as a rejection of Devlin’s reasoning that that state could outlaw “what every right-minded person is presumed to consider to be immoral.”<sup>118</sup>

Justice Harlan noted that such statutes “pass a more rigorous Constitutional test than that going merely to the plausibility of its underlying rationale.”<sup>119</sup> Admittedly, he was referring to the notion that there was a fundamental right at stake—the notion of privacy.<sup>120</sup> In this sense, Justice Harlan was a proponent of the “sex is different” reasoning, if by “sex” one meant consensual heterosexual sex.<sup>121</sup> But he may as well have been referring also to the notion that a criminal statute carries a weightier burden than mere regulation. Indeed, much of the rest of his dissent was aimed at disclosing the evils associated with criminalizing such private conduct, and the methods the State would use to enforce the prohibition.<sup>122</sup> Justice Harlan’s argument, while limited, echoes some

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<sup>113</sup> Poe, 367 U.S. at 545 (Harlan, J., dissenting).

<sup>114</sup> *Id.* at 546-47 (Harlan, J., dissenting).

<sup>115</sup> *Id.* at 547 (Harlan, J., dissenting).

<sup>116</sup> *Id.*

<sup>117</sup> *See generally id.* at 497.

<sup>118</sup> DEVLIN, *supra* note 19, at 15.

<sup>119</sup> Poe, 367 U.S. at 548 (Harlan, J., dissenting).

<sup>120</sup> *Id.* (Harlan, J., dissenting).

<sup>121</sup> *Id.*, at 552 (Harlan, J., dissenting) (“Thus, I would not suggest that adultery, homosexuality, fornication and incest are immune from criminal enquiry, however privately practiced”).

<sup>122</sup> *Id.* at 548-53 (Harlan, J., dissenting).

of the arguments of Hart and Feinberg in terms of the severity and suggested limits on criminal sanctions.

## 2. *Griswold v. Connecticut*

By most accounts, *Griswold* established the constitutional basis of the right to privacy.<sup>123</sup> At issue were two criminal statutes. One statute prohibited any person from using contraception.<sup>124</sup> The other statute prohibited assisting anyone in committing this first crime.<sup>125</sup> This second statute was applied to the appellants, doctors who had assisted married couples in procuring contraceptives by giving advice, examinations, and prescriptions for contraceptives.<sup>126</sup>

The splintered nature of *Griswold* makes it difficult to find any consensus in the Court's reasoning.<sup>127</sup> The prevailing opinion did, however, revisit the idea that civil regulation would have been proper but criminalization simply went too far:

The present case, then, concerns a relationship lying within the zone of privacy created by several fundamental constitutional guarantees. And it concerns a law, which, *in forbidding the use of contraceptives rather than regulating their manufacture or sale, seeks to achieve its goals by means having a maximum destructive impact upon that relationship.* Such a law cannot stand in light of the familiar principle, so often applied by this Court, that a “governmental purpose to control or prevent activities constitutionally subject to state regulation may not be achieved by means which sweep unnecessarily broadly and thereby invade the area of protected freedoms.”<sup>128</sup>

At this point, the Supreme Court has developed a theme that traces Feinberg's reasoning. The purpose, scope and enforcement of criminal laws are separate from the

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<sup>123</sup> See *Lawrence v. Texas*, 539 U.S. 558 (2003); Radhika Rao, *Property, Privacy, and the Human Body*, 80 B.U.L. REV. 359, 390 (2000).

<sup>124</sup> *Griswold v. Connecticut*, 381 U.S. 479, 480 (1965).

<sup>125</sup> *Id.*

<sup>126</sup> *Id.*

<sup>127</sup> Later in *Carey v. Population Services*, 431 U.S. 678 (1977), the Court advanced a broader understanding of this opinion. The Court stated that *Griswold* stands for the proposition that “the Constitution protects individual decisions in matters of child-bearing from unjustified intrusion by the State. *Id.*”

<sup>128</sup> *Griswold* at 485 (quoting *NAACP v. Alabama*, 377 U.S. 288, 307 (1964) (emphasis added)).

purpose, scope and enforcement of civil laws. Because criminalization involves more drastic consequences, the State must provide a more compelling justification for, *e.g.*, imprisonment rather than taxation.<sup>129</sup>

### 3. *Roe v. Wade*<sup>130</sup>

The criminal statute at issue in *Roe* outlawed abortion except when attempted to save the life of the mother.<sup>131</sup> The Court noted there were three reasons commonly advanced in support of abortion statutes. The first argument, that “these laws were the product of a Victorian social concern to discourage illicit sexual conduct,”<sup>132</sup> was not advanced in the case and the Court summarily dismissed it. The other two arguments, advanced by the State of Texas, had to do with concern about the safety of the procedure in regards to the mother’s health<sup>133</sup> and the State’s interest in protecting prenatal life.<sup>134</sup>

In weighing the individual’s privacy interests against the State’s regulatory interest, the Court asserted that the mother’s decision regarding abortion was a right of personal privacy.<sup>135</sup> This right, however, was subject to the State’s important interest in safeguarding health, maintaining medical standards, and protecting potential life.<sup>136</sup> Examining the debate in *Roe* in reference to the State’s interest in prevention of harm, it is evident that the harm principle influenced the Court’s reasoning.

With respect to the State’s interest in preventing medical procedures hazardous to a woman’s health, some versions of the harm principle would condone such a justification.<sup>137</sup> Others, like Feinberg, would allow for criminalization of this conduct to the extent that the woman’s choice to abort was not fully informed.<sup>138</sup> On the other hand, if the State sought merely to prevent a woman from inflicting harm on herself, then this reason would fail as a justification under Feinberg’s harm principle.

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<sup>129</sup> FEINBERG, HARM TO OTHERS, *supra* note 21, at 23-24.

<sup>130</sup> 410 U.S. 113 (1973).

<sup>131</sup> *Id.* at 117-18.

<sup>132</sup> *Id.* at 148.

<sup>133</sup> *Id.* at 148-49.

<sup>134</sup> *Id.* at 150.

<sup>135</sup> *Id.* at 154.

<sup>136</sup> *Id.*

<sup>137</sup> See HART, *supra* note 20, at 31.

<sup>138</sup> See *e.g.* FEINBERG, HARM TO SELF, *supra* note 21, at 12 (1986).

