Toward a Constitutional Law of Crime and Punishment

Markus Dirk Dubber
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MARKUS DIRK DUBBER*

INTRODUCTION

The basic concept underlying the Eighth Amendment is nothing less than the dignity of man.†

Our Constitution is a charter of human rights, dignity and self-determination.‡

It has become a commonplace that there are no meaningful constitutional constraints on substantive criminal law.† While procedural criminal law is thoroughly constitutionalized, so much so that criminal procedure has become synonymous with constitutional criminal procedure, the law

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of crime and punishment has remained virtually untouched by constitutional scrutiny.

The failure to place constitutional limits upon substantive criminal law reflects two common features of the constitutional jurisprudence of the United States Supreme Court: the prioritization of process over substance and, relatedly, the prioritization of states' rights over individual rights, where criminal lawmaking is taken to be one, perhaps the, manifestation of the power of governance most closely associated with the states, the police power, which is also widely recognized as the power of governance least susceptible to definition, never mind limitation.\(^2\)

The time may be ripe, however, for the constitutionalization of substantive criminal law, for three reasons.

*First*, there is great need for constitutional principles of criminal law. The war on crime of the past thirty-odd years has wrought havoc on the traditional principles of American criminal law, exposing their fundamental weakness. The foundation of "mens rea" and "actus reus" in common law precedent did not stand in the way of the transformation of criminal law into a system of risk administration, which began over a century ago with the medicalization and bureaucratization of criminal law and culminated in the war on crime, an increasingly ambitious social control program launched by President Richard Nixon and continued, and continually expanded, by succeeding administrations that eventually encompassed all levels of American government.\(^3\)

The venerable principles of common criminal law—imported from foreign soil and associated with an undemocratic, unrepublican system of governance that regarded criminal law as an order maintenance system, where they long ago had been eviscerated through the gradual displacement of common law crimes by statutory crimes—crumbled under the pressure of crime waves and crime scares, political opportunism and populist one-up-manship. After a gradual, but accelerating, process of evisceration that I have described elsewhere in some detail,\(^4\) the once vaunted principles of the English common law eventually came, at best, to retain a largely antiquarian significance, as relics from a mythical time when mens rea meant mens rea and actus reus, actus reus. At worst, they

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helped to legitimize the transmogrification of modern criminal law, as they stood for the reassuring notion that in the realm of "real" criminal law—of "true" or "traditional" crimes—the world was still in order, while outside, on the "periphery," strict liability crimes spread in open defiance of the mens rea requirement, possession offenses flouted the purportedly non-negotiable act requirement, and defenses, like insanity and intoxication, were either crippled or eliminated altogether.

Second, not only is there great need for reconceiving the principles of American criminal law—there recently have been signs, however disparate and tentative, that the tide has begun to turn. Crime rates have leveled off, and so has the rhetoric of the war on crime. Bellicose emotions have found a new outlet, the war on terrorism, which is now pursued with a singularity and commonality of purpose familiar from the war on crime only a few years ago.

The war on terrorism, besides taking some pressure off the war on crime, also has obvious relevance for the recovery of criminal law after the crime war. I do not mean the direct implications for domestic criminal law of the widespread campaign to identify and root out "terrorists" (and those "associated" with them). Instead, I have in mind the fact that the global pursuit of the targets of the war on terrorism necessarily, if entirely unintentionally, brings American law into contact with non-American legal norms.

For present purposes, the internationalization of the war on crime implies the internationalization of constitutional criminal law. For instance, the question of the legal status of detainees at Camp X-Ray at Guantanamo Bay ("prisoners of war"? "enemy aliens"? "enemy combatants"? "unlawful combatants"?), which is currently before the U.S. Supreme Court, ultimately turns on the origin, and nature, of individual

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5. Curt Anderson, Crime Continued to Drop; 2002 Levels Are Lowest in 30 Years, Justice Department Says, WASH. POST, Aug. 25, 2003, at A6 ("Violent and property crimes dipped in 2002 to their lowest levels since records started being compiled 30 years ago, and have dropped more than 50 percent in the last decade.").


The rights of the detainees at Guantanamo Bay are human rights first, and (American) constitutional rights second. The connection between constitutional and human rights deserves greater attention than it has received. Long-standing American exceptionalism in constitutional law must go the way of similarly misguided American exceptionalism in criminal law. While the United States deserves considerable credit, as a historical matter, for the establishment of a constitutional system of government based on certain minimum guarantees of personal rights, the world has long since caught up with American constitutional law in the protection of human rights, i.e., the rights of persons as persons, rather than as citizens, or residents, of this or that political community. The protection of human rights in other domestic legal systems, as well as increasingly in the still emerging field of international law, is no longer limited to grand pronouncements of grand principles, as toothless as they were hypocritical. As the Canadian Supreme Court and the German Constitutional Court on a national level, and the European Court of Human Rights (ECHR) on an international one, have shown, it is possible to construct a meaningful constitutional jurisprudence of criminal law within the framework of a system of human rights that nonetheless remains respectful of the legitimate exercise of communal self-government through the legislature.

Third, a line of recent cases indicates that the U.S. Supreme Court may have reached the end of its aconstitutional rope, and that the irrelevance of the constitutional jurisprudence of rights to criminal law, the

12. See Cole, supra note 7, at 957 ("The basic rights at stake... are best understood not as special privileges stemming from a specific social contract, but from what it means to be a person with free and equal dignity. They are human rights, not privileges of citizenship....") (emphasis added).
area of law that poses the greatest threat to these rights, cannot be sustained after decades of the war on crime. Prominent examples of this trend include City of Chicago v. Morales,\(^{16}\) where the Court reaffirmed its commitment to an important aspect of the constitutional principle of legality—the principle of specificity (also known as “void-for-vagueness”)—by striking down a Chicago gang loitering ordinance. The following year, in Apprendi v. New Jersey,\(^{17}\) the Court—to the great surprise of most commentators—struck down a state “hate crimes” statute that authorized a judge to dramatically increase the maximum sentence following a determination of guilt. Apprendi was followed by a remarkable duo of death penalty cases, Atkins v. Virginia\(^{18}\) and Ring v. Arizona,\(^{19}\) where the Court invalidated, in one case, a state statute that permitted the execution of mentally retarded persons and, in the other, a state statute that placed the ultimate death sentencing decision in the hands of a judge, rather than a jury—thus extending Apprendi to capital sentencing. Finally, and most recently, there is the Court’s momentous decision last term, in Lawrence v. Texas, to strike down the Texas criminal sodomy statute.\(^{20}\)

The three most recent decisions, Atkins, Ring, and Lawrence, are particularly significant. In all three, the Supreme Court reversed course, overruling recent hands-off decisions.\(^{21}\) Ring confirmed that the Court’s decision in Apprendi was not a fluke, and indeed reflected a general trend toward reconsidering the constitutional constraints upon criminal lawmaking. In doing so, Ring also challenged the significance of a line that in recent decades had shielded the vast bulk of criminal law from constitutional scrutiny—the line separating the death penalty from all other punishments. By reiterating the truism that “death is different,”\(^{22}\) the Court had managed to limit the constitutional law of crime and punishment to the constitutional law of murder and death. While Ring reinvoked the familiar refrain of the uniqueness of capital punishment, it did not put it to its familiar insulating use. For Ring extended the principle in Apprendi, that the jury, not the judge, must make factual findings increasing the maximum sentence, from noncapital to capital cases.\(^{23}\)

22. Ring, 536 U.S. at 587.
23. Id. at 609.
More dramatically, the Court in Lawrence went out of its way not merely to overrule, but entirely to disavow, its 1986 decision in Bowers v. Hardwick, which had upheld the constitutionality of Georgia’s criminal sodomy statute against a due process attack. Lawrence accused the Bowers Court of “fail[ing] to appreciate the extent of the liberty at stake” and “demean[ing] the claim the individual put forward, just as it would demean a married couple were it to be said marriage is simply about the right to have sexual intercourse.” The Court concluded that “Bowers was not correct when it was decided, and it is not correct today.”

Most important, Atkins, Ring, and Lawrence suggest not only that the constitutional irrelevance for American criminal law might finally be overcome, but also how. Atkins refocused doctrinal attention on the rich, and largely unexplored, substantive core of the Eighth Amendment’s prohibition of cruel and unusual punishments: the dignity of the person. A new constitutional law of crime and punishment requires no more, and no less, than recognizing this fundamental principle in its full scope and working out its implications for the criminal process in all of its aspects, from the definition of norms (the realm of substantive criminal law) to their application (the domain of procedural criminal law) to their enforcement (the sphere of prison law).

