

LAWRENCE BEYOND GAY RIGHTS: TAKING THE RATIONALITY REQUIREMENT FOR JUSTIFYING CRIMINAL STATUTES SERIOUSLY

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I. INTRODUCTION

Probably the most widely noted Supreme Court decision of the Court's 2002-2003 term was *Lawrence v. Texas*.¹ In *Lawrence*, the Court held that a Texas statute criminalizing homosexual sodomy was unconstitutional.² The decision overruled the Court's 1986 decision in *Bowers v. Hardwick*,³ which upheld a Georgia statute that on its face criminalized all sodomy, both heterosexual and homosexual, but focused almost entirely on the statute as applied to homosexual behavior.⁴ Five of

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

2. *Id.* at 578-79.

3. *Id.* at 578 (discussing *Bowers v. Hardwick*, 478 U.S. 186 (1986)).

4. *Bowers v. Hardwick*, 478 U.S. at 188 n.1, 192. The Georgia statute challenged in *Bowers* provided: "A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the mouth or anus of another." GA. CODE ANN. § 16-6-2 (1984), *quoted in* *Bowers v. Hardwick*, 478 U.S. at 188 n.1. Justice White's opinion for the Court, however,

the six justices in the *Lawrence* majority relied on the Due Process Clause of the Fourteenth Amendment;⁵ the sixth, Justice O'Connor, invoked the Amendment's Equal Protection Clause.⁶

From the day it was decided, *Lawrence* has attracted an enormous amount of commentary, both in scholarly journals and the popular media.⁷ One might ask, with considerable justification, why yet another article about the case and its implications could be expected to add anything of value to the literature. A large majority of the commentary on *Lawrence* has focused, quite unsurprisingly, on its implications for the further evolution of the law with respect to the rights of gays and lesbians.⁸ While these questions may be the most immediate ones presented by the decision, the underlying rationale behind *Lawrence* has potentially wider implications.

Not that long ago it was common for lawyers to assume that constitutional rights claims could be disposed of by placing the claim at issue into one of two, or perhaps three, categories.⁹ Once this was done, the rest was easy: two of the categories, claims entitled to "strict scrutiny" and those entitled to mere "low-level scrutiny," would lead to essentially automatic results.¹⁰ If a claim was one that subjected the government to strict scrutiny, the claim would succeed; if it subjected the statute or government practice to low-level scrutiny, the government would prevail.¹¹

The third category, claims calling for the courts to apply "intermediate scrutiny," was far less determinate,¹² but because that balancing test was reserved for only a few types of cases, it did not seem to

characterized the respondent's argument as asking the Court to "announce . . . a fundamental right to engage in homosexual sodomy." *Bowers v. Hardwick*, 478 U.S. at 191.

5. *Lawrence v. Texas*, 539 U.S. at 564.

6. *Id.* at 579-85 (O'Connor, J., concurring).

7. See generally Katherine M. Franke, *The Domesticated Liberty of Lawrence v. Texas*, 104 COLUM. L. REV. 1399, 1399-1401 (2004) (noting the comments of advocacy groups and gay rights scholars); *Lawrence v. Texas Symposium*, 46 S. TEX. L. REV. 245 (2004) (discussing the legal ramifications of and history behind the *Lawrence* decision).

8. See generally Robyn Wiegman, Comment, *Queer Theory, Feminism, and the Law*, 11 DUKE J. GENDER L. & POL'Y 93 (2004).

9. Donald L. Beschle, *Kant's Categorical Imperative: An Unspoken Factor in Constitutional Rights Balancing*, 31 PEPP. L. REV. 949, 958-59 (2004).

10. *Id.*

11. *Id.*

12. *Id.*

complicate the analysis that much.¹³ The creation of the third category was perhaps the first clear indication that the Supreme Court was becoming dissatisfied with the apparent all-or-nothing approach presented by the other two options.

Lawrence is one of several recent cases indicating that the certainty of the dichotomy between strict scrutiny and low-level scrutiny is breaking down.¹⁴ The breakdown of the familiar dichotomy between constitutional claims deserving strict scrutiny and those entitled only to low-level review shifts the focus of analysis from trying to weigh the importance of the right asserted by the individual to the strength of the government's justification for the challenged statute.¹⁵ When the challenge is to a criminal prohibition, the individual's liberty is, by definition, at stake. Until recently, careful review, indeed any meaningful review, of the substantive legitimacy of criminal statutes was essentially nonexistent unless a narrow category of "fundamental rights" were implicated.¹⁶

Lawrence, however, strongly suggests that this will no longer be the case. The mere enactment of a criminal statute will be insufficient to establish that it is not an arbitrary act, and is therefore a violation of due process. At the same time, however, we can expect that the vast majority of criminal statutes will easily satisfy substantive due process review. Critics of *Lawrence*, most notably Justice Scalia, have warned that it threatens a wide range of criminal prohibitions, and that its analysis has no logical stopping point.¹⁷ Is this really the case?

If *Lawrence* is not confined to its facts, and to the specific question of the due process rights of gays and lesbians, a framework for determining just how far its reasoning alters current analysis must be developed. Perhaps just as important is to explain how *Lawrence* does not give courts a license to overturn a wide range of criminal statutes, but rather only holds legislatures, in a meaningful way, to the requirement of rationality. This

13. See *id.* at 959 (noting that the Supreme Court has refused to apply intermediate scrutiny in cases involving affirmative action, but arguing that "the intermediate scrutiny test has sometimes been applied in ways that seem quite similar to traditional strict scrutiny, further blurring the distinction") (footnote omitted).

14. See discussion *infra* notes 103-28 and accompanying text.

15. ERWIN CHEMERINSKY, CONSTITUTIONAL LAW: PRINCIPLES AND POLICIES § 9.2, at 651-59 (2d ed. 2002).

16. See discussion *infra* notes 48-52 and accompanying text.

17. See *Lawrence v. Texas*, 539 U.S. 558, 589-90 (2003) (Scalia, J., dissenting) (asserting that the Court's decision calls into question "[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity").

Article attempts to provide a framework and explanation, by drawing heavily on the work of Joel Feinberg, who attempted to articulate a comprehensive liberal analysis of the moral basis of criminal punishment.¹⁸ If this analysis is valid, *Lawrence* may be seen in the future as having a significance far beyond its obvious implications for homosexual rights.

II. *LAWRENCE* AND ITS PREDECESSORS

To fully understand *Lawrence*, it is necessary to understand its predecessor, *Bowers v. Hardwick*.¹⁹ *Lawrence* not only overruled *Bowers*,²⁰ it is in several respects almost a perfectly reversed mirror image of the earlier decision. In *Bowers*, the Court addressed a Georgia statute that criminalized sodomy, whether engaged in by heterosexuals or homosexuals.²¹ In *Lawrence*, the Texas statute in question prohibited only homosexual sodomy.²²

Nevertheless, the *Bowers* opinion addressed homosexual sodomy only.²³ This may be attributed to the fact that the challenge to the statute was brought by gay plaintiffs,²⁴ but may also reflect the reluctance of the *Bowers* majority to risk defection if the opinion, in apparent tension with earlier cases dealing with sexual intimacy,²⁵ were to explicitly uphold

18. 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984) [hereinafter FEINBERG, HARM TO OTHERS]; 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS (1985) [hereinafter FEINBERG, OFFENSE TO OTHERS]; 3 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO SELF (1986) [hereinafter FEINBERG, HARM TO SELF]; 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING (1988) [hereinafter FEINBERG, HARMLESS WRONGDOING].

19. *Bowers v. Hardwick*, 478 U.S. 186 (1986).

20. *Lawrence v. Texas*, 539 U.S. at 578.

21. *Bowers v. Hardwick*, 478 U.S. at 188.

22. *Lawrence v. Texas*, 539 U.S. at 563. The statutory provision at issue in *Lawrence* provided: "A person commits an offense if he engages in deviate sexual intercourse with another individual of the same sex." TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003). "Deviate sexual intercourse" was defined 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.* § 21.01(1), quoted in *Lawrence v. Texas*, 539 U.S. at 563.

23. *Bowers v. Hardwick*, 478 U.S. at 190 ("The issue presented is whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy . . .").

24. *Id.* at 188-89.

25. *Id.* at 190. The Court stated as follows:

We first register our disagreement with the Court of Appeals and with

prohibitions on heterosexual sodomy.

While the *Bowers* opinion treated a sexual orientation neutral statute as if it dealt only with homosexual activity,²⁶ the *Lawrence* majority, with the exception of concurring Justice O'Connor,²⁷ dealt with a statute targeting gays by invalidating all sodomy statutes, regardless of their scope.²⁸ Thus, while the immediate and most obvious beneficiaries of the decision were homosexuals, the implications of the decision reach much further, and, in fact, are not clearly limited to matters involving sexual conduct.

Writing for the Court, Justice Kennedy begins analysis of the issue by reviewing the Court's modern history of substantive due process holdings.²⁹ He detailed how *Griswold v. Connecticut*³⁰ established that a "right to

respondent that the Court's prior cases have construed the Constitution to confer a right of privacy that extends to homosexual sodomy The reach of this line of cases [has included rights] dealing with child rearing and education; with family relationships; with procreation; with marriage; with contraception; and with abortion

Accepting the decisions in those cases . . . we think it evident that none of the rights announced in these cases bears any resemblance to the claimed constitutional right of homosexuals to engage in acts of sodomy that is asserted in this case. No connection between family, marriage, or procreation on the one hand and homosexual activity on the other has been demonstrated

Id. (citations omitted).

26. *Id.* at 200 (Blackmun, J., dissenting) (noting the majority's narrow focus on homosexual activity despite the broad language of the Georgia statute).

27. *Lawrence v. Texas*, 539 U.S. 558, 582 (2003) (O'Connor, J., concurring). Justice O'Connor relied on the Equal Protection Clause, rather than the Due Process Clause: "Moral disapproval of [a] group, like a bare desire to harm the group, is an interest that is insufficient to satisfy rational basis review under the Equal Protection Clause." *Id.*

28. *Id.* at 574-75 (Kennedy, J.). The plurality reasoned:

As an alternative argument in this case, counsel for the petitioners and some *amici* contend that *Romer v. Evans* provides the basis for declaring the Texas statute invalid under the Equal Protection Clause. That is a tenable argument, but we conclude the instant case requires us to address whether *Bowers* itself has continuing validity. Were we to hold the statute invalid under the Equal Protection Clause some might question whether a prohibition would be valid if drawn differently, say, to prohibit the conduct both between same-sex and different-sex participants.

Id.

29. *Id.* at 564-66.

30. *Griswold v. Connecticut*, 381 U.S. 479 (1965).

privacy” was entitled to constitutional protection, and did so by focusing “on the marriage relation and the protected space of the marital bedroom.”³¹ In *Eisenstadt v. Baird*,³² the Court invalidated a Massachusetts statute prohibiting the distribution of contraceptives to unmarried persons.³³ While the *Eisenstadt* court focused on “the decision whether to bear or beget a child,”³⁴ drawing the case within the *Griswold* line,³⁵ Justice Kennedy characterized *Eisenstadt*, with some justification,³⁶ as involving “the right to make certain decisions regarding sexual conduct.”³⁷

*Roe v. Wade*³⁸ and other cases³⁹ followed, reaffirming and extending the scope of the privacy right, but *Bowers* refused to extend protection to homosexual activity.⁴⁰ A five-justice majority determined that history and tradition demonstrated no recognition of such activity as worthy of special protection and, therefore, neither strict nor any form of heightened scrutiny was called for.⁴¹

Perhaps most significant for what was to follow in *Lawrence*, however, was the *Bowers* majority’s brief analysis of the issue presented under the low-level scrutiny of the “rational basis” test.⁴² The Court found that traditional morality condemned homosexual activity, and the translation of traditional moral rules into criminal sanctions satisfied the

31. *Lawrence v. Texas*, 539 U.S. at 564-65.

32. *Eisenstadt v. Baird*, 405 U.S. 438 (1972).

33. *Id.* at 440-43.

34. *Id.* at 453.

35. *See id.* at 453-54 (analyzing the statute at issue in *Eisenstadt* in light of *Griswold*).

36. The emphasis in *Eisenstadt* on the potential for childbirth seems to ignore the obvious point that the state is not compelling anyone to risk bearing a child, but only seeking to eliminate the possibility of unmarried couples engaging in sexual activity free from the risk of pregnancy. Justice Kennedy’s characterization of *Eisenstadt* seems quite justified.

37. *Lawrence v. Texas*, 539 U.S. at 565.

38. *Roe v. Wade*, 410 U.S. 113 (1973).

39. *See, e.g.*, *Troxel v. Granville*, 530 U.S. 57, 72-75 (2000) (plurality opinion) (protecting the right of parents to make decisions concerning their children’s upbringing); *Planned Parenthood v. Casey*, 505 U.S. 833, 846, 869 (1992) (reaffirming and redefining the scope of a woman’s abortion right before viability); *Moore v. City of East Cleveland*, 431 U.S. 494, 504-06 (1977) (protecting the right to live with extended family members).

40. *See Bowers v. Hardwick*, 478 U.S. 186, 192 (1986).

41. *Id.* at 191-96.

42. *See id.* at 196 (devoting one paragraph to an application of the rational basis test).

requirement that government must have a legitimate purpose when infringing upon a person's liberty interest, and the requirement that the government action have a rational relationship to satisfy that interest.⁴³

In *Lawrence*, Justice Kennedy reviewed the history of Anglo-American law with respect to homosexuality, finding it to be somewhat more complex than the unambiguous condemnation outlined by the Court in *Bowers*.⁴⁴ Still, the Court did not go so far as to label consensual adult sexual activity, either heterosexual or homosexual, as a fundamental right calling for the protection afforded by the application of strict scrutiny.⁴⁵ Instead, "the most private human conduct, sexual behavior, and in the most private of places, the home," was described as "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."⁴⁶

Since *Griswold*, substantive due process cases have generally focused on whether the conduct at issue qualified for recognition as a fundamental right.⁴⁷ The failure of a claimant to establish the existence of a

43. *Id.* ("The 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.").

44. *Lawrence v. Texas*, 539 U.S. 558, 568-70 (2003). The Court explained that early American sodomy laws were not directed at homosexuals as such but instead sought to prohibit nonprocreative sexual activity more generally . . .

. . . .

. . . Instead of targeting relations between consenting adults in private, 19th-century sodomy prosecutions typically involved relations between men and minor girls or minor boys, relations between adults involving force, relations between adults implicating disparity in status, or relations between men and animals. . . .

. . . .

. . . [I]nfrequency [of prosecution] makes it difficult to say that society approved of a rigorous and systematic punishment of the consensual acts committed in private and by adults.

Id.

45. *See id.* at 567.