As to the hazards abortions pose to women, the Court noted that those hazards are no longer a serious consideration, at least before the first trimester.<sup>139</sup> The Court noted, “mortality rates for women undergoing early abortions, where the procedure is legal, appear to be as low as or lower than the rates for normal childbirth.”<sup>140</sup> Accordingly, the State’s proposed interest in maternal safety was inadequate to support criminalization. Because the State could cite no real harm to the mother, it was limited to regulating, but not criminalizing, abortion after the first trimester.<sup>141</sup> Again, the Court did not overtly adopt a harm principle, but its reasoning squares well with both Hart and Feinberg’s views, both by accepting a state’s power to regulate and by denying the State the power to criminalize harmless conduct.

The State’s interest in protecting prenatal life would be supported by the harm principle if one viewed the fetus as a person.<sup>142</sup> No one could seriously argue that the State lacked an interest in preventing someone from terminating another’s life.<sup>143</sup> However, if the fetus is not viewed as a person, the harm principle counsels that aborting it would cause no harm since the fetus’ only interests were merely “potential.”<sup>144</sup>

As to whether or not a fetus was a person, the Court declined to decide this issue, especially since “those trained in the respective disciplines of medicine, philosophy, and theology are unable to arrive at any consensus.”<sup>145</sup> The Court noted that the law itself did not seem to attribute to a fetus any legal interests; at most, it acknowledged the interests of the parents.<sup>146</sup> However, the Court did accept the fact that the State had an interest in protecting potential life.<sup>147</sup> Thus was born the viability test.

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<sup>139</sup> Roe, 410 U.S. at 149.

<sup>140</sup> *Id.*

<sup>141</sup> *Id.* at 162-62.

<sup>142</sup> *Id.* at 150.

<sup>143</sup> Moreover, if it was deemed to be a person, it would find direct textual protection in the Constitution. *Id.* at 156-57.

<sup>144</sup> FEINBERG, HARM TO OTHERS, *supra* note 21, at 96.

<sup>145</sup> *Id.* at 159.

<sup>146</sup> Roe, 410 U.S. at 161-62.

<sup>147</sup> *Id.* at 150, 163-64.

According to the Court, viability had become an important point in the chronology of pregnancy, at least in the medical and scientific community.<sup>148</sup> Viability is defined as the point when a fetus is “potentially able to live outside the mother’s womb, albeit with artificial aid.”<sup>149</sup> The point of viability, the Court held, was determinative in drawing a Constitutional line. Because it is at viability that “the fetus then presumably has the capability of meaningful life outside the mother’s womb,”<sup>150</sup> states could regulate abortion from that moment on, including proscription, but could not do so prior to the point of viability.<sup>151</sup>

By making these findings, the Court insulated its decision from attack by supporters of the harm principle. The harm principle is concerned only with the question of at what point a fetus is capable of being harmed. The harm principle does not define that moment but only counsels what to do once defined.<sup>152</sup> The Court did state that it was refraining from defining at what point life began. But that did not preclude it from picking a point where it felt the fetus was close enough to life that its destruction would be harmful. Indeed, viability has become the central measuring point for when criminalization of abortion is proper.<sup>153</sup>

Again, the point to stress is not that the Court adopted one specific version of the harm principle but, rather, that it adopted a harm principle that resembled ones advanced by others. In this respect, *Roe* comes close to mirroring Feinberg, if not fully adopting his reasoning.<sup>154</sup>

#### 4. *Bowers v. Hardwick*<sup>155</sup>

*Bowers* is no longer good law, but nonetheless, it is important to examine this case for present purposes.<sup>156</sup> As one commentator noted, *Bowers* “recast the Hart-Devlin debate in constitutional terms.”<sup>157</sup> The winners at the time were clearly Devlin,

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<sup>148</sup> *Id.* at 160.

<sup>149</sup> *Id.*

<sup>150</sup> *Id.* at 163.

<sup>151</sup> *Id.* at 163-64.

<sup>152</sup> See generally FEINBERG, HARM TO OTHERS, *supra* note 21, at 95-97.

<sup>153</sup> See *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833, 859 (1992).

<sup>154</sup> See *e.g.* FEINBERG, HARM TO SELF, *supra* note 21, at 90 n.60.

<sup>155</sup> 478 U.S. 186 (1986).

<sup>156</sup> See *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>157</sup> Anne Goldstein, *History, Homosexuality, and Political Values: Searching for Hidden Determinants of Bowers v. Hardwick* 97 *YALE L.J.* 1073, 1096 (1988).

Stephen, and the general concept of criminalizing morality for morality's sake. The law at issue was a statute that criminalized sodomy.<sup>158</sup> The Court upheld its constitutionality. As Justice White noted, the reasons asserted by the State in enacting the statute were its own sense of morality, and the idea that this sense of morality was proper.<sup>159</sup> These justifications, however, were at odds with the variant of the harm principle that does not accept that immoral harms could harm society. White, like Devlin, argued that morality is often the basis for the laws of society and that this basis is proper. He compared homosexual sodomy to other victimless crimes such as the possession and use of illegal drugs and noted that the State could properly criminalize these other victimless crimes.

In contrast, the dissent seemed to argue from a purely liberal (in Feinberg's sense) perspective. Justice Blackmun argued that violations of Georgian law that rested entirely in the private sphere caused no harm to any individual.<sup>160</sup>

Both the substance and inconsistency of *Bowers* was attacked following the Court's decision. Some argued that the majority chose the wrong side of the debate in terms of allowing a legislature to be guided by morality.<sup>161</sup> Others felt that *Bowers* was simply inconsistent given *Griswold, et al.*<sup>162</sup> *Lawrence* made these arguments moot except in its acknowledgment that the Court was involved in a debate about the extent to which morality, unhinged from any harmful conduct, may justify criminal sanctions.

It is difficult to explain legally, or even philosophically, why the Stephen/Devlin reasoning carried the day in *Bowers* but was later overtaken by the Mill/Hart/Feinberg harm principle in *Lawrence*.<sup>163</sup> The cynical observer would likely argue that this is based on judicial preference. However, *Lawrence* eventually got the proper standard right, in the sense that it applied the constitutional harm test to the anti-sodomy laws. *Bowers*, then, was in tune with these cases in that it framed the debate properly — as one of harm. It was simply mistaken in its conclusion, a mistake later rectified.

