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The Constitutional Status of Morals Legislation

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INTRODUCTION

In 1859, the British political philosopher John Stuart Mill published *On Liberty,* an essay that changed the course of modern liberalism. In the first chapter of the essay, Mill set forth a bold and pristine principle for defining the sphere of individual liberty. He wrote:

The object of this essay is to assert one very simple principle . . . . This principle is that . . . the only purpose for which power can be 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, it would be wise or even right . . . . The only part of the conduct of anyone for which he is amenable to society is that which concerns others. In the part which merely concerns himself his independence is, of right, absolute. Over himself, over his own body and mind, the individual is sovereign.

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3 Mill, *supra* note 2, at 68.
Mill’s “harm principle,” as it came to be called, holds that the only legitimate justification for the state to limit the liberty of the person is the prevention of harm to third parties.\(^4\) This principle has had a powerful symbolic influence on American constitutional ideals, presaging, in particular, the modern right to privacy.\(^5\) The most important consequence of the harm principle is that it rejects, as inconsistent with the principles of a free society, laws which prohibit private or “self-regarding” acts on grounds that the majority believes the activity to be morally objectionable. The term “morals legislation” has been used to designate laws prohibiting activities such as consensual homosexual relations, abortion, adultery, fornication, prostitution, bestiality, bigamy, adult incest, sadomasochism, gambling, the use of illegal drugs, euthanasia, and assisted suicide, to name a few.\(^6\) To the extent that the right to privacy is understood in Millian

\(^4\) See id.

\(^5\) See Griswold v. Connecticut, 381 U.S. 479, 484–86 (1965) (elaborating a privacy right encompassing a zone of protected personal activity marked out by the non–public nature of the conduct protected by the right). Mill referred to this private realm as the domain of “self-regarding” activities—acts that do not directly harm third parties. See Mill, supra note 2, at 70. The self-regarding domain consists principally of three regions:

[F]irst, the inward domain of consciousness, demanding liberty of conscience . . . liberty of thought and feeling, absolute freedom of opinion, and sentiment on all subjects. . . . Secondly, the . . . liberty of tastes and pursuits, of framing the plan of our life to suit our own character . . . without impediment from our fellow creatures as long as what we do does not harm them . . . . Thirdly, . . . [the] freedom to unite for any purpose not involving harm to others . . . .


The debate ensued after Devlin criticized the findings of the British Wolfenden Commission, a public commission which studied the legal treatment of homosexual-
terms, it would immunize from constitutional attack all such laws, at least to the extent that they do not directly harm third parties.

Over the course of the last twenty-five years, the Supreme Court has adopted an increasingly Millian gloss to its Due Process jurisprudence. In 1986, Justice Stevens declared in his dissent in *Bowers v. Hardwick*\(^7\) that "the fact that a 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...."\(^8\) Justice Kennedy, writing the Court's majority opinion which overturned state sodomy laws, cited these comments with approval in 2003 in *Lawrence v. Texas.*\(^9\) Kennedy declared that while objections to homosexuality "are not trivial concerns, but profound and deep convictions accepted as ethical and moral principles ... [t]he 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."\(^10\) The opinion answered this question in the negative, declaring that the Texas law "furthers no legitimate state interest which can justify its intrusion into...
the personal and private life of the individual." This led Justice Scalia to declare in his dissent that the Court's conclusion "effectively decrees the end of all morals legislation." The central contention of this Article is that, contrary to the best hopes of some libertarians and the worst fears of some conservatives, recent constitutional cases do not sound the death knell for most forms of "morals legislation." It is well within the constitutional authority of the states to achieve many, though not quite all, of the types of state interests traditionally associated with the "moral function of law." More generally, this Article argues that there has been something profoundly artificial about the "morals legislation" debate, particularly since the famous Hart–Devlin debate of the 1960s. Like most liberals, Hart rejected "morals legislation" broadly on the basis of Mill's harm principle, a principle he and most other liberals have explicitly rejected in other respects. Like many conservatives, Lord Devlin himself grudgingly concluded that consensual adult homosexual activity should not be subject to legal sanction, even as he defended an expansive conception of state power to reach behavior which the majority regards as immoral.

This Article argues that, in seeking to protect the private activities of gays and lesbians, liberals from Hart on have thought it necessary to throw the baby out with the bathwater by maintaining that the state may never regulate on the basis of "private morals." The better conclusion is that society has now reached a general consensus that it is wrong to single out one type of sexual activity and mark for punishment the class of people who engage in it. This, indeed, is the meaning of Lawrence v. Texas, and not the more expansive claim that Lawrence declares the end of morals legislation.

Part I sets the stage by examining the philosophical background of the "morals legislation" debate. It offers a clear definition of morals legislation, briefly tracks the philosophically contested issues between liberals and conservatives from Mill's time to our own, and examines the concept of "harm" as Mill and more recent liberals have understood it. This Article argues that while it is sometimes assumed that there exists a clear, hermetic distinction between "public" and "private," marked off by this concept of a discrete harm to third parties, the concept of "harm" is considerably more ambiguous and laden with normative underpinnings than some theorists have appreciated. Indeed, liberals today have a considerably broader idea

11 Id. at 578.
12 Id. at 599 (Scalia, J., dissenting).
13 See Hart, supra note 6 (defending a version of Mill's liberal position); Devlin, supra note 6 (making a conservative rejoinder to Hart).
14 See infra note 19 (discussing modern liberals' embrace of paternalism).
15 See Devlin, supra note 6, at 5 ("I do not think there is any good the law can do that outweighs the misery that exposure and imprisonment causes . . . . Punishment will not cure and because it is haphazard in its incidence I doubt if it deters.")
Parts II through V discuss the constitutional limitations on morals legislation. Part II examines the scope of the modern privacy right and the analogous Due Process doctrines. It highlights the uneven protection accorded to various self-regarding activities, from abortion to consensual sexual relations to assisted suicide. The main thrust of Part II is to show that the modern right to privacy, as it has been elaborated over the past forty-five years, falls far short of the expansive contours of the harm principle. Few behaviors which Mill considered self-regarding are protected by the modern right to privacy. Part III surveys the strictures of rational basis review and examines particular “means” and “ends” problems confronting those who challenge morals legislation. Part IV examines the idea of a legitimate state interest and explores which morality-related ends meet the legitimate state interest test.

Additionally, Part IV introduces five classes of morality-related state interests, including (1) the regulation of the secondary effects of private activity (e.g., regulating prostitution to prevent related, secondary crimes), (2) the regulation of offensive, non-harmful conduct (e.g., indecent exposure), (3) state interests which seek to assist in the development of moral character, (4) interests which protect abstract moral values without any reference to impact on particular individuals (e.g., protecting the value of respect for life or the value of non-discrimination), and (5) state interests which promote “morality as such.” The fifth (and most controversial) class of interests is purely expressive in nature. The interests included in the fifth class have no other goal than to amplify and project the majority’s moral disapproval of a particular activity. As we move through the five classes, the basis for regulation grows less “empirical” and more “normative” or morality-oriented. We will see that most liberals permit regulation in furtherance of (1) and (2) but draw various lines after this point, invariably refusing to admit regulation on the basis of (5). This Article argues that while the philosophical debate between liberals and conservatives has centered largely on (5), defenders of morals legislation can achieve virtually everything they seek to achieve under classes (1) through (4). Thus, while the debate between liberals and conservatives is of philosophical interest, it is not significant as a practical, constitutional matter.

Finally, Part V, “Three Readings of Lawrence,” discusses three alternative interpretations of the decision and argues that Lawrence should be understood as a sober, coherent, but limited, restriction on the power of the state to foster, express, and reinforce public morality. Lawrence, as argued, should be understood as another in a line of “rational relation” cases that prohibit states from discriminating against vulnerable or unpopular minorities. The Article concludes that fornication and adultery statutes, which come closest to anti-sodomy statutes in terms of the activity they seek to regulate, are
not immune from state regulation under the Constitution.

I. MORALS LEGISLATION AND THE HARM PRINCIPLE

A. Some Difficulties with the Concept of "Morals Legislation"

The harm principle entails that the state has no right to enact laws which limit any act, whether committed alone or in union with others, that does not bring about direct and material harm to a third party. From Mill's time forward, political philosophers have recognized that consistent application of the harm principle prevents government from having two common motivations for legislation: protecting the individual from the potentially harmful consequences of his own acts (legal paternalism) and preventing non-harmful activities because they are at least believed to be immoral (legal moralism). Many contemporary liberals reject Mill's staunch anti-paternalism and, as such, do not accept the harm principle in toto. Yet, they remain followers of Mill to the extent that they contend that the state has no right to "legislate morality," a position which ostensibly

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16 See Mill, supra note 2, at 68-69 ("[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."). Mill made it clear that the injury must be direct and specific to particular individuals saying,

[B]ut with regard to the merely contingent or, as it may be called, constructive injury which a person causes to society by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself, the inconvenience is one that society can afford to bear, for the sake of the greater good of human freedom.

Id. at 149. Consequently, acts done to, and with, other consenting adults generally fall within the self-regarding realm with some restrictions to be discussed shortly. Id. at 168-69.

17 See Mill, supra note 2, at 68 (declaring that the individual's "own good, either physical or moral, is not a sufficient warrant" to legally proscribe his conduct). The essence of paternalism is to limit a person's freedom to protect his own well-being. See Paternalism (Rolf Sartorius ed., 1983) (compiling the best essays on the concept of paternalism). See also 3 Joel Feinberg, The Moral Limits of the Criminal Law: Harm to Self 3-23 (1986) (providing the most extensive and recent philosophical defense of the liberal case against paternalism).

18 Hart, supra note 6, at 6 (apparently coining the term "legal moralism"). Hart's book was a compilation of his Harry Camp Lectures delivered at Stanford in 1962. See Hart, supra note 6.

19 See Hart, supra note 6, at 32-33 (asserting that Mill carried the fear of paternalism to "fantastic" extremes and claimed that modern liberals' more receptive attitude to paternalism is due, "in part, to a general decline in the belief that individuals know their own interests best and to an increased awareness of a great range of factors which diminish the significance to be attached to an apparently free choice or to consent"); Robert E. Goodin, Permissible Paternalism: In Defense of the Nanny State, in The Essential Communitarian Reader 115, 115-23 (Amitai Etzioni ed., 1998) (defending the legitimacy of paternalism in a broad number of areas).
marks one of the principal dividing lines between modern liberalism and conservatism.\textsuperscript{20}

The standard understanding of morals legislation is that it involves laws which regulate or prohibit private acts on grounds that the majority believes them to be immoral. This captures the basic idea, but there are two difficulties worthy of note. First, morals laws sometimes extend beyond the "private," prohibiting activities which are indeed "public." Consider such undeniably public activities as publicly offensive conduct, public profanity, obscenity, lewdness in public, and indecent exposure, all of which are often considered instances of morals legislation. Also consider the act of adultery which may be considered "private" or self-regarding as

\textsuperscript{20} At least five different varieties of justifications have been offered for prohibiting morals legislation. The most all-encompassing, and the most consistent with Mill's position, is that of modern libertarianism. Libertarians frequently rely on an objective natural rights philosophy to argue that the state must remain neutral among competing conceptions of the good so long as the individual does not infringe the rights of others. \textit{See}, e.g., ROBERT NOZICK, \textit{Anarchy, State, and Utopia} (1974); MURRAY N. ROTHBARD, \textit{The Ethics of Liberty} (1998); RANDY BARNETT, \textit{The Structure of Liberty} (1998).

A second diametrically-opposed view holds that all moral judgments are irredeemably subjective or "relative," so that the state has no legitimate basis for choosing one conception of the good life over others. \textit{See} RICHARD RORTY, \textit{Philosophy and Social Hope} 72-90 (1999) (defending a "pragmatic" version of ethical relativism).

A third view counsels neutrality on utilitarian grounds, asserting that government neutrality among competing lifestyles and choices promotes maximal utility by permitting each to pursue his own lifestyle choices. Mill himself sought to ground the harm principle on utility, though he added that he meant "utility in the largest sense, grounded on the permanent interests of man as a progressive being." \textit{Mill, supra note 2, at 70.} Jeremy Bentham, utilitarianism's most famous exponent, argued that private consensual acts between adults were "unmeet for punishment" because punishment was groundless since the parties had consented, and no harm to third parties occurred. \textit{Jeremy Bentham, Principles of Morals and Legislation} 170-72 (Prometheus Books 1988) (1789). Richard Posner formulated a more recent version of the utilitarian approach in this regard. \textit{See} RICHARD A. POSNER, \textit{Economic Analysis of Law} (2006) (putting forth an economic-utilitarian defense of privacy rights); RICHARD A. POSNER, \textit{Sex and Reason} 241-434 (1992) (examining facets of the economic approach to sexual regulations).

A fourth approach, grounded on "minimalist" or pragmatic assumptions, holds that since persons inevitably disagree about morality and religion, these decisions should simply be bracketed from legal treatment in order to preserve political compromise in the spirit of liberal toleration. \textit{See e.g., John Rawls, Political Liberalism} 9-11 (1993) (asserting that neutrality permits achievement of an "overarching consensus" among different groups).

Yet it is the fifth justification, one based on neo-Kantian notions of personal autonomy, that has proven to be the most popular and enduring among liberal advocates of a robust interpretation of the privacy principle. For example, John Rawls has argued that the two principles of justice he develops in \textit{A Theory of Justice}, which he calls "justice as fairness," have a similar limiting function on state intervention in the private sphere. \textit{See John Rawls, A Theory of Justice} 330-31 (1972). He writes, "Justice as fairness requires us to show that modes of conduct interfere with the basic liberties of others or else violate some obligations or natural duty before they can be restricted." \textit{Id. at 331. See also Alan Gewirth, Reason and Morality} (1978) (describing a philosophical defense of a neo-Kantian ethics); RONALD DWORKIN, \textit{A Matter of Principle} 235-89 (1985) (citing Posner's approach).
between the participants but is arguably neither in the larger sense because the interests of a third party, the cuckolded spouse, are obviously affected.

These examples highlight the deeper ambiguities inherent with our concept of privacy. As commonly used today, “privacy” denotes three different aspects of an activity: the place where an act occurs (e.g., that it occurs “behind closed doors”), the nature of the act (e.g., that it is considered consensual or self-regarding), and the consequences of the act (e.g., that it does no harm to third parties). Torturing an individual within the confines of a secluded dungeon owned by the torturer is “private” in the first but not the latter two senses. Adultery may be private in the first and second, but not the third sense. Adultery may occur out of range of the public and be “self-regarding” in the sense that it is consensual as between the two parties engaged in the act and, yet, not be “private” in the third sense because the interests of the cuckolded spouse are obviously affected.

Some activities (e.g., making a contract) may be private in the second and third senses in that they are consensual and non–harmful even though they obviously take place in public. Other acts may be private only in the loosest, third sense of the term. Indecent exposure or other forms of lewd and offensive conduct may occur in public and be non–consensual so that they are “public” in the first two senses while still not being harmful in the strict sense, as required by the third conception of privacy. Those who defend a broader conception of state power may go further, insisting that even some acts that meet all three conditions are not truly private if they harm one of the participants themselves. Even some liberals have argued, for example, that extreme sado–masochistic activities should be prohibited on grounds that, while they may meet each of these three definitions of privacy, they are still a matter of public concern in that they harm one of the participants themselves.21

In sum, if all activities regulated by morals legislation are “private,” as the traditional understanding assumes, it is only because our concept of the “private” is hopelessly equivocal. Additionally, there is a second deeper problem with the usual understanding of morals legislation. The usual definition suggests that morals legislation functions in an entirely distinct manner from other criminal laws (which prohibit everything from murder to insider trading). The traditional understanding suggests that these other laws regulate on the basis of the effects (e.g., to prevent the harmful consequences of the acts) while morals laws are mainly expressive in function (e.g., they regulate as an emanation of the moral repugnance of the majority without reference to the activity’s social effects). Conservatives

21 But see Mill, supra note 2, at 173 (arguing that an agent who voluntarily assumes the risk cannot be “harmed” since he has consented to the risk and stating that “the principle of freedom cannot require that he be free not be free” when discussing the voluntary selling of oneself into permanent involuntary servitude); Joel Feinberg, The Moral Limits of the Criminal Law: Harm to Others 115–17 (1984).
themselves have usually fostered this fallacy and have suffered the consequences for it as liberals have made easy sport of their arguments.22

The problem with viewing the distinction between morals legislation and other criminal laws in this way is that ordinary criminal laws are motivated by the same kinds of strongly-felt moral outrage as are morals laws. The prohibition of murder seeks to deter the harm of murder, but it also expresses and reinforces the community’s sense of moral outrage directed toward the act of murder. Indeed, some polls indicate that people normally feel considerably less “moral outrage” toward prostitution or other morals–based laws than they do toward murder, rape, and theft.23

This, obviously, makes sense because our level of moral outrage should normally be expected to closely track the harm incurred by the activity. Thus, the typical understanding of morals legislation is misleading to the extent that it suggests that morals laws function in a merely “expressive” manner while other criminal laws function to prevent real harms.

Conversely, morals laws can be justified in the same way as traditional criminal laws, as prophylactic measures intended to prevent certain kinds of social harms. The only difference between morals legislation and laws prohibiting murder, theft, and rape, as we shall see, is that morals laws seek to contain less material social effects that fall short of our usual ideas of harm. Morals laws may seek to prevent offensive but non–harmful behavior or developmental harms caused, for example, by exposure of adolescents to obscene or sexually explicit material. They may seek to prevent the erosion of certain essential human values such as respect for life, equality, non–discrimination, etc. In sum, morals laws are as preventative of certain kinds of social effects as ordinary criminal laws, except that they seek to prevent less material and more abstract social evils.

Indeed, as argued within, it is impossible to fully disentangle the harm–preventing from the value–preserving aspects of law; they are functionally–intertwined.24 In sum, there is no sui generis difference between the function of morals laws and other laws; morals legislation should not be conceived and cannot be justified in purely “expressive” terms. Such laws can only be justified as a societal response to the negative social effects generated by putatively self–regarding activity, albeit effects which do not qualify as “harms” in the Millian sense.

22 See infra Part II.

23 “A 1985 opinion survey conducted by the United States Department of Justice ranked prostitution 174th in severity out of 204 crimes ranging from first–degree murder to school truancy . . . ” while the 175th ranked offense was a store owner knowingly mislabeling the size of eggs prior to sale. ROBERT M. HARDWAY, No Price Too High: Victimless Crimes and the Ninth Amendment 24 (2003).

24 See infra Part IV.E.
B. The Near Irrelevance of the Philosophical Debate

There is a large and ever-burgeoning body of philosophical literature on morals legislation which provides the backdrop for contemporary legal debate on the subject. As we will see, however, both the prevailing liberal and conservative positions are cast at a level that floats above the terra firma of modern constitutional jurisprudence. Liberals from before Mill's time have claimed that the state should have no power to regulate morality; yet the Supreme Court has never questioned the police power of the state to regulate health, safety and morals. By the same token, however, the Supreme Court has never entertained the broad conservative claim that the state must be able, at least in principle, to reach every form of conduct, nor have states attempted to legislate on the basis of some abstract conception of natural law or to regulate "morality for the sake of morality" as conservatives have sometimes insisted.

