THE CONSTRAINT OF DIGNITY: *LAWRENCE v. TEXAS* AND PUBLIC MORALITY

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INTRODUCTION

The modern American political arena has sometimes resembled a battlefield in which rival factions perennially war over so-called "social issues." These conflicts typically arise over activities viewed as innately immoral by a portion of the population, encompassing issues like abortion, homosexual acts, prostitution, polygamy, gambling, pornography, drug use, euthanasia, and even animal cruelty.[1] Often, the very legitimacy of prohibiting those activities is in question. One side of the conflict asserts that morality cannot and should not be legislated, while the other side contends that the enforcement of morality is a democratic prerogative. Such disputes are framed in terms of enforcing "public morality" or of championing "legal moralism." Public morality is defined as "an ethic of decency or civility (not simply rights and liberties) which is public in the sense that it is generally acknowledged as a requisite to the well-being of the community as such—and is therefore recognized in public policy, and (periodically at least) supported by the law."[2]

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1 *See* Christopher Wolfe, *Public Morality and the Modern Supreme Court*, 45 AM. J. JURIS. 65, 66 (2000). "The focal cases of public morality are those involving laws that limit certain forms of conduct of consenting adults, on the grounds that they are morally wrong." *Id.* at 65.

2 Harry M. Clor, *The Death of Public Morality?*, 45 AM. J. JURIS. 33, 33 (2000) (emphasis omitted). This ethic raises questions about "what role the political community should take in promoting norms of morality for citizens." Wolfe, *supra* note 1, at 65. Public morality is concerned with safeguarding the moral well-being of individual citizens as well as promot-

Legal moralism is the belief that it is "morally legitimate to prohibit conduct on the ground that it is inherently immoral, even though it causes neither harm nor offense to the actor or to others."[3] As such, legal moralism is the jurisprudential mechanism through which public morality is enforced.

The Supreme Court seemingly resolved this dispute in *Lawrence v. Texas*,[4] a case adjudicating the constitutionality of a Texas statute criminalizing consensual homosexual sodomy.[5] Many commentators interpreted the opinion as adopting a libertarian approach to morals legislation, essentially extending the constitutional rights of privacy and liberty to encompass all "victimless" crimes.[6] In his dissent, Justice Scalia echoed this belief, asserting that precluding states from legislating on the basis of morality would potentially invalidate "laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."[7]

For the most part, Justice Scalia's vision of hedonistic bliss did not become a reality.[8] However, as the tenth anniversary of *Lawrence* passes, it is important to examine the case's impact on the enforcement of morality in order to discern its true meaning. This Note will proceed in four parts. Part I will catalogue the jurisprudential and philosophical conflict over the legitimacy of morals legislation. Part II will examine the Supreme Court's jurisprudence regarding reproductive and sexual *liberty*, noting the trend towards conflating liberty with autonomy that culminated in *Lawrence v. Texas*. Part III will closely scrutinize the characterization of liberty in *Lawrence*, demon-

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ing a moral cultural milieu in the aggregate. For example, drug use can be prohibited because it causes moral harm to the user, but it can also be prohibited because the failure to stigmatize drug use can lead to its proliferation, resulting in a culture bereft of personal initiative and productivity. *Id.* at 67–68.

3 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS 27 (1984) [hereinafter FEINBERG, HARM TO OTHERS].

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

5 For a review of the facts surrounding *Lawrence*, see *infra* note 111 and accompanying text.

6 *See infra* note 117.

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

8 *See, e.g.*, Sarah Darville & Leah Greenbaum, *Professor David Epstein Charged with Incest with His Daughter*, COLUMBIA SPECTATOR (Dec. 10, 2010), http://www.columbiaspectator.com/2010/12/10/professor-david-epstein-charged-incest-his-daughter (describing a Columbia University professor's indictment for incest in the third degree after an alleged consensual sexual relationship with his twenty-four year old daughter came to light); Jason McLure, *Maine Town is Shaken by Zumba Prostitution Scandal*, CHI. TRIB. (Oct. 17, 2012), http://articles.chicagotribune.com/2012-10-17/news/sns-rt-us-usa-maine-madamebre89g1yt-20121017_1_zumba-studio-kennebunk-police-department-zumba-class (detailing the prosecution of a Maine fitness instructor for allegedly operating a prostitution ring out of her studio and office); *Three Indictments in Polygamist Case*, L.A. TIMES (Nov. 13, 2008), http://articles.latimes.com/2008/nov/13/nation/na-briefs13.S6 (detailing the indictment of members of the Fundamentalist Church of Jesus Christ of Latter Day Saints for bigamy); Jonathan Turley, *Of Lust and the Law*, WASH. POST (Sept. 5, 2004), http://www.washingtonpost.com/wp-dyn/articles/A62581-2004Sep4.html (recounting the post-*Lawrence* prosecution of a Virginia town attorney for adultery).

strating that it is restricted by associational and spatial limitations. Part IV will connect those limitations to the description of *dignity* Justice Kennedy employed in *Lawrence* and in other cases. This conception of dignity embodies substantive values concerning the appropriate context of sexual liberty. Indeed, though not a doctrinally perfect match, Justice Kennedy's depiction of dignity resembles the Catholic conception of sexual dignity: one that recognizes the worth of sexual relations in advancing love and intimacy, but one that does not embrace total autonomy. Consequently, the liberty interest Justice Kennedy identifies should not be interpreted as a rejection of public morality, because his conception of liberty is premised on a substantive dignity that refuses to divorce itself from morality.

I. The Great Debate

Although such early thinkers as Aristotle and Saint Thomas Aquinas advocated the idea that the law could be used to create a social environment conducive to human virtue,[9] scholarly consensus suggests that the modern debate over legal moralism began in the mid-nineteenth century. This debate was sparked by the publication of *On Liberty*, a defense of liberalism written by the utilitarian philosopher John Stuart Mill. Mill's argument against legal moralism was shaped by a guiding ethic known as the "harm principle":

> [T]he sole end for which mankind are 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. His own good, either physical or moral, is not a sufficient warrant.[10]

The harm principle precluded state interference with individual action unless the interests of others were impacted by that action.[11] In the absence of harm, this perspective elevated human autonomy over attenuated social interests or paternalistic interests.[12] As a result, implementation of the harm principle would necessarily prevent the criminalization of activities deemed harmful solely because they violated prevailing moral norms.

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9 *See generally* Robert P. George, Making Men Moral 19–35 (1993).

10 John Stuart Mill, On Liberty 70 (Michael B. Mathias ed., Pearson Longman 2007) (1859).

11 *See id.* at 130.

12 Mill came to this conclusion by weighing the interests of the individual against those of society:

> [N]either one person, nor any number of persons, is warranted in saying to another human creature of ripe years that he shall not do with his life for his own benefit what he chooses to do with it. He is the person most interested in his own well-being—the interest which any other person . . . can have in it is trifling compared with that which he himself has; the interest which society has in him individually (except as to his conduct to others) is fractional and altogether indirect . . . .

In the era of strict Victorian morality, Mill's argument was controversial, to say the least. Consequently, the English jurist Sir James Fitzjames Stephen challenged the harm principle in *Liberty, Equality, Fraternity.* Stephen exclaimed that Mill's theory "would condemn every existing theory of morals."[13] For Stephen, it was a society's prerogative to criminalize immoral behavior simply because it was immoral.[14] He indicated that various assumptions regarding morality undergirded everything from contract to inheritance law.[15] Additionally, Stephen noted that even the criminalization of activities that caused harm to others, such as the unwarranted use of force or fraud, did not merely serve the sole purpose of protecting the public. Instead, such behavior was prohibited "also for the sake of gratifying the feeling of hatred—call it revenge, resentment, or what you will—which the contemplation of such conduct excites in healthily constituted minds."[16] The goal of prohibiting harm to others served the purpose of reflecting a moral consensus that such behavior was intrinsically repugnant. This perspective was largely shaped by Stephen's penchant for retributive justice. He asserted that the criminal law did not merely exist for deterrence, but also to "giv[e] distinct shape to the feeling of anger, and a distinct satisfaction to the desire of vengeance."[17] It was through this expressive condemnation and punishment that society deterred behavior it deemed wrongful, preventing individuals from further indulging in degrading activities, as well as educating the public as to prevailing social norms, thus reinforcing those norms.[18]

Id. at 130. This principle obviously applied to the criminal law, but it also went beyond criminalization, seemingly prohibiting any form of paternalistic government regulation or even subtle social pressure.