Lawrence makes clear that the principle of dignity underlies not only the Eighth Amendment’s cruel and unusual punishments clause, but the Fifth and Fourteenth Amendments’ Due Process Clause as well: “It suffices for us to acknowledge that adults may choose to enter upon [a homosexual] relationship in the confines of their homes and their own private lives and still retain their dignity as free persons.” The gist of Justice Kennedy’s majority opinion is simply that, contra Bowers, even “persons in a homosexual relationship” are entitled to “the respect the Constitution demands for the autonomy of the person.”

24. 123 S. Ct. at 2478.
25. Id. at 2484.
29. Id. at 2481–82.
To appreciate the full reach and depth of the principle of human dignity, it is important to recognize that the principle underlies not only the protection against cruel and unusual punishments and the guarantee of due process of law, but the Constitution, and in fact the American system of government, as a whole. What is at stake is the basic principle of legitimacy of the American state, and of all modern liberal states: autonomy, or self-determination.30 "Liberty," as the Court put it in Lawrence, "presumes an autonomy of self."31 Every person has dignity, and enjoys the right to have dignity respected by her fellow humans, regardless whether they act in their own behalf or in the name of "the state" or "the criminal justice system," not because she was born into a particular position in the social hierarchy or into a specific political community, nor because she achieved that status after birth, but because she is a person, period. The dignity that is protected by the Eighth Amendment, the Due Process Clause, and American constitutions, federal and state, is not social dignity, but human dignity, a property shared by all persons as such. It is not a dignity that is bestowed upon persons, either by other persons or by "the state" or "society" or some community or other, and that therefore can be taken away. It is a dignity that exists entirely independently of political and social institutions; it is a moral, as opposed to an ethical or political, property.32

Once we recognize the basis of human dignity in the concept of the person, understood as an individual possessed of the capacity for autonomy, or self-government, the connection between the challenge of constitutional criminal law in the United States and in other legal systems, as well as in international law, becomes clear. The protection of autonomy, or liberty, is not, or no longer, a uniquely American aspiration. It is a central task facing any legal system that seriously grapples with the promise of self-government underlying the modern liberal state. More specifically, it is a problem familiar to any court that exercises the power of constitutional review once restricted to American courts, and—most prominently, but not exclusively—the United States Supreme Court. The problem of constitutional criminal law arises in any constitutional state


31. 123 S. Ct. at 2475.

32. For a modern discussion of the distinction between (abstract) morality and (substantive) ethics, see Jürgen Habermas, Morality and Ethical Life: Does Hegel's Critique of Kant Apply to Discourse Ethics?, in MORAL CONSCIOUSNESS AND COMMUNICATIVE ACTION 195 (1989).
that takes autonomy seriously, no matter how the protections of that autonomy are phrased in constitutional documents drafted in specific, and specifically different, historical and political circumstances. (The German Constitution speaks in terms of “human dignity,” the Canadian Charter safeguards “the right to life, liberty and security of the person” against interference inconsistent with “the fundamental principles of justice” and proscribes punishments “degrading to human dignity,” the European Convention on Human Rights, another product of the twentieth century, guarantees every person a “right to liberty and security,” while the much earlier U.S. Constitution strives to “establish justice” and “secure the Blessings of Liberty,” protects a person’s “life, liberty, or property” against deprivation without “due process of law,” recognizes rights “retained by the people” and citizens’ “privileges or immunities,” and prohibits “cruel and unusual punishments.”)

Framing the task of constitutional criminal law as drawing out the implications of the fundamental constitutional principle of personal dignity for the criminal process, including its substantive aspects, is nothing new. This has been the approach of the Canadian Supreme Court and the German Constitutional Court, as well as the European Court of Human Rights. A little closer to home, it has been the approach that has animated much of the U.S. Supreme Court’s spotty jurisprudence of constitutional criminal law, as well as its comprehensive jurisprudence of constitutional criminal procedure. Further, it has been the approach of many state supreme courts that, unhampered by federalist concerns,

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34. CAN. CONST. (Constitution Act, 1982) pt. I (Canadian Charter of Rights and Freedoms), § 7. The Canadian Supreme Court has held that this guarantee “encompasses notions of personal autonomy (at least with respect to the right to make choices concerning one’s own body), control over one’s physical and psychological integrity which is free from state interference, and basic human dignity.” Rodriguez v. Att’y Gen. of British Columbia, [1993] S.C.R. 519, 521 (upholding criminal prohibition of assisted suicide); see also R. v. Morgentaler, [1988] S.C.R. 30, 164, 166-67 (Wilson, J., concurring) (striking down criminal prohibition of abortion, linking right to liberty guaranteed in § 7 to human dignity).


37. U.S. Const. pmbl.; id. at amends. V, VIII, IX, XIV.

have scrutinized their state's criminal law far more closely than has their federal analogue.\textsuperscript{39} In fact, we will find traces of this approach even in the federal Supreme Court's handling of \textit{federal} criminal law which, though generally careful to steer clear of constitutional law, has imposed considerable, if not always consistent, limits on the federal criminal lawmaking power of the federal legislature.\textsuperscript{40}

This Article proceeds as follows. Part I provides an overview of previous work on American constitutional criminal law. It argues that these recurrent attempts, while stimulating and well-intentioned, have failed to articulate a principle, or set of principles, that could trigger, structure, and sustain comprehensive constitutional scrutiny of American criminal law.

Part II lays out the general conceptual framework underlying a constitutional regime of criminal law. After briefly sketching the generally comparative approach driving the argument for a new constitutional criminal law, it introduces the concept of personal—as opposed to social—dignity and highlights the connection between dignity and the right to autonomy.

The Article closes, in Part III, by sketching the general outline of a system of constitutional criminal law based on the principle of personal dignity, which requires that every individual—suspect, defendant, offender, and victim—be treated with respect for his autonomy as a person. For purposes of illustration, the principle is applied to certain central topics in the general part and the special part of American criminal law, which deal with the general principles of criminal liability and specific offenses, respectively.

\section{I. Henry Hart and the Supreme Court}

\subsection{A. Hart's Aims and Ambitions: Culpability}

The idea of a constitutional criminal law, the conviction that crime and its punishment cannot be matters of indifference to constitutional law, has received intermittent attention in American legal scholarship for half a century. The starting point, and in many ways the high point, of the constitutional criminal law literature was Henry Hart's justly celebrated 1958 essay \textit{The Aims of the Criminal Law}.\textsuperscript{41} Ironically, Hart's article was

\textsuperscript{40} See, e.g., Morissette v. United States, 342 U.S. 246, 263 (1952) (holding mens rea required as a matter of statutory interpretation, not constitutional right).
not about constitutional criminal law. Hart in this piece set out to provide a comprehensive overview of the principles—or, given his consequentialist outlook, the “aims”—governing the criminal process as a whole. In 1958, the drafting of the Model Penal Code was well underway, and Hart sought to make a contribution to this great project of law reform and revision undertaken by his fellow Legal Process traveler, and casebook co-author, Herbert Wechsler. It is no accident that the article ends not with a call for the constitutionalization of criminal law, but with a proposed revision of section 1.02 of the Model Code, dealing with the purposes of punishment—or penal treatment, as the Code drafters would have put it.

Since Hart was not primarily concerned with constitutional criminal law, it is no surprise, perhaps, that he devoted little time to explain just what a constitutional criminal law might look like. He mercilessly chided the Supreme Court for not developing a jurisprudence of constitutional criminal law, but did not do much to develop one of his own. The closest thing to a principle of constitutional criminal law in the essay is Hart’s repeated suggestion that punishment implies blame and therefore requires blameworthiness. Why punishment should imply blame, or just what he meant by blameworthiness, Hart did not explain. Clearly, he was no friend of Supreme Court opinions that either affirmed the constitutionality of strict liability crimes or read mens rea requirements into federal statutes, though for what he considered the wrong reasons.

42. This is why a recent, belated, attack on Hart’s essay by Louis Bilionis is beside the point. Louis D. Bilionis, Process, the Constitution, and Substantive Criminal Law, 96 Mich. L. Rev. 1269 (1998). Bilionis’s article provocatively chides Hart for being provocative, and one-sidedly accuses him of being one-sided. Id. at 1288. Bilionis goes so far as to propose a comprehensive approach to constitutional criminal law on the basis of what may be the worst reasoned, and least considered, of the Court’s undistinguished opinions in this area, United States v. Dotterweich, 320 U.S. 277 (1943), and the one that—not coincidentally—attracted the lion’s share of Hart’s derision. Id. at 1291. It should be noted, however, that Bilionis on another occasion has expressed considerable sympathy for the construction of a substantive constitutional theory of the Eighth Amendment very much in line with the argument of this Article, though he applies it only to capital punishment, rather than to criminal law generally. Louis D. Bilionis, Eighth Amendment Meanings From the ABA’s Moratorium Resolution, 61 Law & Contemp. Probs. 29, 31–32 (1998) (discussing Brennan’s view of the Eighth Amendment as protecting “common human dignity”).