Moreover, even at a philosophical level, the liberal–conservative debate is often more illusory than real. When cast at the level of principle, the debate appears to be one of clashing, incompatible, political paradigms


By the mid–nineteenth century, the Supreme Court routinely included the power to regulate morals within the scope of the police power. See Thurlow v. Massachusetts, 46 U.S. 504, 592 (1847) (encompassing the regulation of any activity injurious to the health or morals of the community); Muggler v. Kansas, 123 U.S. 623, 661–62 (1887) (stating that police power extends to "protect the public health, the public morals and the public safety" as applied to the regulation of alcohol). The Court subsequently recognized Congress’s power to regulate on the basis of morality. See Champion v. Ames, 188 U.S. 321, 356–57 (1903) (regulating lotteries). See also Goldberg, supra note 6 at 1247–58 (2004) (detailing the history of the power to regulate morality in American history).

See Devlin, supra note 6, at 12 ("[I]t is not possible to set theoretical limits to the power of the State to legislate against immorality.").

See infra Part IV.E. (discussing whether the state has a legitimate state interest in regulating "morality as such").
with conservatives assaulting the Millian bastion that divides the personal sphere from the realm of public power, while liberals defend it at all costs as the sanctum sanctorum of political liberalism. Yet, for many liberals and conservatives, these pristine differences on matters of principle melt away at the level of application. Nevertheless, a brief treatment of the debate is warranted.

Students of American jurisprudence have, for the last forty years, learned of the Hart–Devlin debate of the 1960s and, before that, James Fitzjames Stephen’s attack on Mill in the 1870s. The Hart–Devlin debate was sparked by the 1957 release in Britain of the Wolfenden Report, which recommended the decriminalization of consensual homosexual acts and prostitution (though the Report concluded that public solicitation and advertising could be limited). These were essentially the same conclusions Mill reached almost exactly a century earlier.

In the more contemporary debate, Mill’s position was defended by H.L.A. Hart, the don of jurisprudence at Oxford, while the conservative jurist Lord Patrick Devlin took a position close to that of Stephen. Hart argued, as the Wolfenden Report put it, that there is “a realm of private morality and immorality which is, in brief and crude terms, not the law’s business.” Yet in practice, Hart and most contemporary liberals cede much of the territory Mill hoped to claim with the harm principle. Surprisingly, Hart suggested, for example, that bigamy could be prohibited as a form of public offense to religious feelings. Nor was he opposed to paternalism:

I do not propose to defend all that Mill said; for I myself think there may be grounds justifying the legal coercion of


31 See The Wolfenden Report, supra note 6, at 187–89.

32 Mill concluded that fornication “must be tolerated” and while he does not mention homosexual relations specifically, the logic of the surrounding argument appears to cover gay as well as straight sex outside of marriage. See Mill, supra note 2, at 169. In regards to prostitution, he was concerned about the public effects of solicitation and concluded that “there is considerable force” in the suggestion that prostitutes and gambling houses “may be compelled to conduct their operations with a certain degree of secrecy and mystery, so that nobody knows anything about them but those who seek them . . . .” Id. at 170.

33 See Devlin, supra note 6.


35 See Hart, supra note 6, at 42–43 (banning bigamy would depend on weighing the invasion of the interests of potential bigamists against the seriousness of the affront to others’ feelings). Notably, Hart also makes very clear that regulating bigamy is utterly different from attempts to enforce sexual morality, which Hart thought was beyond the scope of the law. Id. at 43.
the individual other than the prevention of harm to others. But on the narrower issue relevant to the enforcement of morality Mill seems to me to be right. Many contemporary liberals go further, advocating restrictions of prostitution, pornography, smoking, and even recently, the use of trans fats in restaurant cuisine. Mill would have objected to each of these, ruling them out as legitimate objects of legislation under his harm principle.

Indeed, liberals differ from conservatives today less about whether the law can regulate a particular activity than about how it should regulate. Most non-libertarian liberals agree with conservatives, for example, that the law has a role in preventing serious drug use, but frequently prefer a less punitive, more therapeutic approach to the problem. Where conservatives may wish to punish prostitution as a moral offense which threatens the family, liberals want to regulate it on grounds that prostitution is exploitative of prostitutes, engenders negative stereotypes about women, or commodifies sexuality. Liberals also question the efficacy of the criminal sanction in prohibiting putatively self-regarding acts but seldom today do they adopt the true Millian position that these activities should simply be off-limits to the State.

If modern liberals have ceded a great deal of territory in the morals legislation debate, contemporary conservatives are usually found fighting on the wrong front altogether. Rather than defending the legitimacy of morals legislation on the sensible grounds that they are required as prophylactic measures against the potentially harmful public effects of such activities as drug use, prostitution, bigamy, adultery, assisted suicide, and other activities, conservatives from Stephen to Devlin have staked their case on the intensity of the felt animus of the moral majority. They have argued as if morals laws are justified by nothing more than the strong feelings of

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36 Id. at 5.
37 See PATERNALISM, supra note 17 (essays defending paternalistic intervention in different contexts).
38 Compare SAMUEL WALKER, SENSE AND NONSENSE ABOUT CRIME AND DRUGS: A POLICY GUIDE (2006) (arguing for a more proactive, interventionist and therapeutic approach to the war on drugs), with Off With Their Heads: Thoughts from the Drug Czar, WASH. POST, June 20, 1989 at A21 (quoting President Reagan’s former drug czar, William Bennett, who, when asked whether the authorities should consider beheading drug offenders, responded, “Morally, I don’t have any problem with it”).
39 Compare GEORGE GILDER, MEN AND MARRIAGE 5 (2d prtg. 1986) (“In creating civilization, women transform male lust into love, channel male wanderlust into jobs, homes and families; link men to specific children, rear children into citizens; change hunters into fathers; divert male will to power into a drive to create.”) with Priscilla Alexander, PROSTITUTION: A Difficult Issue for Feminists, reprinted in Mary Becker, et al., CASES AND MATERIALS ON FEMINIST JURISPRUDENCE: TAKING WOMEN SERiously (1994) (arguing that society channels sexuality in order to create families and sublimate male energy to higher pursuits).
40 See, e.g., STEPHEN, supra note 25, at 62; DEVLIN, supra note 6, at 14–17.
the "average citizen" (or as Devlin called him, "the man in the Clapham omnibus"), rather than by the harmful social effects of these activities.\textsuperscript{41} Stephen was famous for a particularly incendiary brand of rhetoric that conceived of morals laws as a persecution for the grosser forms of vice.\textsuperscript{42} He justified morals legislation on the basis of "the feeling of hatred and the desire of vengeance [which] are important elements in human nature" and which he thought should "be satisfied in a regular, public and legal manner."\textsuperscript{43} He grounded the legitimacy of morals legislation even more explicitly on the retributive and expressive or cathartic functions of the criminal law stating, "You cannot punish anything which public opinion, as expressed in the common practice of society, does not strenuously and unequivocally condemn. . . . To be able to punish, a moral majority must be overwhelming."\textsuperscript{44}

More recent conservatives, including Lord Devlin, seem to have been led similarly off course by the dichotomy, implicit in Stephen's rhetoric, between laws which prevent harm and laws which express the moral outrage of the "moral majority." Devlin argued that it was enough for the legitimacy of morals laws that they express the "intolerance, indignation, and disgust"\textsuperscript{45} of "the man on the Clapham omnibus."\textsuperscript{46} Like Stephen, he thought that the depth of moral outrage served as the touchstone to the legitimacy of morals legislation. "No society can do without intolerance, indignation, and disgust; they are the forces behind the moral law."\textsuperscript{47} Without them, the feelings of society cannot be weighty enough to deprive the individual of freedom of choice.\textsuperscript{48} He followed with a ringing endorsement of the unlimited power of the State to reach all personal behavior on the basis of the majority's felt repugnance toward an activity. "It is no more possible to define a sphere of private morality than it is to define one of private subversive activity. . . . There are no theoretical limits to the power of the State to legislate against treason and sedition, and likewise I think there can be no theoretical limits to legislation against immorality."\textsuperscript{49}

The consensus today is that Hart demolished Devlin's argument.\textsuperscript{50} Indeed, Devlin's views have been rightly criticized from two sides. Liberal

\begin{footnotesize}
\begin{enumerate}
\item DeVlin, supra note 6, at 15.
\item Stephen, supra note 25, at 162.
\item Id. But see Hart, supra note 6, at 60–64 (criticizing Stephen's moralistic animus).
\item Stephen, supra note 25, at 172–73 (showing that Stephen may have been the first to use this term "moral majority").
\item DeVlin, supra note 6, at 17
\item Id. at 15. See also id. at 17 ("[I]t is the power of a common sense and not the power of reason that is behind the judgments of society.").
\item Id. at 17.
\item Id. at 16–17.
\item Id. at 14.
\end{enumerate}
\end{footnotesize}
critics from Hart on have pointed out that Devlin's views are wrong as a historical matter since social morality frequently evolves without destroying the essential moral fabric of societies. On the other hand, some conservatives have pointed out that Devlin's argument exhibits a kind of cultural relativism; what seems to count is not whether the prohibited activity is actually wrongful, but simply that a majority disapproves of it. The appropriateness of the charge is underscored by a certain irony since conservatives usually level the charge of relativism against liberals.

In sum, the liberal-conservative debate has been a non-starter since most liberals do not accept the extreme Millian understanding of the harm principle, and most conservatives have much stronger practical arguments for morals legislation than those they typically deploy in the debate. Indeed, there is much more agreement between liberals and conservatives on these issues than usually acknowledged. Only with respect to abortion and consensual, non-commercial sexual activity between adults (e.g., adultery, fornication, and homosexual acts) have liberals and conservatives parted ways.

C. The Concept of Harm

The harm principle, as Mill presented it in his introductory chapter in On Liberty, appears at first to be a powerful and unitary principle that bisects our social world into two mutually opposed realms: an inner self-regarding domain of activity with which society may not interfere and an outer social sphere of “other-regarding” activity. Both Mill and his contemporary

51 See Hart, supra note 6. To Devlin's argument that a society was equivalent to its morality such that any shift in morality represents the dissolution of society, Hart pointed out that no reputable historian has maintained this thesis and compared it to Justinian's claim that homosexuality causes earthquakes. Id. at 50. Hart concluded that a gradual change in a society's morality would, if anything, be more like a peaceful constitutional change in government than its violent overthrow. Id. at 52.

52 The charge of relativism stems from Devlin's view that the strongly felt feelings that undergird the cohesiveness of any society, no matter how bad the substantive content of its morality, is all that is necessary to justify the imposition of that morality. This "conservative" justification for morals legislation could justify "Nazi morality," the "morality" of Apartheid, or the morality of any regime or society that violates human rights. Natural law theorists such as Robert George criticize Devlin for this point. See George, supra note 25, at 79 (concluding that the central [natural law] tradition rejects Devlin's relativism and his noncognitivism).

53 Mill stated that the inner realm encompasses an "inward domain of consciousness" consisting of three kinds of freedom: first, liberty of conscience, of thought and feeling, "absolute freedom of opinion and sentiments on all subjects" and the liberty of expressing and publishing these opinions; second, the "liberty of tastes and pursuits, of framing the plan of our own life to suit our character, of doing as we like, subject to such consequences as may follow," as long as this does not violate the interests of others; and, third, complete freedom of association, the "freedom to unite for any purpose not involving harm to others." Mill, supra note 2, at 71.

Justice Douglas used substantially the same language as seen in Mill's three principles
followers, however, have recognized the malleable nature of the concept of harm. The initial appeal of the harm principle derives in part from the empirical gloss normally accorded the concept. Theoretically, "harms" are empirically verifiable injuries, observable conditions that are felt and that can be quantified in some utilitarian sense. The concept of harm, however, cannot be reduced to a strictly physical, financial, or even a psychological commodity.

One reason for this is that the concept of harm inevitably involves a normative dimension. "Harm," properly understood, is a wrongful injury or setback of interests. Non-wrongful injuries or setbacks to interest are not harms, properly speaking. Persons may be injured or have their interests thwarted in a litany of morally permissible ways. Examples include when one person injures another in the course of self-defense; when one person permissibly out-competes a second person for a prize or a scarce commodity; when the harmed individual has consented to, or assumed the risk of, an injury; and, when one person is justified in invading the personal or property interests of another, as in cases of public necessity, among others. Conversely, non-injurious wrongs are not harms. For

when he argued that the right to privacy encompasses three zones: first, a right to "autonomous control over the development and expression of one's intellect, interests, tastes and personality;" second, "freedom of choice in the basic decisions of one's life respecting marriage, divorce, procreation, contraception, and the education and upbringing of children;" and, third, "freedom to care for one's health and person, freedom from bodily restraint or compulsion, freedom to walk, stroll, or loaf." Doe v. Bolton, 410 U.S. 179, 209 (1973) (Douglas, J., concurring). Justice Douglas's concurrence was issued for both Roe v. Wade and Doe v. Bolton.

See BENTHAM, supra note 20, at 29–30 (arguing that pleasure could be more or less quantified along several different dimensions including its intensity, duration, certainty or uncertainty, propinquity or remoteness, purity and extent—the number of persons to whom it extends). Mill, famously, altered this by injecting a qualitative element, insisting that some forms of pleasure are higher than others. JOHN STUART MILL, UTILITARIANISM 11–12 (George Sher ed., Hackett Publ'g Co. 1979) (1861).

See MILL, supra note 2, at 141 (concluding that we harm another when we invade the zone of those interests which each of us has "either by express legal provision or by tacit understanding, [which] ought to be considered as rights").

The category of legal justifications in tort and criminal law represents one broad area where one party is morally and legally justified in adversely affecting the interests of others. But there are also many cases, including that of legitimate competition, where the winning party is under no duty in the first instance to prevent "harm." Rather than viewing the conduct as justified, we view it as conduct which is in no way wrong in the first instance.

Feinberg provided the most comprehensive defense and application of the harm principle in his four-volume series, THE MORAL LIMITS OF THE CRIMINAL LAW. See 1 FEINBERG, supra note 21 (concluding that the concept of harm is an amalgam of our concepts of invasions of interests that amount to injury and acts that are moral wrongs). "Harm" involves only setbacks of interests that are wrongs, and wrongs that are setbacks to interests. See id. at 31–37. Non–wrongful acts that set back another's interests, such as when one person fairly out competes another, are not "harmful" in the relevant sense; nor are wrongs that do not cause setbacks to another's interests, such as when an act that is intended to harm a person winds up benefitting her. See id. at 35.
example, breaches of a moral duty alone, absent an accompanying injury, will generally not be considered "harm." In sum, to be harmed, one must be injured or have one's interests adversely affected (the objective aspect) in a way that violates one's legitimate moral or legal claims (the normative aspect).

Mill's appeal to harm, in other words, is not value-neutral, as he implicitly recognized. Thus, there is no purely objective concept of harm to which we can appeal to tell us where to draw the line between the private and the public realms. In order to draw this normative and legal line, we must already have a background set of normative considerations that guide our understanding of what it means for something to be "harm." This observation has led some to contend that the concept of harm is normatively circular and always potentially contestable.

Yet, the problem is even worse for defenders of the harm principle since it turns out that even the putatively objective aspect of our conception of harm, the injury aspect, is not so purely objective after all. Our ideas of what it means for something to be an injury often reflect a set of background assumptions which are frequently philosophically controversial. Consider the following two examples. First, is one injured by having one's character morally corrupted? While classical philosophers such as Plato and Aristotle assumed that this was indeed one of the gravest forms of personal injury, and while the Judeo-Christian tradition has taken the same position, and the Christian tradition is that the mere outward observance of the Law without inner purity of soul is spiritually meaningless. This is the overriding theme of Christ's "Sermon on the Mount." Matthew 5:7 (New American Standard). Moreover, one who tempts others to moral corruption commits an unpardonable sin. "[W]hoever causes one of these little ones who believe in me to sin, it would be better for him, with a heavy millstone hung around his neck, he had been cast into the sea." Mark 9:42 (New American Standard). Indeed, it is not going too far to say that, for devout Christians, there is a categorical divide between moral and physical well-being such that all that can be gained physically

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58 See, e.g., Restatement (Second) of Torts § 902 cmt. a (1979) ("Damages flow from an injury.").
59 See Mill, supra note 2, at 141.
60 See Neil McCormick, Legal Right and Social Democracy: Essays in Legal and Political Philosophy 29 (1982).
61 Aristotle taught that true human happiness, which the Greeks called "eudamonia," is only achieved by a life lived in accordance with virtue. In order to act virtuously, not only must the agent do what is right, but, equally importantly, the agent "must be in a certain condition when he does them: in the first place he must have knowledge; secondly he must choose the [right] acts, and choose them for their own sakes; and thirdly his action must proceed from a firm and unchangeable character." Aristotle, The Basic Works of Aristotle 956 (Richard McKeon ed., 1941). The person who prevents another from developing a virtuous character thereby undermines his chances for true happiness in the world. See Plato, The Collected Dialogues of Plato 772–98 (Edith Hamilton & Huntington Cairns eds., 1989) (1961) (describing different character types and their corresponding political constitutions). Plato describes in book VIII of the Republic the way in which the moral decay of individual character ultimately foreshadows the political decay of the state. Id.
62 One of the central teachings of the Christian tradition is that the mere outward observance of the Law without inner purity of soul is spiritually meaningless. This is the overriding theme of Christ's "Sermon on the Mount." Matthew 5:7 (New American Standard). Moreover, one who tempts others to moral corruption commits an unpardonable sin. "[W]hoever causes one of these little ones who believe in me to sin, it would be better for him, with a heavy millstone hung around his neck, he had been cast into the sea." Mark 9:42 (New American Standard). Indeed, it is not going too far to say that, for devout Christians, there is a categorical divide between moral and physical well-being such that all that can be gained physically
some recent liberal theorists disagree. Legal philosopher Joel Feinberg argued, for example, that moral corruption is not an injury to the person who is corrupted if it does not affect his interests and life chances in the world, and if he did not otherwise have an antecedent desire to avoid being morally corrupted. The second example concerns whether the plaintiff in a wrongful life case has been genuinely injured. Is one injured by being born in a disabled state when the alternative is not having been born at all? Whatever one's position on these issues, they make clear that even our concept of injury frequently reflects a contestable normative stance which will often be reflected in our notions about what constitutes a legitimate state interest.