13 JAMES FITZJAMES STEPHEN, LIBERTY, EQUALITY, FRATERNITY 9 (Stuart D. Warner ed., Liberty Fund 1993) (1873).

14 *See id.* at 100 ("[I]llustrations of the fact that English criminal law does recognize morality are to be found in the fact that a considerable number of acts which need not be specified are treated as crimes merely because they are regarded as grossly immoral.").

15 *See id.* at 101–02.

16 *Id.* at 98.

17 *Id.* at 100.

18 Stephen presumed that expressive punishment for vice would be conducive to virtue:

> Persons who call debauchery wrong mean to imply that debauched persons ought to be punished either by public opinion or by their own consciences. . . . The sentiment of justice when moralized by the social feeling is the feeling of vengeance against a debauched person acting in a direction conformable to the general good . . . . I do not know how it is possible to express in a more emphatic way the doctrine that public opinion ought to put a restraint upon vice, not to such an extent merely as is necessary for definite self-protection, but generally on the ground that vice is a bad thing from which men ought by appropriate means to restrain each other.

Id. at 90.

Stephen ultimately questioned Mill's perception of society as a collection of individuals exhibiting total separation from one another.[19] Likening vice to an infectious disease or to pollution, he recognized society's interest in maintaining high moral standards that were conducive to virtue.[20] It was through the criminal law that society could most emphatically condemn or curb the spread of vice. At the same time, Stephen believed that this need to defend morality had to yield to privacy in some instances.[21] In particular, he cited "the internal affairs of a family" or "the relations of love or friendship" as intimate associations for which state interference would potentially do more harm than good.[22] However, this limitation merely restrained the scope of legal moralism—it did not negate its central premise.

The debate over legal moralism reemerged nearly a century later, when the Committee on Homosexual Offences and Prostitution released a report in 1954, evaluating the state of laws criminalizing homosexual conduct and prostitution in the United Kingdom. The report, which became generally known as the Wolfenden Report, also suggested potential reforms to the criminal code. Most notably, the Committee determined that the criminal law should play no role in the enforcement of morality:

> [I]ts function, as we see it, is 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 because they are young, weak in body or mind, inexperienced, or in a state of special physical, official or economic dependence.
>
> It is not, in our view, the function of the law to intervene in the private lives of citizens, or to seek to enforce any particular pattern of behaviour, further than is necessary to carry out the purposes we have outlined.[23]

In proposing that consensual homosexual activity in private be decriminalized, the Committee asserted that "[u]nless a deliberate attempt is to be made by society . . . to equate the sphere of crime with that of sin, there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business."[24] Similarly, with regard to prostitution, the Committee proposed that criminal sanctions be reserved for public street

19 *See id.* at 86 ("It is surely a simple matter of fact that every human creature is deeply interested not only in the conduct, but in the thoughts, feelings, and opinions of millions of persons who stand in no other assignable relation to him than that of being his fellow-creatures.").

20 *See id.* at 93.

21 *Id.* at 106 ("Legislation and public opinion ought in all cases whatever scrupulously to respect privacy . . . . All the more intimate and delicate relations of life are of such a nature that to submit them to unsympathetic observation . . . inflicts great pain, and may inflict lasting moral injury.").

22 *See id.* at 108.

23 REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENCES AND PROSTITUTION 9–10 (1957) [hereinafter WOLFENDEN REPORT].

24 *Id.* at 24.

solicitation in order to drive it from public view, rather than focusing resources on prosecuting private acts of prostitution.[25]

The Wolfenden Report sparked an intellectual battle that would rage throughout the remainder of the twentieth century. Baron Patrick Devlin fired the first shots in this battle with his 1959 Maccabaean Lecture in Jurisprudence to the British Academy, the arguments of which were later refined in *The Enforcement of Morals*. Devlin premised his thesis on the belief that "it is clear that the criminal law . . . is based upon moral principle."[26] He cited the fact that murder and assault were illegal, regardless of the victim's consent, to support his proposition that the criminal law reflected certain values beyond merely protecting individuals from unwanted coercion.[27] For Devlin, morality could not be solely private because society was comprised of a "community of ideas, not only political ideas but also ideas about the way its members should behave and govern their lives; these latter ideas are its morals. Every society has a moral structure as well as a political one."[28] Widespread deviations from that prevailing moral consensus would have explicitly public consequences:

> Each one of us has ideas about what is good and what is evil; they cannot be kept private from the society in which we live. If men and women try to create a society in which there is no fundamental agreement about good and evil they will fail; if, having based it on common agreement, the agreement goes, the society will disintegrate. For society is not something that is kept together physically; it is held by the invisible bonds of common thought.[29]

Devlin envisioned majoritarian morality as the glue that held society together, thus promoting stability. Because societal self-preservation is the first goal of government, it "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."[30] Indeed, Devlin considered vice no more private than treason.[31] Consequently, he believed that society could use the criminal law to enforce moral-

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25 *Id.* at 80.

26 PATRICK DEVLIN, THE ENFORCEMENT OF MORALS 7 (1965).

27 *See id.* at 6.

28 *Id.* at 9.

29 *Id.* at 10.

30 *Id.* at 11.

31 Devlin exclaimed:

> The suppression of vice is as much the law's business as the suppression of subversive activities; it is no more possible to define a sphere of private morality than it is to define one of private subversive activity. It is wrong to talk of private morality or of the law not being concerned with immorality as such or try to set rigid bounds to the part which the law may play in the suppression of vice.

Id. at 13–14. Devlin illustrated the futility of the public-private distinction by using the example of drunkenness. If an individual chooses to overindulge in the privacy of his or her home, it cannot be said that the activity immediately impacts the public as a whole. However, as such behavior becomes tolerated or even destigmatized, the proportion of private drunkards will rise, and their aggregated activity will inevitably shape the quality of that society. *See id.* at 14.

ity—a morality that would be gauged by the beliefs of the "reasonable man" or juror.[32]

Devlin's legal moralism did have limits, though. Like Stephen, Devlin asserted that privacy acted as a countervailing interest to public morality and cited the existence of "a general sentiment that the right to privacy is something to be put in the balance against the enforcement of the [vice] law."[33] Furthermore, practical concerns impeded the enforcement of certain criminal sanctions. For instance, adultery disrupted the social fabric by weakening the institution of marriage, and fornication was frowned upon by many moral traditions, but the criminal prohibition of either was not significantly enforced due to the ubiquity of those activities, as well as their occurrence in private. The most a society could do, Devlin argued, was to enforce laws against the worst manifestations of adultery or fornication, such as various forms of organized commercial sex.[34] Those practical considerations notwithstanding, though, the legal enforcement of morality was not proscribed in principle.

The legal philosopher H.L.A. Hart subsequently critiqued Devlin's arguments in a series of lectures at Stanford University. Those lectures were eventually compiled in *Law, Liberty, and Morality*. Hart believed that laws criminalizing harmless consensual activities on the basis of morality threatened to "create misery of a quite special degree."[35] This was especially true of laws regulating sexuality, since "the suppression of sexual impulses generally . . . affects the development or balance of the individual's emotional life, happiness, and personality."[36] Hart divided defenders of legal moralism into two camps, represented by the "moderate" and "extreme" theses. The moderate thesis was championed by Devlin, and its premise was that morality must be enforced because "a shared morality is the cement of society; without it there would be aggregates of individuals but no society."[37] Consequently, legal moralism was valuable even in the absence of identifiable harm because it prevented social disintegration and allowed communities to preserve those shared norms.[38] However, Hart was not persuaded by this argument, noting that "no evidence is produced to show that deviation from accepted sexual morality, even by adults in private, is something which, like treason, threatens the existence of society."[39] Additionally, Hart believed that Devlin conflated morality with society: a view that would necessitate societal collapse every time a society's dominant morality evolved or changed.[40]

32 *See id.* at 15.

33 *Id.* at 19.

34 *See id.* at 22. Today, the most prominent examples of such manifestations would likely be prostitution, sex or "swingers" clubs, and the pornography industry.

35 H.L.A. HART, LAW, LIBERTY, AND MORALITY 22 (1963).

36 *See id.*

37 *Id.* at 48.

38 *See id.* at 48–49.

39 *Id.* at 50.

40 *See id.* at 51–52.