46. *Id.*

47. *See, e.g., Washington v. Glucksberg*, 521 U.S. 702, 723 (1997) (finding no fundamental right to assisted suicide); *Roe v. Wade*, 410 U.S. 113, 154 (1973) (finding a

fundamental right would almost invariably mean that the substantive due process claim would fail; the Court felt no need to discuss classifications beyond the dichotomy of fundamental rights and non-fundamental rights.⁴⁸ In cases involving procedural due process claims, the language and analysis were different. In order to warrant consideration of a claim of deprivation of procedural due process, one did not need to establish a fundamental right was at stake, but merely that the government was interfering with liberty or property.⁴⁹ Of course, this did not mean that the claim would succeed, but it would require the Court to balance the interests at stake to some degree,⁵⁰ rather than simply accepting the procedures provided by the state as adequate.⁵¹

fundamental right to abortion); *Loving v. Virginia*, 388 U.S. 1, 12 (1967) (finding that the right to marry is a fundamental right).

48. See, e.g., *Michael H. v. Gerald D.*, 491 U.S. 110, 127 (1989) (finding no fundamental right of a natural father to establish paternity of a child conceived with another man's wife); *Bowers v. Hardwick*, 478 U.S. at 191 (refusing to recognize "a fundamental right to engage in homosexual sodomy"); *Village of Belle Terre v. Borass*, 416 U.S. 1, 7-8 (1974) (noting there is no fundamental right of unrelated people to live together).

49. See, e.g., *Goss v. Lopez*, 419 U.S. 565, 574-76 (1975) (treating reputation as a liberty interest and "a student's legitimate entitlement to a public education a property interest"); *Perry v. Sinderman*, 408 U.S. 593, 601-03 (1972) (finding a property interest in "a teacher . . . who has held his position for a number of years [as granting] a legitimate claim for job tenure"); *Goldberg v. Kelly*, 397 U.S. 254, 262 n.8 (1970) (finding a property interest in continuation of public assistance payments).

50. The balancing test applied in procedural due process cases was set forth in *Mathews v. Eldridge*, 424 U.S. 319 (1976). The *Mathews* balancing test provides that

identification of the specific dictates of due process generally requires consideration of three distinct factors: First, the private interest that will be affected by the official action; second, the risk of an erroneous deprivation of such interest through the procedures used, and the probable value, if any, of additional or substitute procedural safeguards; and finally, the Government's interest, including the function involved and the fiscal and administrative burdens that the additional or substitute procedural requirement would entail.

Id. at 335.

51. In *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), the Court rejected the argument that a state could successfully argue that a set of inadequate termination procedures could be incorporated into the definition of a public employee's property right. *Cleveland Bd. of Educ. v. Loudermill*, 470 U.S. at 539-41. In an earlier case, the Court suggested that the government could avoid the need for any procedural requirements in dismissing an employee by making it clear at the outset that the employee had no procedural rights. See *Bishop v. Wood*, 426 U.S. 341, 356 (1976) (noting that "continued public employment . . . can exist only if the employer, by statute or contract, has actually granted some form of guarantee").

In recent years, the language of “liberty interest” or “claim of liberty” has begun to appear in the Court’s substantive due process decisions, as well as those involving procedural claims.⁵² In procedural cases, having one’s claim labeled a liberty interest is at least a partial victory. But, somewhat ironically, the language of liberty interests began to appear in substantive due process opinions of those justices opposed to the extension of the privacy right.⁵³ Justices opposed to the extension or reaffirmation of *Roe v. Wade* would refer to a liberty interest in reproductive decisions.⁵⁴ While this designation would seem to concede that the Due Process Clause was relevant to the claim before the Court, it also marked the claim as one entitled to something less than strict scrutiny analysis, with that test reserved for cases involving only the narrow category of fundamental rights. The recognition of liberty interests as presenting a genuine due process issue, however, is a double-edged sword. If it can be wielded as a weapon to reduce constitutional protection, as in the abortion cases, it can also be used to increase that protection, as in *Lawrence*. A full understanding of the issues inherent in substantive due process claims will require that we go back beyond the *Griswold* line of privacy cases, to the early years of the Court’s consideration of these claims.

The central demand of the Due Process Clause, in its analysis of the substance of prohibitory legislation, is that such legislation is not arbitrary or irrational.⁵⁵ Much of the history of substantive due process involves the Court’s attempt to define one or more standards for determining just when

52. See, e.g., *Hodgson v. Minnesota*, 497 U.S. 417, 434 (1990) (stating that “[a] woman’s decision to conceive or to bear a child is a component of her liberty that is protected by the Due Process Clause”); *Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 278-79 (1990) (characterizing the right to refuse medical treatment not as a fundamental right, but rather, a “liberty interest” requiring balancing of interests); *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 520 (1989) (plurality opinion) (“[T]here is wisdom in not unnecessarily attempting to elaborate the abstract differences between a ‘fundamental right’ to abortion . . . a ‘limited fundamental constitutional right,’ . . . or a liberty interest protected by the Due Process Clause, which we believe it to be.”) (citations omitted).

53. See, e.g., *Webster v. Reprod. Health Servs.*, 492 U.S. at 520 (Rehnquist, C.J.) (referring to *Roe*’s “liberty interest”).

54. See, e.g., *id.*

55. LAURENCE H. TRIBE, *AMERICAN CONSTITUTIONAL LAW* § 8-1, at 1333 (3d ed. 2000) (“By 1855, in any event, the Supreme Court was treating as implicit in the Due Process Clause of the Fifth Amendment the requirement that, to qualify as ‘law,’ an enactment would have to meet substantive requirements of rationality, non-oppressiveness, and even-handedness.”); see also Robert E. Riggs, *Substantive Due Process in 1791*, 1990 WIS. L. REV. 941, 948-58 (tracing the Due Process Clause to the Magna Carta, which prohibited arbitrary action by the king).

a legislature has crossed the line into irrationality.⁵⁶ This debate dates back to the Supreme Court's decision in *Lochner v. New York*,⁵⁷ now considered a significant judicial misstep, but still the starting point in the history of substantive due process.

Lochner produced three opinions, each working from the premise that due process of law includes the requirement that the government not act in an arbitrary irrational manner, but each differs significantly on the question of how rigorous the proper test for rationality should be.⁵⁸ Two of the three opinions are well known, and have been the source of much subsequent jurisprudential thought.⁵⁹ The third, which has been somewhat overlooked for a long while, however, seems to, consciously or not, provide the antecedent for some recent Supreme Court analysis, including *Lawrence*.⁶⁰

The definition of a legitimate restriction on liberty, all of the *Lochner* justices would agree, is a restriction that furthers the states' "police power."⁶¹ This term includes not merely crime prevention, the most common use of the word "police" today, but refers to the promotion of the morals, health, safety, and general welfare of the community.⁶² A

56. See R. Randall Kelso, *Standards of Review Under the Equal Protection Clause and Related Constitutional Doctrines Protecting Individual Rights: The "Base Plus Six" Model and Modern Supreme Court Practice*, 4 U. PA. J. CONST. L. 225, 258-59 (2002) (cataloging the array of tests the Court has enunciated).

57. *Lochner v. New York*, 198 U.S. 45 (1905).

58. See *id.* at 64 (Peckham, J.) ("We are justified in [declaring a law unconstitutional] when, from the character of the law and the subject upon which it legislates, it is apparent that the public health or welfare bears the most remote relation to the law."); *id.* at 69 (Harlan, J., dissenting) (stating the standard as whether "there is . . . [a] real or substantial relation between the means employed by the state and the end sought to be accomplished by its legislation"); *id.* at 76 (Holmes, J., dissenting) (concluding the test should be whether a rational and fair man would "admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law").

59. See *infra* notes 66-75 and accompanying text.

60. See *infra* notes 80-93 and accompanying text.

61. *Lochner v. New York*, 198 U.S. at 53 (Peckham, J.) ("Both property and liberty are held on such reasonable conditions as may be imposed . . . in the exercise of [a state's governing] powers, and with such conditions the Fourteenth Amendment was not designed to interfere."); *id.* at 65 (Harlan, J., dissenting) (noting that "the existence of [the police] power [of the state] has been uniformly recognized"); *id.* at 76 (Holmes, J., dissenting) (suggesting that because the law at issue could be viewed by a reasonable man as "a proper measure on the score of health," it is a proper exercise of governmental power).

62. *Id.* at 53.

community's general welfare might be contrasted with the promotion of private gain, at the expense of the welfare of all, or perhaps more obviously, an action that seeks to disadvantage some for the sake of the disadvantage itself, with no resulting benefit to all.⁶³

The principle that restrictions on liability should be justified as genuine efforts to promote the general welfare sounds unobjectionable in the abstract, but its application, of course, is far from simple. Much, perhaps most, legislation has different degrees of impact on different groups and individuals; yet at the same time, its motivation and effect clearly reflects concern for the welfare of the entire community. How can we recognize when this is not the case, and, perhaps more importantly, who has the authority to make that decision?

A tradition that has become known as "civic republican" saw the ideal state as one in which a virtuous public, through its representatives, would reject "faction," or private gain, in favor of the general welfare.⁶⁴ A rival tradition maintains that faction and self interest are inevitable aspects of government, and that structures should be created to limit the ability of dominant factions to act contrary to the general welfare.⁶⁵ Each tradition seeks to promote the general welfare, but will lead to different approaches to answering the question of who is in the best position to assess whether legislation is legitimate. When kings or a small elite were legislators, their obvious ability to act in their own self-interest, or perhaps on a whim, might require an outside arbiter. In a working democracy, though, are not the people's elected representatives, at least presumptively, the body best equipped to determine what is or is not in furtherance of the general welfare? Or must there be a strong check on the majority's ability to prefer its own welfare to that of the entire community?

63. See, e.g., *Calder v. Bull*, 3 U.S. (3 Dall.) 386, 388 (1798) (Chase, J.) (stating that a law that summarily "takes property from A. and gives it to B. . . . is against all reason and justice," and, thus, "cannot be considered a rightful exercise of legislative authority").

64. See Kathleen M. Sullivan, *Rainbow Republicanism*, 97 YALE L.J. 1713, 1713 (1988) (describing the civic republican ideal as "[c]ollective self-determination by political equals, animated by civic virtue to seek a common good").

65. Skepticism about the ability of those holding power to put aside self-interest would lead to the conclusion that the best way to promote the general welfare would be to create a system that assumed the inevitability of factional loyalties, but assured that no faction could dominate. See generally Jonathan R. Macey, *The Missing Element in the Republican Revival*, 97 YALE L.J. 1673, 1674-79 (1988) (discussing the framers' design of the United States Constitution, which contemplated narrow partisanship and fashioned a way to cope with it).

Lochner can be seen as a clash of these two traditions. The majority opinion saw New York legislation limiting the working hours of bakers as an infringement of liberty requiring justification by proof of the regulation's connection to health and safety concerns.⁶⁶ Giving essentially no deference to the legislature, the majority determined that a law limiting the number of hours a baker could be required to work was unrelated to "any other portion of the public than those who are engaged in that occupation,"⁶⁷ so the legislation could not be justified as an exercise of the police power.⁶⁸ The Court set forth no formula for analyzing substantive due process cases, but it would seem that the majority saw it as their responsibility to determine, essentially *de novo*, whether the legislation was necessary, and its contribution to the general welfare significant.⁶⁹ This rigorous standard can be seen as the progenitor of the "strict scrutiny" test that the Court would adopt decades later, first in a limited range of equal protection cases,⁷⁰ and later in a new generation of substantive due process disputes.⁷¹ However, at least since the 1940s, strict scrutiny has been the exception, rather than the standard approach employed in substantive due

66. *Lochner v. New York*, 198 U.S. at 57-58.

67. *Id.* at 57; *see also id.* at 59 (diminishing the protection for workplace hazard relating to health needs by bakers because even though "the trade of a baker does not appear to be as healthy as some other trades, [it] is also vastly more healthy than still others," and has "never been regarded as an unhealthy one").

68. *Id.* at 57-64.

69. *See id.* at 62 (holding that a law restricting the number of hours a baker can work is not necessary to insure "cleanliness on the part of the workers," and, in turn, a healthy product); *id.* at 62-63 (holding that if a suspect argument is needed to justify a law a "health law," "it gives rise to at least a suspicion that there was some other motive dominating the legislature than the purpose to subserve the public health or welfare").

70. Strict scrutiny in cases involving racial discrimination was first articulated in *Korematsu v. United States*, 323 U.S. 214, 216 (1944). Ironically, this is one of two Supreme Court decisions in which the Court held that a government act expressly disadvantaging a minority racial group satisfied this test. *See id.* at 223-24; Joseph C. Fetterman, *Affirmative Action Hiring Obligations: Is It Time for a Race-Neutral Policy or a Race to the Court House?*, 33 PUB. CONT. L.J. 781, 793 (2004) (citing *Korematsu* and *Hirabayashi v. United States*, 320 U.S. 81 (1943), as the only such cases). Both cases, now widely regarded as embarrassing errors by the Court, upheld the wartime evacuation and detention of Japanese-Americans on the West Coast.

In *United States v. Carolene Products Co.*, 304 U.S. 144, 153 n.4 (1938), Justice Stone singled out statutes showing "prejudice against discrete and insular minorities" as situations in which the Court should not show great deference to legislative judgment.

71. *See supra* notes 31-46 and accompanying text.

process cases.⁷²

Justice Holmes's dissent in *Lochner* can be seen as the polar opposite of the majority opinion, yet it starts from the same premise: the Due Process Clause demands that an infringement of liberty be justified as rationally related to the general welfare.⁷³ Holmes, however, skeptical of judges' ability to discern public welfare from private gain as he was of legislatures', argued for a high degree of deference to legislative judgment.⁷⁴ Except in cases where reasonable people simply could not fail to see that the challenged legislation bore no relation to the community's welfare or cases that violated an express constitutional prohibition, a substantive due process claim should fail.⁷⁵

Holmes's deferential standard can be seen as the progenitor of the low-level "rational basis" test that came to be applied in many equal protection cases and most substantive due process cases from the 1940s on. The Supreme Court's repudiation of *Lochner* itself,⁷⁶ and its severe limitation of the types of cases in which it would be proper to show little or no deference to the legislature,⁷⁷ led the Court to approach most substantive due process claims as *Lochner*'s severest critic, Justice Holmes, would.

Almost every graduate of an American law school in the past half-

72. Kathleen M. Sullivan, *Post-Liberal Judging: The Roles of Categorization and Balancing*, 63 U. COLO. L. REV. 293, 296 (1992).

73. Holmes would ask whether "a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law." *Lochner v. New York*, 198 U.S. at 76 (Holmes, J., dissenting).

74. *See id.* (arguing that "the word liberty, in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion," unless that opinion "infringe[s] fundamental principles").

75. *See id.*

76. Without expressly overruling *Lochner*, the Supreme Court put an end to strict scrutiny of economic regulation in the 1930s and 1940s. *See, e.g., West Coast Hotel Co. v. Parrish*, 300 U.S. 379, 399-400 (1937) (upholding state minimum wage legislation applicable only to women and minors); *Nebbia v. New York*, 291 U.S. 502, 516-17 (1934) (upholding state price regulation for milk).