44. Hart, supra note 41, at 432 n.70 (“[I]t is a general principle of our law that criminal condemnation imports moral blameworthiness.”).

45. Hart’s criticism of the Morissette decision is telling. In that case, the Court found an implied mens rea requirement in a federal conversion statute that included no such requirement on its face. It did not reach this result on constitutional grounds, but as a matter of statutory interpretation of a federal statute by the highest federal court. Hart’s main criticism of the decision was not that it side-
Likewise, he criticized the Court for failing to see that the Constitution could not be agnostic on the all-important issue of what can count as an "offense," and therefore surely must place some limits on the legislature's discretion to attach that label to certain conduct. Once again, Hart was less forthcoming, however, in clarifying just where that line should be drawn, and why.

Besides these rather bare exhortations directed at the Supreme Court to recognize some—any—constitutional constraints on mens rea and actus reus—and on the general and special parts of criminal law—Hart's essay contains a suggestive, but similarly unexplored, remark about the unappreciated substantive potential of the explicit constitutional principle of prospectivity:

Ex post facto clauses are the only important express substantive limitation usually found in American constitutions. It should be noticed, however, that the principles of just punishment implicit in such clauses have relevance in other situations than that only of condemnation under an after-the-fact enactment—a wider relevance than courts have yet recognized. 46

Even this suggestion, however, was more of an admonition of the (federal and state) judiciary, than the kernel of a theory of constitutional criminal law. Not only is it relegated to a footnote, but Hart nowhere explains what "the principles of just punishment implicit in such clauses" might be. 47 Clearly, this is the sort of thing a comprehensive account of constitutional criminal law would be expected to provide.

On the topic of constitutional criminal law, Hart's essay thus probably is best read as a provocation, or perhaps a manifesto, rather than as a coherent account. At its core is an insight about the relationship between constitutional criminal law and constitutional criminal procedure that Hart characteristically formulates as a rhetorical question: "What sense does it make to insist upon procedural safeguards in criminal prosecutions if anything whatever can be made a crime in the first place?" 48

This question aims at the heart of the process fetishism of American constitutional law in general, and of American constitutional criminal law in particular. It challenges the received wisdom that a good (or constitutional) procedure can save any state action, no matter how bad (or unconstitutional). Edward Corwin captured the same sense of unease in

stepped the constitutional issue but that it produced a "discursive essay[] on the law" where it would have been quite enough simply to invoke a familiar doctrine of common law to resolve the matter—in this case the defense of claim of right. Id. at 431 n.70.

46. Id. at 411 n.27.
47. Id.
48. Id. at 431.
his classic article on *The Doctrine of Due Process of Law Before the Civil War*, half a century before Hart considered its application to the criminal process: "The essential fact is quite plain, namely, a feeling on the part of judges that to leave the legislature free to pass arbitrary or harsh laws, so long as all the formalities be observed in enforcing such laws, were to yield the substance while contending for the shadow."49

And it is a sentiment that underlies recurrent calls for constitutional criminal law even today. William Stuntz, for instance, recently reiterated the point, though in somewhat less categorical form, when he observed that—*assuming* a detailed constitutional law of criminal procedure—"special rules for criminal procedure logically require substantive limits on the law of crimes."50 In other words, from the standpoint of the legitimacy of the criminal process, it makes no sense to constitutionalize only one of its aspects, while leaving the logically, and generally temporarily, prior one—that of substantive criminal law—without constitutional constraint.

It is obviously unfair to fault Hart for not setting out a detailed account of constitutional criminal law in a broad ranging essay on a different subject. Unfortunately not much has changed since then. Constitutional criminal law scholarship by and large has remained content to follow in Hart's footsteps, both in substance and in approach. The bulk of writings on constitutional criminal law have concerned themselves with the topic that happened to attract the bulk of Hart's attention, mens rea. Only recently has an attempt been made to spell out the constitutional foundation of Hart's other, lesser, interest—actus reus—that other grand old common law principle of criminal law.51

**B. FOLLOWING HART, TRACKING THE COURT: BURDENS OF PROOF**

In style, and not only in substance, constitutional criminal law scholarship has stuck to Hart's agenda, however spotty and haphazard. Hart's discussion of constitutional criminal law was entirely framed by the Supreme Court. He criticized—and ridiculed—Supreme Court opinions, and he admonished the Court to rethink its jurisprudence.52 He did not develop an account of constitutional criminal law of his own. His criticisms and witticisms were meant to provoke the Court into developing a

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51. Finkelstein, supra note 1, at 342.
52. Hart, supra note 41.
constitutional criminal law, rather than to develop one himself. (Hart's expertise, after all, was not in criminal law.)

While constitutional criminal law scholarship since then has become more constructive—and, perhaps necessarily so, less entertaining—it has become no less reactive and limited in scope and audience. Reflecting a general trend in American constitutional law scholarship, the object of study has been opinions of the United States Supreme Court and the audience has been the members of that Court. Virtually no attention— with some recent exceptions—has been paid to state supreme courts, which have shown far greater interest in constitutional criminal law than has their federal analogue. And so constitutional criminal law scholarship has followed Supreme Court opinions on constitutional criminal law, rather than vice versa. Commentators by and large have waited for the Court to set the agenda. They are waiting still.

Occasionally the Court has taken up issues of constitutional criminal law, without recognizing them as such. (Much, perhaps most, of the Court's constitutional criminal law jurisprudence is accidental, as the abortion and euthanasia cases illustrate.3) And as surely as night follows day, Court decisions on constitutional criminal law spawned a slew of articles dedicated to the specific issue resolved by the Court in the particular case, without ever getting around to developing a comprehensive account of constitutional criminal law. Perhaps one reason for this absence is the Court's habit to reverse itself in short order on issues of constitutional criminal law, as in Robinson and Powell (actus reus),54 Mullaney and Patterson (burden of proof),55 and in Rummel, Hutto, Solem, Harmelin, and now Ewing (proportionality).56 Other opinions were not reversed, but instead left adrift "as a derelict on the waters of the law."57 Perhaps if the Court had not sent its watchers reeling almost as soon as they had begun to make another cautious foray into one corner of constitutional criminal law, someone might have begun the task of assembling the bits and pieces of doctrine into a whole. Instead, these

57. This quote is from Justice Frankfurter's well-known dissent in Lambert v. California, 355 U.S. 225, 232 (1957) (Frankfurter, J., dissenting). It could also be applied to Morissette v. United States, 342 U.S. 246 (1952) (regarding Supreme Court's rambling and noncommittal foray into the constitutional law of mens rea).
partial academic projects of construction were condemned to irrelevance, and abandoned, as soon as the Supreme Court changed course, again.

A theory of constitutional criminal law that stands and falls with Supreme Court jurisprudence has other drawbacks as well. Substantively, it echoes every bias in the Court's approach to an issue, and—worse—magnifies that bias by taking it as the starting point of theory building. More specifically, the Court's failure to face substantive questions head-on, and instead approach them indirectly from a procedural perspective has made the construction of substantive constitutional criminal law difficult indeed.

Now the problem with a procedural approach to substantive issues—or, rather, with addressing substance for procedure's sake—is not just that it is indirect, but that it is backward. Substance is logically, and temporarily, prior to procedure. It makes little sense to talk about how to apply norms before figuring out what the norms are. The procedural questions of who gets to decide who committed a crime (Apprendi) \(^58\) and by what standard (Winship) \(^59\) and upon whose proof (Mullaney) \(^60\) do not, and cannot, arise before the substantive question of what a crime is.

The perhaps best-known example of the Court's ill-conceived procedural jurisprudence of substantive criminal law is the constitutional law of criminal evidence, and of burdens of proof (what are they and who should shoulder them, defendant or state?) in particular. \(^61\)

As it stands, the constitutional law of burdens of proof—clearly a matter of process, not substance—turns on a fundamental substantive distinction, which itself faces no constitutional constraints whatsoever. Apart from making a mockery of the constitutional law of burdens of proof—since a change in concededly aconstitutional substance can guarantee the constitutionality of a matter of process—the resolution of a procedural issue by reference to an aconstitutional substantive question reduces the latter to merely instrumental significance. To be more precise, the substantive distinction between offense elements and defense elements matters only insofar as it is significant for the procedural constitutional question of which elements the state must prove, and must prove beyond a reasonable doubt (offense elements), and which it does not (defense elements).