In contrast, Hart ascribed the extreme thesis to Stephen, defining that perspective as one in which the enforcement of morality was viewed as intrinsically valuable, requiring no secondary effects to justify its enforcement.[41] Hart found this argument equally unconvincing, asserting:

> [W]here there is no harm to be prevented and no potential victim to be protected, as is often the case where conventional sexual morality is disregarded, it is difficult to understand the assertion that conformity, even if motivated merely by fear of the law's punishment, is a value worth pursuing, notwithstanding the misery and sacrifice of freedom which it involves.[42]

Hart also disputed whether a single majoritarian morality could be identified in a contemporary population. Without any such consensus, it was unclear whether society could legitimately punish immorality for its own sake.[43]

The arguments in support of the harm principle were reevaluated by Joel Feinberg in a four-volume treatise entitled *The Moral Limits of the Criminal Law*. Unlike John Stuart Mill, Feinberg was not concerned with all forms of social coercion that could be used to enforce the moral norms of a governing majority.[44] Instead, he sought to evaluate when a criminal sanction could become illegitimate because of a countervailing liberty interest.[45] For Feinberg, the application of liberalism to the criminal law required a "presumption . . . of liberty":[46]

> Liberty should be the norm; coercion always needs some special justification. That "presumption" together with its justifying reasons we can call the "presumptive case for liberty." . . . Suffice it to say that the person deprived of a liberty will think of its absence as a genuine personal loss, and when we put ourselves in his shoes we naturally share his assessment. Moreover, loss of liberty both in individuals and societies entails loss of flexibility and greater vulnerability to unforeseen contingencies. Finally, free citizens are likelier to be highly capable and creative persons through the constant exercise of their capacities to choose, make decisions, and assume responsibilities.[47]

Feinberg thus sought to balance an individual's interest in personal liberty against the necessity of coercion to achieve a particular public end. He concluded that only two circumstances would justify the use of legal coercion and curtailment of freedom. The first circumstance was the use of coercion to prevent some form of harm to other individuals or to the public at large.[48]

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41 *Id.* at 49.

42 *Id.* at 57.

43 *See id.* at 63.

44 FEINBERG, HARM TO OTHERS, *supra* note 3, at 3.

45 *See id.* at 7.

46 *Id.* at 14.

47 *Id.* at 9.

48 Feinberg essentially reiterated Mill's harm principle:

> [I]t is legitimate for the state to prohibit conduct that causes serious private harm, or the unreasonable risk of such harm, or harm to important public institutions and practices. In short, state interference with a citizen's behavior tends to

The second circumstance was the use of force when "it would probably be an effective way of preventing serious offense (as opposed to injury or harm) to persons other than the actor, and that it is probably a necessary means to that end."[49] Basically, Feinberg added his "offense principle" to Mill's harm principle. When taken in conjunction, these principles meant that it would be inconsistent with liberalism for the state to criminalize an activity merely on the basis of its perceived immorality.[50]

The arguments rejecting legal moralism made by Mill, Hart, and Feinberg were predicated on the maximization of individual liberty and diminution of individual suffering. Essentially, they each critiqued the criminal law under a robust theory of liberalism. However, another claim against legal moralism emerged: the belief that the state had a moral obligation to maintain neutrality among competing conceptions of "the good" by recognizing the intrinsic value of autonomy. Under this theory of "autonomism," human worth was linked to the capacity for choice rather than the object being chosen.[51] This left to private individuals the power to apply their own moral preferences. As such, the focus shifted towards arguments against legal moralism based on autonomy and moral neutrality.[52]

In *Taking Rights Seriously*, Ronald Dworkin perceived individual rights as grounded in equality rather than liberty:

> Government must treat those whom it governs with concern, that is, as human beings who are capable of suffering and frustration . . . and acting on intelligent conceptions of how their lives should be lived. Government must not only treat people with concern and respect, but with equal concern and respect. . . . It must not constrain liberty on the ground that one citizen's conception of the good life of one group is nobler or superior to another's.[53]

The state was morally obligated to maintain neutrality in the face of activities deemed immoral. From this, Dworkin derived a "right to moral independence" that was basically a right to personal autonomy.[54] This right to moral independence was an animating principle of justice that would trump other social goods under certain circumstances. For instance, Dworkin conceded that the proliferation of pornography could corrode a social structure that emphasized beauty and dignity in sexual relations. However, he believed that prohibiting the use or distribution of pornography would

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> be morally justified when it is reasonably necessary . . . to prevent harm or the unreasonable risk of harm to parties other than the person interfered with.

Id. at 11.

49 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 1 (1985) [hereinafter FEINBERG, OFFENSE TO OTHERS].

50 *See* 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 4 (1988) [hereinafter FEINBERG, HARMLESS WRONGDOING].

51 Clor, *supra* note 2, at 40–41.

52 Wolfe, *supra* note 1, at 88–89.

53 RONALD DWORKIN, TAKING RIGHTS SERIOUSLY 272–73 (1977).

54 *See* RONALD DWORKIN, A MATTER OF PRINCIPLE 353 (1985).

still be unjust, notwithstanding that communal interest, because it violated the moral independence of those who sought to view or sell pornography.[55]

Similarly, in *The Moral Criticism of Law*, David A.J. Richards proposed a "contractarian theory" of morality that he applied to the Constitution:

> Moral principles are those that perfectly rational human beings, irrespective of historical or personal age, in a hypothetical position of equal liberty and having all knowledge and reasonable belief except that of their own personal identity, would agree to as the ultimate standards of conduct that are applicable at large.[56]

Thus, morality was determined by the hypothetical consensus that would occur if individuals could not know their future social status or identity. By applying this theory, Richards arrived at one of the basic moral principles of constitutional order: the principle of greatest equal liberty.[57] Under this principle, political rights were valuable insofar as they "enabl[ed] each person to pursue his or her particular ends, whatever they may be."[58] For example, freedom of expression was important because "it support[ed] a mature individual's sovereign autonomy in deciding how to communicate with others; it disfavor[ed] restrictions on communication imposed for the sake of the distorting rigidities of the orthodox and the established . . . [and] nurture[d] and sustain[ed] the self-respect of the mature person."[59] Ultimately, civil liberties reinforced "a belief in the competent independence and integrity of one's person."[60]

Through the prism of this greatest equal liberty, Richards reinterpreted Mill's harm principle, asserting that "the principles underlying a just criminal law require forms of action and forbearance from action that express, on terms fair to all, basic respect for the capacity of persons responsibly to pursue their ends, whatever they are."[61] The state could not legitimately criminalize those activities central to an individual's self-actualization and autonomy, obviously implicating a number of actions prohibited on the basis of morality. Indeed, Richards believed that individuals could rationally

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55 *See id.* at 349.

56 DAVID A.J. RICHARDS, THE MORAL CRITICISM OF LAW 45 (1977) [hereinafter RICHARDS, MORAL CRITICISM].

57 *See id.* at 50–51.

58 *Id.* at 46.

59 *Id.* at 47.

60 *Id.* at 48.

61 DAVID A.J. RICHARDS, SEX, DRUGS, DEATH, AND THE LAW 17 (1982) [hereinafter RICHARDS, SEX, DRUGS, DEATH].

derive value and moral worth from such things as viewing pornography,[62] selling sex,[63] taking drugs,[64] or even committing suicide.[65]

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62 *See* RICHARDS, MORAL CRITICISM, *supra* note 56, at 71 ("[V]arious dispassionate empirical studies show that the use of hard-core pornographic materials has a significant and valued function in the life of many Americans."). Indeed, Richards argued that pornography could convey positive values that dissented from the prevailing conception of sexuality:

> [P]ornography can be seen as the unique medium of a vision of sexuality, a "pornotopia"— a view of sensual delight in the erotic celebration of the body, a concept of easy freedom without consequences, a fantasy of timelessly repetitive indulgence. In opposition to the Victorian view that narrowly defines proper sexual function in a rigid way that is analogous to the ideas of exremental [sic] regularity and moderation, pornography builds a model of plastic variety and joyful excess in sexuality. In opposition to the sorrowing Catholic dismissal of sexuality as an unfortunate and spiritually superficial concomitant of propagation, pornography affords the alternative idea of the independent status of sexuality as a profound and shattering ecstasy.

Id. (footnotes omitted). Because the viewing or production of pornography would constitute a form of sexual expression, Richards found it "difficult to see why the pornographic vision should not have a place in the marketplace of ideas beside other visions that celebrate the life of the mind, the sanctity of ascetic piety, or the usefulness of prudent self-discipline." *Id.*

63 Richards asserted that the decision to engage in prostitution could be both economically prudent and emotionally satisfying:

> [I]n many cases such choices [to engage in prostitution] seem all too rational. . . . Prostitutes have been described as the highest paid professional women in America. There is no evidence that prostitution itself is necessarily an unpleasant experience for the prostitutes, or that, in general, it disables them from engaging in other loving relationships; indeed, there is some evidence that prostitutes, as a class, are more sexually fulfilled than other American women. Many women have traditionally found in prostitution a useful escape from limited, oppressive, and parochial family and career lives. Prostitution, for them, is not adopted exclusively for economic reasons but because its urban life style affords a kind of social and cultural variety, color, glamour, and range of possibilities that would not have been available to them otherwise.