77. Justice Stone's influential footnote four in *Carolene Products* suggested that in addition to instances where a discrete and insular minority was being singled out for disadvantage, strict scrutiny might be applied where the challenged "legislation appears on its face to be within a specific prohibition of the Constitution," or "restricts those political processes which can ordinarily be expected to bring about repeal of undesirable legislation." *United States v. Carolene Prods. Co.*, 304 U.S. 144, 152 n.4 (1938).

century is at least somewhat familiar with these two opinions in *Lochner*, and with the contrasting approaches of strict or low-level scrutiny that grew out of them. For much of that time, constitutional rights litigation, at least those cases involving equal protection or substantive due process claims, could be seen as almost entirely a matter of classification of the claim into one of only two available categories. A limited number of cases would be entitled to strict scrutiny; the application of that test was regarded as essentially guaranteeing invalidation of the challenged statute.⁷⁸ Claims not so classified would be entitled only to rational basis review. A Holmesian level of deference would essentially guarantee that the government would prevail.⁷⁹ In short, the true battleground was the decision regarding which test to apply. Application itself was almost automatic: under strict scrutiny the claimant won, and under rational basis review the claim failed. These alternatives were the only available options.

Yet the *Lochner* Court itself did present a third alternative. Justice Holmes wrote only for himself, yet *Lochner* was a five-to-four decision.⁸⁰ Justice Harlan, writing for himself and two colleagues, also dissented,⁸¹ but did not go so far as Holmes in his level of deference.⁸² While Justice Holmes found it unnecessary to do more than assert that legislators who could not be described as irrational enacted the legislation,⁸³ Justice Harlan cited evidence that, in fact, the health of bakery workers was endangered by excessively long work hours.⁸⁴ At the same time, Justice Harlan did not require that the supporters of the legislation bear a burden of proof

78. See CHEMERINSKY, *supra* note 15, § 8.2, at 601 (“The reality is that virtually any law can meet this very deferential requirement.”).

79. See, e.g., *Lochner v. New York*, 198 U.S. at 75 (deferring, in most cases, to “the right of a majority to embody their opinions in law”).

80. See *id.* at 65 (5-4 decision); *id.* at 74-76 (Holmes, J., dissenting).

81. Justice Harlan was joined by Justices White and Day. See *id.* at 65-74 (Harlan, J., dissenting).

82. Compare *id.* at 65-66 (Harlan, J., dissenting) (“[T]he State in the exercise of its powers may not unduly interfere with the right of the citizen to enter into contracts that may be necessary and essential in the enjoyment of inherent rights belonging to every one” unless “the contracts of business conflict with the policy of the State as contained in its statutes.”) (quoting *Allgeyer v. Louisiana*, 165 U.S. 578, 589 (1897)), with *id.* at 75-76 (Holmes, J., dissenting) (deferring to “the right of a majority to embody their opinions in law,” unless “a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our law”).

83. *Id.* at 76 (Holmes, J., dissenting).

84. *Id.* at 70-71 (Harlan, J., dissenting).

regarding the need or efficacy of the restriction.⁸⁵ Justice Harlan, like Justice Holmes⁸⁶ and the *Lochner* majority,⁸⁷ failed to clearly articulate a particular standard for determining whether a statute is rational or arbitrary.⁸⁸ But his approach is clearly somewhere between the alternatives set forth by his colleagues. While avoiding the nearly automatic deference of Justice Holmes,⁸⁹ Justice Harlan does not require the legislature to convince him.⁹⁰ Instead, he requires some evidence justifying the restriction, not merely the fact of its adoption.⁹¹ A rough analogy may be made to the law of evidence. While the *Lochner* majority would place a burden of proof on the state to justify its action,⁹² Justice Harlan merely requires that the state bear the burden of going forward and producing some modicum of evidence in support of the action.⁹³ Having done so, the state has earned deference.

The approach of Justice Harlan, one which would grant substantial, but not total deference to legislative judgment, did not achieve the prominence of either the opinion of the *Lochner* majority or Justice Holmes's dissent. Indeed, Harlan's approach would largely disappear as subsequent decades saw the debate between advocates and opponents of judicial activism struggle for supremacy. A middle ground would fully satisfy neither side, and it would also have the drawback of being perceived as insufficiently determinate. In contrast, the alternatives of strict or low-level scrutiny that emerged in the decades after *Lochner* provided a sense of determinacy in their application, even if their approach masked a significant degree of indeterminacy in resolving the initial question of

85. See *id.* at 68 (Harlan, J., dissenting) ("If there be doubt as to the validity of the statute, that doubt must . . . be resolved in favor of its validity.").

86. See *id.* at 75-76 (Holmes, J., dissenting).

87. See *id.* at 53-55.

88. See *id.* at 68-69 (Harlan, J., dissenting).

89. See *id.* at 76 (Holmes, J., dissenting).

90. See *id.* at 68 (Harlan, J., dissenting).

91. *Id.* at 72-73 (Harlan, J., dissenting).

92. *Id.* at 57-58 (requiring an "act [to] have a more direct relation, as a means to an end, and the end itself must be appropriate and legitimate, before an act can be held to be valid which interferes with the general right of an individual to be free in her person and in his power to contract in relation to his own labor").

93. See *id.* at 69 (Harlan, J., dissenting) (finding it "plain" that the "statute was enacted in order to protect the physical well-being of those who work in bakery and confectionary establishments," thus finding it "impossible . . . to say that there is here no real or substantial relation between the means employed by the State and the end sought to be accomplished by its legislation").

which test to apply.⁹⁴ The Harlan opinion, however, demonstrates that there has always been an available middle ground between no deference and total deference available to the Court, and the desirability of such a middle ground would become apparent in the last three decades of the twentieth century.⁹⁵

The search for a middle ground would take at least two different forms. The first would appear in equal protection cases in which the plaintiff was a member of a class that had some, but arguably not enough resemblance to racial or ethnic minorities sufficient to entitle that class to invoke strict scrutiny where government acts singled them out disadvantageously.⁹⁶ If it could be said that racial distinctions were essentially never rationally related to the general welfare and distinctions based on factors such as age quite often were,⁹⁷ how should courts deal with something like gender? On the one hand, no one could doubt that the law had a long history of making gender distinctions based only on indefensible stereotypes.⁹⁸ On the other, meaningful differences between the sexes, unlike racial differences, might sometimes justify disparate treatment. Thus, after some false starts,⁹⁹ the Supreme Court forged a third standard for equal protection analysis, one which has become known as intermediate scrutiny.¹⁰⁰

94. "The rational basis test is enormously deferential to the government." CHEMERINSKY, *supra* note 15, § 6.5, at 518. Strict scrutiny has been described as "strict in theory and fatal in fact." *Id.*, at 520 (quoting Gerald Gunther, *Foreword: In Search of Evolving Doctrine on a Changing Court: A Model for a Newer Equal Protection*, 86 HARV. L. REV. 1, 8 (1972)).

95. See *infra* notes 96-102 and accompanying text.

96. See, e.g., *Clark v. Jeter*, 486 U.S. 456, 457, 461-64 (1988) (holding that intermediate scrutiny should be applied to a Pennsylvania law requiring a paternity suit to "be brought within six years of an illegitimate child's birth").

97. See, e.g., *Mass. Bd. of Ret. v. Murgia*, 427 U.S. 307, 314 (1976) (holding that age classifications require only low-level scrutiny).

98. See, e.g., *Hoyt v. Florida*, 368 U.S. 57, 60, 65 (1961) (upholding a Florida statute granting women automatic exemption from jury service unless they specifically waived it); *Goesaert v. Cleary*, 335 U.S. 464, 467 (1948) (upholding a Michigan statute prohibiting, with narrow exceptions, women from employment as bartenders); *Bradwell v. Illinois*, 83 U.S. 130, 139 (1872) (upholding an Illinois statute denying women the right to be licensed as attorneys).

99. See, e.g., *Frontiero v. Richardson*, 411 U.S. 677, 682 (1973) (endorsing, by a four-justice plurality, strict scrutiny as the appropriate test for gender discrimination claims); *Reed v. Reed*, 404 U.S. 71, 76-77 (1971) (using rational basis test to strike down state statute giving preference to male relatives for appointment as administrators of estates).

100. *Craig v. Boren*, 429 U.S. 190, 197-99 (1976) (holding that, under the newly

Although the intermediate scrutiny standard can be stated succinctly, its application is far less determinate than earlier standards.¹⁰¹ It might be fair to conclude, in fact, that “intermediate scrutiny” is merely a label meant to suggest some degree of precision to what is, in fact, a rather open-ended balancing test.¹⁰² Is there enough evidence to refute the notion that the basis of the statutory classification is irrational stereotyping? With no formula available to guide the determination of how much evidence is enough, courts are free to explore the territory between extreme deference and extreme skepticism.

Perhaps even more interesting than the Court’s attempt to frame one or more intermediate standards for evaluating Fourteenth Amendment claims are a number of decisions that challenge the notion that the choice of either strict scrutiny or the low-level rational basis test will lead to inevitable results, invalidating the challenged statute in the former instance, upholding it in the latter.¹⁰³ In wrestling with the issue of affirmative action, the Court has maintained that strict scrutiny is the appropriate standard of review for all racial classifications, whether those classifications work to the advantage or disadvantage of minority groups.¹⁰⁴

adopted intermediate scrutiny, a lower drinking age for females than males violated equal protection).

101. Compare *United States v. Virginia*, 518 U.S. 515, 555-56 (1996) (holding that a state-run military academy’s practice of excluding women was unconstitutional), with *Rostker v. Goldberg*, 453 U.S. 57, 59 (1981) (upholding the practice of requiring only males to register for a potential military draft). See also *Michael M. v. Superior Court*, 450 U.S. 464, 466, 472-73 (1981) (plurality opinion) (upholding statutory rape law, despite the claim that because only men could be held criminally liable under the law it was based on impermissible gender stereotypes); *Orr v. Orr*, 440 U.S. 268, 270, 283 (1979) (invalidating, based on gender stereotypes, a state statute which required husbands, but not wives, to pay alimony following divorce).

102. Occasionally, a Justice has questioned the view that the strict use of three different standards is the proper way to approach Fourteenth Amendment cases, contending that all such cases really call for balancing the public purpose of the challenged statute against the harm to the disadvantaged claimant. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 451 (1985) (Stevens, J., concurring) (“I have never been persuaded that these so-called ‘standards’ adequately explain the decisional process.”); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 98 (1973) (Marshall, J., dissenting) (expressing “disagreement with the Court’s rigidified approach to equal protection analysis”).

103. See *infra* notes 105-14 and accompanying text.

104. See, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. 200, 204, 235-36 (1995) (applying strict scrutiny to a statute authorizing financial incentives to contractors on government projects who hire “socially and economically disadvantaged individuals,” where “race-based presumptions” were used to identify such individuals); *City of Richmond v. J.A. Croson Co.*, 488 U.S. 469, 493-506 (1989) (applying strict

Yet the “strict scrutiny” applied in these cases has allowed room for upholding at least some affirmative action programs.¹⁰⁵ The recent pair of cases in which the Court upheld the affirmative action program used at the University of Michigan Law School,¹⁰⁶ while striking down the program employed by the undergraduate program at the same university,¹⁰⁷ demonstrates an application of strict scrutiny less rigid than that commonly applied.¹⁰⁸

The same flexibility has begun to appear in cases whose holdings refute the notion that a statute or government practice will always prevail when subjected only to low-level scrutiny. In a few instances, the Court found that when a statutory distinction was based on irrational hostility toward a particular group, even one not thought of as a classic “suspect class” for equal protection purposes, that distinction would fail to satisfy even low-level scrutiny.¹⁰⁹ This was true even where plausible reasons unrelated to hostility could be put forward.¹¹⁰ For example, saving money would not justify a classification that excluded households with unrelated adults from the federal food stamp program, where that exclusion was apparently motivated by hostility toward “hippie” communal living arrangements.¹¹¹

scrutiny to a statute requiring contractors on public construction projects to subcontract a specific percentage to businesses owned by minorities).

105. See, e.g., *Grutter v. Bollinger*, 539 U.S. 306, 311, 343 (2003) (upholding the affirmative action program at the University of Michigan Law School). Justice O'Connor, writing for the Court, explained that “[n]ot every decision influenced by race is equally objectionable, and strict scrutiny is designed to provide a framework for carefully examining the importance and the sincerity of the reasons advanced by the governmental decisionmaker for the use of race in that particular context.” *Id.* at 327.

106. *Id.* at 343.

107. *Gratz v. Bollinger*, 539 U.S. 244, 275-76 (2003).

108. Compare *Grutter v. Bollinger*, 539 U.S. at 328 (stating that deference may be granted to a university's academic decisions), with, e.g., *Adarand Constructors, Inc. v. Peña*, 515 U.S. at 224-27 (refusing to afford any deference when strict scrutiny applies).

109. See *Romer v. Evans*, 517 U.S. 620, 635-36 (1996) (holding state initiative disadvantaging homosexuals violative of equal protection under rational basis test); *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. 432, 449-50 (1985) (zoning ordinance disadvantaging mentally disabled held violation of equal protection under rational basis test); *USDA v. Moreno*, 413 U.S. 528, 538 (1973) (holding regulation excluding unrelated household members from food stamp program violative of equal protection under rational basis test).

110. See, e.g., *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. at 448-50 (rejecting the government's “legitimate interests” of safety concerns, flooding concerns, street congestion, and overcrowding).

111. *USDA v. Moreno*, 413 U.S. at 534-36, 538.

The exclusion of group homes for mentally disabled residents from areas zoned for residential purposes could not be justified by the fact that the presence of such homes were likely to have a negative effect on property values in the neighborhood.¹¹² In that case, the Justices who cast the decisive votes declined to adopt a standard of heightened scrutiny, but seemed to conclude that even where the likelihood of harm to property values could be shown, if that harm was the consequence of irrational prejudice the ordinance could not be deemed rational.¹¹³ And in a case foreshadowing *Lawrence*, the Court held that a state's constitutional amendment could not be justified merely by the community's hostility to a minority group, albeit one not entitled to recognition as a suspect class.¹¹⁴

The search for a middle ground between no deference to legislators and complete deference arose first, and has been seen most frequently, in equal protection cases. But, prior to *Lawrence*, some substantive due process cases also suggested that the Court was dissatisfied with an analytical model that leaves only those two alternatives, with the choice of which to follow dependent on the question of whether the claimant seeks to protect a fundamental right.¹¹⁵

For nearly two decades following *Roe v. Wade*, the Court dealt with cases challenging restrictions on abortion in a predictable way.¹¹⁶ Having brought the abortion right within the ambit of the fundamental privacy right recognized in *Griswold*,¹¹⁷ the Court struck down any legislation it viewed as having the slightest effect of placing a burden on an adult woman's choice to abort prior to the third trimester.¹¹⁸ Dissenting Justices,

112. *City of Cleburne v. Cleburne Living Ctr.*, 473 U.S. at 448 (“[M]ere negative attitudes, or fear, unsubstantiated by factors which are properly cognizable in a zoning proceeding, are not permissible bases for treating a home for the mentally retarded differently from apartment houses, multiple dwellings, and the like.”).

113. *Id.*

114. *Romer v. Evans*, 517 U.S. at 634-35.