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<sup>158</sup> *Bowers v. Hardwick*, 478 U.S. 186, 188 (1986).

<sup>159</sup> *Id.* at 196.

<sup>160</sup> Goldstein, *supra* note 157, at 1097-98.

<sup>161</sup> *See id.*

<sup>162</sup> LAURENCE TRIBE, *AMERICAN CONSTITUTIONAL LAW* (3rd ed. 2000) (section on substantive due process).

<sup>163</sup> *See infra*, Part III.C.2.

### C. The Harm Principle as a Limitation on the Propriety of Criminal Law.

#### 1. *Washington v. Glucksberg*

*Glucksberg* was an action for declaratory judgment arguing that the Washington assisted suicide law was unconstitutional on its face.<sup>164</sup> The relevant law stated, “A person is guilty of promoting a suicide attempt [, a felony] when he knowingly causes or aids another person to attempt suicide.”<sup>165</sup> The issue here was different than the one addressed by the Court in *Cruzan v. Director, Mo. Dept. of Health*.<sup>166</sup> That case dealt only with whether a person had a right to “require the hospital to withdraw life-sustaining treatment,”<sup>167</sup> and what standard of proof applied to that determination.<sup>168</sup> Washington statutes had procedures in place that governed like situations, and those were not at issue in *Glucksberg*.<sup>169</sup>

The *Glucksberg* case involved a facial attack on the Washington statute. This posture was significant because, as Justice Stevens stated in his concurrence, the Court had to determine the admissibility of the statute’s categorical ban on assisted suicide rather than the appropriateness of the statute with respect to the particular plaintiffs before the Court.<sup>170</sup> Thus, Justice Stevens found that, in this respect, the statute covered situations beyond mere paternalistic justifications (and thus non-harming conduct). It also sought to “protect the individual from the irrevocable consequences of an ill advised decision motivated by temporary concerns.”<sup>171</sup> Justice O’Connor, joined by Justices Ginsburg and Breyer, concurred in the judgment because, *inter alia*, these Justices found that defining “terminal illness” was difficult.<sup>172</sup> They also worried that the decision of a terminally ill patient to end his or her life might not be truly voluntary.<sup>173</sup> Additionally, Justice Souter argued that one of the State’s justifications, that the statute was aimed at “protecting terminally ill patients from involuntary suicide

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<sup>164</sup> *Washington v. Glucksberg*, 521 U.S. 702, 708 (1997).

<sup>165</sup> *Id.* at 707, n.2.

<sup>166</sup> 497 U.S. 261 (1990).

<sup>167</sup> *Id.* at 269.

<sup>168</sup> *Id.* at 284.

<sup>169</sup> *Glucksberg*, 521 U.S. at 707, n.2.

<sup>170</sup> *Id.* at 739 (Stevens, J., concurring).

<sup>171</sup> *Id.* at 741 (Stevens, J., concurring).

<sup>172</sup> *Id.* at 738 (O’Connor, J., concurring).

<sup>173</sup> *Id.*

and euthanasia, both voluntary and nonvoluntary,”<sup>174</sup> was legitimate because it was not based completely on morality. Rather, it was based on the State’s interest in protecting “nonresponsible individuals and those who do not stand in relation either to death or to their physicians.”<sup>175</sup> Thus, Justices O’Connor, Ginsberg, Breyer, and Souter decided to uphold the Washington statute due to the potential for harm to individuals who did not truly consent to die. Presumably then, these Justices would have objected to the statute if it prevented a fully informed and consenting person from choosing to die. Even the majority reluctantly acknowledged that there could indeed be situations where the statute was applied unconstitutionally.<sup>176</sup>

The reasoning of a majority of the Justices fits well into the harm principle. Recall, for example, Feinberg’s acceptance of soft-paternalism as a proper balance for State action: measures taken by the State to prevent “self-regarding” harm are justified “*when but only when* that conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not.”<sup>177</sup> Therefore, the soft-paternalist “would permit active euthanasia when, but only when, the patient’s consent (request) is voluntary enough to be valid.”<sup>178</sup> Paternalism, in this sense, *i.e.* in assuring that a decision is voluntary and fully informed, is also in line with Mill.<sup>179</sup>

Whether the Court would eventually accept this rationale is unknown. Yet a majority of justices, while purportedly adorning their reasoning with “privacy” and “liberty” rhetoric, implicitly have advanced a harm principle limitation on certain applications of assisted-suicide criminal laws: assisted-suicide laws are unconstitutional when the decision of the terminally ill patient is voluntary and fully informed.

## 2. *Lawrence v. Texas*

The Court in *Lawrence* faced the decision of whether *Bowers* should be overruled.<sup>180</sup> The statute at issue was a criminal prohibition of same sex “deviant”

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<sup>174</sup> *Id.* at 782 (Souter, J., concurring).

<sup>175</sup> *Id.*

<sup>176</sup> *Id.* at 735 n.24.

<sup>177</sup> FEINBERG, HARM TO SELF, *supra* note 21, at 12; *but see* HART, *supra* note 20, at 31.

<sup>178</sup> FEINBERG, HARM TO SELF, *supra* note 21, at 345.

<sup>179</sup> *See* MILL, *supra* note 13, at 15-18.

<sup>180</sup> *Lawrence v. Texas*, 539 U.S. 558, 565 (2003).

sexual intercourse, which entailed, most importantly, sodomy.<sup>181</sup> The Court did overrule *Bowers* and, in doing so, invoked the thinking present in the long line of substantive due process cases.<sup>182</sup> The reasoning took place on multiple dimensions.