II. DEFINING THE SCOPE OF THE PRIVACY RIGHT IN THE CONTEXT OF MORALS LEGISLATION

This section traces the contours of the modern privacy right and its related doctrines. Specifically, it seeks to answer one particular question. Does Supreme Court precedent establish a constitutional right to sexual intimacy—a right that would given strict scrutiny protection to what we might (hopefully not too euphemistically) refer to as “ordinary” forms of traditionally unacceptable sexual activity, such as fornication and adultery? We will focus on these two activities not only because they represent the contemporary Maginot Line between liberals and conservatives concerning morals legislation, but because they fall closest to the line, constitutionally, suggested by Lawrence v. Texas. If non-marital and extramarital sex do not fall within the ambit of constitutional protection, then it is unlikely that other putatively “private” acts, like prostitution, are protected. Conversely, if fornication and adultery statutes are now constitutionally suspect, then what is next? This section argues that neither of these activities are constitutionally protected under the strict scrutiny privacy right jurisprudence, a conclusion that will lead us to consider, in the remainder of the Article, under what circumstances these laws and other forms of morals legislation will meet the kind of rational basis approach applied in

pales in comparison with moral and spiritual purity. "For what does it profit a man to gain the whole world, and forfeit his soul." Mark 8:36 (New American Standard).

63 Feinberg, supra note 21, at 65–70.

64 In the typical wrongful life case the fetus is born with some congenital disability that has not been caused by any party. The "injury" is that he or she has been born at all in a disabled state. See, e.g., Procanik v. Cillo, 478 A.2d 755, 757 (N.J. 1984) (permitting recovery for extraordinary medical expenses but not for the pain and suffering for having been born in a disabled state).

65 See Lawrence v. Texas, 539 U.S. 558, 562 (2003). While Lawrence was not decided on strict scrutiny grounds, there is a good deal of ringing rhetoric that sounds as if the Court was carving out a broad zone of personal liberty as against certain kinds of state interests enforced under a rational basis review.
As various commentators have observed over the years, there are two interpretations of the privacy right: an older idea that hews more closely to the traditional meaning of "privacy" and a more recent notion that associates the privacy right with a wider notion of personal autonomy. The older idea is linked to various values protected at common law—the protection of the home and of private places, preservation of the autonomy of the family, and common law protection, particularly under tort law, against physical invasion of the body. The newer idea protects certain kinds of activities because of their significance to the self, to one's life pattern, or to one's sense of personal identity. It is this latter interpretation which most closely approximates Mill's harm principle and which poses a fundamental challenge to morals legislation.

Griswold v. Connecticut, the first case to recognize the privacy right, explicitly followed the more conservative interpretation of privacy. The Court in Griswold held that a Connecticut law which made it a crime to use

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67 These are values protected both by the Fourth Amendment and the older common law right of repose in one's own home. See U.S. CONST. amend. IV; Olmstead v. United States, 277 U.S. 438, 478 (1920) (Brandeis, J., dissenting) (invoking "the right to be let alone"). See also Bostwick, supra note 66, at 1449-50 (discussing the location—dimension of privacy).

68 A long line of cases have recognized a right of what might be called "family autonomy," a right to beget and to raise children without interference by the State. See Meyer v. Nebraska, 262 U.S. 390, 403 (1923) (holding unconstitutional state law prohibiting the teaching of a foreign language in public or private schools); Pierce v. Soc'y of Sisters, 268 U.S. 510, 534 (1925) (striking law prohibiting students from attending private schools); Wisconsin v. Yoder, 406 U.S. 205, 207 (1972) (permitting Amish parents to withdraw children from school after eighth grade). But see Prince v. Massachusetts, 321 U.S. 158, 170 (1944) (rejecting Free Exercise challenge to a law prohibiting children from publicly distributing literature).

69 See, e.g., Schloendorff v. Soc'y of N.Y Hosp., 105 N.E. 92, 93 (1914) (upholding battery action for medical intervention performed without patient's consent); DeMay v. Roberts, 9 N.W. 146, 166 (Mich. 1881) (determining a battery action when consent to touch is obtained fraudulently).

70 See June Aline Eichbaum, Toward an Autonomy-Based Theory of Constitutional Privacy Beyond the Ideology of Familial Privacy, 14 HARV. C.R.-C.L. L. REV. 361, 365 (1979) (citing J. Harvie Wilkinson, III & G. Edward White, Constitutional Protection for Personal Lifestyles, 63 CORNELL L. REV. 563, 612 (1978)) ("The human dignity protected by the constitutional guarantees would be seriously diminished if people were not free to choose to adopt a lifestyle which allows expression of their uniqueness and individuality"). See also John Lawrence Hill, The Five Faces of Freedom in American Political and Constitutional Thought, 45 B.C. L. REV. 499, 561-79 (tracing the philosophical and constitutional development of the "self-individuating" conception of freedom which is closely linked to autonomy).


72 Griswold, 381 U.S. at 485-86 (1965).
“any drug, medicinal article, or instrument for the purpose of preventing conception” violated the privacy rights of married persons. Griswold’s interpretation of the privacy right, as it emerged from the four distinct opinions which thought the law violated the Constitution, was grounded on an associational conception of privacy specifically limited to marital association. As such, it partook of the line of cases stretching back to the Lochner era forty years earlier which recognized an important liberty interest in the protection of decisions involving family privacy, particularly decisions regarding how one’s children are to be raised and educated.

Griswold’s version of the privacy right also concerned the place where the activity occurred. Justice Douglas famously asked whether we would have the police “search the sacred precincts of the marital bedroom for telltale signs of the use of contraceptives.” Thus, privacy protects some of the same values as the Fourth Amendment. In fact, in his dissent in Poe v. Ullman, a precursor to Griswold, Douglas specifically assumed that the state could ban the sale of contraceptives, even though this would likely create a greater barrier to access than a ban on their use. What the state

73 Id. at 480.

74 The final paragraphs of Justice Douglas’s opinion asks whether the police can search “the sacred precincts of the marital bedroom for telltale signs of the use of contraceptives” and answers that this would be “repulsive” in a free society. Griswold, 381 U.S. at 485-86. Douglas continues:

Marriage is a coming together for better or for worse, hopefully enduring, and intimate to the degree of being sacred. It is an association that promotes a way of life, not causes; a harmony in living, not political faiths; a bilateral loyalty, not commercial or social projects. Yet it is an association for as noble a purpose as any involved in our prior decisions.

Id. at 486. Marriage, in sum, is more intimate, more private, and more fundamental to promoting a way of life than these other kinds of associations. Douglas viewed privacy as an associational concept that had to do with the nature of the relationship between the participants in being married to each other. Id.

Throughout the various other opinions, the Justices repeatedly invoked the right to privacy in marriage. See id. at 486-87 (Goldberg, J., concurring). The concurrence by Justices Goldberg, Warren, and Brennan similarly referred to the right to privacy as “a right so basic and fundamental and deep-rooted in our society as the right of privacy in marriage,” and the right to marital privacy and to marry and raise a family. Id. at 491, 495. (Goldberg, J., concurring). See also John Lawrence Hill, The Political Centrist (manuscript at 123-26 on file with author) (Vanderbilt Univ. Press, forthcoming Oct. 2009) (criticizing the lack of coherence among the various opinions in Griswold and the Court’s inability to arrive at a shared constitutional foundation for the right).


76 Griswold, 381 U.S. at 485.

77 See Poe v. Ullman, 367 U.S. 497, 508–09 (Douglas, J., dissenting (1961) (decided four years before Griswold, this case was dismissed for lack of standing when a Connecticut pharmacist challenged the state’s anti–contraception law).
could not do, he argued, was ban their use—precisely because doing so would
"reach the point where search warrants [were] issued and officers appeared
in bedrooms to find out what went on."\(^78\) Interpreted in this limited fashion,
the right to privacy was easily linked to the kinds of common law values
that accorded special protection to the home and to the family.

Griswold made clear, even as it protected a very traditional zone of
personal and familial liberty, that the Court had no intention of placing
in question the constitutional legitimacy of morals legislation. Justice
Goldberg's three-judge concurrence explicitly mentioned "what is
admittedly a legitimate subject of state concern—the discouraging of
extra-marital relations."\(^79\) The concurrence endorsed the "state interest in
safeguarding marital fidelity,"\(^80\) and announced that the constitutionality of
state statutes prohibiting adultery and fornication were "beyond doubt."\(^81\)
Justice Harlan, writing in \textit{Poe v. Ullman}, similarly assumed that the state
has traditionally concerned itself with the moral soundness of its people
and openly assumed that there exists a strong constitutional presumption
favoring morals legislation.\(^82\) "I would not," wrote Harlan in \textit{Poe}, "suggest
that adultery, homosexuality, fornication, and incest are immune from
criminal enquiry, however privately practiced."\(^83\) This followed his even
more explicit rejection of a Millian interpretation of the right to privacy:

Yet the very inclusion of the category of morality
among state concerns indicates that society is not limited
in its objects only to the physical well-being of the
community, but has traditionally concerned itself with
the moral soundness of its people as well. Indeed to
attempt a line between public behavior and that which is
purely consensual or solitary would be to withdraw from
community concern a range of subjects with which every
society in civilized times has found it necessary to deal.\(^84\)

In sum, the \textit{Griswold} Justices envisioned no special constitutional barrier
to morals legislation. What troubled all of them was not the nature of the
state interest, preventing non-marital and extramarital sexual activity, but

\(^{78}\) \textit{Id.} at 520.

\(^{79}\) \textit{Griswold}, 381 U.S. at 498 (Goldberg, J., concurring).

\(^{80}\) \textit{Id.}

\(^{81}\) \textit{Id.}

\(^{82}\) \textit{Poe}, 367 U.S. at 547 (Harlan, J., dissenting) ("If we had a case before us which required
us to decide simply... whether the moral judgment implicit in [this statute] was a sound one,
the very controversial nature of these questions would, I think, make us hesitate long before
concluding that the Constitution precluded Connecticut from choosing as it has...")

\(^{83}\) \textit{Id.} at 552.

\(^{84}\) \textit{Id.} at 545-46.
the potentially invasive means chosen to effectuate this end.

Reacting to Griswold's narrow interpretation of the privacy right, liberals insisted that privacy has nothing to do with where the activity occurs but, instead, with the nature of the activity itself, such that privacy protects the value of personal autonomy. Subsequent cases made tentative advances in the direction of an autonomy-based conception of the privacy right. In Eisenstadt v. Baird, the next major case after Griswold to implicate privacy-related concerns, the Court held unconstitutional a law that prohibited the distribution of contraception to unmarried persons. Eisenstadt accomplished considerably more than merely applying Griswold's holding to unmarried persons. It endorsed, first, an explicitly individualistic conception of privacy that did not depend upon marriage or, for that matter, on any particular associational context. "If the right of privacy means anything," wrote Justice Brennan, "it is the right of the individual, married or single, to be free from unwarranted government intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Even more importantly, in extending constitutional protection to the distribution of contraceptives, Eisenstadt implicitly abandoned Griswold's emphasis on the privacy of the bedroom. Though a ban on distribution applies at the point of sale and would not threaten intrusion into the "sacred precincts of the marital bedroom," Justice Brennan found the law objectionable on the broader, autonomy-based ground that it interfered with decisions involving "whether to bear or beget a child."

Justice Brennan's opinion in Eisenstadt might be read to announce a general right of sexual autonomy. What is the point of protecting the right of unmarried persons to use contraception, after all, unless it is to insulate from legal proscription the sexual activity that leads to its use? Eisenstadt, however, does not stand for any of these propositions and carries little

85 This conception of personal autonomy is associated with a Kantian approach to meta-ethical theory. The liberalism of two of the most important recent political thinkers, (the early) John Rawls and Ronald Dworkin, among others, are both based on a Kantian approach to political and legal theory. See Rawls, supra note 20, at 450–56 (explicating a modern liberal or neo–Kantian conception of autonomy). Legal scholarship examining or defending the link between the right to privacy and personal autonomy is a veritable growth industry. See Richards, supra note 25, at 8–9 (defending a very broad Kantian understanding of personal autonomy); Henkin, supra note 66, at 1418–19; Smith, supra note 66, at 189–90; J. Harvie Wilkinson, III & G. Edward White, Constitutional Protection for Personal Lifestyles, 63 Cornell L. Rev. 563, 612 (1977). See also Eichbaum, supra note 70. But see Michael Sandel, Liberalism and the Limits of Justice 1 (1982) (criticizing the "unencumbered" subject of neo–Kantian political assumptions).
87 Id. at 440.
88 Id. at 453 (emphasis added).
90 Eisenstadt, 405 U.S. at 453.
precedential value for any quasi–Millian interpretation of privacy. For one thing, the quote purporting to declare a constitutional right of autonomy in decisions concerning “whether to bear or beget a child” appears in Justice Brennan’s three–judge plurality opinion, an opinion that was joined by concurrences which decided the case on different and much narrower grounds.\footnote{Eisenstadt was a 3–3–1 opinion overturning Baird’s conviction for distributing a contraceptive device to a woman after a lecture. Four Justices voted to strike down the law. Justices Marshall and Stewart joined Brennan’s plurality opinion holding that the law could not be sustained on rational basis review. Eisenstadt, 405 U.S. at 447 (3–3–1 decision) (Brennan, J., plurality). Justice Douglas concurred on First Amendment grounds. Id. at 447 (Douglas, J., concurring). Justices White and Blackmun concurred but did not find the law unconstitutional. They concluded that the record did not establish whether the recipient of the contraceptive was married or unmarried and, consequently, overturned the conviction under Griswold. Id. at 465 (White, J., concurring). Chief Justice Burger dissented. Id. at 465–71 (Burger, J., dissenting). Justices Powell and Rehnquist did not take part in the opinion. Id. at 465.}

Moreover, even Justice Brennan’s plurality did not claim that the law violated the right to privacy. As Justice Kennedy would do in Lawrence thirty years later, the plurality opinion in Eisenstadt expounded on the nature of the privacy right, but only to strike the statute under rational basis review.\footnote{Id. at 443.} No Justice thought the statute had to be reviewed under the strict scrutiny standard. Furthermore, in using rational basis review, the plurality never questioned the legitimacy of the state’s ends, as Lawrence did later.\footnote{Id. at 453.} It assumed that the state’s interest in deterring premarital sexual intercourse was legitimate\footnote{Id. at 448–50.} but concluded that the means chosen “prohibiting contraception” were not rationally related to that goal.\footnote{Id. at 448.} “It would be plainly unreasonable,” Justice Brennan wrote, “to assume that Massachusetts has prescribed pregnancy and the birth of an unwanted child as punishment for fornication.”\footnote{Id. at 448.} The plurality, as such, did not insulate non–marital and extra–marital sex from criminal sanction. Rather, it reached the reasonable and substantially more modest conclusion that while the state could prohibit adultery and fornication, it could not punish these acts by preventing participants from protecting themselves from pregnancy and sexually–transmitted diseases.\footnote{Eisenstadt, in sum, followed Griswold in limiting the permissible means by which states could effectuate (what the}
Court assumed was) their legitimate interest in preserving morality.

In *Carey v. Population Services*,98 decided just a few years later, the Court struck down a law prohibiting the distribution of contraceptives to minors and limiting in various other ways, minor access to contraception.99 Justice Brennan again wrote a plurality opinion which, in various ways, would have extended the reach of the privacy right had it garnered a majority. Using strict scrutiny,100 Brennan concluded that the right to privacy protected minors, though he also acknowledged the state had wider latitude in regulating the activity of minors.101 The opinion explicitly distanced itself from *Griswold's* narrow reading of the privacy right:

*Griswold* may no longer be read as holding only that a State may not prohibit a married couple's use of contraceptives. Read in light of its progeny, the teaching of *Griswold* is that the Constitution protects individual decisions in matters of childbearing from unjustified intrusion by the State.102

For the first time, this opinion explicitly linked privacy to the value of personal autonomy.103 It noted, more provocatively, that "[w]hile the outer limits of this aspect of privacy have not been marked by the Court, it is clear that among the decisions that an individual may make without unjustified government interference are personal decisions relating to marriage, procreation, contraception, family relationships, and child rearing and education."104

The plurality's conception of privacy in *Carey* used the term "autonomy" but specifically limited this to matters involving reproduction and the family,105 and even this limited privacy right analysis never received majority backing. The moderates, Justices White and Stewart, dismissed as "frivolous" the argument "that a minor has the constitutional right to put contraceptives to their intended use"106 and were more concerned,

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99 *Id.* at 701–02. The law prohibited the sale of contraceptives to anyone under the age of 16, required that only pharmacists could distribute contraception, and prohibited advertising. *Id.* at 681. The defendant was an out-of-state mail-order distributor of contraceptives. *Id.* at 682.
100 *Id.* at 688.
101 *See id.* at 695 n.17.
102 *Id.* at 687.
103 *See id.* ("[S]ubsequent decisions have made clear that the constitutional protection of individual autonomy in matters of childbearing is not dependent on [the privacy of married couples in the home].").
104 *Id.* at 684–85 (citations omitted).
105 *See id.* at 687.
106 *Id.* at 702–03 (White, J., concurring); *Id.* at 713 (Stewart, J., concurring).
as they were in *Eisenstadt*, with the punitive effects of anti-contraception laws. Likewise, Justice Powell denied that minors’ contraception use was protected as a constitutional right and concurred with the plurality on narrower grounds. Justices Stevens and Powell also specifically endorsed the developmental and moral interests of the state in discouraging intercourse among unwed minors. In sum, *Casey* only marginally expanded privacy right protection and certainly never placed in question the legitimacy of the state interest in preserving the morality of its citizens.

The most important privacy right decision, *Roe v. Wade*, was in one respect only an extension of the logic of its precursors, *Griswold* and *Eisenstadt*. To the extent the Constitution insulates from state interference the decision “whether to bear or beget a child,” abortion laws fall under the same principle as anti-contraception laws. Indeed, there is a strong argument that the kinds of interests protected in *Roe* fall even closer to the heart of the old common law conception of privacy than those involved in *Griswold*. Abortion rights raise, in a much more palpable way than contraception, the importance of a general right of bodily integrity, particularly in medical matters, which connects the right to the kinds of tort interests traditionally protected in the sphere of medical decisions. Under this approach, if abortion rights are controversial at all, it is not

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107 See id. at 705 (1977) (Powell, J., concurring).

108 Id. at 707–08 (Powell, J., concurring). In *Carey*, Justice Powell concluded that the law violated the rights of married persons under the age of 16 (marriage was legal in New York at 14) and violated the constitutional rights of parents to distribute contraceptives to their children while also agreeing that the First Amendment prohibited the advertising provisions. *Id.* at 711.

109 Id. at 709 (“The State justifiably may take note of the psychological pressures that might influence children at a time in their lives when they generally do not possess the maturity generally to understand and control their responses. Participation in sexual intercourse at an early age may have both physical and psychological consequences. . . . Moreover, society has long adhered to the view that sexual intercourse should not be engaged in promiscuously, a judgment that an adolescent may be less likely to heed than an adult.”).

110 See id. at 707–08 (Powell, J., concurring and providing the fifth vote for the majority). As a result, *Griswold’s* reach was extended to married minors and held that parents who wished to distribute contraceptives to their children were also protected by strict scrutiny. *Id*


112 In *Roe*, the Court reiterated that previous decisions “make it clear that the right has some extension to activities relating to marriage, procreation, contraception, family relationships, and child–rearing and education.” *Roe*, 410 U.S. at 135 (internal citations omitted).

113 See *Roe*, 410 U.S. at 145–46 (noting that important medical and psychological interests would be affected if abortion rights were foreclosed).