115. *See infra* notes 120-24, 126 and accompanying text.

116. *See cases cited infra* note 118.

117. *See supra* notes 31-39 and accompanying text.

118. *See, e.g., Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. 747, 759-771 (1986) (holding unconstitutional portions of a Pennsylvania statute requiring the woman to give voluntary and informed consent to an abortion only after being provided with information could “influence the woman’s informed choice between abortion or childbirth,” requiring the physician performing the abortion after the first trimester to report a basis for determining that a child is not viable in addition to an extensive amount of other information, requiring a second physician to be present during the procedure if viability were a possibility, and requiring of the physician (for post-viability abortions) the degree of care required to preserve the life

challenging the basic premises of *Roe*, went to the other extreme, consistently arguing for a rational basis test that would uphold these restrictions.¹¹⁹

Recent cases, however, have avoided the stark alternatives of allowing government free rein to limit abortion or alternatively, permitting no regulation in pursuit of the goal of discouraging abortion.¹²⁰ The “undue burden” test adopted by the Court requires a balancing of interests, with the state’s interest increasing as the term of pregnancy lengthens, but at no time reaching the point where either the state’s interest or the woman’s right entirely eclipses the other.¹²¹

of an unborn child not intended to be aborted and the use of a technique providing the best opportunity for the fetus to be aborted alive, and not containing an “express exception for an emergency situation”) (quoting *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. 416, 443-44 (1983)); *City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. at 422-24, 452 (invalidating portions of a city ordinance requiring “notification and consent by parents before abortions [could] be performed on unmarried minors,” requiring “the attending physician to make . . . statements to the patient to insure that the consent for an abortion is truly informed consent,” requiring a “24-hour waiting period between the time the woman signs a consent form and the time the abortion is performed,” and requiring “fetal remains [to] be disposed of in a humane and sanitary manner”) (internal quotation marks omitted); *Bellotti v. Baird*, 443 U.S. 622, 624-25, 651 (1979) (plurality opinion) (striking down parental consent requirement for minor’s abortion). The major exception to this pattern was the Court’s sustaining of statutes refusing to extend Medicaid to abortion procedures. *See Harris v. McRae*, 448 U.S. 297, 301, 317-18, 326-27 (1980) (upholding federal statute denying Medicaid benefits for “certain medically necessary abortions”); *Maher v. Roe*, 432 U.S. 464, 466, 479-80 (1977) (upholding state statute limiting Medicaid benefits to only “medically necessary” abortions during the first trimester). These cases held that while a state could not affirmatively place obstacles in the way of a woman seeking abortion, the state had no duty to allocate funds equally between abortion and childbirth.

119. *See, e.g., Thornburgh v. Am. Coll. of Obstetricians & Gynecologists*, 476 U.S. at 788 (White, J., dissenting) (“In my view, the time has come to recognize that *Roe v. Wade* . . . ‘departs from a proper understanding’ of the Constitution and to overrule it.”) (quoting *Garcia v. San Antonio Metro. Transit Auth.*, 469 U.S. 528, 557 (1985)).

120. *See e.g., Planned Parenthood v. Casey*, 505 U.S. 833, 869 (1992) (plurality opinion) (indicating that while a woman has a constitutional liberty to terminate her pregnancy, that liberty is not absolute and must be balanced against the competing interests of the state).

121. *Id.* at 878-89 (outlining the “undue burden” test). The “undue burden” test was first articulated by Justice O’Connor in dissenting opinions objecting to the Court’s post-*Roe* extension of the scope of the abortion right. *See, e.g., City of Akron v. Akron Ctr. for Reprod. Health*, 462 U.S. at 462-66 (O’Connor, J., dissenting). In *Casey*, the test became the key analytical tool used by Justices O’Connor, Souter and Kennedy to affirm the core holding of *Roe*. *Planned Parenthood v. Casey*, 505 U.S. at

Similarly, in dealing with substantive due process challenges to state statutes based upon an alleged “right to die,” the Court has avoided either complete deference to legislators, or extreme skepticism. The Court has recognized a strong right to refuse medical treatment, while at the same time allowing states leeway to assure that such a refusal is actually consistent with the true intent of the patient.¹²²

And while upholding the state of Washington’s prohibition of assisted suicide, a majority of the Justices, in separate opinions, cautioned that the individual’s interest in being free of pain could not be entirely ignored by the state.¹²³ The prohibition would not be read to prohibit palliative care that might have the secondary effect of hastening death.¹²⁴ Just as in the recent abortion cases,¹²⁵ a degree of balancing has appeared in the Court’s approach to this substantive due process issue.¹²⁶

A wide range of cases, then, can be seen to illustrate growing acceptance by the Court of a point raised in separate opinions some years ago by Justices Stevens and Marshall.¹²⁷ There are not two Equal Protection Clauses, each demanding a different type of analysis. There is only one, and it requires the Court in each case to balance the gravity of the harm claimed by the individual against the weight of the government interest pursued by the challenged legislation.¹²⁸ The same insight can be, and has been, applied to recent substantive due process cases.¹²⁹

Balancing will require more than merely labeling a claim as presenting an issue involving a fundamental right or suspect class, or one

878-89; *see also* *Sternberg v. Carhart*, 530 U.S. 914, 945-46 (2000) (striking down Nebraska’s partial birth abortion law using the undue burden test).

122. *See Cruzan v. Dir., Mo. Dep’t of Health*, 497 U.S. 261, 286-87 (1990) (holding that state may require comatose patient’s desire for termination of treatment be established by clear and convincing evidence). While upholding the Missouri statute, the Court did indicate that “[t]he principle that a competent person has a constitutionally protected liberty interest in refusing unwanted medical treatment may be inferred from [its] prior decisions.” *Id.* at 278.

123. *See Washington v. Glucksberg*, 521 U.S. 702, 737-38, 747-48, 784 n.16, 789, 791-92 (1997).

124. The caveat concerning palliative care appears in the concurring opinions of Justice O’Connor, *id.* at 737-38; Justice Stevens, *id.* at 747-48; Justice Souter, *id.* at 784 n.16; Justice Ginsberg, *id.* at 789 (endorsing Justice O’Connor’s concurring opinion); and Justice Breyer, *id.* at 791-92.

125. *See supra* notes 120-21 and accompanying text.

126. *See, e.g., Washington v. Glucksberg*, 521 U.S. at 722.

127. *See supra* note 102.

128. *See supra* note 102.

129. *See supra* notes 120-24 and accompanying text.

lacking such features, and then proceeding to an automatic outcome as a result of the classification.¹³⁰ But this does not mean that every case that requires balancing will present a difficult choice. In some cases, the result of a balancing test will be fairly clear.¹³¹ But that result will not be a consequence of either reflexive deference to the legislature, or of entirely ignoring the possible existence of legitimate government interests. Instead, it will be the result of some degree of care in weighing the claims of both sides.

The Court's analysis in *Lawrence*, then, can easily be seen as a further step in the direction of a more open-ended balancing approach to Fourteenth Amendment cases. Although the rigidity of the choice between complete deference and no deference had its obvious weaknesses, it did provide a significant degree of predictability. Balancing will inevitably provide less determinacy, and the criticism of balancing in this regard cannot be entirely ignored. Any regime of balancing will require some principles or a framework to guide courts and legislatures. Fortunately, the common-law method of building legal principles case by case can be expected to be of assistance here. Several of the equal protection cases discussed above, for example, establish the principle that a majority's mere hostility toward or fear of a distinct group cannot serve to justify a statute which disadvantages that group.¹³² If *Lawrence* had been decided on equal protection grounds, it would have merely reinforced this principle. By basing the decision instead on due process grounds, the Court suggests an additional principle to be added to Fourteenth Amendment balancing, one that will come into play primarily in substantive due process cases. We now turn our attention to the significance of that principle.

130. On constitutional balancing generally, see Paul W. Kahn, *The Court, the Community and the Judicial Balance: The Jurisprudence of Justice Powell*, 97 YALE L.J. 1 (1987); T. Alexander Aleinikoff, *Constitutional Law in the Age of Balancing*, 96 YALE L.J. 943 (1987); David L. Faigman, *Madisonian Balancing: A Theory of Constitutional Adjudication*, 88 NW. U. L. REV. 641 (1994).

131. See, e.g., *Tennessee v. Garner*, 471 U.S. 1, 9-12 (1985) (balancing the police interest in use of deadly force to apprehend an unarmed burglar against a suspect's interest in preserving his life); *Stanley v. Illinois*, 405 U.S. 645, 656-58 (1972) (holding that an unwed father's interest in retaining custody of children upon death of their mother outweighs a state interest in avoiding the minimal cost of a fitness hearing by presuming the unfitness of an unwed father).

132. See *supra* notes 109-14 and accompanying text.

III. THE BROADER IMPACT OF *LAWRENCE*

The Court's use of a balancing test, or if that seems too indeterminate a term, a "rational basis with teeth" standard,¹³³ as we have seen, is not entirely unprecedented. The recent, at least occasional, use of such a standard can be seen as a rediscovery of an approach dating back to Justice Harlan's dissent in *Lochner*.¹³⁴ But if that is all we could say about *Lawrence* and its potential impact beyond its own terms, there would be little need for commentary. If substantive due process litigation is moving in the direction of balancing, what does *Lawrence* tell us about how that balancing should be carried out?

The first step in addressing this question will be to focus on the terminology used by the Court to describe what is at stake and to position what is at stake within the constitutional framework. Any due process claim, whether categorized as one of procedural or substantive due process, requires the court to make an initial determination of whether the clause applies at all. The clause requires the observance of due process when a state deprives an individual of life, liberty or property.¹³⁵ While this would seem too obvious to deserve mention, it is a point that is obscured in most substantive due process cases.

Procedural due process cases often dwell on the threshold question of whether the claimant has demonstrated a deprivation of liberty or property and whether, therefore, any procedural safeguards are necessary at all.¹³⁶

133. The common conception of the rational basis test was that it was "toothless." See Scott H. Bice, *Rationality Analysis in Constitutional Law*, 65 MINN. L. REV. 1, 3-4 (1980) (asserting that "[f]or many years," an application of the rational basis test "was tantamount to declaring that the legislation was constitutional").

134. See *supra* notes 82-93 and accompanying text.

135. U.S. CONST. amend. XIV, § 1.

136. Compare *Vitek v. Jones*, 445 U.S. 480, 482-83, 488-89 (1980) (moving a prisoner to a state mental hospital required notice, an adversary hearing, and provision of counsel prior to the prisoner's relocation because the procedure implicated a liberty interest), and *Goldberg v. Kelly*, 397 U.S. 254, 255, 264, 269-71 (1970) (holding unconstitutional a state's termination of public assistance payments to a recipient without an evidentiary hearing on due process grounds because the recipient lacked alternate income with which to sustain himself), with *Meachum v. Fano*, 427 U.S. 215, 216, 224-29 (1976) (holding that a prisoner is not entitled to an evidentiary hearing before being transferred to a prison "less favorable to the prisoner" because no liberty interest was implicated), and *Paul v. Davis*, 424 U.S. 693, 694-95, 699, 712 (1976) (holding that a police department's circulation of a flyer containing photos of a person identified as an "active shoplifter," even if it harmed the person's reputation, does not alone implicate a liberty interest).

Sometimes the answer to this threshold question is unclear and the debate contentious. But in many cases, the answer is obvious. Probably the most obvious cases that bring claimants within the Due Process Clause are criminal prosecutions.¹³⁷ While sharp disagreement may exist as to what types of procedural protections a criminal defendant must receive, no one doubts that the defendant is entitled to some.¹³⁸ The potential loss of liberty or property as a result of a criminal conviction is obvious.

Since the revival of substantive due process in *Griswold*, however, it has become easy to overlook the language of the Fourteenth Amendment in cases presenting this type of claim. Since resolution of the question of whether a claim involved a fundamental right was essentially determinative of the outcome, it became easy to imagine that, for substantive challenges, the Due Process Clause protected only fundamental rights. The clause, of course, makes no distinction between procedural and substantive claims.

The first significant reminder of the scope of the Due Process Clause in substantive due process cases came, ironically, in the separate opinions of Justices who sought to narrow the scope of the clause and its protections in cases involving abortion.¹³⁹ The use of the term “liberty interest,” rather than “fundamental right,” to describe the private interest at stake¹⁴⁰ suggested strongly that these Justices sought to find a way to severely limit the abortion right without entirely repudiating cases that held reproductive freedom to be protected by the Fourteenth Amendment.¹⁴¹ A mere liberty interest, unlike a fundamental right, it could be argued, could be trumped

137. See, e.g., *In re Oliver*, 333 U.S. 257, 273 (1948) (“A person’s right to reasonable notice of a charge against him, and an opportunity to be heard in defense—a right to his day in court—are basic in our system of jurisprudence; and these rights include, as a minimum, a right to examine the witnesses against him, to offer testimony, and to be represented by counsel.”).

138. Compare Christopher A. Bracey, *Truth and Legitimacy in the American Process*, 90 J. CRIM. L. & CRIMINOLOGY 691, 691 (1999) (advocating for the reduction of some, but not all procedural protections for accused criminals), with R. Randall Kelso, *Styles of Constitutional Interpretation and the Four Main Approaches to Constitutional Interpretation in American Law*, 29 VAL. U. L. REV. 121, 222 (1994) (noting that Justice Brennan included broad due process rights for criminal hearings as part of the instrumentalist quest).

139. See *Webster v. Reprod. Health Servs.*, 492 U.S. 490, 520 (1989) (plurality opinion); see also *id.* at 522-32 (O’Connor, J., concurring); *id.* at 532-37 (Scalia, J., concurring).

140. See *supra* notes 52-54 and accompanying text.

141. See *Webster v. Reprod. Health Servs.*, 492 U.S. at 520 (describing the right created by *Roe* as a “liberty interest protected by the Due Process Clause,” and not a “fundamental right” or a “limited fundamental constitutional right”).

by government satisfaction of a Holmesian rational basis test.¹⁴² But at the same time, the recognition that the Due Process Clause has something to say about the infringement of liberty that may not fall into a category of fundamental rights may lead in some instances to more, rather than less protection.

The first principle implicit in *Lawrence*, then, is one that should be rather obvious, but that has been obscured over the years by the Court's focus on the question of whether a claim invoked a fundamental right. Any deprivation of liberty requires that the government satisfy the Due Process Clause.¹⁴³ A criminal statute is the classic example of one that threatens deprivation of liberty. At least a minimal level of due process is required in any criminal prosecution. No one would argue that this is not so insofar as it deals with procedural due process, but it is also true with respect to the substance of the criminal prohibition.¹⁴⁴

A minimum degree of procedural due process includes such things as notice and an opportunity to be heard.¹⁴⁵ But what is the minimum standard for assessing the substantive due process of a criminal statute? Here we can return to *Lochner*, not to embrace the approach of the majority, but to focus on the starting point of all of the Justices. As we have seen,¹⁴⁶ each of the *Lochner* opinions began its analysis by assuming that a statute that interfered with liberty must not be arbitrary, or to put it in a more positive form, must be rational.¹⁴⁷

This point may be illustrated by recalling a scene in the early Woody

142. See *supra* note 73.

143. See U.S. CONST. amend. XIV, § 1 (“[N]or shall any State deprive any person of life, liberty, or property, without due process of law.”).