To begin with, the Court characterized the previous substantive due process cases as covering and protecting the spectrum of conduct relating to individual, intimate decisions that define the meaning of one's relationships.<sup>183</sup> The Court noted that in prior cases it had previously afforded protection to individuals, not just married persons, in choosing the scope and extent of their individual relationships.<sup>184</sup>

In turning to *Bowers*, the Court argued that it had misunderstood the liberty claim at issue in that case.<sup>185</sup> The *Bowers* Court approached the issue too narrowly by only addressing whether there was a fundamental right conferred upon homosexuals to engage in sodomy.<sup>186</sup> In *Lawrence*, however, the Court took issue with that classification because it failed to understand the "far-reaching consequences, touching upon the most private human conduct, sexual behavior, and in the most private of places, the home."<sup>187</sup> Regardless of whether there was a fundamental right to engage in sodomy, the Court held that the act itself was "within the liberty of persons to choose without being punished as criminals."<sup>188</sup> The Court redefined liberty, or at the least added to its understood scope: "When sexuality finds overt expression in intimate conduct with another person, the conduct can be but one element in a personal bond that is more enduring. The liberty protected by the Constitution allows homosexual persons the right to make this choice."<sup>189</sup>

The Court's careful wording is notable. The dissent emphasized that nowhere did the majority opinion acknowledge that the conduct at issue was in any way

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<sup>181</sup> *Id.* Deviate sexual intercourse was defined fully as "(A) any contact between any part of the genitals of one person and the mouth or anus of another person; or (B) the penetration of the genitals or the anus of another person with an object." *Id.*

<sup>182</sup> *Id.* at 564-565.

<sup>183</sup> *Id.*

<sup>184</sup> "Both *Eisenstadt* and *Carey*, as well as the holding and rationale in *Roe*, confirmed that the reasoning of *Griswold* could not be confined to the protection of rights of married adults." *Id.* at 566. See *Eisenstadt v. Baird*, 405 U.S. 438 (1972); see also *Carey v. Population Services*, 431 U.S. 678 (1977); *Roe v. Wade*, 410 U.S. 113 (1973); *Griswold v. Connecticut*, 381 U.S. 479 (1965).

<sup>185</sup> *Lawrence*, 539 U.S. at 567.

<sup>186</sup> *Id.* at 558.

<sup>187</sup> *Id.*

<sup>188</sup> *Id.*

<sup>189</sup> *Id.* at 567.

fundamental.<sup>190</sup> Unlike the other substantive due process cases then, the *Lawrence* Court invalidated a law that touched on non-fundamental and, therefore, non-traditionally protected conduct.<sup>191</sup> Indeed, the Court, while taking issue with *Bower's* historical analysis of homosexual prohibitions, nonetheless acknowledged the centuries-old condemnation of homosexual acts as immoral.<sup>192</sup> It was irrelevant, however, that homosexual conduct may have been historically condemned; rather, what was important was “an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their private lives in matters pertaining to sex.”<sup>193</sup>

The Court set out to accomplish a difficult and novel task. Having avoided granting fundamental rights status to homosexual sodomy specifically, the Court was left with the arduous work of articulating why the legislation at issue was not rational. The Court's reasoning implicitly yet undoubtedly relied on the harm principle, more so than any other case.

Early in the opinion, the Court noted that by criminalizing the conduct at issue, the legislature sought to regulate private conduct in the home, considered the most private of spaces.<sup>194</sup> The Court held that the private nature of this conduct counseled against efforts by the State “to define the meaning of the relationship or to set its boundaries absent injury to a person or abuse of an institution the law protects.”<sup>195</sup> As to the severity of criminalization, the Court was clear. It held that the stigma of a criminal conviction was significant, especially in light of the collateral consequences of a conviction, such as notations on job applications.<sup>196</sup>

As to whether the conduct at issue actually caused any harm, the Court was also clear. In finding that the consensual homosexual acts criminalized by the statute were not harmful, the Court referenced several notable sources. It cited in support of its

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<sup>190</sup> *Id.* at 587, 592 (Scalia, J., dissenting).

<sup>191</sup> Every other substantive due process case so far discussed found the conduct at issue to be fundamental, and therefore worthy of a higher level of scrutiny. The one exception is *Glucksberg*, whose holding, as noted, is limited by its procedural posture.

<sup>192</sup> *Id.* at 572.

<sup>193</sup> *Id.*

<sup>194</sup> *Id.* at 567.

<sup>195</sup> *Id.*

<sup>196</sup> *Id.* at 575.

reasoning the Model Penal Code's recommendation of not criminalizing consensual sexual relations in private.<sup>197</sup> The Code's recommendations were based, *inter alia*, on the understanding that "the statutes regulated private conduct *not harmful to others*."<sup>198</sup> The Court also found support in the Wolfenden report,<sup>199</sup> which was critical of laws based solely on morality and not on injurious conduct.<sup>200</sup> It also distinguished the conduct in *Lawrence* from other, more harmful conduct, noting that the conduct at issue did not involve minors, coercion, or public conduct.<sup>201</sup> Lastly, it recognized that its decision did not require the government to formally recognize the propriety of homosexual relationships.<sup>202</sup>

Having established the severity of the sanction at issue and the non-harmful nature of the conduct in question, the Court sought to evaluate the reasoning for the legislation. The debate, like in *Bowers*, was whether a justification based on morality alone was enough.<sup>203</sup> The Court changed course from *Bowers*' reasoning. It held that the State has an obligation to protect the liberty interests of all its citizens, not to enforce its "own moral code."<sup>204</sup> The Court held that morality was not a sufficient basis for prohibiting certain practices, and that physically intimate contact and activity is protected by the Due Process Clause of the Fourteenth Amendment.<sup>205</sup> *Bowers*' reasoning was turned on its head. The rationale of the *Bowers* majority was now expressed by the *Lawrence* dissenters.<sup>206</sup>

The Court had finally put to rest the debate that had waged for over a century regarding the validity of criminalizing conduct simply because society found it

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<sup>197</sup> *Id.* at 570.

<sup>198</sup> *Id.* (emphasis added).

<sup>199</sup> *Id.* at 571.

<sup>200</sup> See Wolfenden Report, *supra* note 18.

<sup>201</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

<sup>202</sup> *Id.*

<sup>203</sup> *Id.* at 570 ("The issue is whether the majority may use the power of the State to enforce [moral] views on the whole society through operation of the criminal law."); see also *id.* at 599-600 (Scalia, J., dissenting).

<sup>204</sup> *Id.* at 570, (quoting *Casey*, 505 U.S. at 850).

<sup>205</sup> *Lawrence*, 539 U.S. at 577 (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

<sup>206</sup> *Lawrence*, 539 U.S. at 598-599 (Scalia, J., dissenting) (citations omitted).

immoral. Whatever subtle variations of the harm principle one may find,<sup>207</sup> all its proponents strongly agree in denying that morality alone should ever justify criminalization.<sup>208</sup> The *Lawrence* opinion embodied the harm principle, yet was disguised as an explication on the limits of liberty.