114 See Schloendorff v. Soc’y of N.Y. Hosp., 105 N.E. 92, 128–29 (1914) (Cardozo, J., authored the majority opinion); Philip B. Heymann & Douglas E. Barzelay, *The Forest and the Trees: Roe v. Wade and Its Critics*, 53 B.U. L. Rev. 765, 775 (1973) (“The question of constitutionality is a more difficult one than that involved in *Griswold* and *Eisenstadt* only because the asserted state interest is more important, not because of any difference in the individual [constitutional] interests involved.”).
because of the nature of the liberty interest, but because of the significance
of the countervailing state interest in protecting fetal life.

Taken together, however, *Griswold*, *Eisenstadt*, and *Roe* are often read
as recognizing a right “not to procreate,” which compliments the right to
procreate recognized in *Skinner v. Oklahoma*. In fact, in one respect, the
right to have an abortion potentially implies a right even more expansive
than anything required by the capacious logic of the harm principle. One
of the most famous defenders of abortion rights has argued that abortion is
grounded on a right of bodily integrity or personal autonomy, which includes
a right to end the life of the fetus even if the fetus were considered a “third
party” within the meaning of the harm principle. The right to abortion is
a right not to be an involuntary incubator for the benefit of a third party, the
fetus. In its most expansive incarnation, the right developed in *Roe* was
sometimes read as a general right of self-ownership which could include
a right of complete sexual autonomy, a right to assisted suicide, and
even a right to use hard drugs privately.

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115 *Skinner v. Oklahoma*, 316 U.S. 535, 538 (1942) (holding unconstitutional a law that
required sterilization of those convicted three times of felonies involving moral turpitude).

   reprinted in The Ethics of Abortion: Pro-Life vs. Pro-Choice 241-256 (Robert E. Baird &
   Stuart E. Rosenbaum eds., 2001). In her famous violinist example, Thomson argues that a
woman has no more of an obligation to save the fetus than a stranger would have to save a fa-
mous violinist who had been connected to her, without her knowledge or consent, for medical
reasons. *Id.* at 242. Just as the hapless stranger may disconnect herself from the violinist even
though the violinist will die, so a woman has the right to “disconnect” herself from the fetus.
*Id.* at 255. Of course, Thomson might argue that this does not really take the case outside of
the harm principle since, while the fetus may be assumed to be a third party, the person who
disconnects herself from the violinist is not really “harming” him (anymore than the failure to
rescue someone is harming them in the morally relevant sense). *Id.*

Of course, the Supreme Court held in *Roe* that the fetus is not a person for constitutional
purposes. *Roe*, 410 U.S. at 152-53. However, it does not necessarily follow from the fact that
the drafters of the Fourteenth Amendment did not contemplate the status of the fetus that
it lacks the attributes of personhood in other respects and for other legal and moral purposes.

   bodies for the benefit of third parties would be unconstitutional even if those third parties are
   human beings.”). See also Andrew Koppelman, *Forced Labor: A Thirteenth Amendment Defense of

118 In the fullest sense, this would mean that prostitution is also protected. See Richards,
supra note 25, at 84-125.

119 See *id.* at 245-47.

120 See *id.* at 250. See also David Boaz, *Libertarianism: A Primer 79 (1997) (“The right
of self-ownership certainly implies the right to decide for ourselves what food, drink or drugs
Each of these provocative interpretations has had its supporters; but there has routinely been a stark ideological gap between the rhetoric commentators and courts have used to describe the boundaries of the right and the actual rulings. In Planned Parenthood v. Casey,\footnote{Planned Parenthood of Southeastern Pennsylvania v. Casey, 505 U.S. 833 (1992).} for example, Justice O'Connor provided the privacy right with its most ringing Millian rhetorical cast:

> These matters, involving the most intimate and personal choices a person may make in a lifetime, choices central to personal dignity and autonomy, are central to the liberty protected by the Fourteenth Amendment. At the heart of liberty is the right to define one's own concept of existence, of meaning, of the universe, and of the mystery of human life. Beliefs about these matters could not define the attributes of personhood were they formed under compulsion of the State.\footnote{Id. at 851.}

Yet the Court's decisions have not lived up to the hype. Privacy may give the individual the right to define his concept of the meaning of life, but it apparently does not afford the individual the right to engage in a variety of activities which would fall without question within the ambit of the "personal" sphere protected by the harm principle.

Consider the basic right, implied by a robust interpretation of the principle of self-ownership,\footnote{See supra note 120 (discussing implications of the libertarian conception of self-ownership). See also Meyer v. Nebraska, 262 U.S. 390, 403 (1923); Soc'y of the Sisters v. Hill Military Acad., 268 U.S. 510, 534-35 (1925); Wisconsin v. Yoder, 406 U.S. 205, 207 (1972); Prince v. Massachusetts, 321 U.S. 158, 170 (1944); Schloendorff v. Soc'y of N.Y. Hosp., 211 N.Y. 125, 129-31 (1914); DeMay v. Roberts, 46 Mich. 160, 166 (1881).} of terminally ill patients to enlist the help of third parties to decide when to end their lives. Most recent defenders of the right of personal autonomy have reasonably assumed that the "right to die" must include a right to take active measures to end one's own life, at least under certain circumstances.\footnote{See, e.g., Richards, supra note 25, at 245-47 (arguing for an unlimited right of adults to end their lives as part of the right of autonomy); DEREK HUMPHRY, FINAL EXIT: THE PRACTICALITIES OF SELF-DELIVERANCE AND ASSISTED SUICIDE FOR THE DYING 12-14 (1991) (arguing that an individual facing death has a right to die).} In_{\textit{Cruzan}},\footnote{Cruzan v. Dir., Mo. Dept. of Health, 497 U.S. 261 (1990).} the Court assumed that there is constitutional protection for a competent patient to refuse lifesaving medical hydration and nutrition\footnote{Id. at 279.} but, seven years later, rejected

\begin{footnotes}
\item[122] Id. at 851.
\item[124] See, e.g., Richards, supra note 25, at 245-47 (arguing for an unlimited right of adults to end their lives as part of the right of autonomy); DEREK HUMPHRY, FINAL EXIT: THE PRACTICALITIES OF SELF-DELIVERANCE AND ASSISTED SUICIDE FOR THE DYING 12-14 (1991) (arguing that an individual facing death has a right to die).
\item[126] Id. at 279.
\end{footnotes}
a constitutional right to assisted suicide in *Washington v. Glucksburg*. The *Cruzan* Court had been willing to protect the same kinds of interests that were protected by the tort actions for battery and for breach of informed consent, interests recognized in constitutional decisions dating back more than a century. Nevertheless, the decision in *Glucksberg* reverted to Justice Harlan's more conservative conception of due process, which limits the scope of fundamental rights to activities which are "deeply rooted in this Nation's history and tradition . . ." and "implicit in the concept of ordered liberty." A right to assisted suicide was not among such rights.

One seemingly benign implication of the harm principle is a right of association that would include a right of unrelated persons to live together. The Court, however, has limited heightened review protection only to the extended family. In *Moore v. East Cleveland*, a four-member plurality concluded that a local ordinance, which prohibited a grandmother from living with her son and two grandchildren violated the Due Process Clause. (The grandchildren were first cousins, each being separately descended from the grandmother's two sons.) "Our decisions establish," Justice Powell's plurality opinion declared, "that the Constitution protects the sanctity of the family precisely because the institution of the family is deeply rooted in this Nation's history and tradition."

Other cases, however, have refused the invitation to apply a broader rubric of intimate association to extend constitutional protection for cohabitation in non-familial relationships. For instance, in *Village of Belle Terre v. Boraas*, the Court upheld an ordinance which prohibited cohabitation among persons who were not related by marriage, blood, or adoption. As

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128 *See Cruzan*, 497 U.S. at 269 (quoting Schloendorff v. Soc'y of the N.Y. Hosp., 105 N.E. 92, 93 (N.Y. 1914)). ("Every human being of adult years and sound mind has a right to determine what shall be done with his own body" in medical matters.).
129 *See, e.g.*, Jacobson v. Massachusetts, 197 U.S. 11, 37–38 (1905) (upholding smallpox vaccination requirement against due process challenge). The *Jacobson* Court recognized a limited interest in declining a vaccination, balancing the liberty interest against the state's interest in preventing the spread of disease. *Id.*
130 *Glucksberg*, 521 U.S. at 721 (quoting Moore v. E. Cleveland, 431 U.S. 494, 503 (1977)).
131 *Id.* (quoting Palko v. Connecticut, 302 U.S. 319, 325 (1937)).
132 *See Glucksberg*, 521 U.S. at 728.
134 *Id.* at 498–99.
135 *Id.* at 503. Justice Stevens, who provided the fifth vote, thought the ordinance was a "taking" of property. *Id.* at 521 (Stevens, J., concurring).
137 *Id.* at 8–9. *But see Moore*, 431 U.S. at 498 (distinguishing *Boraas* on grounds that Belle Terre's ordinance expressly exempted all persons related by blood, adoption or marriage).
the Court declared in *Roberts v. U.S. Jaycees,* 138 the “relevant limitations on the sort of relationship ... entitled to some sort of constitutional protection are those that attend the creation and sustenance of a family—marriage, childbirth, the raising and education of children, and cohabitation with one’s relatives.” 139 Those looking for constitutional protection for adultery and fornication laws will find little solace in any of these decisions.

Heightened review has similarly been used to extend constitutional protection to various aspects of marriage, procreation, and parenting along modestly liberal–centrist lines. There is now general recognition of a constitutional right to marry which cannot be restricted on the basis of race, 140 or because marriage license applicants have fallen behind on child support payments, 141 or even because one of the spouses is a prison inmate. 142 On the other hand, those state courts that have found constitutional protection for gay marriage have typically done so on rational basis grounds under the Equal Protection Clause of the state or federal constitution. 143 There is no constitutional protection whatsoever for polygamous marriage 144 and the Court has never explicitly stated that the right to divorce is fundamental. 145 Similarly, while there is protection for the right to procreate, 146 the procreative right certainly does not guarantee

139 Id. at 619.
140 See Loving v. Virginia, 388 U.S. 1, 12 (1967) (holding unconstitutional anti-miscegenation statutes using strict scrutiny under the equal protection clause).
141 See Zablocki v. Redhail, 434 U.S. 374, 387–92 (1978) (applying strict scrutiny to hold unconstitutional, under a hybrid equal protection–fundamental right to marry analysis, Wisconsin’s requirement that those seeking marriage licenses present a judicial order showing that they are current on child support).
142 See Turner v. Safley, 482 U.S. 78, 96 (1987) (following the Court in Zablocki in holding unconstitutional a prison regulation that denied inmates the right to marry unless the superintendent found a “compelling” reason to grant permission).
144 See Reynolds v. United States, 98 U.S. 145, 166 (1879) (upholding bigamy conviction of a Mormon against a free exercise challenge).
145 See Leonard P. Strickman, *Marriage, Divorce and the Constitution,* 22 B.C. L. Rev. 935, 985 (1981)(examining the constitutional status of divorce). But see Boddie v. Connecticut, 401 U.S. 371, 380–81 (1971) (holding unconstitutional, as applied to indigents, a court filing fee for divorce). *Boddie* is best understood, however, as part of a line of cases that held that fees could not be constitutionally charged to the indigents who are seeking to exercise basic civil rights, particularly access to the courts. See Harper v. Va. State Bd. of Elections, 383 U.S. 663, 666 (1966) (protecting fundamental interest in voting by holding a poll tax unconstitutional); Griffin v. Illinois, 351 U.S. 12, 18–19 (1956) ("[D]estitute criminals must be afforded adequate appellate review as defendants who have enough money to buy transcripts [for such review]."); Douglas v. California, 372 U.S. 353, 357 (1963) (holding that indigent criminal defendants are entitled to assistance of counsel on their first appeal).
the procreator custodial rights.\textsuperscript{147} For those recognized as the legal parents of a child, there is heightened due process protection against visitation claims by third parties.\textsuperscript{148} There is also protection for the paternal rights of unwed fathers who have established a relationship with their child;\textsuperscript{149} but there is no protection for those who have failed to establish such a relationship within a reasonable time.\textsuperscript{150} Nor is there any constitutional protection to preserve the paternal rights of men who conceive children in adulterous relationships with married women, even when they have established an emotional bond with the child. In \textit{Michael H. v. Gerald D.},\textsuperscript{151} the Court upheld a state presumption of paternity, which recognized the mother's husband as the father of the child.\textsuperscript{152} The Court was particularly solicitous about safeguarding the state's interest in protecting the integrity of couples who have re-committed themselves to their marriage after an adulterous affair from the potentially destructive

\begin{itemize}
\item For a more exotic application of this rule, see Jordan C. v Mary K., 224 Cal. Rptr. 530, 533 (Cal. Ct. App. 1986) (holding that a sperm donor in an artificial insemination arrangement is permitted a right to visit but not a right to custody).
\item \textit{See} Troxel v. Granville, 530 U.S. 57, 68-69 (2000). In \textit{Troxel}, the Court held that the Due Process Clause protects "the fundamental right of parents to make decisions concerning the care, custody, and control of their children." \textit{Id. at 66}. The Court also held that the federal constitution requires "at least some special weight to the parent's own determination." \textit{Id. at 70}. As such, under a strict scrutiny analysis, the Court invalidated a law which permitted courts to grant child visitation to third parties whenever it was in the best interests of the child.
\item \textit{See} Stanley v. Illinois, 405 U.S. 645, 658 (1972) (holding that the state could not terminate the parental rights of an unwed father who had lived with his children and their mother before the mother's death). \textit{See also} Caban v. Mohammed, 441 U.S. 380, 391-94 (1979) (invalidating on equal protection grounds, a statute which permitted an unwed mother but not unwed father to object to the adoption of a child by mother's new husband). Notably, in \textit{Caban}, the father maintained joint custody of the children. \textit{Id.}
\item \textit{See} Quilloin v. Walcott, 434 U.S. 246, 255-256 (1978) (holding that there was no heightened protection for biological father to object to the adoption of a child by the mother's husband under equal protection or due process when unwed father has failed to establish a relationship with child); Lehr v. Robertson, 463 U.S. 248, 261 (1983) (holding the same). The \textit{Lehr} Court explicitly spelled out the moral underpinnings of heightened constitutional protection for the parental rights of unwed fathers:

\begin{quote}
The significance of the biological connection is that it offers the natural father an opportunity that no other male possesses to develop a relationship with his offspring. If he grasps that opportunity and accepts some measure of responsibility for the child's future, he may enjoy the blessings of the parent-child relationship.
\end{quote}

\begin{itemize}
\item \ldots If he fails to do so, the Federal Constitution will not automatically compel a State to listen to his opinion of where the child's best interests lie.
\end{itemize}
\end{itemize}

\textit{Id. at 262.}


\textsuperscript{152} \textit{Id. at 119-20.
effects of regular visitation by the child's biological father.\textsuperscript{153}

Collectively, these decisions give little aid or comfort to those advancing
the notion that there is now heightened constitutional protection for even a
more limited right to engage in non-marital or extramarital sexual relations,
let alone a general right of sexual autonomy. Indeed, one post-\textit{Lawrence}

federal circuit has rejected a constitutional challenge to a ban on the sale
of sex toys, specifically holding that there is no general constitutional right
to sexual autonomy, even among consenting adults in the privacy of the
bedroom.\textsuperscript{154} \textit{Outside of the context of contraception and abortion, no behavior

targeted by morals legislation has been protected under any form of heightened

constitutional review.} If morals legislation is now moribund, as some liberals
and some conservatives have claimed,\textsuperscript{155} it must be under the kind of

rational basis review employed in \textit{Eisenstadt v. Baird},\textsuperscript{156} \textit{Romer v. Evans},\textsuperscript{157}
and \textit{Lawrence v. Texas}.\textsuperscript{158} It is to this issue that we now turn.

\section*{III. Morals Legislation and the Problems of Rational Basis Review}

For those activities which do not fall within the ambit of a particular

constitutional right, the appropriate standard to evaluate the constitutionality

of a law is rational basis review.\textsuperscript{159} Rational basis review requires that, in

order to justify challenged legislation, the state must demonstrate that the

law is rationally related to a legitimate government interest. In other words,

the purpose, end, or object of the law must be appropriate, permissible,

and legitimate, and the means chosen to effect this end must have some

empirically demonstrable relationship to (it must go some way toward

achieving) the end. Consider the following contemporary examples of

morals legislation and their corresponding state interests.

Prostitution. Laws prohibiting prostitution must bear a rational

relationship to any of the following state interests: protection of marriage

\begin{itemize}
  \item \textsuperscript{153} \textit{Id.} at 129.
  \item \textsuperscript{154} See \textit{Williams v. Att'y Gen. of Ala.}, 378 F.3d 1232, 1238 (11th Cir. 2004). The Eleventh Circuit held on review that the district court committed reversible error in concluding that the Due Process Clause affords individuals the right to use various sexual toys. \textit{Id.} at 1250. The court was forthright in declaring that "[f]or purposes of constitutional analysis, restrictions on the ability to purchase an item are tantamount to restrictions of the use of that item" and held that there was no right to use sex toys, or even a general right of sexual autonomy, between consenting adults. \textit{Id.} at 1242. "The mere fact that a product is used within the privacy of the bedroom, or that it enhances intimate contact, does not in itself bring the use of that article within the right to privacy." \textit{Id.} at 1241.
  \item \textsuperscript{155} See supra notes 6–12.
  \item \textsuperscript{156} \textit{Eisenstadt v. Baird}, 405 U.S. 438, 446–47 (1972).
  \item \textsuperscript{157} \textit{Romer v. Evans}, 517 U.S. 620 (1996).
  \item \textsuperscript{158} \textit{Lawrence v. Texas}, 539 U.S. 558 (2003).
\end{itemize}
or the traditional family unit, prevention of exploitation (usually of the prostitute), prevention of "commodification" of the sexual relationship, preventing the spread of sexually transmitted diseases, and the prevention of secondary crime associated with prostitution.160

Homosexual relations. These laws have frequently been justified on the basis of the state interest in promoting a heterosexual sexual ethic, preventing the spread of sexually transmitted diseases, including AIDS, and preventing the corruption of youth.161

Fornication and adultery. Adultery and fornication laws have traditionally sought to protect the integrity of the family unit by prohibiting extramarital or non-marital sex. They have also been justified on the grounds of preventing the spread of sexually transmitted diseases and of limiting the number of children born out–of–wedlock.162

Assisted suicide. Laws prohibiting assisted suicide have generally served at least four state interests: (1) the preservation of life and prevention of suicide; (2) protecting the integrity and ethics of the medical profession (e.g., preventing a blurring of the line between healing and harming); (3) protecting vulnerable groups, including the elderly, the disabled, and the poor from coercion, abuse, neglect, and discrimination; and (4) preventing a "slippery slope" to the use of non–voluntary forms of euthanasia.163

Bigamy and polygamy. Bigamy and polygamy laws have been predicated on the state's interests in protecting the integrity of the traditional family unit, preventing the debasement of men and the degradation of women, and a more general social interest in limiting the development of what one court referred to as a "despotic" and "patriarchal" family structure.164

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161 See Bowers v. Hardwick, 478 U.S. 186, 196 (1986) (acknowledging that the Georgia sodomy law was based largely on the majority sentiment that the act is immoral), overruled by Lawrence v. Texas, 539 U.S. 558, 578 (2003).