144. The level of procedural due process may vary depending on the circumstances. Compare *Scott v. Illinois*, 440 U.S. 367, 369, 373-74 (1979) (holding that the Sixth and Fourteenth Amendments do not require a right to counsel in cases where a misdemeanor offense authorizes prison time but no prison time is imposed), with *Argersinger v. Hamlin*, 407 U.S. 25, 37 (1972) (finding a right to counsel in misdemeanor cases where any prison time is imposed).

145. See *Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950) (“Many controversies have raged about the cryptic and abstract words of the Due Process Clause but there can be no doubt that at a minimum they require that deprivation of life, liberty or property by adjudication be preceded by notice and opportunity for hearing appropriate to the nature of the case.”).

146. For more analysis of the *Lochner* decision, see *supra* notes 66-95 and accompanying text.

147. See *supra* note 58 and accompanying text.

Allen comic film *Bananas*.¹⁴⁸ A rebel leader in a small South American country who has just succeeded in overthrowing the regime becomes drunk with power and proceeds to proclaim a series of absurd decrees, including the command that the citizens are now to wear their underwear outside their other clothing.¹⁴⁹ If such a statute were enforced and challenged in the United States, a court would not need to discuss at length whether the individual has a liberty interest in choosing how to wear his underwear.¹⁵⁰ The crux of the question before the court would be the obvious interest in avoiding prison or a fine for violation of a statute that is utterly irrational.¹⁵¹ The nature of the specific act in question will require an examination to assess whether it poses a threat to any legitimate state interest,¹⁵² but the act need not be examined to reach the obvious conclusion that an attempt to criminally punish it constitutes an action by which the state threatens liberty.¹⁵³

The importance of the act being criminalized to the individual and the degree to which that act is central to the individual's personhood, privacy or autonomy must be examined to determine whether to impose a heightened level of scrutiny to the prohibition.¹⁵⁴ But where the government will be held to no more than a rational basis test, the central inquiry is not the importance of the act to the individual, but whether the government can demonstrate a legitimate justification for banning it.¹⁵⁵

What, then, qualifies as a sufficient justification, and perhaps more importantly, what does not? The classic formula would concede legitimacy to a government act when it promotes the general welfare, the classic

148. BANANAS (MGM/United Artists 1971).

149. *Id.*

150. *See* *Lochner v. New York*, 198 U.S. 45, 56 (1905) (stating that the paramount inquiry is whether the law in question is "a fair, reasonable, and appropriate exercise of the police power of the state").

151. *See id.* (holding that one's liberty interest provides protection from the execution of "unreasonable, unnecessary, and arbitrary" laws).

152. *Id.* at 53.

153. *See id.* at 56 (explaining that "an unreasonable, unnecessary, and arbitrary interference with the right of the individual to his personal liberty" is unconstitutional).

154. *See* *Planned Parenthood of Southeastern Pa. v. Casey*, 505 U.S. 833, 851 (1992) (explaining that matters "involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment" and that "these matters could not define the attributes of personhood were they formed under compulsion of the State").

155. CHEMERINSKY, *supra* note 15, § 9.2, at 651; *see id.*, at 654-59 (discussing the legitimate government purpose requirement).

definition of what early cases called the police power.¹⁵⁶ But the concept of the general welfare is not necessarily self-defining. One might argue that any prohibition enacted by a democratically elected legislature must be in furtherance of the general welfare. The problem with legislation such as that depicted in *Bananas* is that it is imposed by a dictator.¹⁵⁷ A democratic government would not enact such a statute, and if it did, it would have acted for some benefit, perhaps not evident to us, that actually did further social welfare.

But this position, perhaps not far from that of Holmes,¹⁵⁸ has not been accepted by the Court in recent years.¹⁵⁹ At the very least, the Court has held that there are some illegitimate justifications for legislation, despite its embrace by a majority.¹⁶⁰ Equal protection cases have held that simple hostility toward, or irrational fear of a group cannot justify statutes disadvantaging that group, even under an analysis demanding only minimal scrutiny.¹⁶¹ *Lawrence* holds that mere reliance on traditional, and even contemporary majoritarian concepts of morality, by themselves, are insufficient to justify a criminal prohibition.¹⁶²

These negative statements, though helpful, do not give us a well-grounded theory that will allow us to recognize illegitimate prohibitions with confidence. Some groups may deserve the hostility of the community on rational grounds.¹⁶³ A vast array of criminal statutes are certainly

156. See *supra* notes 61-62 and accompanying text.

157. See *BANANAS* (MGM/United Artists 1971).

158. See *Lochner v. New York*, 198 U.S. at 75 (Holmes, J., dissenting) (arguing that the Supreme Court has allowed state constitutions and laws to “regulate life in many ways which we as legislators might think as injudicious or . . . tyrannical”).

159. See cases cited *supra* notes 109-14.

160. See, e.g., *Romer v. Evans*, 517 U.S. 620, 634-36 (1996) (rejecting the State’s asserted rationale that the Colorado law, which discriminated against homosexuals, protected citizens’ freedom of association and was passed out of respect for citizens who for personal or religious reasons objected to homosexuality); *United States Dep’t of Agric. v. Moreno*, 413 U.S. 528, 534 (1972) (rejecting an asserted government interest in promulgating the 1964 Food Stamp Act, which was intended to prevent politically unpopular “hippies” from utilizing food stamp programs).

161. See *supra* notes 109-14 and accompanying text.

162. *Lawrence v. Texas*, 539 U.S. 558, 577 (2003) (“[T]he 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” (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting))).

163. In *Connecticut Department of Public Safety v. Doe*, the Court justified the practice of requiring sex offenders, when released from custody, to register their presence with public officials in the community due to the potential danger of

consistent with traditional or conventional contemporary morality.¹⁶⁴ A coherent framework or theory is required if the *Lawrence* principle, when applied in other cases, is to deliver coherent and defensible results. Perhaps the best starting point is the classic harm principle set forth by nineteenth century liberal and utilitarian thinkers.¹⁶⁵ John Stuart Mill and others maintained that the only acceptable justification for restraints on liberty was that the restraint would prevent harm to others.¹⁶⁶ We need not accept, at least at the outset of analysis, this proposition in its full force, but few would doubt that preventing harm to others is a legitimate justification for the use of criminal sanctions that restrain liberty. This does, however, leave open the question of just what constitutes harm. And perhaps more controversial is whether, in fact, harm to others is the only proper justification; that is, whether and to what extent government may promote the general welfare by preventing the individual from harming himself.

These questions have been dealt with at length for centuries, but one of the most prominent recent efforts is Joel Feinberg's four-volume work entitled *The Moral Limits of the Criminal Law*.¹⁶⁷ In defending Mill's harm principle, Feinberg examines, in separate volumes, each of four categories of justification for criminal sanctions that have been advocated and accepted by different communities: harm to others,¹⁶⁸ offense to others,¹⁶⁹ harm to the actor himself,¹⁷⁰ and a fourth category of "harmless

recidivism. *Connecticut Dep't of Pub. Safety v. Doe*, 538 U.S. 1, 4 (2003).

164. See discussion *infra* notes 246-69 and accompanying text. Justice Scalia sees this fact as fatal to the position of the Court in *Lawrence*. *Lawrence v. Texas*, 539 U.S. at 589-90 (Scalia, J. dissenting).

165. See, e.g., *THE CLASSICAL UTILITIANS: BENTHAM AND MILL* (John Troyer ed., Hackett Publ'g Co. 2003) (describing the utilitarian harm principle through the writings of John Stuart Mill and Jeremy Bentham).

166. JOHN STUART MILL, *ON LIBERTY* 16 (Prometheus Books ed., 1986) (1859). For example, Mill wrote:

[T]he only purpose for which power can be rightfully exercised over any member of a civilized community, against his will, is to prevent harm to others. His own good, either physical or moral, is not a sufficient warrant. He cannot rightfully be compelled to do or forbear because it will be better for him to do so, because it will make him happier, because, in the opinion of others, to do so would be wise, or even right. These are good reasons for remonstrating with him, or reasoning with him, or persuading him . . . but not for compelling him . . .

Id.

167. See sources cited *supra* note 18.

168. FEINBERG, *HARM TO OTHERS*, *supra* note 18.

169. FEINBERG, *OFFENSE TO OTHERS*, *supra* note 18.

wrongdoing.”¹⁷¹

Unsurprisingly, Feinberg holds that the prevention of harm to others is a clearly acceptable use of the criminal law.¹⁷² He devotes his first volume largely to the most problematic applications of this principle, posing questions such as whether a failure to prevent harm qualifies as harm,¹⁷³ whether the voluntary consent of the person harmed absolves the actor,¹⁷⁴ whether one can be harmed posthumously,¹⁷⁵ and others. For our purposes, we need not examine each of these issues, but should note that Feinberg does not accept “moral harm” as sufficient.¹⁷⁶ Harm to others requires, in Feinberg’s terms, that the harmed person be shown to be worse off in some cognizable way, not merely “worse.”¹⁷⁷

Feinberg takes issue with some extreme liberals and libertarians in his second volume,¹⁷⁸ and contends that causing offense to others can be sufficient to bring the offender within the harm principle.¹⁷⁹ In other words, mental discomfort can legitimately be seen, at some point, to be a

170. FEINBERG, HARM TO SELF, *supra* note 18.

171. FEINBERG, HARMLESS WRONGDOING, *supra* note 18.

172. See FEINBERG, HARM TO OTHERS, *supra* note 18, at 11 (asserting that “it 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”).

173. See *id.* at 126-86 (discussing good Samaritan laws, the conflation of active aid and gratuitous benefit, the difficulty of separating laws requiring minimally decent acts and those requiring acts exceeding persons’ actual moral duties, and the interference with liberty a law imposing a requirement to act would have).

174. See *id.* at 35-36 (asserting that no wrong has occurred if the actor voluntarily inflicts harm upon himself or freely assumes the risk of harm-causing activity); *id.* at 115-17, 215 (discussing the Volenti maxim that a person cannot be wronged by conduct to which he has consented).

175. See *id.* at 79-83 (concluding that death is not necessarily a harm to the person who dies by comparing the case of a younger, vigorous person who dies with that of a retired nonagenarian who dies).

176. *Id.* at 66.

177. See *id.* at 105 (indicating that a harm is a “setting back, thwarting, impairing, defeating, and so on”). But see generally *id.* at 31-36 (struggling to define and classify different types of harms).

178. FEINBERG, HARMLESS WRONGDOING, *supra* note 18, at ix-x.

179. FEINBERG, OFFENSE TO OTHERS, *supra* note 18, at 1-3. Feinberg does limit the offense principle to “serious” offense, and the offense must be caused by conduct that can be seen as wrongful, in that it can be expected by the actor to cause such a reaction. *Id.* In addition, Feinberg maintains that while offense to others can justify criminal punishment, it generally is of a lesser magnitude than actual harm to others. *Id.* at 3.

harm.¹⁸⁰ However, he is careful to circumscribe this conclusion, and draws largely on the law of nuisance.¹⁸¹ An offensive action may be punished as a harm where the time, place, or manner of the act is beyond the bounds of reason, and the unwilling observer's reaction of disgust, shock, or outrage is itself reasonable.¹⁸² Thus, it will be insufficient to invoke this justification by merely alleging that someone (or the community at large) is offended by the knowledge that otherwise harmless, though perhaps repulsive, activity is going on somewhere in private.¹⁸³

In his third volume, Feinberg takes up the subject of legal paternalism, defined by Mill as the use of a criminal prohibition to "*prevent harm (physical, psychological, or economic) to the actor himself.*"¹⁸⁴ Taking the classic liberal position, Feinberg rejects the prevention of harm to the actor himself as a basis for criminal law.¹⁸⁵ However, he draws a line between what he calls "hard paternalism" and "soft paternalism."¹⁸⁶ Soft paternalism, which Feinberg accepts as reasonable and not inconsistent with liberal support for autonomy, warrants state interference with dangerous self-regarding behavior "*when but only when* that conduct is substantially nonvoluntary, or when temporary intervention is necessary to establish whether it is voluntary or not."¹⁸⁷ Because this type of government act does not seek to veto decisions that are genuinely autonomous, but merely to assure that they truly are autonomous, Feinberg concludes that soft paternalism is not clearly paternalistic.¹⁸⁸

Feinberg's fourth volume considers harmless wrongdoing. To clarify, he restates his definition of "harm" that may be criminalized as physical, psychological or economic injury, or as he puts it: "harm to one's body, psyche, or purse."¹⁸⁹ This definition excludes simple moral harms and in Feinberg's view, renders unacceptable any attempt to justify a criminal prohibition simply on the ground that its existence will lead to the elevation of the character of an individual or of society.¹⁹⁰

180. *Id.*

181. *Id.* at 6.

182. *Id.* at 5, 7-10.

183. *Id.* at 10.

184. FEINBERG, HARM TO SELF, *supra* note 18, at 4.

185. *Id.* at 3.

186. *Id.* at 12.

187. *Id.*

188. *Id.*

189. FEINBERG, HARMLESS WRONGDOING, *supra* note 18, at xx.

190. *See id.* at 277-317 (rejecting the principles of "legal perfectionism" and "coercion to virtue").

It is clear that American courts have never adopted in full Feinberg's conclusions concerning the moral justification of criminal sanctions as constitutionally mandated legal rules. No one, of course, liberal or conservative, libertarian or majoritarian, contests the proposition that demonstrable harm to others should be prohibited. But the proposition that the law may not act paternalistically to protect one from harming oneself has never been engraved in constitutional law. The most recent context in which this point has been illustrated has been the judicial treatment of cases contending for a right to die or a right to assisted suicide.¹⁹¹ These cases are not without some nods in the direction of a right of autonomy. The common law right to refuse medical treatment appears to command support among a majority of the Supreme Court,¹⁹² as does (although somewhat less clearly) the right to have an advance directive instructing withdrawal of treatment honored,¹⁹³ but the Court has failed to endorse a positive right to suicide or a right to obtain the assistance of others in ending one's life.¹⁹⁴ The Court's explanation for this refusal contains significant elements of what Feinberg would characterize as "soft paternalism."¹⁹⁵ The Court is concerned that lifting the bar on assisted suicide would create too great an opportunity for abuse and for hastening the death of some who may not actually desire death.¹⁹⁶ Still, at least where the harm involved is to the actor's "body, psyche, or purse," current constitutional doctrine¹⁹⁷ has not yet invalidated paternalism as a legitimate

191. See *supra* notes 122-24 and accompanying text.

192. See *supra* note 122 and accompanying text.

193. See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 289 (1990) (O'Connor, J., concurring) ("I also write separately to emphasize that the Court does not today decide the issue whether a State must also give effect to the decisions of a surrogate decisionmaker. In my view, such a duty may well be constitutionally required to protect the patient's liberty interest in refusing medical treatment.") (citation omitted). Justice Brennan, in his dissenting opinion, observed that "[t]he court did not specifically define what kind of evidence it would consider clear and convincing, but its general discussion suggests that only a living will or equivalently formal direction from the patient when competent would meet the standard." *Id.* at 323 (Brennan, J., dissenting).