Feinberg's, Hart's, and even Mill's theories had been advanced. Devlin's main point of contention, that a society had a right to criminalize actions that went against its general moral beliefs, had been laid to rest.

#### **IV. Harm and the Constitution**

Having traced both the development of the harm principle and the evolution of its use in constitutional law, the question remains, what is the importance of such development? Why should it matter whether harm is a central concern? What, if anything, should we take from this history? This section will address these questions. First, it will affirm the importance of harm and elaborate on its constitutional significance. Secondly, it will discuss reasons why focusing on harm is preferable to the current analytical scheme.

##### **A. The Role of Harm in Constitutional Analysis**

This section will tie up the lessons learned from the discussion in Parts II and III. Part II gave an overview of the harm principle. The aim of Part III was to show that the harm principle has played an important role in the development of criminal substantive due process law. Admittedly, the Court has never overtly adopted the harm principle as the cornerstone of its analysis. However, it has relied on these principles in its decisions.

Both the harm principle and substantive due process cases hold that criminalization, and not sexual relations, is different. Beginning with *Meyers*, the Court has consistently affirmed that criminal sanctions are extreme and must be used cautiously. Every case discussed in Part III made such a distinction. *Roe*, for example, proscribed criminal sanctions for abortions before viability but *Casey* affirmed that civil laws aimed at dissuading women from getting an abortion during that same timeframe

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<sup>207</sup> Compare e.g., FEINBERG, HARM TO SELF, *supra* note 21, at 12 (paternalism is an invalid justification for criminalization), with HART, *supra* note 20, at 31 (paternalism may be a valid justification for criminalization).

<sup>208</sup> See generally FEINBERG, HARMLESS WRONGDOING, *supra* note 21; HART, *supra* note 20.

are permissible.<sup>209</sup> The same distinctions can be seen in *Glucksberg* and *Cruzan*, or even potentially between *Lawrence* and the gay marriage movement.<sup>210</sup>

This, too, is the starting point for Feinberg,<sup>211</sup> and, to a certain extent, Hart and Mill.<sup>212</sup> The harm principle, at least for Feinberg, is concerned with criminal sanctions being imposed for certain types of conduct; it does not address what civil measures may be taken to advance society' morality.<sup>213</sup> Rather, the harm principle is simply a limiting principle – it addresses what limitations are placed, at the very least, on *criminal* sanctions.

What type of harm must occur before the government can criminalize an act? The cases do not offer a complete answer. Actual, physical, non-consensual harm to others, as likely envisioned by Feinberg, is properly criminalized. *Meyer* and *Pierce* use harm in this sense.<sup>214</sup> The viability test of *Roe* could be interpreted as an application of this concept, with the Court characterizing a viable fetus as enough of a person to be capable of being harmed and worthy of protection. A majority of the judges in *Glucksberg* worried about assuring that the choice to harm oneself was consensual, but not that there was anything wrong once consent was determined.<sup>215</sup> Dicta in *Lawrence* also indicates the Court's view that both harm to others and consent are important factors in determining harm; as the Court noted, the case would have been different had it involved a different act lacking proper consensuality.<sup>216</sup>

The fact that the Court has never grappled directly with this question may simply be a product of it never having the chance to do so; however, the principle is so obvious that it has never been in doubt. Instead, the Court has been called on to adjudicate the more ambiguous, gray areas. Recently, the ambiguities have slowly been

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<sup>209</sup> *Planned Parenthood of Southeastern PA v. Casey*, 505 U.S. 833, 872-73 (1992).

<sup>210</sup> The idea being that, for example, while the state cannot criminalize consensual homosexual conduct, it need not endorse it civilly. *Compare* *Standhart v. Superior Court ex. rel. County of Maricopa*, 77 P.3d 451 (Ariz. App. 2003) (finding no right to homosexual marriage, despite *Lawrence*) and *Goodridge v. Dept. of Health*, 798 N.E.2d 941 (Mass. 2003) (reaching opposite conclusion).

<sup>211</sup> See FEINBERG, HARM TO OTHERS, *supra* note 21; see also *supra* notes 57-58 and accompanying text.

<sup>212</sup> Mill did not limit his thesis to the criminal law. Among other things, he applied his harm principle to many areas of civil regulation, such as taxation. See Harcourt, *supra* note 14, at 121-22. Similarly, Hart did not advance his thesis as a guide to criminalization but as a rebuke specifically to enforcing morality. See HART, *supra* note 20.

<sup>213</sup> See generally, FEINBERG, HARM TO OTHERS, *supra* note 21, at 23-24.

<sup>214</sup> See *infra* Part III.A.

<sup>215</sup> See generally *Washington v. Glucksberg*, 521 U.S. 702 (1997).

<sup>216</sup> *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

disappearing. Currently, the question is not be what type of harm can justify criminalization; rather, what justifications run afoul of a harm requirement?

From *Lawrence*, we have a clear answer that an offense to morality alone is not a type of harm and therefore is not a valid basis for criminalization.<sup>217</sup> The Court could not have been more emphatic: “the fact that the governing majority in a State has traditionally viewed a particular practice as immoral is not a sufficient reason for upholding a law prohibiting the practice.”<sup>218</sup> Coupled with the Court’s discussion on the severity and stigma of criminal sanctions, this analysis fits squarely with most versions of the harm principle, especially Feinberg’s formulation.

Another possible invalid justification comes from *Glucksberg*. As noted above, the Court hinted that it would reject mere paternalism as a basis for criminalization.<sup>219</sup> The Court’s reservations mirrored those of Feinberg. A majority of the Justices expressed concern over whether certain types of historically vulnerable persons could properly consent to assisted suicide, and thus whether a law that addressed this issue was valid. However, these same justices seemingly adopted Feinberg’s (and Mill’s) argument that once consent was validly established, the State’s paternalistic justifications standing alone could not be enough to validate criminal sanctions.<sup>220</sup>

To sum up, these substantive due process cases instruct as follows. Criminalization is severe and, therefore, harm is required before a legislature can constitutionally criminalize certain conduct. Without a valid, harm-based justification, the legislature has acted irrationally. That is, the legislation has no rational basis. While we may not know completely what “harm” is, we know what it is not: it is not morality and it is not, seemingly, paternalism. Morality and paternalism, alone, are not rational reasons for criminalizing conduct (rational in the constitutional sense of failing the rational basis test).