If we stick with the burden-of-proof issue for a moment, we can see why this procedural problem cannot be resolved without first attending

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60. Mullaney, 421 U.S. at 684.
to the substantial distinction upon which it turns. As Ronald Allen pointed out some time ago, it makes no sense constitutionally to prohibit the state from shifting the burden of proof onto the defendant on an issue it is not constitutionally required to prove in the first place.\textsuperscript{62} If, to take \textit{Mullaney}, the state is not constitutionally required to recognize the defense of provocation, how can it be constitutionally precluded from shifting the burden of proving provocation onto the defendant? In other words, if there is no constitutional principle governing the substantive point (must the state recognize the provocation defense?), then there can be no constitutional principle governing the subsidiary procedural point (who must prove, or disprove, the provocation defense?). This argument is generally referred to as the "greater power implies the lesser power" argument.\textsuperscript{63} We might think of it as the "substantive power implies procedural power" argument instead.

The problem here is not just that the primary substantive problem remains unaddressed, but why. In the Court's view, constitutional law has nothing to say about the question whether the state can do away with provocation as a defense altogether because the defense is conceived of as a privilege, rather than a right.\textsuperscript{64} Upon closer inspection it therefore turns out that while the substantive question is not addressed, it is nonetheless resolved, if only implicitly. Implicit in the Court's failure to see a constitutional dimension to the question of whether provocation is a defense or not is an anachronistic view of defenses as state—originally royal—privileges bestowed upon offenders at the discretion, and hopefully the mercy, of the state—originally the king.\textsuperscript{65} As soon as a defendant has a right to a "defense," however, the state no longer enjoys unlimited discretion to do away with it as it pleases. Once the "greater power" (of abandoning the defense altogether) disappears, so do its "implications," including most importantly the "lesser power" (of shifting the burden of proving the defense onto the defendant).

The state-centered view of criminal law underlying the Court's constitutional burden-of-proof jurisprudence, however, itself cannot withstand constitutional scrutiny. While the precise formulation of a provocation defense—or any other defense—may well be beyond constitutional scrutiny, the core idea of the defense is not. Provocation at heart

\textsuperscript{63} Finkelstein, \textit{supra} note 1, at 346.
\textsuperscript{65} \textit{See, e.g., The Queen v. Dudley & Stephens}, 14 Q.B.D. 273, 288 (1884) (holding murder defendants are not entitled to a necessity defense as a matter of law, but acknowledging availability of royal pardon as a matter of mercy).
is based on the recognition that under certain circumstances, a person is not fully blameworthy for his actions because, while equipped with the capacities requisite for personhood, he was prevented from exercising them, and thus acts according to his personhood, his human nature, if you will. He remained a person (and therefore deserves punishment, rather than, say, treatment\textsuperscript{66}), but he did not fully act \textit{as} a person (and therefore deserves \textit{less} punishment).

\textit{1. Allen's Procedural Principle of Substance: Proportionality}

Perhaps the most telling evidence of the oddness of putting the cart of process before the horse of substance comes in the form of the constitutional rules that result from this backward approach. Take, for instance, the patently empty rule that the state can shift the burden of proof on any issue it designates as a "defense element," rather than an "offense element," first suggested in the 1952 case \textit{Leland v. Oregon},\textsuperscript{67} and since cemented in a series of cases, including \textit{Patterson} and \textit{Mullaney}. Other attempts, by commentators rather than by the Justices, to make sense of the Court's jurisprudence on burdens of proof are less empty, but no less circuitous.

Allen, for example, proposes an alternative rule that, in his opinion, better accounts for the Court's opinions in \textit{Patterson} and \textit{Mullaney}:

If the courts conclude that a given punishment is not disproportional to what the state has proved beyond reasonable doubt notwithstanding the presence or absence of any mitigating factors, then a defendant's liberty interest would obviously be satisfied by a statute that required proof of only those elements and that imposed that particular punishment.\textsuperscript{68}

In other words, the Constitution prohibits the state only from shifting the burden of proof onto the defendant on any element without which the prescribed punishment would be disproportional. So, for instance, if all intentional homicides are punishable by life imprisonment and that punishment is not disproportional, then the state can shift the burden of proving provocation—or any other mitigating factor—onto a defendant who has been proved to have committed an intentional homi-

\textsuperscript{66} This is an important point. Respect for the offender's dignity implies a right to be punished, rather than be treated, or eliminated, or corrected, as a condition or a dog might. \textit{See} Markus Dirk Dubber, \textit{The Right to Be Punished: Autonomy and Its Demise in Modern Penal Thought}, 16 L. & Hist. Rev. 113, 115–16, 137 (1998). This right to be punished thus both grounds and limits the availability of excuses based on incapacity or the failure to exercise one's capacity, including provocation, extreme mental disturbance, extreme emotional disturbance, diminished capacity, intoxication, duress, military orders, infancy, and, of course, insanity.

\textsuperscript{67} 343 U.S. 790, 798, 802 (1952) (upholding constitutionality of state statute placing burden of proving insanity beyond a reasonable doubt onto defendant).

\textsuperscript{68} Allen, \textit{supra} note 62, at 46.
cide; the affirmative defense of provocation "after all could constitutionally be ignored." 69

Rather than formulating a procedural solution to a procedural problem, this rule replaces one substantive rule with another. Instead of relying on the distinction between offense elements and defense elements, it relies on the principle of proportionality. That substantive principle, however, remains as unexplored as did the Court's definition of an offense, and of a defense to that offense.

Allen's roundabout rule does have the advantage of turning on more than legislative labeling. Although the Court's offense rule leaves the definition of an offense to the legislature, Allen's proportionality rules leaves the definition of proportionality to the Court. But there is nothing about the offense rule that requires leaving its substance to the legislature, just as there is nothing about Allen's rule that requires leaving its substance to the Court. In other words, substantively speaking—as opposed to, say, institutionally speaking—the proportionality rule is no more attractive than is the offense rule. Apart from the question of who gets to decide what, both rules attempt to resolve a procedural problem by reference to an undeveloped substantive principle.

More important, Allen does not reject the "greater power implies the lesser power" thesis, nor the substantive approach upon which it is based. In fact, the reason why Allen thinks the defendant's "liberty interest" is unaffected if the state forces him to prove a defense it did not have to disprove in the first place is just that: it did not have to recognize the defense at all, no matter who had to prove, or disprove, it. Allen's move to proportionality thus cements the unexamined traditional view that the state/king is free to grant or to deny certain, and perhaps all, defenses to a defendant, at its/his pleasure, for offense has been taken either way.

If we were to approach the implicit substantive issues head-on, rather than gesture at them from a procedural distance, we might instead ask ourselves whether a defendant has a right to certain defenses, or rather to have certain factors taken into consideration when the state decides to bring the power of criminal law to bear upon him. If we then proceeded to the question of who should bear the burden of proof on these factors, we might well decide—but need not—that the state may not constitutionally shift the burden of proof onto an issue which the defendant has a constitutional right to have considered in reaching a criminal judgment. The point here is that, however we resolve the procedural issue the primary, substantive, one must be considered first.

69. Id.
Now, besides the right to certain "defenses," other substantive constitutional constraints might well end up informing procedural questions like the assignment of burdens of proof. So Allen's reference to a proportionality principle was entirely appropriate, if underexplored. In fact, in existing systems of constitutional criminal law, such as in Canadian and German law, proportionality plays a central role. And as we will see shortly, proportionality was the key, in fact the only, principle that Jefferson worked out when he turned his attention to the reform of criminal law in light of the constitutional principles undergirding the New Republic.

2. Finkelstein (and Mill): Offense (and Harm)

Eschewing Allen's proportionality rule—and proportionality analysis in general—Claire Finkelstein recently has suggested how another aspect of the Court's procedural burden of proof jurisprudence might be placed on a substantive footing. Rather than focusing on proportionality of crime and punishment, or on the nature and constitutional status of a defense, Finkelstein instead proposes that we consider the constitutional status of, and limitations upon, the other side of the Court's formal offense/defense distinction, the notion of an offense. Finkelstein argues that the state is constitutionally prohibited from criminalizing certain conduct, in particular conduct that violates Mill's celebrated "harm principle." (And so the state cannot saddle the defendant with the burden of proof on an element if without that element the conduct would violate the harm principle and therefore could not have been constitutionally punished.)

Note, however, that there is nothing inconsistent between Allen's proportionality-based and Finkelstein's offense-based approach. In fact, Finkelstein's attempt to place substantive limits on the notion of an offense can be seen as one way of putting meat on the bare bones of proportionality. To decide what proportionality between crime and punishment means, it would help to know more about one of the concepts in the balance, "crime." Put another way, one way in which punishment can be (grossly) disproportionate to a crime would be if the


71. See infra text accompanying notes 114-20.


73. Finkelstein, supra note 1, at 371; John Stuart Mill, On Liberty 9-11 (Elizabeth Rapaport ed., Hacket Publ'g 1978) (1859) ("[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 . . . .").
crime is not (or may not constitutionally be) a crime in the first place. In that case any punishment would be unconstitutional, no matter how light.