RICHARDS, SEX, DRUGS, DEATH, *supra* note 61, at 113 (footnotes omitted).

64 Richards believed that the prohibition of "hard" drugs reflected a kind of moral paternalism over the perceived addict:

> [T]he psychological centrality of drug use for many young addicts in the United States may, from the perspective of their own circumstances, not unreasonably organize their lives and ends. In contrast, the moral criticism implicit in the concept of drug abuse fails to take seriously the perspective and circumstances of the addict, often substituting competences and aspirations rooted in the critic's own background and personal aspirations to organize a self-respecting social identity, which might only exceptionally require drug use.

Id. at 176–77.

65 Richards argued that human autonomy could demand a right to euthanasia:

> Since persons have broad latitude to define the dignified meaning of their lives, they must have, consistent therewith, the corollary right to define the meaning of their deaths, including forms of self-willed death that are consistent with treating persons as equals. . . . Consistent with such considerations, the concern for per-

As time passed, those arguments against legal moralism, grounded in liberalism and autonomism, were bound to encounter resistance from those who felt virtue and communal values were intrinsic goods. In *Making Men Moral*, Robert George offered a defense of legal moralism grounded in perfectionism and communitarianism. He argued that moral norms induced some individuals into choosing the basic goods that were fundamental to human well-being and fulfillment.[66] Civil liberties were valuable to the extent that they helped identify and protect those basic goods.[67] However, that moral worth was purely instrumental, not intrinsic.[68] For example, George asserted that communication was instrumentally valuable insofar as it fostered the basic human good of cooperation. However, once that communication ceased to reinforce a basic good—like when it became indecent or obscene—it no longer had worth.[69] Similarly, privacy was instrumentally valuable when it facilitated basic goods like community formation, the creation of personal identities, or cooperation.[70] Yet, when privacy served no valuable purpose, George insisted it deserved no protection, noting "[t]here is no moral compulsion to respect the privacy of a terrorist who is building a bomb, or a gang of thieves planning a robbery, or even parents who are abusing or neglecting their children."[71]

As part of guiding individuals toward virtue and well-being, societies needed to enforce moral codes. George identified four ways in which the law could play a subsidiary role in making individuals moral:

> (1) preventing the (further) self-corruption which follows from acting out a choice to indulge in immoral conduct;
>
> (2) preventing the bad example by which others are induced to emulate such bad behavior;
>
> (3) helping to preserve the moral ecology in which people make their morally self-constituting choices; and
>
> (4) educating people about moral right and wrong.[72]

Consequently, the legal prohibition of vice played a central role in protecting individuals and communities from moral harm.[73] The enforcement of morals deterred the proliferation of vice, something that affected a community's "moral ecology" if left unchecked:

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sonal responsibility, fundamental to human rights, appears to support an affirmative moral interest in encouraging persons to reflect on the kinds of considerations, if any, that would lead them reasonably to depart life.

Id. at 249 (footnotes omitted).

66 *See* GEORGE, *supra* note 9, at 12–14.

67 *See id.* at 190.

68 *See id.* at 191.

69 *See id.* at 194–95.

70 *See id.* at 212–14.

71 *Id.* at 215.

72 *Id.* at 1.

73 *See id.* at 44.

> A physical environment marred by pollution jeopardizes people's physical health; a social environment abounding in vice threatens their moral well-being and integrity. A social environment in which vice abounds (and vice might, of course, abound in subtle ways) tends to damage people's moral understandings and weaken their characters as it bombards them with temptations to immorality. People who sincerely desire to avoid acts and dispositions which they know to be wrong may nevertheless find themselves giving in to prevalent vices and more or less gradually being corrupted by them.[74]

As such, society's interest in preserving communal virtue could justify enforcing public morality.

Ultimately, this battle over the enforcement of morality consumed the latter half of the twentieth century. And yet, notwithstanding a formidable effort by the defenders of public morality and legal moralism, by the time *Lawrence* was handed down, it appeared as though those opposed to legal moralism in favor of the harm principle and autonomism had largely won.[75] Some believed *Lawrence* was merely the final nail in the coffin for public morality.

II. The Supreme Court's Liberty and Privacy Jurisprudence

The decision in *Lawrence v. Texas* can be most easily understood as an extension of the Supreme Court's reproductive privacy and liberty jurisprudence. Indeed, the Court cited *Griswold v. Connecticut*[76] as "the most pertinent beginning point" for its analysis.[77] *Griswold* involved a challenge to a pair of Connecticut statutes that criminalized the use of contraceptives, as well as serving as an accomplice to that use.[78] After counseling married couples about contraceptive use and prescribing contraception, the two appellants were prosecuted as accessories to the use of contraceptives.[79] In striking down the statutes, Justice Douglas's opinion announced that the marital relationship was protected within a "zone of privacy" created by the

74 *Id.* at 45; *see also* Clor, *supra* note 2, at 33 ("Liberal society requires a countervailing ethic operating to restrain the excesses of individualism and sensualism which it tends to incite. The point can be stated thus: an intact public morality serves two enduring social interests—one concerning community and the other concerning character." (emphasis omitted)). For example, a social environment comprised of men who frequent prostitutes with impunity will detrimentally impact institutions integral to the public interest, like marriage and the family. *See* Robert P. George, *The Concept of Public Morality*, 45 Am. J. Juris. 17, 25 (2000).

75 *See* Bernard E. Harcourt, *The Collapse of the Harm Principle*, 90 J. Crim. L. & Criminology 109, 109–13 (1999) (claiming that arguments predicated on legal moralism had become so discredited that moralists began to use the harm principle to justify prohibitions on vice).

76 381 U.S. 479 (1965).

77 Lawrence v. Texas, 539 U.S. 558, 564 (2003).

78 *See Griswold*, 381 U.S. at 480.

79 *See id.*

penumbras formed by emanations from specific guarantees in the Bill of Rights.[80]

However, this conception of privacy was relatively modest, confined to associational and spatial provinces.[81] Rather than focusing on individual autonomy, Justice Douglas emphasized that the law threatened "a maximum destructive impact upon [the marital] relationship" by prohibiting private use of contraceptives rather than outlawing their manufacture or sale.[82] Additionally, he expressed concern over the degree of physical intrusion that would be required to enforce such a law.[83] By confining privacy to the intimate association between husband and wife as well as the spatial dimensions of the marital bedroom, the opinion in *Griswold* applied an older interpretation of privacy "linked to various values protected at common law—the protection of the home and of private places, preservation of the autonomy of the family, and common law protection . . . against physical invasion of the body."[84] The Court's critiques implied that the primary issue was the poor fit between the ends sought and the means used. As several concurrences noted, this hardly negated all criminal laws premised on morality.[85]

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80 *See id.* at 484–85.

81 *See* John Lawrence Hill, *The Constitutional Status of Morals Legislation*, 98 KY. L.J. 1, 20–21 (2010) (arguing that the privacy in *Griswold* "was grounded on an associational conception of privacy specifically limited to marital association . . . [and] also concerned the place where the activity occurred" (emphasis omitted)); David D. Meyer, *Domesticating* Lawrence, 2004 U. CHI. LEGAL F. 453, 466 ("Before *Lawrence* . . . [p]ersons who asserted an interest in an accepted conception of family life, such as traditional marriage, procreation, and childrearing, received substantial protection against state interference.").

82 *Griswold*, 381 U.S. at 485.

83 *See id.* at 485–86 ("Would we allow the police to search the sacred precincts of marital bedrooms for telltale signs of the use of contraceptives? The very idea is repulsive to the notions of privacy surrounding the marriage relationship.").