## **B. Why Harm Should Control**

Up until now, we have explored the use of harm in substantive due process cases. The Court has relied on harm as a method of constitutional balancing, but not as

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<sup>217</sup> See Huhn, *supra*, note 11, at 90-93.

<sup>218</sup> *Lawrence*, 539 U.S. at 578 (quoting *Bowers v. Hardwick*, 478 U.S. at 216 (Stevens, J., dissenting)).

<sup>219</sup> See *infra*, Part III.C.

<sup>220</sup> *Id.*

the cornerstone for constitutional analysis. Why, however, should harm be elevated to this status? Why should the Court, in criminal cases, abandon the fundamental rights/privacy rhetoric? Both constitutional and policy reasons support a shift towards a harm principle analysis.

### 1. Constitutional Reasons

Historically, the consensus was that there is no such thing as constitutional criminal law.<sup>221</sup> However, this consensus is slowly shifting now that the Court has become so active in the field.<sup>222</sup> Very eloquent arguments have been made in support of constitutional limitations on substantive criminal law, *e.g. mens rea, actus reus*.<sup>223</sup> In terms of a constitutional harm principle — one that rejects morality and paternalism as valid justifications for criminal sanctions and counsels that only nonconsensual harm to others is an acceptable basis on which to legislate — there are also supporting arguments.

Raymond Ku argues that the way we frame the debate is important. He asks whether state and federal governments have the authority to regulate morality: “Does the government have the power to criminalize X?”<sup>224</sup> Ku first answers this question by tracing the history of the harm principle in democratic theory and moral philosophy.<sup>225</sup> He then analyzes how the harm principle fits within American constitutional government.<sup>226</sup> Ku opines that because our system is based upon first principles,<sup>227</sup> “[t]he argument that a majority of the population can impose its morality upon the rest of the nation or a state is only tenable if the enforcement of morality is a power delegated to government by the people as a whole.”<sup>228</sup>

Ku goes on to argue that in terms of the federal government, this power was not granted in the Constitution. His support for this claim rests on the powers granted to

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<sup>221</sup> See *supra* note 1.

<sup>222</sup> See *e.g.*, Dubber, *supra* note 1.

<sup>223</sup> For a good overview, see Bilionis, *supra* note 1.

<sup>224</sup> See Ku, *supra* note 6, at 3.

<sup>225</sup> *Id.* at 12-21.

<sup>226</sup> *Id.*

<sup>227</sup> *Id.* at 21, citing Raymond Ku, *Consensus of the Governed: The Legitimacy of Constitutional Change*, 64 *FORDHAM L. REV.* 535 (1995) (defining first principles as “1) a constitution represents the will of the people as a whole, and 2) powers granted by a constitution must, therefore, either command the actual unanimous support of the people or be recognized through mechanisms designed to approximate that consensus”).

<sup>228</sup> Ku, *supra* note 6, at 21.

the State under the constitution,<sup>229</sup> the Founders' concerns about the tyranny of the majority,<sup>230</sup> and a "moral reading of the Constitution."<sup>231</sup> As for state governments, he posits that only the traditional "police power" of the states might harbor the power to regulate morality. However, he notes criticism of this broad reading as far back as Justice Chase in *Calder v. Bull*.<sup>232</sup> Latching on to Justice Chase's argument, Ku concludes that regulation of individual conduct that does not harm others impermissibly benefits a certain group of citizens at the expense of others.<sup>233</sup> This limited police power argument has been adopted by various state courts.<sup>234</sup>

Ku's definition of the harm principle seems to deal only with how morality fits within it. He does not speak about paternalism and where that fits within the harm principle. As seen by the distinction between Feinberg and Hart, paternalism can go either way: Feinberg sees it as outside of the harm principle while Hart views it as a valid reason, sometimes, for criminalization. Yet, regardless of who is right, there is support for the position that the Constitution does not allow for paternalism to guide legislative action.

Arielle Goldhammer addresses that very issue.<sup>235</sup> Goldhammer argues against criminalizing consensual acts, which are prohibited because of morality *and* a sense of paternalism.<sup>236</sup> Goldhammer puts forth many policy arguments, among which are the troubles with actually enforcing these crimes<sup>237</sup> and the hypocrisy and historical failure of enforcement.<sup>238</sup> Most importantly, Goldhammer objects on constitutional grounds.

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<sup>229</sup> *Id.* at 22-23 ("constitutional theory makes sense only if 'We the People' means all of the people to be governed by the constitution, not simply a portion of them").

<sup>230</sup> *Id.* at 23-24; *see also* *Gryczan v. State*, 942 P.2d 112, 125 (Mont. 1997), (citing *THE FEDERALIST*, NO. 51, at 351 (James Madison) (Jacob E. Cooke ed., 1961)) ("James Madison decried the potential for a tyranny of the majority, pointing out that it was as important in our system of government to guard the minority in our society against injustice by the majority, as it was to guard society from the oppression of its rulers").

<sup>231</sup> Ku, *supra* note 6, at 31.

<sup>232</sup> *Id.* at 27-28 (referencing *Calder v. Bull*, 3 U.S. 386 (1798)).

<sup>233</sup> *Id.* at 31.

<sup>234</sup> *Id.* at 32-34, (citing *Commonwealth v. Bonadio*, 415 A.2d 47 (Pa 1980); *Powell v. State*, 510 S.E.2d 18 (Ga. 1998); *Gryczan v. State*, 942 P.2d 112 (Mont. 1997); *Campbell v. Sundquist*, 926 S.W.2d 250 (Tenn. Ct. App. 1996); and *Harris v. State*, 457 P.2d 638 (Alaska 1969)). For a case decided after Ku's article, see *Jegley v. Picado*, 80 S.W.3d 332 (Ark. 2002).

<sup>235</sup> *See* Arielle Goldhammer, *A Case Against Consensual Crimes: Why the Law Should Stay Out of Pocketbooks, Bedrooms, and Medicine Cabinets*, 41 *BRANDEIS L.J.* 237 (2002).

<sup>236</sup> *Id.* at 240, 244-46.

<sup>237</sup> *Id.* at 246-51.

<sup>238</sup> *Id.* at 251-54.