162 See Martin v. Ziherl, 607 S.E.2d 367 (Va. 2005). The Supreme Court of Virginia held unconstitutional the state's fornication statute at issue in Martin. The statute was based on the interests in protecting public health and encouragement that "children be born into a family consisting of a married couple." Id. at 370 (internal quotations omitted).


164 See Davis v. Beason, 133 U.S. 333 (1890) (stating that polygamy "tend[s] to destroy the purity of the marriage relation, to disturb the peace of families, to degrade women, and to debase men"), overruled on other grounds by Romer v. Evans, 517 U.S. 620, 634 (1996). See also Reynolds v United States, 98 U.S. 145, 165–66 (1878) (characterizing polygamy as an "offense
Additionally, each of these prohibitions has frequently been justified as a prohibition of acts which are contra bonos mores, immoral in themselves. In other words, where the previous state interests posit some social malady which these respective laws seek to prevent, they have also been justified on the more abstract ground that they are intrinsically immoral activities.

Part A examines the substantial difficulties faced by those attacking the "means" or the "rational relation" requirement on rational basis review. Part B then examines the "ends" prong of the test.

A. The "Rational Relation" Test in Context

There are several recurring "means-related" objections to morals legislation that are made in the legal and philosophical literature on the topic:

1. The problem of over-broad and under-inclusive legislation.— Even when a state interest may undoubtedly serve a legitimate public health measure, such laws are likely to be vastly over- and under-inclusive. Consider prohibitions of consensual homosexual relations justified on grounds of preventing the spread of STDs, including AIDS. Although this is obviously a legitimate (if not a compelling) state interest, a problem arises because these laws are usually grossly over- and under-inclusive. One commentator has argued that public health justifications for sodomy laws fail to recognize that while the largest number of AIDS cases in the U.S. affects homosexual men, intravenous drug users are becoming the fastest increasing group of victims of HIV and AIDS. Moreover, these laws affect lesbians as well, who account for a minuscule number of AIDS cases. In other words, sodomy statutes are vastly under-inclusive (to the extent that AIDS is spread in other ways) and over-inclusive (to the extent that healthy gays and lesbians are affected by these laws).

The same problem attends virtually all other forms of morals legislation to the extent that they hinge on the state's interest in protecting public health and safety. Laws prohibiting prostitution or fornication as an attempt to prevent the spread of STDs, for example, will obviously be vastly over-inclusive to the extent that most participants in these activities will protect themselves against society ... [which] ... leads to the patriarchal principle, and which, when applied to large communities, fetters people in stationary despotism").

165 This amounts to what Hart called "enforcing morality as such," regulating acts for reasons that may have nothing to do with their social effects. HART, supra note 6, at 4.


167 Cicchino, supra note 166 at 152 (citing U.S. DEP’T OF COMMERCE, STATISTICAL ABSTRACT OF THE UNITED STATES 142 (1997)).
themselves or will not otherwise threaten the spread of STDs. The same is true of laws prohibiting drug use, which obviously prevent some who might use marijuana or other drugs safely (over-inclusiveness), even as the laws leave untouched the hazards of alcohol use (under-inclusiveness). Laws prohibiting assisted suicide, which serve the interest of preventing the potential abuse or coercion of the dying, will prevent some terminally ill who are not coerced or abused from opting to end their lives. Similarly, if adultery laws are justified as a means of preventing some divorces, many acts of adultery do not lead to divorce, while many other unregulated conditions do — an example of both over and under inclusiveness. These examples could be multiplied indefinitely, but the point should be clear: many forms of morals legislation are often highly over and under-inclusive.

The problem for challengers of these laws, however, is that rational basis review is an incredibly deferential standard on the “means” requirement, over- and under-inclusiveness ordinarily pose no difficulty for those who want to see these laws upheld. To be “rationally related” to its end, laws must simply go some way toward advancing the legitimate state interest. States may adopt legislative schemes in furtherance of legitimate interests which are far from perfectly tailored to meet the overall goal. Laws will survive even when they are both over- and under-inclusive. As the Court once put it, “The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State’s objective.” Just so long as their action is not arbitrary, legislatures must be free to draw hard lines between different activities when doing so advances a legitimate goal.

Moreover, laws may address a problem a step at a time by, for example, regulating one activity while leaving a closely-related activity untouched. “It is no requirement of equal protection that all evils of the same genus be eradicated or none at all.” States can, for instance, attack the spread of STDs by targeting those types of acts among the most likely to spread these conditions even if they do not reach all such harm-producing

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168 See Glucksberg, 521 U.S. at 732.
171 See Beazer, 440 U.S. at 592–93 (1979) (upholding a blanket ban on the employment of methadone users to further state interest in ensuring safety of the transit system’s riders even though methadone users could have filled non-safety related jobs).
173 In Fritz, Congress sought to eliminate “dual benefits” under Social Security and the Federal Railroad Retirement Act among those who had worked for the railroad between ten and twenty-five years. The law retroactively rescinded the benefits of those who no longer worked for the railroad. Fritz, 449 U.S. at 175–79.
activities. Thus, for all practical purposes, objections from the under- and over-inclusiveness of these regulations will seldom be constitutionally availing.

2. The problem of empirical disagreement. — In addition to the problems related to the “fit” between a state’s purpose and the means it employs, other more overtly empirical issues arise on rational basis review.

In passing morals legislation, legislatures must answer two distinct questions which are usually submerged in the discussion of the means requirement. A law can only be rationally related to a given end or purpose if two conditions are met. First, the social evil which the law seeks to prevent (or the good which it seeks to further) must be traceable to the regulated activity and, second, regulating the activity must actually redress the social evil (or promote the good) which constitutes the statute’s purpose. For example, anti-prostitution laws which have as their purpose the protection of the traditional family unit may fail to achieve this end in either of two ways. First, prostitution may pose no threat to marriage since there may be no causal relationship between the availability of prostitution and the stability of marriage (because, for example, those who use prostitutes may be no less likely to avoid marriage or get divorced than those who do not.) This is the problem of traceability. Second, even if there is a link between the availability of prostitution and the breakdown of the family unit (however this may be measured), it may turn out that prohibiting prostitution does little to redress the problem because prostitution may be difficult to deter. Deterrence issues involve the problem of redressability.

Problems of traceability involve some of the most hotly contested empirical disputes. For instance, does gay adoption pose a genuine psychological risk to the adopted child? Do polygamous relationships tend to degrade women or have a deleterious psychological affect on the self-esteem of the polygamist’s wives? Does habitual marijuana use tend to degrade the long-term capacity of users to work? Are men who frequent prostitutes or read pornography statistically more likely to abuse their wives? Will permitting assisted suicide lead to a “slippery slope” devaluation of human life? These issues all involve empirically controversial premises that a particular activity will lead to a specific social harm which are usually disputed by opponents of morals legislation.

Again, however, modern rational basis cases have developed an approach that is highly deferential to these kinds of laws. The Supreme

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175 These two aspects of the means requirement parallel the traceability and redressability conditions for the “standing” doctrine. To have standing, a plaintiff must suffer an injury in fact, the injury must be traceable to the defendant’s conduct, and a favorable court decision must be able to redress the harm. See Lujan v. Defenders of Wildlife, 504 U.S. 555, 560–61 (1992).

176 See infra Part III.A.3 (discussing deterrence issues).
Court has made clear that "states are not required to convince the courts of the correctness of their legislative judgments." A law will not be considered irrational as long as "it is evident from all the considerations presented . . . and those of which we may take judicial notice, that the question is at least debatable." Furthermore, "litigants may not procure invalidation of the legislation merely by tendering evidence in court that the legislature was mistaken." States may take one side of any empirical debate (e.g., whether the issue is the claimed harmfulness of gay adoption or the putative effects of prostitution on marriage) as long as there is some evidence to support their side. Only if no evidence can be marshaled to support an empirical claim will courts determine that there is no rational relationship between the law and its purpose. This obviously gives the state a powerful advantage in litigation over laws regulating these activities.

3. The problem of deterrence.—One version of the redressability problem involves difficulties with deterring certain behavior. Even where a specific harm is linked to a prohibited activity, there may be little the law can do to deter these actions. Since at least the eighteenth century, one of the most oft-cited arguments against morals legislation is that they are often inefficacious because such laws fail to deter the types of activities they target. Morals laws may not deter some conduct for two different reasons.

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177 Minnesota v. Clover Leaf Creamery Co., 449 U.S. 456, 464 (1981). Challengers had adduced significant evidence at trial that paperboard products were environmentally more unsound than plastic. Id. at 460.

178 Id. (quoting United States v. Carolene Products Co., 304 U.S. 144, 154 (1938)).

179 Clover Leaf Creamery Co., 449 U.S. at 464.

180 In Carolene Products, the Court stated that "[w]here the existence of a rational basis for legislation whose constitutionality is attacked depends upon facts beyond the sphere of judicial notice, such facts may properly be made the subject of judicial inquiry . . . and the constitutionality of a statute predicated upon the existence of a particular state of facts may be challenged by showing to the court that those facts have ceased to exist." Carolene Products, 304 U.S. at 153 (internal citations omitted). More recently, the Justices have differed about how much deference this requires exactly. See, e.g., Kassel v. Consol. Freightways Corp., 450 U.S. 662 (1980) (holding, in a Commerce Clause challenge, that the state's empirical claims may be challenged at trial). In Kassel, Justice Brennan argued for a more deferential standard saying, "The courts are not empowered to second-guess the empirical judgments of lawmakers concerning the utility of legislation." Id. at 679 (Brennan, J., concurring). Courts have more recently permitted challengers of a law to produce evidence that there is no empirical connection between the means chosen and the ends. For example, in Romer, the trial court rejected the claim that the state amendment rescinding civil rights protection for gays protected children. See Evans v. Romer, No. 92 CV 7223, 1993 WL 518586, at *9 (Colo. Dist. Ct., Dec. 14, 1993).

181 Bentham described several classes of "cases unmeet for punishment." Included among these are cases where "punishment is groundless" (because the individual is unable to forbear from doing the act) or where "punishment is unprofitable" (because too great a punishment would be necessary to deter it). See BENTHAM, supra note 20, at 170-75.
reasons. One argument, popular since the eighteenth century, is that some acts cannot be deterred because they satisfy deep-seated human needs. Prostitution, the "world's oldest profession," provides a paradigm of this, but the argument has been made in other contexts. Another argument is that many of the kinds of activities prohibited by morals legislation, from illicit sexual acts to illegal drug use, cannot be deterred because they take place in private and are not easily detected. From Bentham's time to our own, these two arguments have provided a mainstay of the utilitarian case against morals legislation.

While there is undoubtedly something to these arguments, it remains an empirical question whether (and to what extent) law can deter particular activities. It is certainly arguable that the threat of prosecution deters a certain percentage of private activity. While the argument that a law does not deter may be sufficient to raise constitutional issues at a heightened level of review, again, the deferential rational basis standard provides little solace to those who challenge morals laws. Legislatures may employ whatever means they deem necessary to prevent a recognized social evil so long as it is at least debatable that laws may deter these activities to some extent.

The same response applies to one other important utilitarian objection frequently made to morals legislation. Limited-government utilitarians typically argue that legalization of an activity is a better way to prevent certain evils than criminalization. Advocates of drug legalization often argue that decriminalizing drugs would lower their costs dramatically,

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182 See id. See also Von Humboldt, supra note 26, at 71–81.
183 See Lars O. Ericsson, Charges Against Prostitution: An Attempt at a Philosophical Assessment, 90 ETHICS 335, 357–61 (1980) (arguing that it is pointless to criminalize prostitution because it is practically undeterrible).
184 See e.g., Lester Grinspoon and James B. Bakalar, Psychedelic Drugs Reconsidered 238–40 (1979) (examining the productive ways in which psychoactive drugs may alter the consciousness).
185 As H.L.A. Hart notes in another context, deterrence is a function of the likelihood of punishment. Acts which are not likely to be detected or prosecuted are less likely to be deterred by legal sanction. And when the activity itself is such that participants are strongly motivated to engage in the act, it will be all the more difficult to deter. H.L.A. Hart, Murder and the Principles of Punishment: England and the United States, in PUNISHMENT AND RESPONSIBILITY: ESSAYS IN THE PHILOSOPHY OF LAW 78 n.43 (1968).
186 In this sense it is argued that regulation, rather than prohibition, will better be able to control certain activities rather than "drive them underground." See Ericsson, supra note 182, at 352. The benefits include "freedom" gains when those who would otherwise be prevented from engaging in the act are now able to do so, social gains from the reduction of interdiction and prosecution costs, as well as permitting increased control of the harms associated with a regulated activity. These arguments have been made frequently in the debate concerning the criminalization of prostitution. Indeed, the authors of the Wolfenden Report found regulation far superior to criminalization on these grounds. See Wolfenden Report supra note 6, at 155–59.
undercut drug-related violence, and permit the regulation and taxation of drug sales. These, too, are the kinds of arguments best directed to legislative bodies; the highly deferential structure of equal protection review leaves courts unable to entertain them. Whether drug legalization will reduce crime or undercut violence associated with drug cartels is an empirical question left to the legislature, as are all of the related utilitarian issues that would have to be considered (e.g., whether there would be a corresponding spike in the public health effects of legalization in the event that lower prices would draw more users into the market).

These principles evince why it is so difficult to attack laws which receive rational basis review on the “means” requirement. It also makes clear the obvious potential for abuse. Because legislatures can almost always plausibly draw some (at least debatable) empirical connection between a social evil and a particular activity, the state will usually have some prima facie ground for regulation.

B. The Concept of a Legitimate State Interest

We must begin with a fundamental, though sometimes contested, truth about the nature of the legitimate state interest requirement. A legitimate state interest is simply a minimally permissible end or purpose which motivates legislative action. Either a state interest is or is not legitimate. This might seem a prosaic truth, but it is occasionally claimed that courts should determine whether a state interest is legitimate by weighing the state interest against the strength of the individual's liberty interest. This, however, cannot be correct. If courts were engaged in a weighing of individual and state interests at rational basis review, we should expect the same state interest to be legitimate in one case (where the competing liberty claim was less significant) and not legitimate in another (where the competing liberty claim was weightier). Indeed, virtually any state interest might be legitimate given a sufficiently weak countervailing individual liberty


188 Commentators have occasionally claimed that determining whether an interest is minimally legitimate requires a utilitarian balancing of the individual's interests against society's interest. See, e.g., Cicchino supra note 166. Peter Cicchino writes, for example, that "equal protection review almost invariably involves some form of utilitarian analysis to endeavor to weigh and compare the competing interests of the government and those burdened by the classification at issue. In this way, courts decide what qualifies as 'compelling,' 'substantial,' or even 'legitimate' . . . ." Id. at 146.
interest, an outcome that few would welcome. If the legitimacy of a state interest were determined in this way, courts could never make a categorical determination of the legitimacy of a particular state interest. Each case would depend on the strength of the countervailing liberty claim. The very structure of modern rational basis review rules out any such balancing of individual versus state interests.  

When is a state interest affirmatively illegitimate? While racial discrimination provides the paradigm example of an illegitimate state interest in the context of heightened review, there are two categories of impermissible purpose cases on rational basis review. The Supreme Court has held, first, that it is not legitimate for states to provide differential compensation to state residents based on their length of residence in a state. These cases are probably best understood as extending protection, even on rational basis review, to the value of the inter-state right to travel and the principle of non-discrimination against new residents. A second and, for our purposes, more important category involves cases in which the Court has determined that a state’s actual purpose was to disadvantage a politically unpopular or otherwise vulnerable group.

In the Moreno case, decided in 1973, the Court held unconstitutional a federal amendment to the Food Stamp Act, which prohibited unrelated persons living together from receiving food stamps because it determined

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189 This is what distinguishes modern rational basis review from the variety used, for example, during “Lochner, Coppage, Adkins, Burns, and like cases . . . .” Ferguson v. Skrupa, 372 U.S. 726, 730 (1963). The Court does not balance interests but, instead, tests to ensure that the means is rationally related to the end. The test is not whether the ends justify the means, but that the means are relevant to achieving a minimally permissible end. As Justice Black commented in Ferguson, “Under the system of government created by our Constitution, it is up to legislatures, not courts, to decide on the wisdom and utility of legislation. There was a time when the Due Process clause was used by this court to strike down laws which were thought unreasonable . . . .” but this doctrine “has long since been discarded.” Id. at 729-30.

190 See, e.g., Loving v. Virginia, 388 U.S. 1, 11-12 (1967) (holding unconstitutional a state anti-miscegenation statute on grounds that the state interests in “preserve[ing] . . . racial integrity[,] . . . prevent[ing] . . . corruption of blood,” and preventing the creation of a mongrel breed of citizens” were not permissible state ends. Id. at 7 (citations omitted).

191 See Zobel v. Williams, 457 U.S. 55, 65 (1982) (holding that it is not permissible for a state to apportion distributions from the state’s oil resources based on the length of residence in the state); Hooper v. Bernalillo County, 472 U.S. 612, 623 (1985) (holding invalid a New Mexico law which gave a $2000 tax exemption to military veterans only if they were living in the state before a certain date); Williams v. Vermont, 472 U.S. 14, 27 (1985) (holding unconstitutional a tax credit for cars purchased in other states by state residents but denying it to new residents).

192 See, e.g., Shapiro v. Thompson, 394 U.S. 618, 638 (1969) (using strict scrutiny based on the right to travel to invalidate one-year residency requirement for welfare recipients); Att’y Gen. of N.Y. v. Soto–Lopez, 476 U.S. 898, 904 (1986) (using strict scrutiny based on the right of interstate migration to invalidate an employment preference limited to veterans who were in-state residents at the time they entered military service).

that the law was motivated by a bald desire to disadvantage hippies. A little over a decade later, the Court held in *City of Cleburne v. Cleburne Living Center* that states and municipalities may not impose zoning burdens on those who wish to open a home for the mentally disabled. More recently, in *Romer v. Evans*, the Court held that states may not impose heightened political obstacles on homosexuals as a class when the intent is to make them "unequal to everyone else." Together these cases stand for the principle that it is not legitimate for the state or federal government to express animus toward a vulnerable or unpopular group. Stated in a slightly more expansive manner it can be said that while laws may check the effects of bad behavior they may not impose obstacles based on a group's cultural or political status. In the broadest sense, these cases involve the application of the principle of non-discrimination on rational basis review.

Does *Lawrence v. Texas* now portend a third and much broader category of cases: those in which the state attempts to advance morals-related interests that do not rise to the level of a Millian harm? The following section examines five such varieties of morality-related state interests that have traditionally been recognized but are now shrouded in controversy.