84 Hill, *supra* note 81, at 19.

85 *See, e.g.*, *Griswold*, 381 U.S. at 498–99 (Goldberg, J., concurring) ("[I]t should be said of the Court's holding today that it in no way interferes with a State's proper regulation of sexual promiscuity or misconduct."); *id.* at 505–06 (White, J., concurring) (taking no issue with the premise that outlawing contraception could deter immoral sexual relations, but conceding that "one is rather hard[-]pressed to explain how the ban on use by married persons in any way prevents use of such devices by persons engaging in illicit sexual relations and thereby contributes to the State's policy against such relationships"). The Court's most ardent defense of legal moralism probably came from Justice John Marshal Harlan II, who also concurred in *Griswold*, when he authored his oft-cited dissent in *Poe v. Ullman*, 367 U.S. 497 (1961). *Poe* involved the same issue and litigants as *Griswold*, but the suit was dismissed as non-justiciable at the time because the statute had yet to be enforced. *Id.* at 508–09. In dissent, Justice Harlan argued that the Connecticut statutes infringed the fundamental rights of married couples protected by the Fourteenth Amendment, but he simultaneously defended the permissibility of morals legislation:

> It is argued by appellants that the judgment, implicit in this statute—that the use of contraceptives by married couples is immoral—is an irrational one, that in effect it subjects them in a very important matter to the arbitrary whim of the legislature, and that it does so for no good purpose. . . . Yet the very inclusion of the category of morality among state concerns indicates that society is not limited

Yet, this constrained definition of privacy gave way to a countervailing interpretation in subsequent decades. That interpretation began to emerge in *Eisenstadt v. Baird*.[86] In *Eisenstadt*, the Court invalidated a Massachusetts law criminalizing the distribution of contraceptives to unmarried individuals.[87] Although the case was decided under the Equal Protection Clause of the Fourteenth Amendment,[88] the majority expressly extended the privacy rationale of *Griswold* to the individual person rather than the married couple, asserting that "[i]f the right to privacy means anything, it is the right of the *individual*, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child."[89] By shifting its privacy analysis away from familial relationships or spatial parameters and towards individual reproductive decision making, the Supreme Court began to conflate privacy with personal autonomy, adopting the notion that certain activities deserved protection "because of their significance to the self, to one's life pattern, or to one's sense of personal identity."[90] Essentially, the Court adopted the

> in its objects to the physical well-being of the community, but has traditionally concerned itself with the moral soundness of its people as well. Indeed to attempt a line between public behavior and that which is purely consensual or solitary would be to withdraw from community concern a range of subjects with which every society in civilized times has found it necessary to deal. The laws regarding marriage which provide both when the sexual powers may be used and the legal and societal context in which children are born and brought up, as well as laws forbidding adultery, fornication and homosexual practices which express the negative of the proposition, confining sexuality to lawful marriage, form a pattern so deeply pressed into the substance of our social life that any Constitutional doctrine in this area must build upon that basis.

Id. at 545–46 (Harlan, J., dissenting).

86 405 U.S. 438 (1972).

87 *Id.* at 440–41, 443.

88 *Id.* at 454–55.

89 *Id.* at 453.

90 Hill, *supra* note 81, at 19; *see also* Katherine M. Franke, *The Domesticated Liberty of* Lawrence v. Texas, 104 COLUM. L. REV. 1399, 1403–04 (2004) ("[T]he Court's privacy jurisprudence has evolved from addressing the disclosure of matters of private concern and governmental intrusion into private spaces to a less situated or territorial notion of protecting a zone of personal autonomy and decisional privacy."). Robert George viewed the distinction between decisional and spatial privacy as the primary fault line in sexual privacy jurisprudence:

> Liberal advocates trade heavily on the ambiguity between "decisional" privacy and "spatial" or "informational" privacy. In the traditional conception of the value of, and right to, privacy, it fundamentally concerns protected places and the control of personal information about oneself. Privacy thus conceived is protected by procedural guarantees of freedom from, for example, unreasonable searches and seizures, warrantless searches . . . , undue surveillance, wire-tapping, etc. The right to privacy, as traditionally understood, is not the substantive right to be legally free to perform certain "private" acts, the immorality of those acts notwithstanding.

GEORGE, *supra* note 9, at 211.

principles of autonomism championed by Ronald Dworkin and David A.J. Richards.

The following year, the adoption of this autonomy-based vision of privacy became readily apparent in *Roe v. Wade*.[91] The appellant in *Roe* challenged a Texas statute that criminalized the acquisition of an abortion in the absence of a threat to the life of the mother.[92] In striking down that statute, the Court grounded the right of privacy in the Due Process Clause of the Fourteenth Amendment, asserting that the right protected "activities related to marriage, procreation, contraception, family relationships, and child rearing and education."[93] Ultimately, in holding the abortion restrictions at issue unconstitutional, the Court declared that the right to privacy "is broad enough to encompass a woman's decision whether or not to terminate her pregnancy."[94]

This characterization of privacy reemerged in *Carey v. Population Services International*,[95] a case in which the Court affirmed the unconstitutionality of a New York law prohibiting the distribution of contraceptives to minors under the age of sixteen.[96] In light of "the constitutional protection of individual autonomy in matters of childbearing,"[97] the majority determined that New York's law could not survive strict scrutiny.[98] More importantly, though, the Court reinterpreted *Griswold* in light of *Eisenstadt* and *Roe*, holding that *Griswold* stood for the proposition that "the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State," thus redefining *Griswold* as a case about protecting personal autonomy.[99]

Finally, this jurisprudential trend culminated in *Planned Parenthood of Southeastern Pennsylvania v. Casey*,[100] a case involving a challenge to five provisions within Pennsylvania's Abortion Control Act of 1982.[101] In reaffirming the central holding of *Roe*,[102] the Court embraced the notion of liberty, rather than that of privacy, grounding the concept in a strong presumption of autonomy:

> [M]atters[ ] involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these mat-

91 410 U.S. 113 (1973).
92 *See id.* at 117–18.
93 *Id.* at 152–53 (citations omitted).
94 *Id.* at 153.
95 431 U.S. 678 (1977).
96 *See id.* at 682.
97 *Id.* at 687.
98 *See id.* at 688–91.
99 *Id.* at 687.
100 505 U.S. 833, 952–53 (1992) (plurality opinion).
101 *See id.* at 844.
102 *See id.* at 912–13.

> ters could not define the attributes of personhood were they formed under compulsion of the State.[103]

Thus, by the time *Lawrence* came before the Supreme Court, autonomy-based conceptions of privacy and liberty had been established with regard to reproduction.

Nonetheless, a right to reproductive privacy or liberty did not necessitate a right to sexual privacy or liberty. This became readily apparent in *Bowers v. Hardwick*,[104] a case involving a challenge to a Georgia law prohibiting consensual sodomy.[105] In his majority opinion, Justice White framed the central issue as "whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy."[106] Refusing to extend constitutional privacy rights to the criminalized activity, Justice White noted that "[n]o connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated"[107] and held that no fundamental right to homosexual sodomy existed.[108] Equally important, the majority rejected the respondent's claim that the law failed rational basis review because it was motivated by morality, asserting that "[t]he law . . . 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."[109] The *Bowers* Court explicitly upheld morality as a valid basis for legislation, and it refused to extend its reproductive privacy precedent to sexual freedom.[110]

Bowers remained good law until *Lawrence v. Texas* was decided in 2003. In *Lawrence*, the two petitioners—John Geddes Lawrence and Tyrone Garner—challenged their prosecution under a Texas statute that criminalized anal sex between men.[111] In adjudicating that claim, Justice Kennedy's

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103 *Id.* at 851.

104 478 U.S. 186 (1986).

105 *See id.* at 187–88.

106 *Id.* at 190.

107 *Id.* at 191.

108 *See id.* at 192.

109 *Id.* at 196.

110 *Bowers* even appeared to limit the scope of spatial privacy recognized in *Griswold*. The Court noted,

> Plainly enough, otherwise illegal conduct is not always immunized whenever it occurs in the home. Victimless crimes, such as the possession and use of illegal drugs, do not escape the law where they are committed at home. . . . And if respondent's submission is limited to the voluntary sexual conduct between consenting adults, it would be difficult, except by fiat, to limit the claimed right to homosexual conduct while leaving exposed to prosecution adultery, incest, and other sexual crimes even though they are committed in the home. We are unwilling to start down that road.

Id. at 195–96.

111 Lawrence v. Texas, 539 U.S. 558, 562–63 (2003).

majority opinion focused on liberty rather than privacy.[112] This liberty "extend[ed] beyond spatial bounds" and "presume[d] an autonomy of self that includes freedom of thought, belief, expression, and certain intimate conduct."[113] In overruling *Bowers*, the Court held that the liberty interest protected by the Fourteenth Amendment encompassed "two adults who, with full and mutual consent from each other, engaged in sexual practices common to a homosexual lifestyle" because "[t]he State cannot demean their existence or control their destiny by making their private sexual conduct a crime."[114]

Furthermore, the majority opinion seemingly addressed the very premise of legislating morality, framing the issue as "whether the majority may use the power of the State to enforce [ethical or moral] views on the whole society through the operation of the criminal law."[115] The answer appeared to be a resounding "no," as the Court declared that "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."[116] With such clear language, the death of legal moralism seemed at hand.