He makes arguments similar to *Ku*, in terms of the powers of government being limited to the prevention of harm.<sup>239</sup>

He notes that the Ninth Amendment was intended to preserve, among other things, people's liberty and to assure that the Bill of Rights was not read as an exclusive list of protected interests.<sup>240</sup> These same limitations were incorporated against the states through the Fourteenth Amendment. He then defines liberty as the freedom to do, to choose, and to act limited only "by that all important boundary—harm to others."<sup>241</sup> He also argues that governing based on morality and paternalism violates the First Amendment:

When society selects one behavior, based on morals, as the proper behavior and enforces it as such against all, society has implicitly (or explicitly?) made the statement that morals which are recognized by one religion or culture take precedent over those of another.<sup>242</sup>

Goldhammer claims that once the link between a law and the preferred morality of a particular religion or culture is made, it becomes clear "that continued criminalization is inappropriate and should cease."<sup>243</sup>

Randy Barnett picks up and elaborates on Goldhammer's theory of liberty.<sup>244</sup> Barnett supports the Court's decision in *Lawrence*. He applauds the Court for focusing on the right to liberty, as announced in the Fourteenth Amendment,<sup>245</sup> and not relying on the right to privacy.<sup>246</sup> While he neither uses the terminology of the harm principle, nor distinguishes between criminal and civil restrictions per se, his arguments support a constitutional restraint on a legislature's powers. Barnett echoes *Ku* in arguing that the police power is not without limits.<sup>247</sup> He then adds that liberty, as the framers intended, is not an amorphous concept. He argues that liberty is limited by the rights of

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<sup>239</sup> *Id.* at 254-66.

<sup>240</sup> *Id.* at 254-55.

<sup>241</sup> *Id.* at 255.

<sup>242</sup> *Id.* at 258.

<sup>243</sup> *Id.*

<sup>244</sup> Barnett, *supra* note 8.

<sup>245</sup> The Fourteenth Amendment reads, in part, ". . . nor shall any state deprive any person of life, liberty, or property without due process of law . . ." U.S. CONST. amend. XIV, § 1 (emphasis added).

<sup>246</sup> See Barnett, *supra* note 8.

<sup>247</sup> *Id.* at 16-17.

others. Barnett notes, “[w]rongful behavior that violates the rights of others may justly be prohibited without violating liberty rights—although ‘wrongful’ is not the same as ‘immoral.’”<sup>248</sup> The term liberty, thus, implies that one is free to do what one wants unless and until his conduct harms another. Only then may a legislature intervene. The harm principle, then, in addition to finding support from the notion of a constitutional government, finds textual support in the Fourteenth Amendment and the word “liberty.”

Powerful arguments have been made which constitutionally support the Court’s use of harm throughout the substantive due process cases. These same arguments would support the Court were it to rely exclusively on harm when evaluating criminal statutes.

## 2. Policy Reasons

In addition to the constitutional basis of the harm principle, there are valid policy reasons why relying on the harm principle is preferable to the current method of analysis. As has often been noted, law and morality overlap and inevitably limit similar types of behavior.<sup>249</sup> In *Ravin v. State*,<sup>250</sup> Alaska’s Supreme Court was called on to decide whether a prosecution for possession of marijuana in one’s home was unconstitutional. The Court first found that “there is no fundamental right, either under the Alaska or federal constitutions, either to possess or ingest marijuana.”<sup>251</sup> However, the Court went on to hold that because of the special protection afforded to one’s home, and the general safeguarding of privacy, the State could only infringe on these protections if they detrimentally impact “the health, safety, rights and privileges of others” or “the public welfare.”<sup>252</sup> Furthermore, the Alaska Supreme Court noted that when a person’s conduct does affect the public, it is no longer wholly private.<sup>253</sup> The conduct can then be limited if an appropriate public need exists.<sup>254</sup>

The Court thus equated privacy with harmless conduct. If someone acts in a manner harmful to others, his conduct is *a fortiori* non-private. On the other hand, if he

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<sup>248</sup> *Id.* at 17.

<sup>249</sup> Kent Greenawalt, *Legal Enforcement of Morality*, 85 J. CRIM L. & CRIMINOLOGY 710, 711 (citing H.L.A. HART, *THE CONCEPT OF LAW*, 188-95 (1961)).

<sup>250</sup> 537 P.2d 494 (Alaska 1975).

<sup>251</sup> *Id.* at 502.

<sup>252</sup> *Id.* at 504.

<sup>253</sup> *Id.*

<sup>254</sup> *Id.*

acts in a manner not harmful to others, his conduct is *a fortiori* private.<sup>255</sup> The Court placed the burden of proving harm on the State, a burden which the State failed to meet. There was substantial evidence of the effects of marijuana, but not enough to justify the restrictions.<sup>256</sup>

Critics argue that adopting the harm principle and rejecting morality as a justification for criminal sanctions would flood the courts with litigation. Indeed, that was the argument of the *Bowers* majority, proponents of morals legislation: “[t]he law, however, is constantly based on notions of morality, and if all laws representing essentially moral choices are to be invalidated under the Due Process Clause, the courts will be very busy indeed.”<sup>257</sup> Despite this prediction, Alaska courts have not been flooded with litigation in the wake of *Ravin*.<sup>258</sup>

The whole of the criminal law will not collapse by relying on the harm principle. Admittedly, there may be certain areas currently regulated which might be affected: drug possession, prostitution,<sup>259</sup> distribution of sex toys,<sup>260</sup> consensual sex between minors,<sup>261</sup> and more. However, eliminating morality as a basis of criminalization will not suddenly legalize acts society deems heinous, because they are harmful as well as immoral.

Besides not destroying the very foundations of criminal law, the harm principle has one very important attribute. In an age when people criticize courts for being activists, the harm principle brings objectivity into judicial reasoning. Without it, the

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<sup>255</sup> *Id.* at 509.

<sup>256</sup> *Id.* at 509-10. “It appears that effects of marijuana on the individual are not serious enough to justify widespread concern, at least as compared with the far more dangerous effects of alcohol, barbiturates and amphetamines.” *Id.*

<sup>257</sup> *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986).

<sup>258</sup> Eric Johnson, Harm to the “Fabric of Society” as a Basis for Regulating Otherwise Harmless Conduct: Notes on a Theme from *Ravin v. State*, 27 SEATTLE U. L. REV. 41, 44 (2003).