The problem with Allen’s and Finkelstein’s approaches is not that they are misguided, but that they are incomplete. Neither proportionality nor offense (nor defense) can generate a comprehensive account of constitutional criminal law. That account can only arise from considering the implications of the basic principle of justice that underlies a constitutional system of government, and therefore a constitutional system of criminal law, human dignity based on the capacity for autonomy. An exclusive focus on proportionality will leave the substantive notion of an offense and the right to certain defenses unexplored. At the same time, limiting one’s attention to the substantive notion of an offense may lead one to disregard the culpability component of crime that not only distinguishes crime from other harmful conduct but also marks crime as a uniquely human act, rather than an ahuman mode of endangerment or pain infliction.\footnote{Finkelstein in fact rejects a constitutional requirement of mens rea, or even of moral blameworthiness. See Finkelstein, supra note 1, at 385–86.}

Note, in this context, that the primacy of substance is often obscured by the very way the doctrinal issue is framed. To characterize a particular precondition of criminal liability as a defense, or rather the absence of a defense, is not only awkward, but also gives it a procedural gloss. Further, it frames the constitutional status of the doctrine in a way that favors the state. For classifying an issue as a defense, by connotation if not definition, suggests that it is something the state might constitutionally do without—no one would suggest that the state could constitutionally abandon an offense, in light of the legality principle—and, more specifically, that it is something the defense may constitutionally be required to prove, after the state has done its part of proving the elements of the offense. For these reasons, such familiar notions as “defense,” “offense,” and for that matter “defendant” and “prosecution,” must be taken with a grain of salt in a truly substantive theory of constitutional criminal law.

3. Apprendi’s Promise: Substance Over Form

Like its emptily formalistic burden-of-proof jurisprudence, the Supreme Court’s recent evidentiary decisions regarding the right to have a jury, rather than a judge, decide whether the burden of proof has been met—no matter by whom, and no matter what it is—have obvious substantive implications. In Apprendi v. New Jersey, the substantive distinction is not that between offense elements and defense elements, but that between offense elements and sentencing factors. Unlike in Patterson, however, the Supreme Court in Apprendi went out of its way to stress
that "the constitutionally novel and elusive distinction between 'ele-
ments' and 'sentencing factors'" is not dispositive, for "'[l]abels do not
afford an acceptable answer."

This rejection of formalism is at least not inconsistent with a willing-
ness to tackle the underlying substantive issue—the distinction be-
 tween offense elements and sentencing factors. Note, however, that the
problem with Patterson is not so much with labels, but with the fact that the
labels are labels of substantive criminal law, and for that reason are
treated as beyond constitutional criticism. The Court’s focus on effect
over form in Apprendi surely marks a welcome change from earlier opin-
ions, which were long on the latter and short on the former, but it does
not indicate, by itself, a revival of interest among the Justices in interro-
gating the constitutional constraints of substantive criminal law.

But whether or not Apprendi signals a change in attitude among
members of the U.S. Supreme Court is, in an important sense, beside the
point. Perhaps Apprendi does suggest that the Court has begun to shed
its troubling nonchalance (or worse, malign neglect) in matters of sub-
 stantive criminal law. And perhaps the Court’s recent reaffirmation, in
Atkins v. Virginia, of its commitment to exploring the concept of human
dignity underlying the Eighth Amendment’s proscription of cruel and
 unusual punishments can be read as indicating how the Court might de-
cide to go about rethinking constitutional criminal law.

Perhaps not. Reducing constitutional criminal law to a search for
oracular signs from the U.S. Supreme Court makes little sense. To begin
with, the Court has been notoriously fickle when it comes to constitu-
tional criminal law, taking one step forward and two back time and time
again. But there is another, more basic, problem with conceiving of
scholarship on criminal constitutional law as Supreme Court commentary
having to do with the nature of judicial decisionmaking in the American
legal system. It is blackletter law that judicial decisionmaking, even on
constitutional questions and even by the U.S. Supreme Court, is limited
to the case and controversy before a given court at a given time. Even if
one thinks that this oft-repeated point is largely of rhetorical significance,
mainly as a defense against critics of "judicial legislation," it does reflect

76. See Apprendi v. New Jersey, 530 U.S. 466, 494 (2000) ("[T]he relevant inquiry is one not of
form, but of effect—does the required finding expose the defendant to a greater punishment than that
authorized by the jury’s guilty verdict?").
77. See McMillan v. Pennsylvania, 477 U.S. 79, 86 (1986) (creating category of "sentencing fac-
tors" and providing it lesser constitutional protection regardless of effect on sentence).
78. 536 U.S. 304, 311 (2002) (quoting Trop v. Dulles, 356 U.S. 86, 100-01 (1958)) ("The basic con-
cept underlying the Eighth Amendment is nothing less than the dignity of man.")
79. See supra text accompanying notes 51–55.
CRIME AND PUNISHMENT

a certain unwillingness—and often a failure—to take a sufficiently broad approach to the issues raised in a particular case.

Following Hart in the Supreme Court’s exploits also means disregarding the considerable and growing jurisprudence of constitutional criminal law in American state courts. Despite the dramatic expansion of federal criminal law, even and especially since Hart’s time, American criminal law remains, by and large, state criminal law. And as a result, American constitutional criminal law has remained state constitutional criminal law as well. By contrast, scholarship on American constitutional criminal law has, almost exclusively, been scholarship on federal constitutional criminal law. The academy has been slow to pick up on the development of a constitutional criminal law in the state courts, some notable—but largely unnoticed—exceptions notwithstanding.

What we need, in short, is a fresh start. We need to free constitutional criminal law from its previous doctrinal and theoretical baggage, represented by the Supreme Court’s undistinguished jurisprudence in this area, on one hand, and by Henry Hart’s provocative yet underdeveloped remarks, on the other. We need to face the constitutional law of crime and punishment directly, without the distracting and secondary concerns of procedure or federalism. Instead of amplifying or simply repeating Hart’s call for the judicial recognition of principle, we need to set out principles ourselves, and follow their implications throughout the criminal law. Instead of trying to squeeze sense out of the Supreme Court’s ill-considered efforts on substantive criminal law over the decades, we should point the way toward a systematic constitutional law of crime and punishment, addressed to anyone who is willing to give the


81. Two of the most ambitious recent efforts of this kind, both concerned with the far-and-away most popular topic in substantive constitutional criminal law, mens rea, are those by Richard Singer and Alan Michaels. Having carefully analyzed the familiar string of strict liability cases beginning with Shevlin-Carpenter, Singer concludes, echoing Herbert Packer, that “[m]ens rea is not constitutionally mandated, except sometimes,” Richard Singer & Douglas Husak, Of Innocence and Innocents: The Supreme Court and Mens Rea Since Herbert Packer, 2 BUFF. CRIM. L. REV. 859, 943 (1999), while Michaels concludes that “strict liability is constitutional when, but only when, the intentional conduct covered by the statute could be made criminal by the legislature.” Alan C. Michaels, Constitutional Innocence, 112 HARV. L. REV. 828, 834 (1999). Perhaps the Court’s cases can be read in these ways, perhaps not. What is missing is an account of what the constitutional law of mens rea should be, as opposed to what it can be read to be.
constitutional constraints on criminal law some serious thought, be they federal or state legislators, judges, or prosecutors.

II. DIGNITY, AUTONOMY, AND CONSTITUTIONAL CRIMINAL LAW

A. A COMMON PROBLEM IN COMPARATIVE PERSPECTIVE

The central question that constitutional criminal law must answer is what limitations upon the state's power to punish are implied by the commitment to the protection of personal—or human—rights that lies at the heart of every liberal system of government. It is a fundamental problem of legitimacy that must be addressed by any government that claims the power to punish. It is not unique to the United States, nor is it unique to the United States Supreme Court. In fact, in the American context it is not even primarily a problem for the federal high court, since criminal law is first and foremost the business of the states.

Even within the confines of federal law, the constraints on the law of crime and punishment are not merely a question for the federal courts in general and the Supreme Court in particular. The confusion in American thinking and writing between constitutional law and the jurisprudence of the U.S. Supreme Court is as pervasive as it is pernicious. The question of judicial review surely is of great importance and deserves careful attention. But to reduce constitutional questions to questions of the authority of judges to review legislative enactments, and more specifically of a group of nine federal judges to review state legislative enactments, does not help serious consideration of the substance of constitutional law. Ideally, everyone acting in some governmental capacity—legislative, judicial, or executive—will pay heed to the constraints constitutional law places upon her action as a state official. At any rate, the nature of these constraints deserves our careful attention no matter who ends up putting them into practice.