III. A Limited Vision of Liberty

Following *Lawrence*, various commentators thought that the case would usher in an end to the legislation of morality.[117] Instead, lower courts interpreted *Lawrence* as allowing for some accommodation of public morality.[118] Consequently, a reevaluation of the case's basic import is in order.

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112 *See id.* at 562 ("Liberty protects the person from unwarranted government intrusions into a dwelling or other private places. . . . And there are other spheres of our lives and existence, outside the home, where the State should not be a dominant presence.").

113 *Id.*

114 *Id.* at 578.

115 *Id.* at 571.

116 *Id.* at 577 (quoting Bowers v. Hardwick, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)).

117 *See* Sonu Bedi, *Repudiating Morals Legislation: Rendering the Constitutional Right to Privacy Obsolete*, 53 Clev. St. L. Rev. 447, 454–55 (2005) (interpreting *Lawrence* as a repudiation of morals legislation); Bernard E. Harcourt, *Forward: "You Are Entering a Gay and Lesbian Free Zone": On the Radical Dissents of Justice Scalia and Other (Post-) Queers [Raising Questions About* Lawrence*, Sex Wars, and the Criminal Law]*, 94 J. Crim. L. & Criminology 503, 503–04 (2004) ("[*Lawrence*] is the *coup de grâce* to legal moralism administered after a prolonged, brutish, tedious, and debilitating struggle against liberal legalism in its various criminal law representations."); J. Kelly Strader, Lawrence*'s Criminal Law*, 16 Berkeley J. Crim. L. 41, 54 (2011) (asserting that *Lawrence* reflects a harm principle in which "morality is not an adequate or sufficient basis for criminalization"); Eric Tennen, *Is the Constitution in Harm's Way? Substantive Due Process and Criminal Law*, 8 Boalt J. Crim. L. 3, 4–5 (2004) (arguing that *Lawrence* concludes a long line of cases that incorporate the harm principle in substantive criminal law).

118 *See infra* note 131.

For all the discussion of liberty and autonomy, as well as Justice Kennedy's remark indicating that the preservation of morality was an insufficient reason to uphold the Texas statute, a close reading of *Lawrence* reveals a remarkable undercurrent of restraint. As asserted by Katherine M. Franke, "the liberty principle upon which the opinion rests is less expansive, rather geographized, and, in the end, domesticated. It is not the synonym of a robust liberal concept of freedom."[119] The "domestication" to which Franke and other commentators refer stems from Justice Kennedy's equation of the protected liberty interest to personal relationships, rather than to sexual relations themselves. The criminal sexual act at issue in *Lawrence* was not depicted in isolation, but rather as a component of something more meaningful:

> [T]he [*Bowers*] Court[ ] . . . fail[ed] to appreciate the extent of the liberty at stake. To say that the issue in *Bowers* was simply the right to engage in certain sexual conduct demeans the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.[120]

The *Lawrence* majority went on to declare that "[t]he statutes . . . seek to control a personal *relationship* that, whether or not entitled to formal recognition in the law, is within the liberty of persons to choose without being punished as criminals."[121] Finally, the Court noted that "[w]hen 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*."[122]

In many respects, this language parrots that of *Griswold*, which emphasized protecting the marital relationship rather than the use of contraception itself.[123] This has led some commentators to note that the liberty characterized by Justice Kennedy is constrained within a context marked by monogamy and intimacy:

> Now gay men are portrayed as domesticated creatures, settling down into marital-like relationships in which they can both cultivate and nurture desires for exclusivity, fidelity, and longevity in place of other more explicitly erotic desires. . . . The price of the victory in *Lawrence* has been to trade sexuality for domesticity—a high price indeed, and a difficult spot from which to build a politics of sexuality.[124]

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119 Franke, *supra* note 90, at 1401.

120 *Lawrence*, 539 U.S. at 567.

121 *Id.* (emphasis added).

122 *Id.* (emphasis added).

123 *See* Griswold v. Connecticut, 381 U.S. 479, 486 (1965) ("Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects.").

124 Franke, *supra* note 90, at 1408–09; *accord* Laura A. Rosenbury & Jennifer E. Rothman, *Sex In and Out of Intimacy*, 59 EMORY L.J. 809, 820 (2010) ("[T]he language of the [*Lawrence*] majority opinion suggests that sex is worthy of constitutional protection only when it has the potential to further emotional intimacy."); Teemu Ruskola, *Gay Rights Versus Queer Theory: What is Left of Sodomy After* Lawrence v. Texas?, 23 SOC. TEXT 235, 239

Essentially, the decision reconstitutes the associational privacy rationale of *Griswold* by applying a "romantic rubric . . . [that] replaces marriage and procreation with a new ground for restricting sexual conduct—the promotion of emotional intimacy."[125] The Court's assumption regarding the existence of a relationship is particularly fascinating in light of the lack of evidence to support such an assertion.[126] This may suggest a deliberate attempt by Justice Kennedy to align his conception of liberty with prevailing social norms. Indeed, some lower courts have even applied this relationship paradigm in limiting *Lawrence*'s reach.[127]

Furthermore, the "geographization" to which Professor Franke refers adds another limitation to Justice Kennedy's vision of liberty—a spatial constraint. The majority opinion repeatedly emphasized the private nature of the activity at issue in *Lawrence*, "acknowledg[ing] that adults may choose to enter upon this relationship in the *confines of their homes* and their own *private* lives and still retain their dignity as free persons."[128] Additionally, after outlining the liberty interests used to invalidate the Texas statute, Justice Ken-

(2005) ("[Justice Kennedy's] rhetoric leaves little or no justification for protecting less-than-transcendental sex that is not part of an ongoing relationship. In the end, the crucial rhetorical limitation of *Lawrence* is precisely its inability, or refusal, to imagine (legitimate) homosexual sex that does not take place in a relationship and does not connote intimacy."); Mark Strasser, *Monogamy, Licentiousness, Desuetude and Mere Tolerance: The Multiple Misinterpretations of* Lawrence v. Texas, 15 S. CAL. REV. L. & WOMEN'S STUD. 95, 98 (2005) ("Much of the Court's focus in *Lawrence* was on same-sex relationships rather than on same-sex relations.").

125 *See* Rosenbury & Rothman, *supra* note 124, at 825; *see also id.* at 827 ("Underlying the language and rationale of *Lawrence* is the notion that without sex a relationship between adults cannot reach the pinnacle of intimacy represented archetypically in the marital bond.").

126 *See* DALE CARPENTER, FLAGRANT CONDUCT 280–81 (2012) (recounting the background facts of *Lawrence* by interviewing the primary actors involved with the case and ultimately determining that there was no relationship between the defendants). *See generally* Ariela R. Dubler, *Immoral Purposes: Marriage and the Genus of Illicit Sex*, 115 YALE L.J. 756, 807 (2006) ("No doubt, one can dispute whether or not Lawrence and Garner in fact understood their sexual encounter as part of an enduring personal bond."); Franke, *supra* note 90, at 1408 ("[T]he Court took it as given that Lawrence and Garner were in a relationship, and the fact of that relationship does important normative work in the opinion."); Rosenbury & Rothman, *supra* note 124, at 824–25 ("The defendants in *Lawrence* . . . did not hold themselves out as a couple nor is there any evidence that they intended to pursue an ongoing relationship comparable to dating or marriage. In fact, one of the men was 'romantically involved' with another man at the time of the arrest, and it was that romantic partner who called the police.").

127 *See infra* note 131.