194. See *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) (upholding a state's ban on assisted suicide).

195. See FEINBERG, HARM TO SELF, *supra* note 18, at 12-16 (defining soft paternalism as the state's "right to prevent self-regarding harmful conduct . . . when but only when that conduct is substantially nonvoluntary").

196. See *Washington v. Glucksberg*, 521 U.S. at 731-32 ("[T]he state has an interest in protecting vulnerable groups—including the poor, the elderly, and disabled persons—from abuse, neglect, and mistakes.").

197. See *id.* at 731 ("[T]he state has an interest in protecting vulnerable groups

government justification for criminal sanctions.¹⁹⁸ The issue of the legitimacy of paternalistic justifications is not central to our inquiry into the significance of *Lawrence*, however, and it can therefore be set aside.

What *is* significant and new in *Lawrence* is the extent to which it suggests that the Court endorses Feinberg's rejection of "legal moralism," initially defined by Feinberg as the proposition that "[i]t can be 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 others."¹⁹⁹ *Bowers* explicitly endorsed the position that an accurate appraisal of traditional or majoritarian views on the immorality of an act is sufficient to legitimate criminalization of that act under low-level rational basis scrutiny, with no further need to justify the community's view by pointing to concrete harms flowing from this activity.²⁰⁰ *Lawrence*, however, rejects that view.²⁰¹

To justify a criminal statute by its foundation in majority views of morality is to essentially argue that its legitimacy under low-level scrutiny is beyond judicial review. A court could hardly claim the power to declare that the legislative assessment of what the majority view of morality entailed was less accurate than the court's own.²⁰² While the position that courts should defer to any legislative judgment that is not an irrefutable violation of a clear constitutional command has a long history of academic advocacy,²⁰³ it has never been adopted by the Supreme Court. Apart from

... from abuse, neglect, and mistakes.").

198. See FEINBERG, HARM TO SELF, *supra* note 18, at 4-8 (describing the reasoning underlying "legal paternalism" in criminal law).

199. See FEINBERG, HARMLESS WRONGDOING, *supra* note 18, at xix-xx. Feinberg later redefines "legal moralism" "as the principle that *it is always a good reason* in support of criminalization that it prevents non-grievance evils or harmless immoralities." *Id.* at 324.

200. *Bowers v. Hardwick*, 478 U.S. 186, 188, 190-96 (1986).

201. See *Lawrence v. Texas*, 539 U.S. 558, 571-73, 578 (2003) (overruling *Bowers* after questioning the validity of the assertion that homosexual activity has a history of being characterized, and actively prosecuted, as criminal conduct).

202. This problem is heightened by the finality of Supreme Court determinations. The Canadian constitutional system, in contrast, provides that in a wide range of instances involving rights claims, legislatures may respond to Supreme Court decisions invalidating statutes by reenacting the law in question, and the law will stand, regardless of the Court's decision, for a period of five years. See CANADIAN CHARTER OF RIGHTS AND FREEDOMS pt. I, § 33.

203. See, e.g., James B. Thayer, *The Origin and Scope of the American Doctrine of Constitutional Law*, 7 HARV. L. REV. 129, 144 (1893) (proposing that "only . . . when those who have the right to make laws have not merely made a mistake, but

a few academic voices, it seems well accepted across the political spectrum that the Court is empowered to assess legislation against even the most open-ended of constitutional commands.²⁰⁴

But if we take seriously the position of Justice Harlan in *Lochner*, that the government must produce some evidence to support the legitimacy of criminal legislation,²⁰⁵ we must then face the question of how much evidence, and perhaps more significantly, what kind. Justice Harlan's opinion suggests that the quantum of evidence the state must produce to satisfy the test of rationality is not great.²⁰⁶ Certainly, the proof offered does not need to satisfy a court that it outweighs the evidence that the prohibition does not further the general welfare.²⁰⁷ It seems to be, in evidence law terms,²⁰⁸ more of a burden of going forward than a burden of proof.²⁰⁹ This seems to be something akin to the deferential standard

have made a very clear one,—so clear that it is not open to rational question,” should courts find a statute unconstitutional).

204. Of course, there is still widespread disagreement concerning how vigorously the power of judicial review should be exercised, but the fact that the Court has the power to disagree with legislative determinations concerning such things as due process and equal protection is firmly established. *See generally* Symposium: *Judicial Review Versus Democracy*, 42 OHIO ST. L.J. 1 (1981) (containing analysis of the political implications of judicial review by some of the nation's leading constitutional law scholars).

205. *See Lochner v. New York*, 198 U.S. 45, 68-72 (1905) (Harlan, J., dissenting) (asserting that the statute should be upheld because evidence had been presented that bakers and confectioners who worked excessive hours were prone to severe health problems, which, in Justice Harlan's view, was sufficient to establish a connection between the conduct prohibited by the statute and the harm that would have occurred absent the statute).

206. *See id.* at 68 (“If the end which the legislature seeks to accomplish be one to which its power extends, and if the means employed to that end, although not the wisest or best, are yet not plainly and palpably unauthorized by law, then the Court cannot interfere.”).

207. *Id.*

208. *See* FED. R. EVID. 301 (providing that “a presumption imposes on the party against whom it is directed the burden of going forward with evidence to rebut or meet the presumption, but it does not shift to such party the burden of proof in the sense of risk of nonpersuasion, which remains throughout the trial upon the party on whom it was originally cast”).

209. *See Lochner v. New York* 198 U.S. at 68 (noting that the burden of proof “is upon those who assert [that the statute is] unconstitutional”). Professor Clifford Fishman provides more information on the distinction between burdens of proof and burdens of going forward, or to put it differently, burdens of producing evidence and burdens of persuasion. *See* CLIFFORD S. FISHMAN, *JONES ON EVIDENCE: CIVIL AND CRIMINAL* §§ 3:1-3:45 (7th ed. 1992).

commonly applied in cases reviewing actions of administrative agencies.²¹⁰

More significant, however, is the question of the kind of evidence or the type of justification put forward. How, in a post-*Lawrence* legal world, can we recognize insufficient arguments in favor of a criminal prohibition based not on the weight of the evidence, but rather on the nature of the justification? Drawing on Feinberg, we can delineate two types of insufficient justifications, though whether a particular prohibition falls into either category will not always be immediately obvious. The first of these is that the prohibition in question seeks to preserve traditional moral or cultural practices from erosion or change.²¹¹ The second is that the prohibited act is simply, in some sense, inherently wrong regardless of whether it has any noticeable affect on others.²¹² In *Lawrence*, there are overtones of each of these attempted justifications.

Prior to *Lawrence*, in *Romer v. Evans*,²¹³ Justice Scalia made clear his view that constitutional litigation over issues regarding sexual behavior and the legislation challenged by that litigation was part of a struggle to define and enforce cultural values.²¹⁴ The context of Scalia's comments in *Romer* made it clear that he regards legislation meant to preserve and enforce these values as legitimate, and not merely reflections of mindless hostility.²¹⁵ The defender of the use of criminal sanctions to preserve

210. While the federal Administrative Procedure Act sets forth both a standard of "substantial evidence" and one of "arbitrary and capricious" agency action for judicial review, each is highly deferential. KENNETH CULP DAVIS & RICHARD J. PIERCE, JR., ADMINISTRATIVE LAW § 11.1-.5 (3d ed. 1994); see also *Ass'n of Data Processing v. Bd. of Governors*, 745 F.2d 677, 683-84 (D.C. Cir. 1984) (noting that "there is no *substantive* difference between what [the arbitrary and capricious standard] requires and what would be required by the substantial evidence test").

211. See generally FEINBERG, HARMLESS WRONGDOING, *supra* note 18, at 39-80 (discussing the concept of "moral conservatism," "the thesis that it can be morally legitimate to preserve a society's traditional way of life from radical or essential change by means of legal coercion").

212. *Id.* at 124-75 (discussing strict legal moralism, the view that "true immoralities, . . . even when private and harmless, are such evident and odious evils that they should be forbidden on the ground of their evil alone").

213. *Romer v. Evans*, 517 U.S. 620 (1996).

214. See *id.* at 636 (Scalia, J., dissenting) ("The Court has mistaken a Kulturkampf for a fit of spite. The constitutional amendment before us here is not the manifestation of a 'bare . . . desire to harm' homosexuals, but is rather a modest attempt by seemingly tolerant Coloradans to preserve traditional sexual mores against the efforts of a politically powerful minority . . .") (citation omitted).

215. *Id.* (Scalia, J., dissenting). The obvious point of Justice Scalia's dissent in *Romer* is that it is quite legitimate to conduct a "culture war" to preserve traditional values.

traditional cultural values will contend that the violation of those norms, even in private, and the knowledge that they are no longer enforced or universally subscribed to, will cause these values to erode.²¹⁶ If this is true, one might argue that there is no significant difference between preventing this from occurring and preventing offense, if not harm, to a majority that wishes to adhere to long-established values. Offense will occur in the long run, rather than immediately, but it will occur nonetheless.

This argument overlooks, however, what must be the position of a society that endorses the concept of liberty generally, and the values inherent in the First Amendment in particular. Such a society has to be open to the possibility that majority values will evolve and perhaps even undergo drastic change. Justice Scalia may be correct in arguing that a culture war is underway,²¹⁷ but there must be ground rules on how that struggle is conducted.

In this regard, it should once again be noted that we are dealing here only with criminal prohibitions, the most obvious method of government depriving a citizen of liberty. Neither the Fourteenth Amendment itself, nor its interpretation in *Lawrence*, requires that the majority of citizens, acting through their representatives, remain entirely neutral on questions of morality. The majority may seek to persuade, and may provide incentives for those who choose to act in a particular way, but the use of criminal sanctions goes too far. It attempts, by coercive means, to freeze traditional moral concepts in a way that limits not only the liberty of the individual today, but the liberty of future majorities to define their own moral conventions.²¹⁸ As Feinberg points out, “the vanishing of the New England theocratic village life-style, the antebellum Southern plantation way of life, and the double-faced Victorian standards of sexual propriety”

216. FEINBERG, HARMLESS WRONGDOING, *supra* note 18, at 43-50 (analyzing the psychic aggression thesis (the “dubious” belief “that deviations from conventional morality even in private are threats to the mental health of others”), the social disintegration thesis (the “even more dubious” belief “that conventional immoralities threaten every individual with the disintegration of his society and ensuing anarchy”), and the offense principle (which is opposed to “discreetly private immoralities on the ground that they would come to be directly offensive anyway, their original privacy not withstanding”) as all being distinct from “moral conservatism”).

217. See *Romer v. Evans*, 517 U.S. at 636 (Scalia, J., dissenting).

218. Thus, to base an argument in favor of coercive enforcement of majoritarian morality or democratic theory creates a paradox. “Democratic theory endorses the moral propriety of majority rule only when minorities have been left free to try to become majorities if they can[;] . . . [t]hat opportunity is hardly open to the person whose favored activities are deemed criminal and banned on pain of punishment.” FEINBERG, HARMLESS WRONGDOING, *supra* note 18, at 52-53.

were certainly seen at one time to be social evils by those who were comfortable in these environments.²¹⁹ In retrospect, however, most would consider the abandonment of these norms to be beneficial. Social change may be resisted by argument, incentives, and nongovernmental social pressure, but the coercive use of criminal sanctions is contrary to the basically open society envisioned by the Constitution.

The argument that criminal sanctions can be justified to prevent social change seen as detrimental has significant flaws, but at least it does maintain that the prohibited conduct will cause or threaten social harm. The second attempt at justification of criminal statutes based solely on moral sentiment would maintain that a demonstration of immediate social harm is unnecessary.²²⁰ Under this view, conduct may be prohibited simply because it is clearly contrary to obvious principles of true or objective morality.²²¹

This position will often overlap with the position that apparently harmless wrongdoing will actually threaten the long-term “harm” of changing commonly accepted norms of social conduct, but it is not precisely the same. By definition, current social norms are those held by the majority; a demonstration that those norms are no longer prevalent effectively rebuts the argument. At least in theory, however, an advocate of the defense of true or objective morality need not demonstrate majority support. It would be quite sufficient that an enlightened minority has succeeded in enlisting the criminal law to coerce others to follow the proper path.

This “pure moralism” is rare as the sole justification for punishment. Those who recognize a true objective morality usually rely not only on the self-evident wrongness of a given act, or on some variation of an argument from divine command. Instead, they will point to the alleged harms caused by the immoral act.²²² In some cases, the harm will be real and undisputable; in other cases, as noted, it will be a variation on this “harm” of eroding social norms. But there will be cases in which the act is performed either in private or only among consenting participants or observers.²²³

219. *Id.* at 80.

220. *See id.* at 124-75.

221. *Id.* at 173-75.

222. *See id.* at 124 (defining a “strict moral realist” as one who believes “there is an can be no harmless wrongdoing”).

223. *See id.* at 124-25.

In these situations, the advocate of the enforcement of true morality may argue that the act in question harms the actor, even if no harm to another can be demonstrated.²²⁴ The efficacy of this argument, either in general or in a particular instance, will depend on the degree to which paternalism is regarded as legitimate. It is far from clear that the Supreme Court has determined, or is likely to determine, that government may not act to protect an individual from harmful consequences of his or her own acts.²²⁵ Feinberg, on the other hand, regards the rejection of paternalism as a legitimate basis for criminal sanctions as fundamental to liberal theory.²²⁶ While there is certainly a gap between these positions, it may not be as sharp as it might initially seem. Much of the Supreme Court's refusal to reject protection of the actor from his or her own actions as a legitimate basis for criminal punishment seems based on the perceived need to protect those who are less than fully competent, or particularly vulnerable, from decisions that can be seen for that reason as less than fully informed or fully volitional.²²⁷ Feinberg does not disagree with the need to protect those whose behavior "is substantially nonvoluntary, or [to act] when temporary intervention is necessary to establish whether it is voluntary or not."²²⁸ To Feinberg, this is soft paternalism, which in his view is not paternalism, or at least not the paternalism that he rejects.²²⁹ In light of this agreement on the legitimacy of government protection of individuals from their own acts where substantial questions can be raised as to the fully voluntary nature of those acts, the gap between Feinberg and the current Supreme Court doctrine shrinks, although in all likelihood it does not disappear. Situations where someone is acting in ways that present obvious threats to the actor's health or other interests will raise questions concerning the voluntary nature of the act; however, where the individual

224. Among many examples would be the dehumanizing effect on actors performing in pornographic films or live sex shows. *See id.* at 126-27.

225. *See* *Washington v. Glucksberg*, 521 U.S. 702, 735 (1997) (upholding a state law banning assisted suicide); *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279-83 (1990) (upholding a statute requiring clear and convincing evidence that an incompetent person's wishes are followed before allowing a surrogate to withdraw treatment).