<sup>259</sup> See *Roe v Butterworth*, 958 F. Supp. 1569 (S.D. Fla 1997) (no fundamental right to engage in prostitution); *In re P.*, 400 N.Y.S.2d 455 (N.Y. Fam. Ct. 1977), *reversed by* 68 A.D.2d 719 (1979) (state cannot constitutionally prohibit commercial, recreational sex).

<sup>260</sup> *Williams v. Pryor*, 240 F.3d 944 (11<sup>th</sup> Cir. 2001) (statute prohibiting distribution of sex toys is not unconstitutional); see also Angela Holt, *From My Cold Dead Hands: Williams v. Pryor and the Constitutionality of Alabama’s Anti-Vibrator Law*, 53 ALA. L. REV. 927 (2002).

<sup>261</sup> Compare *Jones v. State*, 630 So.2d 1084, 1086 (Fla. 1994) (statutory rape law as applied to adults who have sex with minors is constitutional because, *inter alia*, “sexual intercourse with a child under the age of sixteen, with or without consent, is potentially harmful to the child”), with *B.B. v. State*, 659 So.2d 256 (Fla. 1995) (legislature could not criminalize consensual sex between minors in an effort solely to protect their chastity).

Court reasons from ambiguous and ever evolving ideas such as privacy and sexual autonomy. The transformation from *Bowers* to *Lawrence* is indicative. The Court is also left to determine what a fundamental right is, a notion that seems to change with every new judicial appointment.

Once defined, the harm principle provides an objective starting point in determining whether a statute is constitutional. That is not to say that it will eliminate the need for litigation. Quite the contrary, the Court will need to elaborate on the definitions. Up until now, we know only what are not valid, non-harmful reasons for criminalization: morality and paternalism. Harm itself must be more clearly defined. Does it mean only harm to individuals? Does it mean harm to the “fabric of society”?<sup>262</sup> And what empirical justifications sufficiently prove a valid harm? Ultimately, it must mean more than a subjective belief that something is private.

Shifting from the privacy rhetoric to a harm principle will provide legislatures with guidance, allowing them to justify their actions with empirical evidence. It will make the law more predictable and insulate the judiciary from attacks on their decision-making process. In all, it will create a more workable, predictable, and objective constitutional scheme in which to frame the criminal law. It will allow us to understand and tie together the hundred-year path of substantive due process, not as an evolution of sexual intimacy, but as an evolution of criminal law.

Perhaps most importantly, the use of a harm principle will help refocus our very understanding of why we criminalize conduct. For example, recently, the nation has seen an emergence of drug treatment courts.<sup>263</sup> These courts have faced difficult jurisprudential problems, because, *inter alia*, the typical drug treatment court conflicts with our general notion of criminal enforcement. For example, prosecutors, spurred by political pressures to be tough on crime view participation in drug treatment court proceedings to be in conflict with their duty to protect the public by pursuing the

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<sup>262</sup> See Johnson, *supra* note 258, at 45-46.

<sup>263</sup> See Honorable Peggy Hora, Honorable William Schma, and John Rosenthal, *Therapeutic Jurisprudence and the Drug Treatment Court Movement: Revolutionizing the Criminal Justice System's Response to Drug Abuse and Crime in America*, 74 NOTRE DAME L. REV. 439 (1999). Drug courts are those courts are responsible for handling the cases of non-violent drug offenders. These courts offer intensive supervision and treatment programs and force the offender to either address his or her drug problem or face the consequences.

conviction and incarceration of criminals.<sup>264</sup> Similarly, defense counsel is confronted with the difficult decision of whether to participate. Some advocates fear that defendants who submit to the jurisdiction give away too many rights and contend that defense lawyers should not be involved in such a process.<sup>265</sup>

Many of these criticisms are understandable. Being a criminal carries with it a certain connotation, regardless of the type of crime committed. Yet, by relying on the harm principle, we could potentially eliminate certain conduct from the criminal context. This, in turn, would help better focus what exactly we hope to accomplish through the criminal justice system. Drug treatment courts, for example, would not fall under the same type of criticism if the people who appear in these courts were charged with committing a non-criminal act of possessing or using drugs, rather than being charge with a criminal offense. As noted above, simply because we could no longer constitutionally criminalize certain acts does not mean we would be powerless to regulate them. Something like drug treatment courts might actually work more efficiently if the participants were not criminals and their conduct not illegal.

Understandably, the issues arising from drug treatment courts are complex and varied, and to a large extent beyond the scope of this paper. However, the drug courts serve as a useful example to illustrate how, by thinking in terms of harm and developing a workable understanding about why we punish and why we criminalize, we can better address problem areas where the criminal law has seemingly failed to provide relief.<sup>266</sup>

## V. Conclusion

Surely there are gaps to fill. A constitutional harm principle is in its infancy (more so because it resides in the shadow of “privacy” and “liberty” than because it has not been explicitly adopted, though that too is important to acknowledge). After *Lawrence*, one can presume that the Supreme Court has begun to adopt this rhetoric, at least implicitly, and I urge it to do so explicitly. That is, speaking in terms of harm should be the standard constitutional measure for criminal law. How we define harm is

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<sup>264</sup> *Id.* at 516.

<sup>265</sup> *Id.* at 521, (quoting Chuck Squatriglia, *Dispensing Compassion: Richmond Drug Court Mixes Justice and Mercy*, West County Times, May 28, 1997 at A1.)

<sup>266</sup> See e.g., Goldhammer, *supra* note 235, at 246-254 (discussing the unwanted and often unanticipated negative effects of criminalization).

another question altogether. But the shift from speaking in terms of fundamental rights and privacy to speaking about harm should be made.

We know what harm is not – morality and paternalism. But we do not know everything that it is. By harm, do we mean harm to an individual? Harm to society? What would that look like? What sort of empirical or even anecdotal evidence could support such a claim? These questions have not been answered, and need to be. Hopefully, the Court will begin to rationalize in this way, using this terminology. The next substantive due process case should not decide whether a certain act is fundamental or within a certain sphere of liberty. Instead, it should require harm as a justification and then ask what it means to cause harm.

Without a delineation of what harm is and how it is proved, we are free to define it any way we wish, however careless or inconsistent that may be. By elevating the harm principle to a constitutional requirement, the harm principle would be given substance. No longer would we debate whether there were any constitutional limitations to substantive criminal law; rather, we would debate just what those limitations are.