At stake are the basic principles of justice that govern state action in political communities based on minimum requirements of legitimacy. These requirements have been familiar since at least the late eighteenth century, having found their first official and comprehensive expression in the foundational constitutional texts of the United States. Conceiving of the challenge of constitutional criminal law as an American project—or,
even more limited, as a project of American federal constitutional law as constructed by the U.S. Supreme Court—would mean underestimating its scope.

To address the common problem of the constitutional limits of criminal law, it makes sense to look beyond the confines of U.S. Supreme Court precedent. This is especially true when, as it turns out, other courts equipped with similar powers of judicial review, including American state supreme courts, have made considerably more progress in developing a jurisprudence of constitutional criminal law.

It is high time to overcome the parochialism of American constitutional law in general, and of American constitutional criminal law in particular. A comparative curiosity, however, should not be confused with the attempt to transform American constitutional law into a species of international human rights law, or American criminal law into a species of international criminal law. To say that various legal systems today face the same problem of grounding principles of criminal justice in constitutional law is not to say that this problem must have a single solution, in the form of a single principle of international law. Each legal system must find the answer to the challenge of constitutional criminal law that fits within the particularities of its traditions, including the jurisprudence of its constitutional courts. Conceptual approaches, interpretative methodologies, even specific principles cannot be transplanted from one system to another. Comparative analysis may provide insight and fresh perspectives, but it cannot replace the difficult and continuous work of dialogue within the context of an existing constitutional discourse without which legitimation in a political community dedicated to self-

government, i.e., government by self-generated principles of justice, is impossible.\textsuperscript{84}

To get at the roots of the problem of constitutionalizing criminal law, we must not only widen the traditional approach by including a comparative perspective. We must deepen it as well. Insofar as we are ultimately concerned with principles of justice, it would be inappropriate to limit our attention to constitutional law. The specific form of the legal norms, constitutional or not, that are derived from these principles of justice is of secondary importance.

Still, the \textit{constitutional} quality of these doctrines remains significant for two, external, reasons. First, in American jurisprudence, constitutional law marks the realm of principles of justice. Principles of justice thus must first be translated into principles of constitutional law. Note that this translation is not required in other legal systems. In Germany, for instance, criminal theory long preceded constitutional jurisprudence, and criminal law professors reached consensus on the basic principles of criminal liability long before judges had any say in the matter—and in fact long before there was a constitution or a court to interpret it.\textsuperscript{85} In the American system of justice, by contrast, there is no room for “an intermediate body of theory,” “a set of principles below the Constitution, but higher than the rules of positive law.”\textsuperscript{86} For that reason, the constitutionalization of principles of criminal justice is of the utmost importance, \textit{in the United States}. There is no firmer ground for a principle of justice than the Constitution, not the common law, and certainly not professor-made theory.

Second, the \textit{federal} constitutional status of a principle implies its application to state law. Considerations of federalism inform the application of principles of justice, but they are secondary to the formulation of the principles themselves. So from our perspective, the distinction between a constitutional rule and, say, a rule of statutory interpretation—a common move employed by the U.S. Supreme Court in matters of constitutional criminal law—is irrelevant. What matters, for our purposes, is

\textsuperscript{84} Chief Justice Rehnquist apparently agrees: “[N]ow that constitutional law is solidly grounded in so many countries, it is time that the United States courts begin looking to the decisions of other constitutional courts to aid in their own deliberative process.” Chief Justice William Rehnquist, \textit{Constitutional Courts—Comparative Remarks} (1989), in \textit{GERMANY AND ITS BASIC LAW: PAST, PRESENT AND FUTURE—A GERMAN-AMERICAN SYMPOSIUM} 412 (Paul Kirchhof & Donald P. Kommers eds., 1993).

\textsuperscript{85} Still, even in Germany, as the status of the professoriate has declined, more attention is being paid to the question of how the traditional principles of German criminal law can be grounded in constitutional norms. \textit{See generally} \textit{Appel}, supra note 15. In Germany, the task consists of transforming professorial principles into constitutional ones; in the United States, it is the old English common law principles that require constitutional regrounding.

\textsuperscript{86} \textit{George P. Fletcher, Rethinking Criminal Law} 552 (1978).
what principle motivates the adoption of the rule. Whether the principle is such that it should apply interjurisdictionally is another question. We ask ourselves, in other words, whether, within a given jurisdiction, a principle holds, much as would a state court reviewing a state law, or a federal court reviewing a federal statute,\textsuperscript{87} or, for that matter, a Canadian court reviewing a Canadian statute.

B. HUMAN DIGNITY AND HUMAN RIGHTS

The concept of human dignity is not self-explanatory. As a principle of constitutional law it is terribly, even terrifyingly, vague.\textsuperscript{88} Though less nonsensical than the notion of substantive due process, it is no easier to make sense of.\textsuperscript{89} And yet, vagueness clearly does not imply irrelevance, or impropriety. For as fuzzy as human dignity might appear at first sight, as incontrovertible is its resonance in the realm of rights.\textsuperscript{90} Rather than abandon human dignity as hopelessly empty, we might do better to follow the intuition of its constitutional significance, and to tease out its meaning instead of dismissing it as meaningless.

The concept of human dignity has in recent years been subjected to considerable scrutiny in moral and political philosophy, with obvious implications for legal theory, and constitutional law.\textsuperscript{91} The revival of theoretical interest in the concept of human dignity roughly coincided with

\begin{footnotesize}
\begin{enumerate}
\item[87.] Assuming the Court decides the case not as a matter of statutory interpretation, but as a matter of constitutional law. The U.S. Supreme Court's most celebrated mens rea case, \textit{Morissette v. United States}, 342 U.S. 246, 263 (1952), was strictly speaking a case about a rule of statutory interpretation (something like "imply mens rea if faced with a malum in se crime without an explicit mens rea requirement"), not about a constitutional principle ("all malum in se crimes require mens rea"). Cf. \textit{United States v. Lopez}, 514 U.S. 549, 567-68 (1995) (invalidating criminal gun possession statute as beyond Congress’s power to regulate commerce).
\item[89.] See, e.g., CHARLES L. BLACK, JR., \textit{A New Birth of Freedom: Human Rights, Named and Unnamed} 3 (1997) ("[t]his paradoxical, even oxymoronic phrase").
\item[90.] So, for instance, Martha Nussbaum finds at the heart of the liberal tradition of political thought "a twofold intuition about human beings: namely, that all, just by being human, are of equal dignity and worth, no matter where they are situated in society, and that the primary source of this worth is a power of moral choice within them, a power that consists in the ability to plan a life in accordance with one's own evaluation of ends." \textit{Martha C. Nussbaum, Sex & Social Justice} 57 (1999); see also Joel Feinberg, \textit{Harm to Others}, 9 (1987) (arguing human dignity is conditioned on personal freedom).
\end{enumerate}
\end{footnotesize}
the renaissance of political and moral philosophy in the early 1970s, marked by the publication of John Rawls’s *A Theory of Justice* in 1971.92

Long before theory, however, came practice. The Preamble of the 1948 Universal Declaration of Human Rights begins with the “recognition of the inherent dignity and of the equal and inalienable rights of all members of the human family [a]s the foundation of freedom, justice and peace in the world.” Article 1 set out by declaring that “[a]ll human beings are born free and equal in dignity and rights.”93 Since then, human dignity has emerged as a core concept of international human rights law, and theory.94

A little closer to home, human dignity played a significant justificatory role in the civil rights movement. Martin Luther King’s “Letter from Birmingham Jail,” for instance, called for “substantive and positive peace, in which all men will respect the dignity and worth of human personality” and charted a path “from the quicksand of racial injustice to [the] solid rock of human dignity.”95

While the precise requirements of dignity remain controversial—and properly so—progress has been made in clarifying the contours of its meaning and significance. At the outset, it is useful to distinguish between two varieties of dignity, *social* and *moral* (or human) dignity, or dignity of rank and dignity of personhood. Social dignity is determined by one’s position in some hierarchy or another. In fact, one’s dignity in this sense is defined in terms of one’s superiority to another. The king has his dignity, the lord his, and so on down until we reach a point of no dignity. The line between dignity and no dignity might be drawn at different points, perhaps between the aristocracy and commoners, or between men and women, or between householders and servants. The


important point is not where the line is drawn, but that it has to be drawn somewhere. Some people have social dignity, others do not. In fact, if everyone had social dignity, no one would have it.

Social dignity is not only hierarchical and relative. It is also non-essential; it can be gained and lost, at least in a society that permits social mobility upward and downward. So I may lose the dignity associated with a certain status by losing that status, either through my own doing or through degradation by someone else.