128 Lawrence v. Texas, 539 U.S. 558, 567 (2003) (emphasis added*); see also id.* at 572 (citing "an emerging awareness that liberty gives substantial protection to adult persons in deciding how to conduct their *private* lives in matters pertaining to sex" (emphasis added)); *id.* at 578 ("The petitioners are entitled to respect for their *private* lives. The State cannot demean their existence or control their destiny by making their *private* sexual conduct a crime." (emphasis added)).

nedy immediately retreated by announcing a series of what appeared to be exceptions to his holding:

> The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution. It does not involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter.[129]

Some scholars have argued that privatizing the sexual activity criminalized in *Lawrence* reinforces societal disapproval of those physical relations.[130] Additionally, various lower courts have applied these exceptions broadly in order to uphold the prosecution of some consensual sexual activities and even to reaffirm a state's legitimate interest in legislating morality.[131] Accordingly, a libertarian revolution in public morality has apparently failed to take hold, partly because Justice Kennedy included associational and spatial limitations in his opinion, harkening back to *Griswold*.[132]

IV. Justice Kennedy and the Constraint of Dignity

Justice Kennedy's *Lawrence* opinion should not be read as a full-fledged endorsement of liberalism or autonomism. A close reading of the language he employed in *Lawrence* indicates an emphasis on personal dignity rather

129 *Id.*

130 *See, e.g.*, Bedi, *supra* note 117, at 449 ("The appeal to privacy . . . stigmatizes the act as deviant and abnormal. By forcing the act into the bedroom (this is the only way it can be protected), the act becomes unworthy of public consumption."); Franke, *supra* note 90, at 1405–06 (describing a South African constitutional court case acknowledging that privacy arguments "tend[ ] to reinforce the idea that sodomy is something to be shamefully hidden in the confines of the private bedroom").

131 *See, e.g.*, Muth v. Frank, 412 F.3d 808, 817 (7th Cir. 2005) (asserting that states could criminalize adult consensual incest because *Lawrence* "did not announce . . . a fundamental right . . . for adults to engage in all manner of consensual sexual conduct" and merely applied to homosexual sodomy); United States v. Palfrey, 499 F. Supp. 2d 34, 40–41 (D.D.C. 2007) (holding that *Lawrence* did not undermine laws criminalizing prostitution because the language of the case specifically exempted public and commercial activity from review); State v. Van, 688 N.W.2d 600, 614–15 (Neb. 2004) (holding that an assault prosecution stemming from sadomasochistic sexual activity did not violate *Lawrence* because the existence of consent was in question); Singson v. Commonwealth, 621 S.E.2d 682, 685–86 (Va. Ct. App. 2005) (holding that prosecution for solicitation of oral sex in public restroom did not run afoul of *Lawrence* due to its language excluding public sexual activity); *see also* Williams v. Morgan, 478 F.3d 1316, 1322–23 (11th Cir. 2007) (upholding a criminal ban on the sale of sex toys by interpreting *Lawrence* to preclude public morality as a government interest only with regard to private and non-commercial sexual activity, not public or commercial activity); United States v. Stagliano, 693 F. Supp. 2d 25, 37–38 (D.D.C. 2010) (holding that prosecution for the distribution of obscenity does not violate *Lawrence* because the liberty interest in that case applied to forming meaningful relationships, not sexual privacy, and that morality was still a legitimate government interest with regard to public conduct like the dissemination of obscenity).

132 *See* Strasser, *supra* note 124, at 98–99 (arguing that the Court used these limitations to place *Lawrence* in the same strand of substantive due process as *Griswold*).

than on sexual liberty or autonomy.[133] Justice Kennedy repeatedly connected the liberty interest in that case to the dignity of the defendants.[134] Essentially, preserving the liberty of Lawrence and Garner was instrumental in maintaining their dignity.

"Dignity" is defined as "the quality or state of being worthy."[135] As Neomi Rao explained in *Three Concepts of Dignity in Constitutional Law*, "dignity" also tends to be an ambiguous legal concept.[136] Rao identified three versions of dignity that courts apply in constitutional opinions. One form of dignity is derived from the intrinsic worth and personhood of the individual, and it applies equally to all human beings.[137] This "inherent dignity," especially popular in United States constitutional law, is usually related to negative rights that "support[ ] individual autonomy and freedom from state interference."[138] It is protected by allowing human beings to make uncoerced choices that affect their destiny.[139] Due to the need to respect autonomy, this conception of dignity must remain neutral and pluralistic, providing no substantive value judgment as to what constitutes "the good."[140] As such, inherent dignity is intertwined with the jurisprudential theories espoused by Dworkin and Richards. Another version of dignity Rao identified is "dignity as recognition," stemming from a "desire to be recognized, to have the political and social community acknowledge and respect one's personality and dignity."[141] Here, an individual's worth is determined by the extent to which that person is accepted by his or her community. This vision of dignity demands not only equal treatment of individuals by the state, but treatment that recognizes the worth of individuals and their choices.[142]

Rao concluded that both inherent dignity and dignity as recognition were invoked in the *Lawrence* opinion.[143] However, when Justice Kennedy's references to dignity are viewed in light of his constrained depiction of sexual liberty, it becomes apparent that a third variation of dignity was in play. Rao referred to this as "substantive" or "positive" dignity:

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133 *See* Francis Curren ed., *Sexual Privacy After* Lawrence v. Texas, 12 GEO. J. GENDER & L. 333, 336–37 (2011).

134 *See, e.g.*, *Lawrence*, 539 U.S. at 567 ("It suffices for us to acknowledge that adults may choose to enter upon this relationship in the confines of their homes and their own private lives and still retain their *dignity* as free persons." (emphasis added)); *id.* at 578 ("The petitioners are entitled to respect for their private lives. The State cannot *demean* their existence or control their destiny by making their private sexual conduct a crime." (emphasis added)).

135 WEBSTER'S THIRD NEW INTERNATIONAL DICTIONARY 632 (1961).

136 *See* Neomi Rao, *Three Concepts of Dignity in Constitutional Law*, 86 NOTRE DAME L. REV. 183, 186 (2011).

137 *See id.* at 196–99.

138 *Id.* at 203.

139 *See id.* at 203–04.

140 *See id.* at 205.

141 *Id.* at 243.

142 *See id.* at 249.

143 *See id.* at 212, 257.

> By contrast to inherent or intrinsic dignity, positive conceptions of dignity promote substantive judgments about the good life. Dignity here stands for what is valuable for individuals and society at large. Constitutional courts sometimes use this conception of dignity to justify political constraints and to promote values such as community or public morality. In this line of reasoning, a "proper" conception of dignity means guiding the individual and society toward particular dignified choices. These forms of dignity will often conflict with the dignity of the autonomous individual.[144]

Such dignity is expressly communitarian and contingent on social norms rather than the desires or choices of individuals.[145] An individual may gain or lose dignity depending on the degree of conformity to a particular communal virtue.[146] Indeed, Rao noted that consent to partake in an undignified activity was immaterial, citing instances in which courts justified criminal sanctions regarding obscenity and prostitution in order to protect individuals from making the poor and degrading choice of producing pornography or engaging in prostitution.[147] Thus, this substantive dignity is definitively paternalistic and even potentially coercive.

As explained above, Justice Kennedy depicted sexual activity as legitimate and worthy of constitutional protection only when it was undertaken in private and when it furthered emotional intimacy or romance. This in and of itself reflected a moral judgment about the proper context of sexual relations and thereby connected sexual activity to substantive dignity. By equating the sexual relationship of the defendants to that of a married couple, Justice Kennedy implied that the sexual acts in question derived their worth from their marital-esque context and that sexual relations were dignified as long as they were private, intimate, and monogamous—essentially confined within associational and spatial boundaries. Consequently, Justice Kennedy was criticized by some commentators for establishing a sexual paradigm that was

144 *Id.* at 221.

145 *See id.* at 222.

146 *See id.* at 224.

147 *See id.* at 228–29. Although Rao cites Canadian cases to exemplify the use of substantive dignity to restrict prostitution and pornography, a similar phenomenon occurred in some United States Supreme Court cases addressing obscenity. For instance, in *Paris Adult Theatre I v. Slaton*, 413 U.S. 49 (1973), Chief Justice Burger invoked substantive dignity as a rationale for restricting obscenity:

> If we accept the unprovable assumption that a complete education requires the reading of certain books, and the well nigh universal belief that good books, plays, and art lift the spirit, improve the mind, enrich the human personality, and develop character, can we then say that a state legislature may not act on the corollary assumption that commerce in obscene books, or public exhibitions focused on obscene conduct, have a tendency to exert a corrupting or debasing impact leading to antisocial behavior? . . . The sum of experience . . . affords an ample basis for legislatures to conclude that a sensitive, key relationship of human existence, central to family life, community welfare, and the development of human personality, can be debased and distorted by crass commercial exploitation of sex.