226. *See* FEINBERG, *HARMLESS WRONGDOING*, *supra* note 18, at 3 ("'liberalism' . . . rejects the legitimizing principle called 'legal paternalism'").

227. Thus, the more serious the consequences to the actor, the more legitimate is government supervision to assure that the act is genuinely voluntary. *See* FEINBERG, *HARM TO SELF*, *supra* note 18, at 117-21 (arguing that voluntariness is a "variable concept" that is dependent "on the nature of the circumstances, the interests at stake, and the moral or legal purpose to be served").

228. *Id.* at 12.

229. *Id.*

is merely acting in a way that, although not presenting any threat to others or the community, merely indicates that the actor's character falls short of community norms, criminal punishment will not be justified.²³⁰

Feinberg rejects what he calls "legal perfectionism" as a proper justification for criminal sanctions.²³¹ This doctrine holds that a criminal prohibition can be justified by the claim "that it will make citizens better people."²³² Once again, Feinberg stresses that he does not reject the legitimacy of some government role in instilling virtue; education and other incentive-driven behaviors are entirely proper.²³³ But the use of coercion not only violates the basic liberty principle that Feinberg defends,²³⁴ it is somewhat paradoxical. Feinberg asserts that coercion to virtue is a contradiction in terms.²³⁵ Coercion can only instill the "virtue" of obedience to authority;²³⁶ genuine virtues are developed and adopted by the individual.²³⁷ To be sure, the individual acts within a context of social influence, but ultimately that influence falls short of coercion, and the virtuous individual chooses virtue.²³⁸

230. FEINBERG, HARMLESS WRONGDOING, *supra* note 18, at 118-20.

231. *Id.* at 277-311.

232. *Id.* at 277. Or, to put it another way, "[a]ccording to . . . 'legal perfectionism,' it is a proper aim of the criminal law to perfect the character and elevate the taste of the citizens who are subject to it." *Id.*

233. *See id.* at 278 ("It also seems undeniable that the state may properly attempt to promote public virtue and raise the level of excellence throughout society by such methods as moral and cultural education in the public schools, subsidies to the arts and sciences, and awards and prizes to virtuous exemplars.").

234. *See id.* at 281-82 (asserting that "[i]t would be manifestly absurd to threaten people with punishment in order to give them wisdom, style, integrity, or a better sense of humor" because "then they have in mind only those dispositions of character that are *moral* virtues in a familiar stricter sense, but not all of *them* either[:] [g]enuine generosity, concern, magnanimity, and courage are not readily produced by a policeman's billy club or threats of imprisonment"); *id.* at 318-20 ("defend[ing] liberalism from the otherwise potent argument of legal paternalists that mere 'liberty' is value that can sometimes be 'outweighed' by reasonable estimates of the actor's own good").

235. *See id.* at 281-82 ("The only virtue clearly produced by [intimidation], namely simple obedience, may not in its own right be a moral virtue at all.").

236. *Id.* at 282 ("[S]imple obedience . . . may not in its own right be a moral virtue at all.").

237. *Id.* at 281.

238. A strong behaviorist would maintain that all human behavior is controlled, the only difference being in how open the controls are. *Id.* at 289. Feinberg, however, contends that social development of an individual's conscience is not genuine compulsion. *Id.* Rather, it is "indistinguishable from genuine self-determination, even though the determining self is originally the product of the

The distinction between acceptable incentivizing measures and unacceptable coercion is already evident in the Court's approach to substantive due process cases involving abortion. In these cases addressing a recognized component of the privacy right, the Court has drawn a distinction between invalid government prohibition and acceptable government acts to provide incentives to choose alternatives to abortion.²³⁹ Despite strong arguments to the effect that no meaningful distinction can be drawn between coercion and the manipulation of incentives and disincentives, and perhaps even between coercion and the expression of approval or disapproval,²⁴⁰ constitutional law has consistently maintained a line between negative rights to be free of government coercion and the generally rejected concept of positive rights to government assistance in carrying out one's choices.²⁴¹

Lawrence, then, does not disable government from promoting traditional or majoritarian views of morality, it merely removes the criminal law weapon of coercion. Subsequent cases, or cases grounded in state constitutional provisions, may go further, but Feinberg's principle does not inevitably lead to the principle, associated most prominently with

external factors that shaped it." *Id.*

239. Thus, while the Supreme Court protected a strong version of the abortion right in the years immediately following *Roe*, it held that the right has never included entitlement to equal government subsidy of both abortion and childbirth. See cases cited *supra* note 118.

240. Feinberg discusses the work of behaviorist psychologist B.F. Skinner, who maintained that all human action was the result of outside control whether obvious or subtle, whether maintained by punishment (negative reinforcement) or rewards (positive reinforcement). See FEINBERG, HARMLESS WRONGDOING, *supra* note 18, at 287-94.

241. See, e.g., *Harris v. McRae*, 448 U.S. 297, 316 (1980) (rejecting the argument that the denial of public funding for abortions infringes on a constitutional right); *Maier v. Roe*, 432 U.S. 464, 470-71 (1977) (refusing to treat poverty as a suspect classification warranting the application of strict or intermediate scrutiny); *San Antonio Indep. Sch. Dist. v. Rodriguez*, 411 U.S. 1, 35 (1973) (holding that there is no fundamental constitutional right to state-supported education). The United States Constitution, as written and interpreted, provides less support for positive rights to government assistance than the constitutions of many other western nations. See, e.g., Gerhard Casper, *Changing Concepts of Constitutionalism: 18th to 20th Century*, 1989 SUP. CT. REV. 311, 325-30 (discussing the American approach to the welfare state as contrasted with that of France, England, and Germany); Mary Ann Glendon, *Rights in Twentieth-Century Constitutions*, 59 U. CHI. L. REV. 519, 523-26, 527-32 (1992) (contrasting the United States Bill of Rights, which is "a 'charter' of 'negative' liberties, protecting certain areas of individual freedom from state interference," from post-World War II European constitutions, which "supplemented traditional negative liberties with certain affirmative social and economic rights or obligations").

Ronald Dworkin, that government must maintain complete neutrality on the question of what lifestyles are worthy of respect.²⁴²

The principle that criminal sanctions may be used to prevent or punish only harm or offense to others has two sides. It not only provides reasons for invalidating prohibitions, but also provides justifications for upholding them. The limits of the principle can be illustrated by examining the litany of horrors put forward by Justice Scalia in his *Lawrence* dissent.²⁴³ In a widely noted passage, Justice Scalia contends that “[s]tate laws against bigamy, same-sex marriage, adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity are . . . sustainable only in light of *Bowers*’ validation of laws based on moral choices.”²⁴⁴

This list is wildly overinclusive. Justice Scalia fails to distinguish between prohibitions that—while surely consistent with traditional or conventional morality—satisfy the harm principle, and those that do not. A closer look at the activities listed by Justice Scalia reveals that they are by no means all of the same character:

(a) *Adultery*. Perhaps most obvious of all of the offenses on Justice Scalia’s list, adultery clearly can be seen as harmful to a specific victim: the betrayed spouse. Thus, the harm principle is easily satisfied here.

(b) *Bigamy*. Initially, an important distinction must be drawn. The *Lawrence* principle and the Due Process Clause of the Fourteenth Amendment do not require that the government provide benefits, only that it limit its interference with liberty.²⁴⁵ Thus, substantive due process by no means requires states to recognize plural marriages.²⁴⁶ The sole question is

242. See RONALD DWORKIN, *TAKING RIGHTS SERIOUSLY* 179-83 (1978) (analyzing John Rawls’s proposition “that individuals have a right to equal concern and respect in the design and administration of the political institutions that govern them”).

243. See *Lawrence v. Texas*, 539 U.S. 558, 589-90 (2003) (Scalia, J., dissenting) (collecting cases that “have relied on the ancient proposition that a governing majority’s belief that certain sexual behavior is ‘immoral and unacceptable’ constitutes a rational basis for regulation”).

244. *Id.* at 590 (Scalia, J., dissenting).

245. See *id.* at 578 (“[Petitioners]’ right to liberty under the Due Process Clause gives them the full right to engage in their private conduct *without intervention of the government.*”) (emphasis added).

246. See generally Maura Strassberg, *The Crime of Polygamy*, 12 TEMP. POL. & CIV. RTS. L. REV. 353, 357-58, 366-89 (2003) (discussing modern Mormon fundamentalist polygamy, particularly the aspect of teenage plural wives, as a justification for continued government policy of criminalizing it); Richard A. Vazquez, Note, *The Practice of Polygamy: Legitimate Free Exercise of Religion or Legitimate*

whether bigamy can be treated as a crime, consistent with the *Lawrence* principle. History shows that bigamy is often accompanied by fraud or coercion.²⁴⁷ Each of these situations presents an instance of clear harm that goes beyond merely offending notions of conventional morality.²⁴⁸ Granted, there is no perfect fit between instances of bigamy that include fraud or coercion, and those that do not. If *Lawrence* or other cases imposed a traditional strict scrutiny approach on cases such as this, the state might not prevail.²⁴⁹ But *Lawrence* calls only for a determination that the prohibition is not arbitrary.²⁵⁰ *Lawrence* and the harm principle pose no threat to these prohibitions.

(c) *Fornication*. Here, Justice Scalia has a valid point. After *Lawrence*, it is difficult to see how a criminal statute prohibiting consensual, noncommercial sex, in private, between adults could be upheld.²⁵¹ But this seemed clear well before *Lawrence*.²⁵² It is difficult to imagine prosecutors attempting to punish these types of acts after *Griswold* and *Eisenstadt*.²⁵³ Of course, where one of the qualifications (consensual,

Public Menace? Revisiting Reynolds in Light of Modern Constitutional Jurisprudence, 5 N.Y.U. J. LEGIS. & PUB. POL'Y 225, 253 (2001) (arguing that the judiciary should rely on the public policy interests of protecting women and children from "the real harms [they] suffer in polygamous societies," instead of employing "a 'public morality' rhetoric" when "sustain[ing] criminal bigamy laws against Free Exercise challenges").

247. See Vazquez, *supra* note 246, at 239-40 (asserting that criminal bigamy laws would likely survive strict scrutiny if courts would cease "resorting to 'public morality' rhetoric in examining" them, and instead focus on "the real public harms in polygamous communities": sexual assault and fraud).

248. See *id.* at 240-44 (providing examples of fraud and assault in polygamous communities).

249. Cf. *id.* at 245-46 (asserting that the closed nature of polygamous communities insulates the harm to women and children that occurs in such communities from empirical study, making it difficult to pinpoint a specific harm, in turn hindering state legislatures from narrowly tailoring a statute to address the identified harm—fatal in a strict scrutiny analysis).

250. Or, that it is not a statute that "furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual." *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

251. See *Lawrence v. Texas*, 539 U.S. at 578 (citing that because *Lawrence* did not "involve persons who might be injured or coerced or who are situated in relationship where consent might not easily be refused," did not "involve public conduct or prostitution," and did not "involve whether the government must give formal recognition to any relationship that homosexual persons seek to enter," "the State cannot demean their existence or control their destiny by making their private sexual life a crime").

252. See *supra* notes 30-37 and accompanying text.

253. See *supra* notes 30-37 and accompanying text.

noncommercial, private, adult) is not satisfied, the act may be punished because the danger of harm or offense is obvious.²⁵⁴

(d) *Masturbation*. Once again, Justice Scalia seems correct that a private act of masturbation may not be criminally punished after *Lawrence*.²⁵⁵ But, even more clearly than in the case of fornication, it seems clear that this was true prior to *Lawrence*.²⁵⁶ No criminal statute prohibiting masturbation could satisfy Feinberg's harm principle.

(e) *Prostitution*. As in the case of bigamy, prostitution will often present the clear possibility of identifiable harm. Exploitation of women whose participation may not be voluntary,²⁵⁷ public health concerns, and other harms may accompany the exchange of sex for money. It is surely the case that a sub-category of prostitution is free of these threats,²⁵⁸ and if *Lawrence* imposed a standard of strict scrutiny, Justice Scalia's concern might be warranted. But *Lawrence* does not.²⁵⁹ While a blanket prohibition of prostitution may be overbroad, it seems sufficiently related to identifiable harm beyond moral offense to satisfy *Lawrence*.²⁶⁰

(f) *Same-sex marriage*. Here, Justice Scalia conflates failure of a state

254. See *Lawrence v. Texas*, 539 U.S. at 578.

255. *Id.* at 590 (Scalia, J., dissenting).

256. See *id.* at 578 (“[I]ndividual decisions by married persons, concerning the intimacies of their physical relationship . . . are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.”) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986)).

257. See generally Jane E. Larson, *Prostitution, Labor, and Human Rights*, 37 U.C. DAVIS L. REV. 673, 678-79 (2004) (discussing the U.N. Special Rapporteur on Violence Against Women and the U.N. Crime Commission in Vienna, which distinguished women who enter prostitution voluntarily with those who enter involuntarily); Vednita Carter & Evelina Giobbe, *Duet: Prostitution, Racism and Feminist Discourse*, 10 HASTINGS WOMEN'S L.J. 37, 49-52 (1999) (discussing the power imbalance between men and female prostitutes).

258. See Larson, *supra* note 257, at 678 (stating that U.N. processes have come to accept some forms of voluntary prostitution).

259. See *Lawrence v. Texas*, 539 U.S. at 558-79 (refusing to hold that the right to engage in homosexual activity is a fundamental right warranting the application of strict scrutiny).

260. Cf. *City of Erie v. Pap's A.M.*, 529 U.S. 277, 290 (2000) (O'Connor, J.). Justice O'Connor would have upheld the Pennsylvania law in dispute in *City of Erie v. Pap's A.M.*, which barred live nude entertainment, because “‘nude live entertainment . . . adversely impacts and threatens to impact on the public health, safety and welfare by providing an atmosphere conducive to violence, sexual harassment, public intoxication, prostitution, the spread of sexually transmitted diseases, and other deleterious effects.’” *Id.* (quoting *Pap's A.M. v. City of Erie*, 719 A.2d 273, 279 (Pa. 1998)).

to provide equal access to benefits with criminal punishment. While *Lawrence* is surely part of a growing reconsideration by society of its attitude toward homosexuals, the question of whether same-sex marriage is constitutionally required is an equal protection issue.²⁶¹ Even states strongly opposed to same-sex marriage do not prosecute same-sex couples who structure their lives to approximate traditional marriage. As we have seen, *Lawrence* does not disable government from all decisions that create incentives for one course of conduct over another, it merely restricts the use of the coercive force of criminal punishment.²⁶²

(g) *Obscenity*. Supreme Court cases dealing with the obscenity issue actually present further, albeit subtle, support for the proposition that the Court is moving toward acceptance of the harm principle. The Court's earliest obscenity cases seemed to accept prevailing notions of the moral offense presented by the existence of obscenity with little or no discussion.²⁶³ More recent cases, however, have found it helpful, if not necessary, to justify the exclusion of obscenity from the protection of the First Amendment by pointing to the arguable linkage between pornographic or obscene materials and concrete harms such as crime, exploitation of women, or deterioration of neighborhoods.²⁶⁴ The obscenity issue is complicated by the First Amendment concerns that it implicates; it is questionable whether the linkage between obscenity and identifiable social harm is strong enough to survive heightened scrutiny.²⁶⁵

261. Thus, the Massachusetts case holding that homosexual marriage must be recognized by the state turned on the court's reading of the state constitution's equal protection clause, as well as its due process protections. See *Goodridge v. Dep't of Pub. Health*, 798 N.E.2d 941, 959-70 (Mass. 2003).