Moral dignity, by contrast, is an essential characteristic of all persons as such. It is a necessary attribute of individuals who satisfy the minimum requirements of personhood. Whoever qualifies for personhood enjoys human dignity for that reason, and that reason alone. In this sense, we say that someone has a right to dignified treatment, i.e., to our respect. By contrast, there is no such thing as a right to social dignity. Social dignity is an ethical phenomenon that comes and goes with the evolution of the norms of a given ethical community.

The connection between human dignity and human rights lies, as one might suspect, in the concept of humanness, or personhood. And to the extent that law concerns itself with the protection of human rights, human dignity is of legal significance. Now, there is such a thing as human rights law, which in the United States is thought of as a subcategory of international law. Constitutional law, by contrast, is said to concern itself with constitutional rights. Constitutional rights, however, bear an obvious relation to human rights: Human rights are a subset of constitutional rights. Constitutional rights include human, or moral, rights—the rights of persons as persons—in addition to political, or ethical, rights—the rights of persons as citizens, i.e., as members of a given political community, such as the United States or a state. And so the U.S. Constitution defines rights in terms of persons or citizens and, more ambiguously, "the people."

To say that dignity is an attribute of personhood is not saying much, of course, for the concept of personhood is no more self-explanatory than that of dignity. The struggle to make sense of personhood, however,

96. See generally Mary Anne Warren, Moral Status: Obligations to Persons and Other Living Things 90–121 (1997) (discussing various notions of personhood).


98. E.g., U.S. Const. amends. V, XIV.

99. E.g., id. at amend. XIV (referring to citizens of the United States); id. at art. IV, § 2 (referring to citizens of each states.).

100. E.g., id. at amends. I, II, IV, IX. How the inherent ambiguity of "the people" is resolved may be of considerable importance, as the controversy over the Second Amendment illustrates.
is not unfamiliar to American constitutional law. The constitutional law
of abortion, for instance, turns on the Supreme Court's attempt to ex-
plain when personhood, and therefore rights, begins. In Roe v. Wade,\textsuperscript{101}
the Court adopted a medical, rather than a normative, approach to this
tricky question, with the now familiar, and familiarly troublesome, con-
sequence of medicalizing a question of fundamental constitutional sig-
nificance.

C. PERSONS, PUNISHMENT, AND PROPORTIONALITY

It is important to recognize that Roe is (also) a case about constitu-
tional criminal law. Although it was not thought of—by the Court or by
commentators—as a criminal case, Roe raised a number of important
questions of constitutional criminal law.

The specific question in the abortion cases was whether a state was
constitutionally permitted to criminalize certain conduct, namely the
termination of a pregnancy, as an "abortion." Abortion was a serious
crime then, and remains a felony to this day.\textsuperscript{102} From the perspective of
criminal law, the question was whether the Constitution places any limi-
tation upon the state's definition of the crime of abortion or, alterna-
tively, whether it requires the state to recognize certain defenses to the
crime of abortion, however defined.

The Court, in effect, decided that the federal Constitution—and the
right to privacy in particular—required the states to provide for certain
"justifications" in criminal abortion cases, so that the termination of the
pregnancy in those cases was "justifiable," i.e., lawful or at least not
wrongful (as opposed to wrongful, but excusable). Among the conditions
for this constitutional justification were the necessity to preserve the
woman's life, in which case the woman's right to life outweighed that of
the fetus,\textsuperscript{103} and, for our purposes most significant, the viability of the fe-
tus.\textsuperscript{104} (For present purposes, it matters little whether the states codified
this justification by limiting the definition of abortion to "unjustified

\textsuperscript{101} 410 U.S. 113, 116-17 (1973).

\textsuperscript{102} E.g., N.Y. Penal Law §§ 125.40, .45 (McKinney 1998) (designating abortion as a class D fel-
ony).

\textsuperscript{103} In fact, the justification of necessity (or "balance of evils") was first recognized in German
criminal law in just such a case. Judgment of Mar. 11, 1927, RGSt 61, 242 (regarding risk of suicide); cf.

\textsuperscript{104} See, e.g., N.Y. Penal Law § 125.05(3) ("An abortional act is justifiable when . . .
(a) . . . necessary to preserve [the pregnant female's] life, or, (b) within twenty-four weeks from the
commencement of her pregnancy.").
abortion," by allowing for a defense of justification separate from the definition of the offense, or by doing something in between.

It is also worth noting that this is not the only question of constitutional criminal law raised by the abortion cases. For the state is not only obligated to protect the rights of persons against itself, but also against other persons. In Roe, the Court decided that the fetus did not achieve personhood until viability and therefore could not be protected by means of the criminal law (though the state might be free to discourage early-term abortions by other, non-criminal, means). In German constitutional law, in fact, the issue of the criminal protection of personal rights in the case of abortion was framed more starkly; there the question was whether the state is constitutionally prohibited, not from punishing certain abortions, but from not punishing them, or put more generally, whether the state can ever be obligated to punish certain conduct.

In fact, the general obligation to protect persons' "lives, liberties, and property" against interpersonal violation justifies the state's exercise of the right to punish, and to prevent, in the first place. Criminal law, at bottom, is simply one way in which the state discharges its most basic obligation, to guarantee the rights of its constituents as persons. In the familiar words of Thomas Jefferson:

We hold these truths to be self-evident, that all men are created equal, that they are endowed by their Creator with certain unalienable Rights, that among these, are Life, Liberty, and the pursuit of Happiness. That to secure these rights, Governments are instituted among Men . . .

Criminal law protects the rights of persons against a particular type of interference, namely by other persons, as opposed to, say, the forces of nature, wild animals, or foreign nations. As Jefferson explained in the preamble to his 1778 draft criminal code for his state of Virginia:

[I]t frequently happens that wicked and dissolute men resigning themselves to the dominion of inordinate passions, commit violations on the lives, liberties and property of others, and, the secure enjoyment of these having principally induced men to enter into society, government would be defective in it's [sic] principal purpose were it not to restrain

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106. E.g., N.Y. PENAL L. § 125.40 ("A person is guilty of abortion . . . when he commits an abortional act upon a female, unless such abortional act is justifiable pursuant to . . . section 125.05.")
109. THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776) (emphasis added).
such criminal acts, by inflicting due punishments on those who perpetrate them . . .

Concerned with the protection of persons against interpersonal violence—understood broadly as the violation of personal rights—the criminal law faces a particular paradox and an inherent limitation. In protecting one person’s right, it must not disregard the right of another. To put it differently, not only the victim has rights as a person, so does the offender. And so Jefferson’s preamble continues:

[B]ut it appears at the same time equally deducible from the purposes of society that a member thereof, committing an inferior injury, does not wholly forfeit the protection of his fellow citizens, but, after suffering a punishment in proportion to his offence is entitled to their protection from all greater pain, so that it becomes a duty in the legislature to arrange in a proper scale the crimes which it may be necessary for them to repress, and to adjust thereto a corresponding gradation of punishments.

In other words, the very nature of “governments” as guarantors of rights both grounds, and constrains, the state’s power to punish. And more specifically, it imposes upon the state a general requirement of proportionality of crime and punishment. Just what this principle of proportionality consists of—never mind what it requires in particular cases—is not self-evident, and has remained highly controversial to this day. The U.S. Supreme Court, for one, has continued to struggle to put meat on the bones of what is now a constitutional requirement of proportionality said to derive from the Eighth Amendment’s proscription of “cruel and unusual punishments.”

Any exploration of the specific requirements of proportionality, however, must proceed from the recognition that proportionality is not an incidental feature of the law of sentencing, but a fundamental principle of justice that emanates directly from the state’s essential duty to protect the personal right of its constituents. In Jefferson’s words, the principle of proportionate punishment is a basic right that is retained even by those “wicked and dissolute men” who commit crimes, “deducible from the purposes of society,” i.e., to secure their, and not only their victims’, “unalienable Rights, [including] Life, Liberty and the pursuit of Happiness.”