**IV. Morality as a Legitimate State Interest: Five Types of Moral Purposes**

A rigorously Millian concept of harm encompasses acts that directly and wrongfully injure third parties. The following five species of justification regulate on the basis of affects which are either not sufficiently direct (or concrete) or are too generalized (such that they affect everyone generally, but no one in particular, in a sufficiently palpable way) to constitute a harm in the Millian sense. These include (1) regulating on the basis of the secondary effects of self-regarding acts; (2) regulating offensive conduct; (3) preventing "moral corruption" of individual character; (4) protecting

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194 Id. at 534.
196 Id. at 450.
198 The Court has explicitly stated in other contexts that one’s status can seldom, if ever, be the basis for the imposition of criminal sanctions. *See Robinson v. California*, 370 U.S. 666, 666–67 (1962) (overturning on "cruel and unusual punishment" grounds a law that made it an offense to be a drug addict). The Court’s rationale was that offenses must involve specific acts and that a person could not be convicted for the status of being an addict. *Id.* at 666; *cf. Powell v. Texas*, 392 U.S. 514, 532 (1968) (upholding conviction for public intoxication on grounds that this involved the act of being publicly intoxicated).
199 *See supra* notes 16–24 and accompanying text (for a discussion of the harm concept); *infra* notes 200–224 and accompanying text (distinguishing direct harm from indirect harm and distinguishing harm from offense.) For a recent philosophical treatment of the concept of harm, see FEINBERG, supra note 21.
and fostering important social values and institutions; and (5) regulating morality as such. As we progress through the list, the justifications grow more controversial from a standard liberal perspective as the morals concern becomes “purer” and less obviously tied to some direct, individualized harm. As we will see, Mill himself made provision for some instances of (1) and (2). Modern liberals usually go further, often embracing at least some cases involving (3) and (4), while drawing the line at (5). This Article contends that this gives moderate defenders of morals legislation all they require to justify such laws.

A. The Secondary or Indirect Public Effects of Private Activity

When, if ever, should the state be able to regulate putatively private behavior on the grounds that, in a certain percentage of cases, this behavior leads to harmful public consequences? When, if ever, can private drug use be prohibited on grounds that drug users tend to commit a higher rate of crimes than others? Similarly, can prostitution be prohibited on grounds that crime rates are higher around red light districts? True Millians are obviously not opposed to punishing the harmful public effects of private acts, but it is another matter to prohibit the private activity itself as a prophylactic measure. Liberals face a dilemma in this regard. If they permit regulation on the basis of the secondary public effects of private acts, there will be little left of the harm principle, since self-regarding activities frequently have public consequences. Gambling, drug use, prostitution, even some consensual sexual acts such as adultery will each predictably have public effects on crime, unemployment, or, in the case of adultery, consequences for the structure of the family and the well-being of children. Yet if they do not permit these kinds of regulations, social order will obviously be imperiled as legislators are foreclosed from attacking the conditions that give rise to these public harms.

Mill recognized the problem and, as a general matter, attempted to maintain the separation between private acts and public consequences. He argued that the harm principle usually sanctions punishment only for

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200 We regulate on the basis of secondary effects when we prohibit one act in order to prevent a second, distinct act (which usually involves harm to a third party). Examples include prohibiting drug use to prevent robbery (as when the user holds up a convenience store owner to obtain cash to support his habit), or when the customer of a prostitute infects his wife with an STD from the illicit arrangement. Yet it is not always clear whether laws are based on the primary or secondary effects of an activity. For example, to prohibit homosexual activity in order to prevent the spread of disease, the effect would be primary to the extent that we want to protect the participants themselves but would be secondary to the extent that we want to protect third parties (e.g., the wife of a covertly gay man). Similarly the “prevention of the corruption of youth” rationale for homosexuality concerns the direct effects of homosexual intercourse on children and adolescents. See Cicchino, supra note 166, at 149 (characterizing as secondary effects a range of effects some of which are primary or direct).
the harmful public effects of private behavior, never for the private behavior itself.\textsuperscript{201} Private drunkenness or even drug use should be beyond the reach of the law, he argued, but when a policeman or soldier is drunk on duty they can of course be punished.\textsuperscript{202} At another point, however, he softened his stand. He admitted that the risk of harmful public consequences could sometimes be sufficient to regulate an activity, conceding that whenever "there is a definite damage, or definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty and placed in that of morality or law."\textsuperscript{203}

How definite must the risk of public harm be? Contemporary Millians have frequently reverted to a utilitarian balancing formula. They permit intervention when the gravity and the probability of potential harm outweigh the infringement on the liberty interests of the individual.\textsuperscript{204} Yet, libertarians and other purer Millians may object that a utilitarian balancing of the collective and individual interests violates the spirit of the ethic of liberty. One person's freedom to act in a self-regarding way should not be limited because another permits the consequences of his own behavior to flow out into the public realm. Mill appears to have been sympathetic to this objection and counseled a more individualistic approach to the problem. Rather than prevent everyone from engaging in a private activity because of the harmful consequences brought about by the few, he preferred stronger responsive sanctions to the few whose behavior results in the harmful public consequences. He advocated, for example, that anyone who committed a violent act under the influence of alcohol could forever be enjoined from drinking alcohol, with a severely increased sanction for repeat offenders.\textsuperscript{205}

\begin{itemize}
\item \textsuperscript{201} \textit{Mill}, supra note 2, at 149.
\item \textsuperscript{202} \textit{Id.}
\item \textsuperscript{203} \textit{Id.} (emphasis added). The two emphasized portions indicate significant amendments to the harm principle. In conceding that the mere risk of damage is enough, Mill opened the door to quantitative assessments of potential harms and to utilitarian balancing of harms against the social interests advanced by prohibition.
\item \textsuperscript{204} See \textit{Feinberg}, supra note 21, at 191. Feinberg's formula is similar to the calculus made famous by Judge Learned Hand in the \textit{U.S. v. Carroll Towing}. Hand's formula generally states that whether there is a duty in negligence cases is determined by whether the burden of preventing a given harm is less than or equal to the probability of harm multiplied by the gravity of the harm. \textit{See United States v. Carroll Towing Co.}, 159 F.2d 169, 173 (2d Cir. 1947). In some cases, Feinberg notes, a licensing mechanism may be a better alternative to blanket prohibition, on one hand, or permission, on the other. \textit{See Feinberg}, supra note 21, at 194.
\item \textsuperscript{205} \textit{Mill}, supra note 2, at 167. Mill even went so far as to argue that the State could act in a prophylactic manner to prevent the potential secondary effects of certain personal choices. For example, he argued that the right to marry may be denied to those who cannot demonstrate that they can support a family—a conclusion which would strike many today as profoundly "conservative" on grounds that it is better to severely limit the freedom of those whose activities may have serious public costs or consequences than to limit everyone's freedom to engage in an otherwise self-regarding activity. \textit{Id.} at 179; \textit{contra Zablocki v. Redhail}. 
\end{itemize}
American law does not follow Mill's more individualistic approach. Laws routinely regulate or even prohibit self-regarding acts on the basis of their harmful secondary effects and most liberals today support this, distancing themselves in this respect from Mill's individualism. As a constitutional matter the Supreme Court has regularly and unequivocally upheld the legitimacy, even the compelling need, for preventing secondary effects of putatively self-regarding activities. In *Paris Adult Theatre I v. Slayton*, the Court upheld an injunction on the exhibition of obscene movies invoking the local interest in addressing "the arguable correlation between obscene material and crime," and the "anti-social behavior" brought about by "crass commercial exploitation of sex." Indeed, the Court cast these secondary effects in the very generalized terms of upholding social order and morality. States may legitimately judge whether "public exhibition of obscene material, or commerce in such material, has a tendency to injure the community as a whole, to endanger the public safety, or to jeopardize . . . the States' right . . . to maintain a decent society."

Similarly, in *Barnes v. Glen Theatre, Inc.*, the Court upheld a local ordinance banning nude dancing. Justice Souter, who provided the fifth vote, concurred not on the basis of the "sufficiency of society's moral views to justify the limitations at issue, but on the State's substantial interest in combating the secondary effects of adult entertainment establishments."

More recently the Court upheld a similar ordinance banning nude dancing based on the asserted justification that "crime and other public health and safety problems are caused by the presence of nude dancing establishments." There is no serious doubt that, as a constitutional matter, states may regulate private activities when the effects of these activities affect the public in a certain proportion of cases.

**B. Offensive Conduct**

Offensive activity raises the example of the "concreteness" of harm.

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434 U.S. 374, 390–91 (1978) (where the Court ruled that a state could not constitutionally deny a marriage license even to a person who was already behind in child support payments). *Zablocki* evinces the modern liberal shift away from imposing severe sanctions on weaker or poorer members of society.


207 *Id.* at 58.

208 *Id.* at 63.

209 *Id.* at 69. (internal citations omitted).


211 *Id.* at 582 (Souter, J., concurring). The other four justices went further, sanctioning the power of the state to regulate on the basis of morality simpliciter. See *id.* at 569, 580.

212 *City of Erie v. Pap's A.M.*, 529 U.S. 277, 300 (2000); see also *id.* at 296.
Since offense does not usually involve an invasion of a person’s physical or economic interests, it does not qualify as a true “harm” in the Millian sense. At most, offense is an invasion of our sensory, emotional, or dignitary interests—our interests in not being shocked, disgusted, “grossed out,” or humiliated. Perhaps because it represented an obvious extension of his principle, Mill dealt obliquely with those “offenses against decency upon which it is unnecessary to dwell” but stated unequivocally that the prohibition of those activities is consistent with the harm principle.

No one has seriously cast doubt on the principle that states may legitimately reach a variety of offensive behaviors and conditions. Nuisance principles in tort and criminal law prohibit the invasion of various generalized rights of a public nature or private rights to the owner’s use and enjoyment of his property.

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213 Offensive conduct is often wrongful, but it may not rise to the level of injury in the Millian sense if it does not involve the kind of invasion of one’s physical, emotional, or economic interests as do genuine harms. Contemporary liberals follow Mill in holding that, while offense is not harm in the strict sense, prohibition of offensive conduct is consistent with liberal political commitments. Feinberg defines liberalism “as the view that the harm and offense principles, duly clarified and qualified . . . exhaust the class of morally relevant reasons for criminal prohibitions.” See supra note 17, at 14-15.

214 Joel Feinberg describes six varieties of offense in his harrowing “ride on the bus” example. See 2 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: OFFENSE TO OTHERS 10-13 (1985). Feinberg asks the reader to imagine that they are on a bus when other passengers engage in a variety of offensive, disgusting, or shocking behaviors of the six kinds. First, there are assaults upon the senses, as when confronted with someone who has not bathed, someone wearing violently clashing colors, or someone scratching their fingernails on a blackboard. Id. at 10. Second, acts which evoke disgust and revulsion in cases ranging from passengers who “scratch[], drool[], cough[], fart[], and belch[]” to passengers spreading out a picnic lunch of insects, or, worse, passengers consuming each other’s vomit. Id. at 11. Third, cases involving shock to our moral, religious or patriotic sensibilities: defiling corpses, using the American flag to clean one’s face after a messy lunch, a T-shirt depicting a crucified Christ which says, “Hang in there baby,” etc. Id. Fourth, behavior causing a mixture of shock and embarrassment exhibited by a passenger openly masturbating on the bus. Id. Fifth, behaviors evoking annoyance, boredom, or frustration, like your neighbor on the bus insisting on talking to you even though you have signaled a desire to return to your book. Id. at 13. Sixth, mocking behavior causing fear, resentment or humiliation exemplified by a passenger wearing a swastika on his armband or a T-shirt reading “Keep bitches barefoot and pregnant.” Id. Each of these categories of offense infringe on our emotional sensibilities in different ways without constituting a Millian harm.

215 See MILL, supra note 2, at 168. Additionally, Mill wrote that “there are many acts which . . . if done publicly, are a violation of good manners and, coming thus within the category of offenses against others, may rightly be prohibited.” Id. As Feinberg put it, after Mill’s “bold initial claim” that harm is the only basis for limiting liberty, he “comes to appreciate the offense principle in a later chapter as a kind of afterthought.” See supra note 21, at 14.

216 Feinberg distinguishes nuisances from “profound offense[s].” See FEINBERG, supra note 21, at 50-57. The Restatement of Torts provides that a “public nuisance is an unreasonable interference with a right common to the general public.” RESTATEMENT (SECOND) OF TORTS § 821(B) (1979). It usually requires conduct that “involves a significant interference with the public health . . . safety . . . peace . . . comfort . . . or convenience,” and public
While the Supreme Court has regularly extended constitutional protection to putatively offensive speech under First Amendment principles, more serious forms of offensive conduct, such as indecent exposure, engaging in sexual acts in public, and the improper treatment of dead bodies, appear to be beyond constitutional question. States may also legitimately express their disgust at a variety of other putatively distasteful activities. For instance, the Seventh Circuit recently upheld a law, prohibiting the sale of horse flesh for human consumption. It is important to note that the law did not prohibit killing horses and was not justified on animal cruelty grounds. Rather, it was justified as the expression of profound distaste directed at the human consumption of horse meat. As Judge Posner declared in his opinion:

> [E]ven if no horses live longer as a result of the new law, a state is permitted, within reason, to express disgust at what people do with the dead, whether dead humans being or dead animals . . . A follower of John Stuart Mill would disapprove of a law that restricted the activities of other people . . . on the basis merely of distaste, but American governments are not constrained by Mill’s doctrine.

While the offensiveness of an activity occasionally makes something wrong, in other cases we find it offensive because we find it wrong. We are offended at the idea of necrophilia, for example, because it offends our

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217 See id., cmt. d.; see also id. § 821(D) (providing a discussion of private nuisance).
218 See e.g., Cohen v. California, 403 U.S. 15, 26 (1971) (overturning the conviction under a statute punishing profanity of a man who wore a jacket with the words “Fuck the Draft” emblazoned on it).
219 See Model Penal Code §251.1 (1962) (amended 1980) (misdemeanor prosecution for “Open Lewdness,” for “any lewd act which he knows is likely to be observed by others who would be affronted or alarmed”). The mistreatment of dead bodies is more frequently the subject of civil actions for intentional or negligent infliction of emotional distress. See Gonzalez v. Metro. Dade County Pub. Health Trust, 651 So. 2d 673, 675–76 (Fla. 1995) (requiring plaintiff to show physical injury or willful or wanton conduct resulting from negligent mishandling of a dead body); Christensen v. Superior Court, 820 P.2d 181, 184 (Cal. 1991) (mishandling of 16,000 decedents).
220 See id. at 553.
221 Id. at 557.
222 Id.
223 See Hart, supra note 6, at 43–44 (noting the distinction drawn in the criminal law between immorality and indecency). "Sexual intercourse between husband and wife is not immoral, but if it takes place in public it is an affront to public decency. Homosexual intercourse . . . is immoral according to conventional morality, but not an affront to public decency, though it would be both if it took place in public." Id. at 45.
deepest moral sensibilities about the proper treatment of human bodies. We find the practice offensive because we understand it to be wrong. This indicates not only that most will accept regulation of sub–harmful injuries, but that people sometimes accept them primarily because of the moral component.\(^{224}\) This strongly suggests that most accept the protection and cultivation of our moral sensibilities as a worthy justification for legislation independent of harm prevention.

**C. Preventing the Corruption of Moral Character**

Should government play a role in fostering social conditions essential to the development of the moral character of its citizens? While these functions are seen as central to the conservative or communitarian conceptions of society,\(^{225}\) it is frequently maintained that the liberal state can have no role in value shaping, character formation, or even fostering conditions conducive to the development of good moral character.\(^{226}\) Indeed, some liberal philosophers have taken the extreme position that the corruption of one's character cannot even be considered a cognizable harm to the person who has not yet acquired a desire to be morally virtuous.\(^{227}\) Liberal political philosophers have thus consistently rejected what we might call the “moral educative” function of the law.\(^{228}\)

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\(^{224}\) See supra Part IV(B) for a discussion of the idea that law may prohibit acts on the basis of their perceived immorality.

\(^{225}\) See, e.g., GEORGE F. WILL, STATECRAFT AS SOULCRAFT (1993) (arguing for a return to a civic republican conception of self and politics); SANDEL, supra note 85 (critiquing the liberal conception of the self).

\(^{226}\) Liberals are usually opposed to a role for the state in character shaping for a variety of reasons. They may fear that when government is able to shape its citizens' values, this comes too dangerously close to an Orwellian vision of totalitarianism. As Ronald Dworkin put it, the core value of liberalism is that “government must treat all its citizens with equal concern and respect” which requires, in turn, “that all political decisions must be, so far as is possible, independent of any particular conception of the good life or of what gives value to life.” DWORKIN, supra note 20, at 181, 190–91. More commonly, however, giving the state a role in shaping character is viewed to violate liberal neutrality and a Kantian conception of autonomy, which requires that the person must choose his own ends in life. See GEWIRTH, supra note 20, at 32 (choices which are in any way shaped or compelled are not truly voluntary). The state should have no role in influencing our moral choices and convictions. As Michael Sandel argues, “For the liberal self, what matters above all, what is most essential to our personhood is not the ends we choose, but our capacity to choose them.” MICHAEL SANDEL, DEMOCRACY'S DISCONTENT: AMERICA IN SEARCH OF A PUBLIC PHILOSOPHY 12 (1996). Sandel quotes Rawls' dictum: “For the self is prior to the ends which are affirmed by it; even a dominant end must be chosen from among numerous possibilities.” Id. (quoting JOHN RAWLS, A THEORY OF JUSTICE 560 (1971)).

\(^{227}\) See FEINBERG, supra note 21, at 68–70 (arguing that we cannot be harmed if we do not have an antecedent desire to be morally good).

\(^{228}\) Like Mill, Hart was skeptical of the moral–educative function of law. Hart wrote, “Much morality is certainly taught and sustained without [legal punishment], and when mo-
Notwithstanding these oft-cited tenets of liberal political theory, courts have routinely recognized the state’s interest in protecting the development of individual character, particularly among the young. These interests were traditionally couched in such explicitly moralistic terms as protecting the “purity” or “chastity” of those who have not yet reached adulthood, preventing the corruption of youth, and, even more explicitly, “encourag[ing] continence and self-restraint” and “engender[ing] in the state and nation a virile and virtuous race of men and women.”

Today, however, they are frequently cast in more modern psychological or developmental terms. In *Bethel School Dist. No. 403 v. Fraser,* for example, the Court upheld the school-sanctioned punishment of a high school student who gave a sexually explicit speech during a high school assembly. In its opinion, the Court recognized the state’s interest in curbing offensive speech to a captive audience when it concluded that “the speech was acutely insulting to teenage girl students.” The Court, however, also invoked the state’s interest in preventing developmental harms to young students. States have an interest in protecting youth from “speech [that] could well be seriously damaging to its less mature audience, many of whom were only 14 years old and on the threshold of awareness of human sexuality.” It firmly underwrote the school’s function as an instrument of moral education, declaring that schools “may determine that the essential lessons of civil, mature conduct cannot be conveyed in a school that tolerates lewd, indecent, or offensive speech and conduct such as that indulged in by this confused boy.”