Id. at 63 (citations omitted).

bourgeois and heteronormative.[148] To them, his opinion stood for the proposition that "[t]he Court, and the Constitution, will respect . . . sex lives, but on condition that [those] sex lives be respectable."[149]

Nonetheless, *Lawrence* was not the first time that Justice Kennedy invoked or agreed with a paternalistic or substantive form of dignity. For instance, Justice Kennedy joined Justice Rehnquist's majority opinion in *Washington v. Glucksberg*.[150] In that case, the Court rejected a Fourteenth Amendment challenge to a Washington law that made assisting suicide a crime.[151] The respondents asserted that the liberty protected by the Fourteenth Amendment encompassed the individual decision to die with dignity, hence explicitly conflating dignity with autonomy.[152] However, the Court rejected this perspective. It held that Washington had a legitimate interest in criminalizing assisted suicide in order to preserve human life literally and symbolically,[153] to protect "the integrity and ethics of the medical profession,"[154] and to protect vulnerable populations like the terminally ill or disabled.[155] Viewed in another light, the decision can be understood as preserving the dignity of human life, the dignity of medical professionals, the dignity of the physician-patient relationship, and the dignity of sick or disabled individuals. Each of the interests the Court listed embodied a substantive value judgment that ultimately outweighed autonomy in the name of a public good, affirming principles broader than mere harm to non-consenting parties.

Similarly, Justice Kennedy authored the majority opinion in *Gonzales v. Carhart*,[156] a post–*Lawrence* case that addressed the constitutionality of the Partial-Birth Abortion Ban Act of 2003.[157] In upholding the law, Justice Kennedy emphasized the gruesome nature of the procedure, known as intact dilation and evacuation, in which a fetus is delivered until its head is lodged in the cervix, at which point its skull is pierced with scissors or crushed with forceps.[158] In light of the procedure's similarity to infanticide, Justice Kennedy asserted that Congress had a legitimate interest in outlawing the proce-

148 *See, e.g.*, Rosenbury & Rothman, *supra* note 124, at 839 ("The sex-in-service-to-intimacy model . . . can harm individuals living both within and outside of coupled intimacy by sustaining the current systems of gender and heteronormativity[,] . . . producing shame and guilt about desires and practices that do not conform to the state's vision of appropriate sex . . . ."). Rosenbury and Rothman specifically cite casual sex with multiple partners or the "one-night stand[ ]" as examples of sexual activity that would fall outside of Justice Kennedy's paradigm. *Id.* at 838.

149 Ruskola, *supra* note 124, at 239.

150 521 U.S. 702 (1997).

151 *See id.* at 705–06.

152 *See id.* at 726.

153 *See id.* at 728–29.

154 *Id.* at 731.

155 *See id.* at 731–32.

156 550 U.S. 124 (2007).

157 *See id.* at 132.

158 *See id.* at 151.

dure to prevent the coarsening of society's approach to the value of human life, as well as to distinguish abortion from infanticide.[159] Furthermore, Justice Kennedy noted that Congress had a legitimate interest in protecting the mother-child relationship by apprising the mother of the gravity of the procedure she sought.[160] Once again, the Court applied a value judgment, opting to weigh the dignity of potential human life and the dignity of motherhood over personal autonomy, thus invoking a substantive conception of dignity.[161]

The substantive dignity Justice Kennedy associated with sexual relations in *Lawrence* cannot be separated from morality. His view of sexuality confined to monogamous relationships and private spaces is similar to the view of legal moralists who argue that the dignity of sexual relationships should be protected from disconnecting the sexual act from love or intimacy.[162] Furthermore, although Catholicism deems same-sex sexual activity to be immoral, Justice Kennedy's broader view regarding the dignity of the sexual act could even be characterized as embodying distinctly Catholic overtones.[163] Consequently, it cannot be argued that the decision in *Lawrence* reflected an end to legal moralism. Justice Kennedy's direct application of a paternalistic and substantive version of dignity to sexual relations directly undermines the central premises of the liberalism advocated by Mill, Hart, and Feinberg, as well as the autonomism supported by Dworkin and Rich-

159 *See id.* at 157–58.

160 *See id.* at 159.

161 Indeed, in her *Carhart* dissent, Justice Ginsburg asserted that the majority based its opinion on "moral concerns"—something that she argued was explicitly barred by *Lawrence*. *See id.* at 182 (Ginsburg, J., dissenting).

162 *See, e.g.*, GEORGE, *supra* note 9, at 99 ("The human interest in dignity and beauty in sexual relationships, and in the creation and maintenance of a 'cultural structure' which supports these goods, is a 'collective' interest . . . ."); Clor, *supra* note 2, at 36–37 ("The traditional public morality that condemns the pornographic is part of an ethos associating sexuality with love or affection—or, at least, regarding it as a relation among persons, not just between bodies. So it labels as indecent the depersonalization, and hence dehumanization, of erotic life and its participants.").

163 In his encyclical *Evangelium Vitae*, Pope John Paul II warned that a vision of freedom separated from tradition and authority would devolve into relativism, resulting in society "becom[ing] a mass of individuals placed side by side, but without any mutual bonds." JOHN PAUL II, EVANGELIUM VITAE ¶ 20 (1995). This would ultimately result in a depersonalized sexuality devoid of all love:

> Within this same cultural climate, the body is no longer perceived as a properly personal reality, a sign and place of relations with others, with God and with the world. It is reduced to pure materiality: it is simply a complex of organs, functions and energies to be used according to the sole criteria of pleasure and efficiency. Consequently, sexuality too is depersonalized and exploited: from being the sign, place and language of love, that is, of the gift of self and acceptance of another, . . . it increasingly becomes the occasion and instrument for self-assertion and the selfish satisfaction of personal desires and instincts. Thus the original import of human sexuality is distorted and falsified . . . .

Id. ¶ 23.

ards. Since Justice Kennedy invoked a liberty interest more grounded in the associational and spatial privacy of *Griswold* than the personal autonomy of *Eisenstadt*, *Roe*, and *Casey*, the advancement of unimpeded liberty or autonomy in all matters of sexual gratification cannot be the primary intent of his *Lawrence* opinion. Instead, Justice Kennedy seemed far more concerned with the creation of a safe space in which same-sex couples could strengthen their emotional bonds and love. Permitting a degree of sexual freedom is merely instrumental in achieving those ends. This is not necessarily at odds with legal moralism or the advancement of public morality. As explained in Part I, legal moralists like Stephen, Devlin, and George each recognized that the enforcement of public morality had to allow a degree of privacy in order to protect certain intimate relationships.[164] As social norms change, the determination of which relationships are worthy of that protection will change as well. Perhaps *Lawrence* merely reflected that change.

Consequently, notwithstanding Justice Kennedy's statement regarding the impropriety of enforcing morality, nothing in the liberty interest he characterized precludes the enforcement of public morality. Due to his emphasis on substantive dignity, Justice Kennedy's invocation of liberty is incompatible with liberalism and autonomism because it imposes associational and spatial constraints on sexual activity that go beyond mere avoidance of harm, and it embodies a distinct value judgment as to the appropriate context of sexual activity independent of individual choice.

CONCLUSION

Of the great philosophical and jurisprudential struggles that have emerged over the past few centuries, perhaps none has raised such passionate debate as the one created by the tension between the rights of the individual and the dictates of a communal morality. After the Supreme Court struck down a Texas statute prohibiting private and consensual homosexual sodomy in *Lawrence v. Texas*, some believed that the enforcement of public morality was no longer a legitimate state interest. And yet, to the disappointment of many civil libertarians, *Lawrence* did not result in the national legalization of drug possession, prostitution, or other "victimless" crimes, nor did it result in the nullification of all laws justified on the basis of public morality. Instead, it appears as though its general effect was narrowly confined to the legal struggles over gay rights.

This Note argues that *Lawrence*'s limited impact on the legislation of public morality should not have been surprising, because the case never stood for the proposition that morality could not be legislated. When the values underlying the decision are examined, it becomes clear that the liberty interest Justice Kennedy invoked was one in which sexual activity was restricted by associational and spatial limitations. Most importantly, Justice Kennedy tied this liberty to a substantive vision of dignity present in other opinions written and joined by Justice Kennedy. This substantive dignity

164 *See supra* notes 21, 33, 70, and accompanying text.

reflects a moral paternalism that conflicts with the liberalism and autonomism championed by civil libertarians. Ultimately, Justice Kennedy's opinion recognized the value of sexual relations in private as a means of furthering emotional intimacy and partnership, rather than deeming sexual liberty as valuable in itself. This value judgment was effectively the expression of a moral judgment regarding the appropriate context for sexual relations, so it could not serve as a categorical indictment of morals legislation. Regardless of the way courts will interpret *Lawrence* in the future, though, one thing is certain: the debate over legislating morality is unlikely to go away anytime soon.