262. See *Lawrence v. Texas*, 539 U.S. at 571 ("The issue is whether the majority may use the power of the State to enforce these views on the whole society through operation of the criminal law.").

263. E.g., *Roth v. United States*, 354 U.S. 476, 481 (1957) ("Although this is the first time the question has been squarely presented to this Court . . . expressions found in numerous opinions indicate that this Court has always assumed that obscenity is not protected by the freedoms of speech and press.").

264. For example, in *Paris Adult Theatre I v. Slaton*, the Court cited evidence of "at least an arguable correlation between obscene material and crime." *Paris v. Adult Theatre I v. Slaton*, 413 U.S. 49, 58 (1973). In cases involving the regulation of expressive activity not classified as obscene, the Court has pointed to the likelihood of "negative secondary effects" impacting health, safety and general welfare, as justifying such regulation. See, e.g., *City of Erie v. Pap's A.M.*, 529 U.S. at 290.

265. When the First Amendment is applied with full force and there has been no determination that a particular work is obscene, an arguable link between pornography and violence toward women has been held insufficient to justify a punitive ordinance. See, e.g., *Am. Booksellers Ass'n, Inc. v. Hudnut*, 771 F.2d 323, 331-

But *Lawrence* does not insist on that level of state justification. By itself it adds little or nothing to prevailing law on this question.

(h) *Adult Incest*. Assuming that Justice Scalia is referring here only to consensual adult activity, it is likely that he is correct. As much as adult incest is still regarded as repellant, it seems difficult to produce a convincing rationale for such criminal prohibitions. Once again, however, this may well have been true prior to *Lawrence*, simply on the basis of the *Griswold-Eisenstadt* line of cases.²⁶⁶ As with fornication or masturbation, there seems little or no actual public or prosecutorial zeal for punishing these acts in contemporary society.²⁶⁷

(i) *Bestiality*. Once again, this presents an issue that is hardly at the top of the list of concerns for many prosecutors. Nevertheless, it would seem that possible public health dangers may well satisfy the harm principle here. In addition, if we include animals within the universe of those who the state may protect from harm or undue exploitation, a rational defense of those proclivities is evident.

Justice Scalia severely overstates the impact of the *Lawrence* principle, seen as an endorsement of the harm principle, on a wide range of criminal statutes.²⁶⁸ He fails to distinguish between the vast majority of criminal statutes that, while surely consistent with traditional or conventional morality, also serve to guard against harm to “body, psyche, or purse,” and those that do not.²⁶⁹ The relatively small universe of the latter, which we might designate as purely moral offenses, is indeed on tenuous constitutional ground, but this can be seen as less of a revolution than an obvious extension of earlier developments. But the fact that *Lawrence* will not lead to massive rewriting of criminal codes does not mean that it is insignificant. *Lawrence* does, at least potentially, place meaningful restrictions on the extent to which legislators may enact criminal sanctions without doing more than merely responding to public

34 (7th Cir. 1985) (rejecting an Indianapolis ordinance even though it was limited to injuries “directly caused by . . . pornography”). For a contrasting analysis of these same issues within a constitutional system that explicitly calls for balancing free speech concerns with public welfare concerns, see *Butler v. The Queen* [1992] S.C.R. 452 (Can.).

266. See *supra* notes 30-37 and accompanying text.

267. This is limited, of course, to such activity that remains not only consensual, but private and noncommercial. See, e.g., *Commonwealth v. Walter*, 446 N.E.2d 707, 708-09, 711 (Mass. 1983) (affirming a prostitution conviction when the defendant advertised massages and performed masturbation for a fee).

268. *Lawrence v. Texas*, 539 U.S. 558, 590 (2003) (Scalia, J., dissenting).

269. See FEINBERG, HARMLESS WRONGDOING, *supra* note 18, at xx.

sentiment.

IV. SUMMARY AND CONCLUSION

Lawrence v. Texas is obviously an extremely significant development with respect to gay and lesbian rights. But what can we say about its significance beyond those parameters? What does it add to the overall pattern of constitutional analysis? At the outset, of course, some degree of caution is warranted. Past decisions of the Supreme Court have had a significant impact on American history but do not appear to have left a lasting imprint on the development of constitutional doctrine apart from their narrow holdings. Some, like *Korematsu v. United States*,²⁷⁰ have become anomalies,²⁷¹ inconsistent with subsequent developments. Others, such as *Shelley v. Kraemer*,²⁷² provided an impetus for subsequent developments, but are rarely relied on for their underlying reasoning.²⁷³ And still others, including *Bush v. Gore*,²⁷⁴ remain as potential sources of new law, while at the same time have the possibility of becoming mere legal curiosities in future decades. This history, together with the fact that only five justices joined the *Lawrence* majority opinion,²⁷⁵ make sweeping predictions hazardous.

270. *Korematsu v. United States*, 323 U.S. 214, 223-24 (1944) (upholding wartime order excluding Japanese-Americans from designated areas of the west coast); see *supra* note 70.

271. See *supra* note 70. While *Korematsu* has never been expressly overruled, it is instructive that the Supreme Court's most recent reference to it was to cite Justice Murphy's *dissenting* opinion. See *Hamdi v. Rumsfeld*, 124 S. Ct. 2633, 2650 (2004). Justice Scalia recently used a reference to *Korematsu* as a way to denunciate of the Court's partial-birth abortion decision in *Stenberg v. Carhart*, 530 U.S. 914 (2000). See *id.* at 953 (Scalia, J., dissenting) ("I am optimistic enough to believe that, one day, *Stenberg v. Carhart* will be assigned its rightful place in the history of this Court's jurisprudence beside *Korematsu* and *Dred Scott*.").

272. *Shelley v. Kraemer*, 334 U.S. 1, 4, 23 (1948) (holding that state court enforcement of private restrictive covenants constitutes state action for purposes of the application of the Fourteenth Amendment).

273. See CHEMERINSKY, *supra* note 15, § 6.4, at 506-07 ("*Shelley* remains controversial because ultimately everything can be made state action under it. . . . [T]he Court only rarely has applied *Shelley* as a basis for finding state action.").

274. *Bush v. Gore*, 531 U.S. 98, 110-11 (2000) (invalidating Florida Supreme Court's order for a manual recount of ballots that did not register a vote for president in the 2000 presidential election).

275. Justice Kennedy's majority opinion was joined by Justices Stevens, Souter, Ginsburg and Breyer. *Lawrence v. Texas*, 539 U.S. 558, 561 (2003). Justice O'Connor concurred, but on equal protection grounds, and disagreed with the majority's overruling of *Bowers*. *Id.* at 579, 585 (O'Connor, J., concurring).

Still, there is good reason to believe that *Lawrence* is more than just a gay rights decision. To begin with, it is consistent with the recent tendency of the Court to move away from treating constitutional cases as presenting a stark choice between granting essentially total deference to legislative decisions and giving no deference to them at all. While the language of strict scrutiny or low-level scrutiny persists, it has become clear that each of these alternatives, along with alternative formulations, such as intermediate scrutiny, is merely a way of approaching a less than fully determinate balancing test.²⁷⁶ If the Court has become skeptical of Justice Holmes's position in his *Lochner* dissent, it has shown little enthusiasm for reviving the approach of the *Lochner* majority. Instead, we can see an unacknowledged turn to Justice Harlan's brand of balancing.

This approach can be seen in places apart from Fourteenth Amendment cases. Automatic deference to Congress in defining the scope of the Commerce Clause is no longer the rule,²⁷⁷ but neither is a requirement that Congress go beyond demonstrating a nontrivial link between its action and commercial activity.²⁷⁸ The Court's turn to balancing, however, is most evident in a range of Fourteenth Amendment cases.²⁷⁹ *Lawrence* strongly suggests that cases presenting substantive due process claims will be examined with a degree of balancing that might call to mind the balancing applied in procedural due process cases, more than the all-or-nothing approach presented by the fundamental right/no fundamental right approach of earlier substantive due process cases.²⁸⁰

276. See *id.* at 578 (indicating that intimate relationships “are a form of ‘liberty’ protected by the Due Process Clause of the Fourteenth Amendment. Moreover, this protection extends to intimate choices by unmarried as well as married persons.”) (quoting *Bowers v. Hardwick*, 478 U.S. 186, 216 (1986) (Stevens, J., dissenting)). The Court did not use a specific test in analyzing the Texas statute, but instead held that “[t]he Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.” *Id.*

277. See *United States v. Lopez*, 514 U.S. 549, 551, 567 (1995) (holding that Commerce Clause power does not justify federal statute criminalizing the possession of firearms in a school zone); *United States v. Morrison*, 529 U.S. 598, 601-02, 619 (2000) (holding that Commerce Clause power does not permit Congress to create a federal civil remedy for victims of gender-motivated violence).

278. See, e.g., Jesse H. Choper & John C. Yoo, *The Scope of the Commerce Clause After Morrison*, 25 OKLA. CITY U. L. REV. 843, 866 (2000) (“[N]either *Lopez* nor *Morrison* prevent Congress from regulating any activity that involved the exchange of a single dollar of U.S. currency or even barter.” Thus, Congress “may still be able to ban any violence that has an economic motive or purpose.”) (emphasis added).

279. See *supra* notes 120-24, 126 and accompanying text.

280. See *Lawrence v. Texas*, 539 U.S. at 578 (balancing the rights of individuals “to engage in their conduct without intervention of the government” against the

Procedural due process cases are decided under a three-part balancing test set down by the Court in *Mathews v. Eldridge*.²⁸¹ The test, on its face, seems quite indeterminate, yet case law allows us to identify some procedural steps which are almost always required, such as a minimal notice requirement,²⁸² and others which are hardly ever required, such as appointed counsel in non criminal cases.²⁸³ In other words, a balancing test will not necessarily lead to an unmanageable degree of uncertainty.

Similarly, balancing Fourteenth Amendment substantive due process and equal protection claims will surely not drastically affect settled law. We can remain confident that, for example, overt racial discrimination will continue to be almost always impermissible, and that government regulation of business will be generally upheld. But *Lawrence* reminds us of a burden placed on governments seeking to coerce through the use of criminal sanctions. Such sanctions must not be arbitrary, but must be related to a legitimate government interest in punishing the actor.²⁸⁴

A recent Eleventh Circuit case illustrates both the type of statute that should raise post-*Lawrence* concern, and also, unfortunately, the reluctance of at least one circuit to recognize the impact of the *Lawrence* principle.

In *Williams v. Attorney General of Alabama*,²⁸⁵ the ACLU, acting on behalf of several users and vendors, challenged an Alabama statute that prohibits the commercial distribution of sex toys, that is, “any device designed or marketed as useful primarily for the stimulation of human genital organs.”²⁸⁶ Plaintiffs based their challenge on arguments similar to those that would be advanced in *Lawrence*, and the district court held the statute unconstitutional.²⁸⁷

The Eleventh Circuit panel reversed, in a 2-1 decision,²⁸⁸ but perhaps

“further[ing] of [a] legitimate state interest which [could] justify its intrusion into the personal and private life of the individual”).

281. *Mathews v. Eldridge*, 424 U.S. 319, 335 (1976); *see supra* note 50 (setting forth the *Mathews* balancing test).

282. *See Mullane v. Cent. Hanover Bank & Trust Co.*, 339 U.S. 306, 313 (1950).

283. *See, e.g., Lassiter v. Dep’t of Soc. Servs. of Durham County*, 452 U.S. 18, 31 (1981) (holding that due process does not require “the appointment of counsel in every parental termination proceeding”).

284. *See Lawrence v. Texas*, 539 U.S. at 578.

285. *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232 (11th Cir. 2004).

286. *Id.* at 1233; ALA. CODE § 13A-12-200.2(a)(1) (Supp. 2003).

287. *Williams v. Pryor*, 220 F. Supp. 2d 1257, 1277 (N.D. Ala. 2002), *rev’d sub nom.* *Williams v. Attorney Gen. of Ala.*, 378 F.3d 1232.

288. *Williams v. Attorney Gen. of Ala.*, 378 F.3d at 1233, 1250.

more disturbing than the outcome was the majority's analysis. The Plaintiffs maintained that the statute violated a "fundamental right [to] sexual privacy."²⁸⁹ Finding, quite correctly, that *Lawrence* rejected strict scrutiny,²⁹⁰ the court concluded that no such fundamental right existed²⁹¹ and, having done so, upheld the statute with no discussion of whether the state satisfied the rationality requirement.²⁹² The *Williams* majority adhered to the rigid fundamental right/complete deference dichotomy.²⁹³

Dissenting Judge Barkett did recognize the impact of *Lawrence*. She wrote: "The doctrine of substantive due process requires, first, that *every* law must address in a relevant way only a legitimate governmental purpose. In other words, no law may be arbitrary and capricious"²⁹⁴ She noted that Alabama presented no justification for the statute beyond criminalizing activity seen to offend the morality of the majority.²⁹⁵ Judge Barkett recognized the wider impact of *Lawrence*, but the fact that she wrote in dissent indicates that it may be some time before that impact is generally recognized and accepted.

By holding that the state's assertion that a criminal prohibition accurately reflects the moral sentiment of the community is insufficient to satisfy the due process clause, the Supreme Court has taken a significant, if partial, step toward accepting the harm principle of Mill and others, as elaborated by Joel Feinberg. By no means has the Court gone so far as to accept all of Feinberg's conclusions. Most significantly, the question of whether, and to what degree, the state may act to prohibit one from harming himself or herself remains open to debate.

This is hardly the "massive disruption of the current social order" envisioned by Justice Scalia.²⁹⁶ The vast majority of criminal statutes, while surely resting on moral grounds, can be seen as attempts to prevent harm or offense, as defined by Feinberg, to individuals or the community at

289. *Id.* at 1236.

290. *Id.*

291. *See id.* at 1239-50 (applying the *Washington v. Glucksberg* analysis, and concluding that *Lawrence* created no additional fundamental right to sexual privacy).

292. *See id.* at 1250.

293. *Id.* at 1238; *see also id.* at 1250 ("Once elevated to constitutional status, a right is effectively removed from the hands of the people and placed into the guardianship of unelected judges.").

294. *Id.* at 1252 (Barkett, J., dissenting).

295. *Id.*

296. *Lawrence v. Texas*, 539 U.S. 558, 591 (2003) (Scalia, J., dissenting); *see also supra* notes 244-68 and accompanying text (diminishing the list of evils predicted by Justice Scalia).

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large. By insisting that the government explain the use of coercion by more than simply pointing to the desire of the majority, *Lawrence* makes the rational basis requirement of the Due Process Clause more than a paper tiger.