Recent commentators who support a quasi-Millian ban on all forms of morals justifications have interpreted *Fraser’s* more developmental or psychological gloss on the state’s interest as evidence that courts are abandoning morals-based justifications and limiting constitutional validity to harm-based justifications. But there are several problems with this...
First, it is at least debatable whether there is a real harm in the Millian sense when an individual hears sexual information at a point in youth before he or she should otherwise be exposed to such information. It is not clear how this "harms" the individual—at least not in Mill's sense. More importantly, it is certainly arguable that we are simply repackaging our older "moral" vocabulary in more modern, empirical-sounding psychological terms.

Nineteenth-century proponents of anti-profanity rules might have employed the traditional, Aristotelian moral vocabulary, invoking concerns about protecting the character of our youth, but is this really any different than what we are concerned about today when we speak of a young person's psychological well-being? Indeed, modern psychologists often implicitly appeal to a kind of teleological understanding of human development that underlies more traditional notions of character development. Whether cast in the older Aristotelian ideal of "fostering good character," or in the more recent psychological vocabulary, the interest is the same. We recognize the "moral harm" in being prematurely exposed to sexually-explicit speech or conduct as it was recognized previously even though our conceptual paradigm has changed.

Nor are these kinds of character-based justifications limited to the protection of youth. From laws prohibiting lotteries, alcohol and...
polygamy enacted more than a century ago to modern-day laws banning drug use, prostitution, and even television advertising for cigarettes, laws today protect the same kinds of governmental interests once associated with the protection of character. As Robert George puts it, the state has an interest in protecting a shared "moral ecology in which people make their morally self-constituting choices." Of course, today we are more willing to protect the individual paternalistically from his own choices and less willing to make "moralistic" judgments about his behavior than we were a century ago. Modern paternalism, however, has many of the same goals and effects as the moralism of the traditionalist. Consider seatbelt and motorcycle helmet laws, paradigm instances of paternalism. Not only do these laws restrain bad choices by threat of some legal sanction, over the long term they "teach" people which choices to make and inculcate steady habits (e.g., habitually strapping in when one gets into a vehicle).

These are examples of the conservative character-shaping function of law to which liberals are usually opposed.

Indeed, there is a double irony in this modern linguistic subterfuge. From the true Millian perspective, it is no more permissible for the state to act paternalistically than moralistically. Thus, it is not clear what the "payoff" is for those who persist in characterizing their mission as essentially Millian. Secondly, while we may have shifted our vocabulary, we have not altered our underlying concerns. What seems to motivate modern prohibitions of drugs and prostitution—two of many potential examples—seems to be exactly the same kinds of concerns that motivated nineteenth-century moralistic prohibitions on lotteries, alcohol use, and prostitution. What might once have been couched in terms of the desacralization of sexual relations, today will be characterized as the commodification of sex.

What once was characterized as moral decadence will now be described in the modern psychological vocabulary of habituation, psychological

241 See Davis v. Beason, 133 U.S. 333, 341 (1890) (finding that polygamy tends to "destroy the purity of the marriage relation, to disturb the peace of families, to degrade women and to debase men.").


243 GEORGE, supra note 25, at 1 (arguing that law has an important role to play in helping people shape their moral character).

244 See Herbert Morris, A Paternalistic Theory of Punishment in Paternalism, supra note 17, at 139–52 (defending a paternalistic conception of punishment which seeks the improvement of the offender's own character).

245 See RADIN, supra note 160.
dependency, or regression. The paradigm has changed, but, contrary to the claims of the recent quasi-Millians, we are no less concerned with the development of moral character today than we were a century ago.

D. Protecting Essential Values and Social Institutions

Can the state ever legislate to protect an abstract value independently of the material interests associated with the value? For example, anti-discrimination laws prohibit discrimination in particular cases and, to that extent, prevent particularized harms to specific individuals. Yet, they also undoubtedly contribute to a more general ethic of anti-discrimination, literally inculcating the value of equality by using the force of law to foster a non-discriminatory value system within society. This section considers whether states have a legitimate interest in preserving and protecting essential values such as equality or respect for life.

Certain strands of liberal political thought counsel that the "moral neutrality" requirement entails that states have no conceivable legitimate interest in fostering or transmitting any values or protecting traditional social institutions. Yet there are three well-known philosophical problems with this position. First, as Isaiah Berlin and other theorists broadly sympathetic to the liberal tradition have pointed out, a rigorous commitment to "moral neutrality" has the paradoxical effect of "driving out" liberal values to the extent that it requires the liberal to accept sub-cultures which embrace non-liberal values and institutions. The "neutral" liberal's commitment to be "open" to all values and lifestyles compels acceptance of neo-Nazi or Islamic fundamentalist sub-cultures, for example, which are antagonistic to a liberal ethos and which may denigrate women, Jews, and other outsiders. The liberal simply has to take a stand on some moral issues if for no other reason than to protect his own liberal commitments.

Second, not only is a stance of strict moral neutrality dangerous to a liberal social ethic, strict neutrality is ultimately philosophically incoherent. It is impossible for the state to observe a stance of strict moral neutrality because even a decision not to intervene in certain activities will have moral consequences.


247 A thorough discussion of this is beyond the scope of this Article, but two examples will do: one from philosophical literature, the other from constitutional case law.

Nozick raised the example of the State's neutrality as between the claims of a rapist who wishes to pursue his own "conception of the good" and the victim. Nozick, supra note 20, at 272–73. By threatening to punish him for rape, the state is acting non-neutrally, and obviously rightly so. Id. While advocates of neutrality have replied even to arguments such as this, it appears impossible to imagine a scheme of true neutrality without a background conception of rights to tell us when state action preserves "equal chances in life" between different parties.
neutrality is that those who make it seem not to recognize that it is itself usually advanced in the name of such particular, albeit important, moral values such as liberty and equality.

Finally, it is fair to question whether liberal advocates of moral neutrality really mean what they say. In their unguarded moments, liberals believe as much as conservatives do that the state has an important function in promoting certain moral values; they simply happen to disagree about which values we should protect. They will support legislation which ensures diversity in higher education or requires gender inclusion in social and business organizations. Perhaps it does not go too far to speculate that they accept these policies not only for the material goods they foster in preventing particular harms but more generally for the values they engender, promulgate, and promote. If this is a fair criticism, then liberals do not seek neutrality any more than conservatives do.

As a constitutional matter, the Supreme Court has regularly upheld the legitimacy of protecting moral values independently of the material interests associated with these values. For example, in Washington v. Glucksberg, upholding a state ban on assisted suicide, the Court recognized two distinct abstract values as minimally legitimate. It found that the state had “an unqualified interest in the preservation of human life.” Importantly, the interest was not limited to the protection of particular lives. The Court said that this “interest is symbolic and aspirational as well as practical” and went on to observe that “the ban against assisted suicide and euthanasia shores up the notion of limits in human relationships. It reflects the gravity and when it distorts these equal chances. This background conception of rights, however, is likely to be as controversial as the asserted basis for state action to promote some moral ideal or value.

Secondly, consider Lyng v. International Union, wherein the controversy involved a congressional amendment to the Food Stamp Act which provided that food stamps allotment would not increase to families with a member on strike. Lyng v. Int'l. Union, 485 U.S. 360, 362 (1988). The purpose was to ensure that the government remained “neutral” as between strikers and management that it did not assist the striking side by providing increased food stamp benefits. Id. at 362, 371–73. The majority upheld the amendment on these grounds while the dissent complained that this created gross disparities between strikers and those who quit their jobs or did not work for other reasons. Id. at 373–75. Which position, we may ask, was the more “neutral?”

248 As critics of liberalism have pointed out, liberalism purports to achieve its purposes neutrally, but in fact, liberal theories reflect one or another value bias. See, e.g., Sandel, supra note 85 (criticizing both Rawlsian left-liberalism and Nozick's libertarianism).


252 Glucksberg, 521 U.S. at 729.
with which we view the decision to take one's own life or the life of another, and our reluctance to encourage or promote these decisions.”

Related to this, the Court endorsed the state interest in preventing a slippery slope effect, whereby “assisted suicide will start it down the path to voluntary and perhaps even involuntary euthanasia.” These interests are nothing if not emanations of a deeper and more general interest in fostering, expressing, and reinforcing the value of respect for human life.

The Court in Glucksberg also recognized a particularized state interest in “protecting the integrity and ethics of the medical profession.” From the Court's perspective, the state had a legitimate concern for maintaining high standards of professional conduct, protecting “the trust that is essential to the doctor–patient relationship,” and preventing a “blurring [of] the time–honored line between healing and harming.” Similarly, in Gonzales v. Carhart, the recent partial birth abortion case, the Court approved of Congress's finding that permitting late term abortions would “further coarsen society to the humanity of not only newborns, but all vulnerable and innocent human life” and noted that Congress sought to “draw a bright line that clearly distinguishes abortion and infanticide.”

What are these state interests if not the protection of essential values—values that have significance independent of more particularized harms? It might be objected that we only protect these values in order to protect particular human lives, that there is always a real, empirical harm underlying the normative gloss. This does not, however, appear to be the import of these decisions. The Court appears to signal that the protection of moral values has another function besides harm–prevention. One function is to teach the value—i.e., to have the individual internalize it because of its intrinsic importance. Another function is to bracket certain activities in order to counsel individual and collective reflection about them.

When we place assisted suicide off–limits to shore–up the notion of limits in human relationships, we are not simply seeking to prevent some specific harm in the future; we are underscoring the gravity of the

253 Id.
254 Id. at 732.
255 Id. at 731.
256 Id.
257 Id.
258 Id.
life-taking decision. We may hope to encourage individuals to reflect on these issues, even if we should ultimately collectively decide that when a seriously terminally ill person chooses to take their own life it is not "harm" at all. The value is important as a kind of social marker. When the state underwrites certain values, its goal is not simply the primary consequence of harm-prevention but the secondary and more general consequence of placing brackets around a particular activity, often in situations where social attitudes are quickly changing, and encouraging deeper reflection about them. It is to express society's conviction that we should go slow.

Of course, neo-Millians may simply reject these other functions as illegitimate. They may insist that there must be some direct connection between the protection of a value and the prevention of "harm," and without this connection, the state lacks a legitimate interest in legislating. Even this position, however, may represent another significant departure from the harm principle. At any rate, as the present discussion makes clear, the courts have not warmed to the neo-Millian position. They not only protect abstract moral values but also appear to protect them for reasons that have little to do with the immediate prevention of harm.

E. Legislating "Morality as Such"

We are now led to what has been the theoretical Maginot Line between modern liberals and conservatives. We have seen that Mill used the concept of harm to draw the line between public power and private right, and that modern liberals follow some version of this distinction though many accept a greatly expanded concept of harm, leaving the government considerably more latitude to intervene in ways which Mill would have wanted.

There is no doubt that even this bracketing function serves a "conservative" social goal insofar as it functions to retard ill-considered social changes that may be irrevocable. Marking out certain activities will usually be intended to "conserve" a certain moral framework and cuts against the unintended consequences of rapid social changes. We should keep in mind, however, that "liberal" social goals — e.g., equality, anti-discrimination, autonomy — can be "conserved" in this way as well.

The problem is that protecting abstract values usually requires a much more general "zone of prohibition" than true Millians wish to see. Legislating to prevent the slippery slope provides the best example of this. Mill insisted that one private or non-harm producing act cannot normally be prohibited in order to prevent harm from another act. Mill rejected regulating those who are "injurious by [their] example." See Mill, supra note 2, at 147, 149-50. We cannot prohibit the terminally ill from using assisted suicide if our real goal is to prevent it from being offered to the non-terminally ill, for example. Nor could we prohibit one (presumably permissible) form of abortion in order to prevent the slide to other forms. In fact, insofar as the purpose of the law is to affect human attitudes, to prevent our values from coarsening, this would simply be off-limits to the serious Millian. So the liberal who embraces any form of values legislation as legitimate has already rejected what lies at the heart of the harm principle.

rejected. Nevertheless, however broadly modern liberals may wish to define the concept of harm, there comes a point where the prevention of harm ends and purely “moralistic” intervention begins. This, at least, has been the lesson of the Hart–Devlin debate and ensuing exchanges between liberals and conservatives. This is supposed to be the point where liberals will draw their line in the sand and insist that government has no right to legislate—the point beyond which the state is, as Hart put it, legislating “morality as such.”

What Hart called regulating “morality as such,” however, consists either of empirical claims (though often of a weak or disputed variety) over which the legislature has control under one or more of the four types of justification above, or they represent the kinds of appeals to retributive or natural law conceptions upon which no advocate of state intervention need rely. Thus, the argument surrounding regulating morality for the sake of morality is indeed a Maginot Line—a well-fortified but easily circumvented defensive line that no liberal need draw and no conservative need attack.

Hart distinguished two varieties of conservative argument which, if accepted, would permit regulating for the sake of “morality as such.” He called these the “moderate” and the “extreme” theses. The moderate thesis advocates regulating to prevent certain generalized social evils which do not qualify as Millian harms because they affect society as a whole without harming any particular individual. These generalized social evils—Feinberg calls them “free-floating social harms”—include such conditions as the breakdown of civility, the coarsening of human sentiments or a loosening of communal ties that rest upon a shared communal morality,

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265 See Mill, supra note 2.
266 See supra note 6.
267 Hart, supra note 6.
268 See id.
269 See id. at 48.
270 Id. at 48–49. The difference between the two is that the “moderate” thesis is based on certain kinds of generalized harms to society at large—the breakdown of the social fabric—caused by the failure to enforce morality. The moderate thesis is thus still broadly utilitarian in that it justifies punishing behavior that harms no particular individual by claiming that such behavior nevertheless harms society as a whole. Id. The “extreme” thesis, in contrast, enforces morality for morality’s sake, independently of any appeal to socially beneficial consequences. Id. Hart concluded that Stephens generally defended the extreme thesis and Devlin the moderate thesis. Id. at 55. Joel Feinberg drew a similar distinction between legal moralism in the broad and narrow senses. Legal moralism in the broad sense holds that the state is justified in prohibiting “certain actions that cause neither harm nor offense to anyone, on the grounds that such actions constitute or cause evils of other (‘free-floating’) kinds.” Feinberg, supra note 21, at 27. Legal moralism in the narrow sense parallels Hart’s extreme thesis. It holds that “[i]t can be morally legitimate to prohibit conduct on the ground that it is inherently immoral....” Id.
etc. Advocates of the moderate thesis, Hart argued, want to preserve a shared morality to preserve society and to prevent the evils associated with social disintegration. Shoring up morality is a means, from the moderate perspective, to the end of preserving existing social order. Advocates of the extreme thesis, on the other hand, assert that the law should protect a common morality not for the sake of society, but for the sake of morality. Even if there were no changes in society wrought by the spread of some putatively immoral act, defenders of the extreme thesis would insist on prohibiting the activity because it is viewed to be an affront to morality itself.

As we have just seen, the Court has recognized state interests in preventing the coarsening of human sentiments, protecting certain essential values and institutions such as the value of respect for life or the value of non-discrimination and protecting the institutions of civil society, including the family. It can even protect some of these interests as abstract expressions of value independently of particular instantiations of that value. For example, it can protect the value of life over and above protecting particular lives to the extent that these are intended to preserve social order. Thus it is clear that states may regulate on the basis of what Hart called the moderate thesis.

This does not mean that we should accept all versions of the moderate thesis. As we noted in Part I, Hart did indeed demolish Devlin's version of the moderate thesis, but only because Devlin was drawn into defending an overly abstracted version of the thesis. He argued as if society were a concrete object with a univocal and unchanging moral order such that any changes in this morality would spell destruction of this society as we know it. Devlin wrote that "society is not something that is kept together physically; it is held together by the invisible bonds of common thought. If the bonds were too far relaxed the members would drift apart. A common morality is part of the bondage." Hart appropriately responded that Devlin appears to move from the acceptable proposition that "some shared morality is essential to the existence of any society to the unacceptable proposition that a society is identical with its morality as that is at any given

271 The moderate thesis might even qualify as a "harm-based" justification, given a broad enough conception of harm. See Feinberg, supra note 21, at 22–27. While it does not involve harm to particular individuals, it does encompass more generalized social harms such as "the decay of the family structure" or changes in the basic ways human beings communicate with others. Feinberg, supra note 6, at 20–25 (discussing what he means by "free-floating evils," such as generalized harms that do not sufficiently affect any individual's interests to be considered 'harms')
272 See Hart, supra note 6, at 53–54.
273 See id.
274 See id. at 54.
275 See supra notes 67–74.
276 Devlin, supra note 6, at 10.
moment of its history, so that a change in its morality is tantamount to the destruction of a society.” 277

Rather than defending specific values and particular institutions on grounds that these are necessary to prevent various concrete social evils which do not rise to the level of a Millian harm, Devlin defended the absurd view that any change in morality amounted to the de facto destruction of society. As Hart put it:

[E]ven if the conventional morality did so change, the society would not have been destroyed or “subverted.” We should compare such a development not to the violent overthrow of government but to a peaceful constitutional change in its form, consistent not only with the preservation of a society but with its advance. 278

Advocates of morals legislation need not rely on anything like this conception of social morality. They can defend the legitimate authority of the State to reinforce basic moral ideals and social institutions for their capacity to ensure human well-being.

What about the extreme thesis? Hart introduces the extreme thesis in Kantian or broadly non-utilitarian terms:

[T]he extreme thesis does not . . . justify the punishment of immorality as a step taken, like the punishment of treason, to preserve society from dissolution or collapse. Instead, the enforcement of morality is regarded as a thing of value, even if immoral acts harm no one directly, or indirectly by weakening the moral cement of society. 279

Hart defines the extreme thesis in terms of the enforcement of morality for the sake of morality itself, rather than as a means to preserving social order. It is an “extreme” view in the sense that those who hold it believe that morals laws can be justified without reference to any identifiable social affect at all. Behavior deemed to be immoral is prohibited simply because it is immoral, even in the absence of any other harms prevented or benefits gained from prohibiting the behavior. While some theologians and philosophers of past ages may have held some version of the extreme thesis, 280 Hart’s discussion demonstrates just how infrequent and marginal

277 HART, supra note 6, at 51 (emphasis in original).
278 Id. at 52.
279 Id. at 49 (emphasis added).
280 See THOMAS AQUINAS, 2 SUMMA THEOLOGICA 232 (Fathers of the English Dominican Province, trans., Christian Classics 1981). Those most likely to have defended morals legislation on these grounds include orthodox theologians and natural law theorists who believe that
If the extreme thesis is understood to mean that some activities may be criminalized simply because they are thought to be immoral—that the law may be used to uphold a moral value or principle without performing any other social function—then Hart apparently could not find a single example of this in recent legal and political thought. Instead, his discussions examined some of the functions of morals legislation surveyed earlier here. He considered the use of morals legislation to deter private, non-harmful behavior such as homosexual acts and raised several plausible utilitarian objections to this. Hart also explored and rejected the moral-educative function of law.

Neither of these functions of morals legislation, however, are examples of legislating merely for the sake of upholding a moral principle. Whether or not deterring non-harmful conduct or shaping values has a place in a liberal-democratic system of justice, they have the very real, social functions of deterring and educating. These simply are not instances of legislating purely to vindicate the sanctity of a moral value. Even where Hart comes closest, in discussing Stephen’s advocacy of the denunciatory function of law—such as legislating to express condemnation and to vent society’s moral outrage directed to some activity, it is not a pure example

human laws should reflect, at least to some extent, divine ordinances. Yet even many of these thinkers did not believe that morality should be enforced purely for the sake of morality. St. Thomas Aquinas, the greatest of the natural law thinkers, for example, believed that law exists “to lead men to virtue, not suddenly, but gradually.” He also explicitly concluded that laws “[d]o not lay upon the multitude of imperfect men the burdens of those who are already virtuous . . . [since those] unable to bear such precepts, would break out into yet greater evils.” Even when the law should prohibit vice, moreover, Aquinas and other natural law theorists would not frame the matter in the same way as Hart. See id. Hart’s extreme thesis has a Kantian ring to it insofar as it suggests that morality can be enforced purely for the sake of morality. See supra note 6, at 49; Immanuel Kant, Grounding for the Metaphysics of Morals 7 (James W. Ellington, trans., Hackett Pub’g Co. 1981) (1787). Yet Aquinas, who wrote 500 years before Kant, would not have endorsed such a deontological conception of morals legislation. See supra. Aquinas and other natural law theorists thought that law has a moral-educative function similar to that which we have already examined. See supra Part IV. Morality is not enforced for the sake of morality. It is enforced for the sake of bringing people’s characters into conformity with virtue. Only someone writing after Kant could defend (or conceive) something quite like Hart’s extreme thesis. See supra notes 159–164 and accompanying text. Hart rejects the denunciatory function, contending that punishing “as a means of
of the extreme thesis. The denunciatory justification functions partially as a kind of social catharsis by allowing what are thought to be the pent-up feelings of moral outrage experienced by the “moral majority.”

The point of all this is not to suggest that Hart was wrong in concluding that there is little point in deterring some non–harmful acts or that using law in an expressive manner presents its own moral difficulties. Rather, Hart’s error was to collapse and unnecessarily dichotomize the criminal law into two categories: those that prevent harm and those that merely regulate “morality as such.” Instead of only two categories there is in fact an intermediate spectrum of permissible justifications between the two. His discussion of the extreme thesis, moreover, critiques a position which few conservatives in recent memory have defended, and which no conservative need ever defend.

The crucial distinction for us to draw today is not the distinction between laws that prevent real harms and laws that regulate “morality as such,” but rather, the distinction between the permissible use of law to achieve some legitimate social affect and the impermissible use of law to express “the feeling of hatred and the desire of vengeance,” as Stephen put it in the nineteenth century, or to vent “intolerance, indignation and disgust” as Devlin reiterated the idea in the 1960s. This, as the next section demonstrates, is the lesson of Lawrence v. Texas.

V. THREE READINGS OF LAWRENCE v. TEXAS

A. The All–Encompassing View

Lawrence v. Texas can be, and has been, read in three alternative ways. The first and broadest interpretation reads Lawrence to have declared something approximating a general right of intimate sexual conduct between consenting adults. It entails that states will never have any legitimate state interest, whether based on health, safety, or morals, sufficient to justify laws regulating fornication, adultery, homosexuality, and possibly other consensual sexual acts such as incest and sadomasochistic activity. There is language in Lawrence which renders this reading plausible, at least if read independently of other considerations. Referring to the petitioners, adult homosexual men, in Lawrence, the Court said:

The State cannot demean their existence or control their

venting or emphatically expressing moral condemnation is uncomfortably close to human sacrifice as an expression of religious worship.” Hart, supra note 6, at 65–66.

286 Stephen, supra note 25, at 162.

287 Devlin, supra note 6, at 17.

destiny by making their private sexual conduct a crime. Their right to liberty under the Due Process Clause gives them the full right to engage in their conduct without intervention of the government. It is a promise of the Constitution that there is a realm of personal liberty which the government may not enter. The Texas statute furthers no legitimate state interest which can justify its intrusion into the personal and private life of the individual.\footnote{Lawrence v. Texas, 539 U.S. 558, 578 (2003) (internal quotations and citations omitted).}

At least one state supreme court has interpreted \textit{Lawrence} in this most all-encompassing manner. In \textit{Martin v. Ziherl}, the Virginia Supreme Court struck down a state law prohibiting sexual intercourse between two unmarried persons.\footnote{See \textit{Martin}, 607 S.E.2d at 371.} The court acknowledged that “[v]alid public reasons for the law exist,” including protection of public health and “encouraging that children be born into a family consisting of a married couple.”\footnote{\textit{Id.} at 370.} Yet the court went on to say that “the Supreme Court in \textit{Lawrence} indicated that such policies are insufficient to sustain the statute’s constitutionality.”\footnote{\textit{Id.}} It unequivocally interpreted \textit{Lawrence} in the most all-encompassing way. After quoting the language in \textit{Lawrence} indicating that the “statute furthers no legitimate . . . interest which can justify its intrusion” into the personal domain, the \textit{Martin} Court stated:

This statement is not limited to state interests offered by the state of Texas in support of its statute, but sweeps within it all manner of states’ interests and finds them insufficient when measured against the intrusion upon a person’s liberty interest when that interest is exercised in the form of private, consensual sexual conduct between adults. . . . [T]his same liberty interest is invoked in the case when two unmarried adults make the choice to engage in . . . intimate sexual conduct . . . .\footnote{\textit{Id.}}

Perhaps laws prohibiting sex between unmarried adults are as “uncommonly silly” today as Justice Stewart thought contraception laws were in 1965.\footnote{See \textit{Griswold v. Connecticut}, 381 U.S. 479, 527 (Stewart, J., dissenting).} Still, the all–encompassing interpretation of \textit{Lawrence} should be rejected for several reasons. As an initial matter, philosophically, it goes well beyond what even a devout Millian should require insofar as it entails that states cannot prevent the kinds of material harms such as the

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\item \footnote{Lawrence v. Texas, 539 U.S. 558, 578 (2003) (internal quotations and citations omitted).}
\item \footnote{See \textit{Martin}, 607 S.E.2d at 371.}
\item \footnote{\textit{Id.} at 370.}
\item \footnote{\textit{Id.}}
\item \footnote{\textit{Id.}}
\item \footnote{See \textit{Griswold v. Connecticut}, 381 U.S. 479, 527 (Stewart, J., dissenting).}
\end{itemize}
secondary affects of private activity, health, and safety concerns, etc., which fall squarely within Mill's "public" domain. The ultimate implication of the decision in Martin is that states are not only foreclosed from acting for moralistic reasons but that they additionally cannot act for harm-based reasons if they are regulating consensual sexual activity. The all-encompassing interpretation entails that the state lacks even a minimally legitimate interest in protecting the public health or preventing other material harms. Indeed, it says that no interest whatsoever will be sufficient to justify laws regulating intimate sexual relations, whatever the public effects which motivate the law.

Second, the constitutional implications of Martin are breathtaking because the opinion provides a level of protection for activities that fall within the sweep of its principle that far surpasses even the lofty level of protection accorded to abortion rights, contraception, or other rights, all while claiming to be using rational basis review. Indeed, it absolutely immunizes these activities. More specifically, not only does the opinion ignore the ordinary strictures of rational basis review, it altogether inverts them. In determining whether a state interest is legitimate, normally we do not balance countervailing state and individual interests. Instead, we simply ask whether the interest is minimally legitimate. The Martin Court, however, went beyond even the "balancing" idea, holding that the individual's liberty interest is always an absolute trump on the state's interest notwithstanding what the state's interest is or how important it may be in a particular case. The holding effectively disables the state from preventing the kinds of health and safety concerns that have sometimes been recognized as compelling state interests and, again, does so while purporting to use the lowest level of constitutional scrutiny.

The import of Martin is even more dangerous given the uncertain scope of its principle. If the ruling is limited to "ordinary," non-commercial sexual acts between unmarried persons, what is the constitutional principle for drawing a line between this and such activities as adultery, prostitution, incest, and sadomasochism? How can there be absolute protection to the former while recognizing state power over the latter? To the extent, however, that the principle is intended to go further, or is enlarged in a subsequent case, the implications are indeed sweeping insofar as it would prevent a state from reaching the secondary effects of prostitution, the social and economic effects of adulterous relationships, and, for that matter, the prohibition of bigamy, polygamy, or incest. It is little wonder that no other court has adopted the all-encompassing interpretation of Lawrence.296

295 See Cicchino, supra note 166.
A second interpretation of *Lawrence* adopts a quasi–Millian approach to the case. The quasi–Millian approach recognizes the authority of the state to regulate on the basis of all empirical justifications, including the protection of genuine health and safety justifications. It is quasi–Millian insofar as it follows the modern liberal position recognizing broader authority for the state to intervene paternalistically and to prevent exploitation, commodification, and other conditions which Mill would not have considered legitimate justifications for legislation. What it would prohibit are justifications that crossed the line from those preventing empirical harms to those reflecting purely moralistic justifications. Unlike the first and broadest reading of *Lawrence*, this interpretation would not completely immunize fornication, adultery, or other consensual sexual acts. Instead, it would prevent the state from regulating on the basis of only moralistic justifications.

The quasi–Millian justification is supported by language in *Lawrence* itself which directly precedes its ultimate conclusion. The Court approvingly quotes Justice Stevens’ dissent in *Bowers v. Hardwick* which stated, “[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; neither history nor tradition could save a law prohibiting miscegenation . . . .” Several commentators have read *Lawrence* in precisely this quasi–Millian way. Suzanne Goldberg argues that the protection of “abstract philosophical justifications” or moral values disembodied from factual concerns can never be legitimate and that “all justifications for government action, including those reflecting particular moral concerns, be tied to demonstrable facts.” Requiring a factual basis for laws, Goldberg argues, would provide courts with a neutral and objective rationale for decision-making, one that avoids the dilemma of either simply deferring to majoritarian sentiments, on one hand, or imposing the judge’s values, on the other. Peter Cicchino draws a similar

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297 See *Hart, supra* note 6.
299 *Goldberg, supra* note 27, at 1236.
300 See id. at 1238–40 (arguing that judges are faced with a “double–edged predicament,” because requiring a demonstration of an empirical harm would restrict courts to a more scientific assessment of the empirical concerns motivating the law).
distinction between “bare assertions of 'public morality'” and “arguments based on 'public welfare.'”301 “A bare assertion of public morality, divorced from any empirical effect on the public welfare,” he maintains, “cannot constitute a legitimate government interest.”302

As we have suggested already, however, the quasi-Millian formulation proves too much and too little. It proves too much in the sense that it disables states from legally enshrining basic moral principles embodied in our traditions as discussed in Part IV.D above. It prevents the state from protecting abstract values independently of the particular instances of harm that may result from a departure from these moral principles. It prevents the state from declaring that sex should not be the subject of market transactions, that racism is inherently wrong, that spouses should be faithful to one another, that out-of-wedlock teen pregnancy should be discouraged, that the value of human life is sacred independently of the particular lives that may be saved by prohibitions on killing, that the remains of the dead should not be furiously abused even when, virtually by definition, there can be no “empirical harm” to the deceased or to their unwitting relatives.

In another respect, however, the quasi-Millian interpretation does not go far enough because it opens the door to constitutional legitimacy whenever the state can adduce some putative empirical interest in limiting a behavior. Goldberg admits as much near the end of her article in recognizing that “the empirical grounding constraint may not provide a meaningful constraint” since defenders of such laws can always make “highly speculative arguments about factual harms and thereby render the empirical grounding requirement useless.”303 She cites a case which upheld a ban on gay adoption on grounds that straight parents were better able to provide a stable environment and upbringing for the (presumably straight) adopted children.304 Quasi-Millian rationales do not succeed within the context of rational basis review because, as discussed in Part III, judicial deference with respect to the means requirement permits states to circumvent the quasi-Millian paper tiger by legislating on the basis of some made-up empirical harm constructed in a post hoc manner, even when the true motive may be animus directed against gays and lesbians or other politically vulnerable groups.

301 Cicchino, supra note 166, at 140 (“‘Bare public morality’ arguments defend a law by asserting a legitimate government interest in prohibiting or encouraging certain human behavior without any empirical connection to the goods other than the alleged good of eliminating or increasing... the behavior at issue. ‘Public welfare’ arguments, in contrast, defend a law by asserting that the law avoids harms or realizes goods other than the good of eliminating or increasing the behavior...”).

302 Id. at 142.

303 Goldberg, supra note 27, at 1307.

304 Id. (citing Loftus v. Sec'y of Dep't of Children and Family Serv., 358 F.3d 804 (11th Cir. 2004)).
C. The Meaning of Lawrence

What, then, are we to make of the meaning of Lawrence? Consider three points relevant to our discussion of homosexuality and rational basis review. First, as we have just seen, it is almost impossible to attack the constitutionality of a law on the basis of the “means” requirement on rational basis review. This means that laws may be passed pre-textually, where a more “empirical” state interest (e.g., preventing the spread of sexually-transmitted diseases) stands in for what may be an irrational bias or animus on the basis of highly disputable empirical premises which purport to connect the harm the state claims to be combating to the regulated activity (e.g., consensual homosexual relations). Thus, while the quasi–Millian reading of Lawrence may go further to disable states from passing some forms of morals legislation to the extent that they are predicated on purely “moral” concerns, it does not go far enough in the context of anti-sodomy laws which, in the post–AIDS era, can always be justified on empirical grounds.

Second, laws prohibiting homosexuality are likely to be singularly immune to legislative revision even as they are susceptible to selective enforcement. Even when a majority may no longer view homosexuality as immoral or, at any rate, worthy of legal prohibition, a powerful “moral minority” can make it politically inexpedient for the legislature to revisit the issue. Prohibitions on homosexual conduct provide a prime example of the situation where a law may be retained on the books long after the majority has changed their mind about the morality of the act.

Finally, and most crucially, Lawrence involves the same basic concerns about animus that motivated the Court to strike down the challenged laws in the Moreno,306 Cleburne,307 and, of course, Romer308 cases. Moreno, the “hippie food stamp case” made clear that “if the constitutional conception of ‘equal protection of the laws’ means anything, it must at the very least mean that a bare. . . desire to harm a politically unpopular group cannot constitute a legitimate government interest.”309 As Justice Kennedy, who wrote the opinions in Romer and Lawrence, said in Romer:

By requiring that the classification bear a rational relationship to an independent and legitimate legislative end, we

305 See supra notes 167–180 and accompanying text (discussing the problems of over and under-inclusiveness and problems associated with the deference given to legislatures on empirically disputed issues).
309 Moreno, 413 U.S. at 534.
ensure the classifications are not drawn for the purpose of disadvantaging the group burdened by the law. If the adverse impact on the disadvantaged class is an apparent aim of the legislature, its impartiality would be suspect.310

The Court later observed more pointedly that “laws of the kind now before us raise the inevitable inference that the disadvantage imposed is born of animosity toward the class of persons affected.”311

As analogous as fornication or adultery appear to be to consensual homosexuality given that each concerns consensual non-marital or extra-marital sex, laws prohibiting fornication and adultery are not motivated by the same kind of personal animus that motivates anti-sodomy laws. When the heterosexual majority criminalizes heterosexual acts, the operative “us and them” distinction that applies in the context of homosexuality is obviously inapposite. Moreover, to Justice Scalia’s objection that laws that single out a behavior always single out the class of persons who engage in the behavior, that anti-nudist laws do to nudists what anti-sodomy laws do to homosexuals,312 our response can only be to advert to the structure of Texas’s anti-sodomy law and point out that it manifestly did not apply to homosexuals and heterosexuals alike; it exempted heterosexual sodomy. Thus, we are safe in concluding that the Texas law did not legislate against an activity; it legislated against the class of persons most likely to engage in the activity while exempting the majority who may, as a numerical matter, commit a greater number of such acts. In this way the law raises the same specter of political animus the Court found present in Romer.

Given the normal strictures of rational basis review, how are we to understand the Court’s function in Lawrence? In other words, given the highly deferential stance accorded legislation on rational basis review, on what basis could the Court draw the distinction it did between legislating against a genuine social harm and legislating against an unpopular or vulnerable group? An eminent constitutional scholar has suggested that the Court sometimes engages in a “checking” function, that it sometimes decides cases to act as “checks” against legislative over-reaching in cases where it may otherwise be difficult to draw airtight distinctions of principle.313 The 1995 Lopez case arguably involved just such an exercise of the checking function in the Commerce Clause context, another area where courts have found it difficult to cabin legislative authority.314 Lawrence is to

310 Romer, 517 U.S. at 633 (internal quotations and citations omitted).
311 Id. at 634.
313 See PHILIP BOBBITT, CONSTITUTIONAL FATE: THEORY OF THE CONSTITUTION 209–11 (1982) (the checking function serves an expressive purpose to “indicate that some constitutional boundary has been reached” even if it is not well-marked out textually or doctrinally).
the state police power what Lopes and later United States v. Morrison were to the federal commerce power. In each case, the Court was seeking not so much to draw a line in the sand as to remind the Legislative Branch that it sometimes has to do better than to simply assert some ground for legislative authority. While the states retain broad authority to regulate even consensual sexual activity among adults, they must regulate even-handedly, for genuine empirical reasons, and must seek to regulate an activity rather than impose a disability upon a vulnerable or unpopular group. This is what Justice Kennedy had in mind when he declared that “[the] statute furthers no legitimate state interest that can justify its intrusion” into the life of the Petitioner.316

CONCLUSION

Since the Hart–Devlin debate, the furor over “morals legislation” has been skewed by the treatment of homosexuality. In seeking to protect homosexuals, liberals have pretended to embrace a principle they generally do not accept in other contexts. The exceptions they have made to the harm principle, particularly their acceptance of paternalism, is outmatched only by the way in which they have expanded the concept of harm in order to justify increased government intervention to foster the kinds of social values that cannot be furthered under a genuinely Millian regime. As for conservatives, at least since Devlin’s time, they have defended broad government intervention on the basis of unnecessarily crude principles in defense of laws limiting a practice which many conservatives believe should not concern the law in the first place. Liberals have sought to throw the baby out with the bathwater while conservatives have found themselves defending principles which resemble anything but the limited government philosophy they normally embrace in other contexts.

Lawrence should be understood not as the first step in a new libertarian revolution against all forms of morals legislation but as the constitutional denouement of two converging trends. As liberals have retreated from the harm principle to a more moderate stand against legislating “morality as such,” the courts have retreated from the traditional recognition of unlimited state power in all matters that touch on morality to a sober, circumscribed recognition that while the State has in important role to play in shaping and expressing public morality, it may not merely reflect “a bare . . . desire to harm a politically unpopular group . . .”317 Lawrence embodies

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315 See United States v. Morrison, 529 U.S. 528 (2000) (holding that the civil penalty provisions of the Violence Against Women Act exceeded the scope of congressional power under the commerce clause).
316 Lawrence, 539 U.S. at 578.
the convergence of these two developments.