The question of course is what has to be proportional to what. Jefferson’s own view of proportionality oddly combined strict adherence to

111. See generally Dubber, supra note 3.
the *lex talionis* and a Beccarian interest in balancing the anticipated pains of punishment against the anticipated pleasures of crime. In his view, proportionality did not stand in the way of, and indeed *called for*, corporal punishment, including "cutting out or disabling the tongue, slitting or cutting off a nose" in—proportionate—retaliation for having done the same to another person, the victim.\(^{13}\)

Jefferson's proportionate mutilation was merely a crude version of the elaborate taxonomy of proportionate pain developed by another follower of Beccaria's utilitarian theory of punishment as deterrence, Jeremy Bentham. Bentham distinguished between various sources of proportionality, including "The same Instrument used in the Crime as in the Punishment," "For a Corporal Injury a similar Corporal Injury," "Punishment of the Offending Member," and "Imposition of Disguise assumed." Arson should be punished by proportionate, and analogous, burning, carefully calibrated to the offender's act:

> It would be necessary carefully to determine the text of the law, the part of the body which ought to be exposed to the action of the fire; the intensity of the fire; the time during which it is to be applied, and the paraphernalia to be employed to increase the terror of the punishment."\(^{14}\)

 Forgery likewise was to be punished by stabbing the offender with the tool of his trade: "[T]he hand of the offender may be transfixed by an iron instrument fashioned like a pen, and in this condition he may be exhibited to the public previously to undergoing the punishment of imprisonment."\(^{15}\)

Instead of regarding proportionality as a way to maximize deterrence, the Canadian Supreme Court recently has recognized a constitutional principle of "proportionality between blameworthiness and punishment," derived from the "fundamental value" of human dignity.\(^{16}\) Thus broadly construed and connected to the similarly broad notion of blameworthiness, proportionality can accommodate a wide range of more specific principles, most notably those that guarantee some, any, kind of blameworthiness in the first place, such as actus reus, mens rea, and the excuses (like duress, provocation, and insanity).

In German constitutional law, proportionality in a different sense—the means-ends relationship between the state's action and the interest, or right, it is meant to further, or protect—has been invoked in support

\begin{itemize}
  \item \(^{13}\) See id. at 96.
  \item \(^{15}\) Id.
\end{itemize}
of the so-called *ultima ratio* principle. This principle authorizes the state to employ the criminal law only as a last resort, if no less intrusive alternatives are available.\footnote{Roxin, supra note 70, at 26–27. For a discussion of this idea in the Anglo-American context, see Douglas Husak, *The Criminal Law as Last Resort*, 24 Oxford J. Legal Studies (forthcoming 2004).}

Citing the usual federalist constraints, the U.S. Supreme Court has taken a far narrower view of the constitutional requirement of proportionality. There is even support among members of the Court, led by Justice Scalia, for the proposition that the cruel and unusual punishments clause in the Eighth Amendment implies no proportionality requirement of any kind, at least not in noncapital cases.\footnote{Harmelin v. Michigan, 501 U.S. 957, 965 (1991) (Rehnquist, C.J., & Scalia, J.). Everyone acknowledges that the “excessive fines” clause does demand proportionality. According to Justice Scalia, then, a one cent fine is subject to proportionality analysis, but a sentence of life imprisonment without the possibility of parole is not.} (Even in capital cases, this faction only grudgingly allows for constitutional proportionality, largely on grounds of *stare decisis*.\footnote{Id. at 993–94.})

It is important to recognize that the very attempt to define a requirement of proportionality reflects a particular approach to the criminal law. As long as the criminal law is perceived as an exercise of the royal prerogative to punish or not to punish, or rather to “amerce” or not to “amerce,” it would be difficult to impose any constraints on its use.\footnote{E.g., 2 Frederick Pollock & Frederic William Maitland, *The History of English Law Before the Time of Edward I*, at 513 (Cambridge Univ. Press 1923) (1898) (regarding amercements in English law).} The king was offended, and it was up to the king to decide whether, and if so how, and how harshly, to respond. The prohibition of “greatly disproportionate” or “malicious” punishment in English law appears to have originated precisely as an attempt to limit, and to legalize, the king’s unconstrained power of amercement.\footnote{Anthony F. Granucci, “Nor Cruel and Unusual Punishments Inflicted”: The Original Meaning, 57 Cal. L. Rev. 839, 846–47 (1969).} The recognition of some proportionality requirement still does not settle the question of what should be proportionate to what (after all, the requirement might demand that the king’s amercement be proportional to the offense taken), but it at least marks the beginning of a transition from a preconstitutional to a constitutional system of criminal law.

**D. Autonomy and Dignity**

Now, regardless of which criminal issue Roe raised—may the state punish, or must it?—from the perspective of *constitutional* law the question before the Supreme Court was whether viability is a necessary con-
dition of personhood, in which case the previable fetus would not qualify as a rights bearer (and thus have no right to criminal protection). Whether viability is also a sufficient condition is another matter altogether. For the concept of personhood, and the right to dignity emanating from it, has traditionally been associated with the capacity for self-determination, or autonomy. There can be little doubt that there are human beings who lack that capacity, understood broadly as the ability to identify and apply relevant norms and act according to them. The capacity for autonomy presupposes certain basic intellectual capacities, cognitive as well as volitional, that certain individuals have not yet developed, will never develop, or have lost for one reason or another.

In this context, actual autonomy should be distinguished from the capacity for autonomy, or what John Finnis has dubbed radical autonomy. It is the latter that makes a person. While a person may be more or less autonomous in fact, depending on such particular characteristics as age, race, gender, health, wealth, social status, place of residence, or for that matter state of consciousness, all persons share the capacity for autonomy. There are of course differences in the capacity for autonomy as well. Even children—and viable fetuses—have the basic prerequisites for developing a full capacity, and it is for that reason that they can claim certain rights, even if only through the mediation of a person with a fully developed capacity for autonomy.

Individuals who, regardless of age, entirely lack the capacity for autonomy, either temporarily or permanently, raise a difficult question. In criminal law, that question is handled through the defense of insanity, if it is the putative offender who is incapacitated in this fundamental way. In the case of an incapacitated victim, the criminal law draws no distinctions on the basis of capacity, even though the totally incapacitated victim cannot be said to have suffered interference with her "unalienable Rights." If anything, the person who stands convicted of

122. See, e.g., NUSSBAUM, supra note 90, at 57.
124. Id. ("A day-old baby has—radically, albeit not yet in actually usable form—this capacity to choose (with such self-determining, intransitive effects."); see also BVerfGE 39, 1, 41 (1975) ("Where human life exists it merits human dignity; it is not decisive whether the holder of this human dignity knows of it and is able to maintain it by himself. The potential capabilities lying in human existence from its inception on are sufficient to justify human dignity.").
125. As this Article explores in greater detail below, the defense of insanity thus implicates human dignity in two, conflicting, ways. On the one hand, to permit punishment of those who lack the capacity for autonomy implies the irrelevance of that capacity in general and thus transforms punishment into a practice without regard to the personhood of its object. On the other, an expansive insanity defense might violate the right to dignity of those who "benefit" from it, by moving them beyond the realm of personhood. See infra text accompanying notes 192-94.
committing a violation against an incapacitated victim is likely to face \textit{harsher} punishment, rather than no punishment at all.\footnote{126}

It may be, of course, that legal protections—including those in the form of the criminal law—are extended to those who lack even the capacity for autonomy not as a matter of right, but as a matter of mercy. Then again, perhaps they reflect a consensus that all humans share at least the radical capacity for autonomy, no matter what medical science might tell us, so that even the most severely incapacitated individual retains the chance or at least the hope, however small, of gaining, or regaining, her autonomy. In that case, her entitlement to rights and to human dignity still would derive from her capacity for autonomy, however remote.\footnote{127}

The idea of autonomy as the foundation of personhood, and therefore of human dignity, is ordinarily associated with Kant.\footnote{128} Clearly, Kant presented the most elaborate account of autonomy and the dignity to which it gives rise. Just as clearly, however, Kant was not alone in stressing the connection between human—as opposed to social—dignity and human rights. To begin with, Kant himself acknowledged that he took the notion of the dignity of the person from Rousseau:

\begin{quote}
I feel the whole thirst for knowledge and the curious unrest to get further on, or also the satisfaction in every acquisition. There was a time when I believed that this alone could make the honor of humanity and I despised the rabble that knows nothing. \textit{Rousseau} set me to rights. This dazzling superiority vanishes, I learn to honor man . . . . \footnote{129}
\end{quote}

Also from Rousseau stems Kant's view that the origin of human dignity, and respect for persons as such, lay simply in the general capacity for self-determination shared by all persons, no matter what their social status or even, in Kant's words, their "thirst for knowledge."\footnote{130}

\footnote{130. See Michael J. Meyer, \textit{Kant's Concept of Dignity and Modern Political Thought, in \textit{8 Hist. of Eur. Ideas} 319, 327 (1987).}}
Further, the connection between dignity and personhood, and between personhood and autonomy, was a central feature of political discourse in the late eighteenth century, the time of Kant and of the American Founding Fathers. As Michael Meyer has shown, a common response to Edmund Burke's withering critique of the French Revolution was to assert the universal concept of human dignity against Burke's exclusive notion of social dignity as the proper foundation of legitimate government. In 1776, the Welsh political philosopher Richard Price noted that "according to the[ ] definitions of the different kinds of liberty, there is one general idea, that runs through them all; I mean, the idea of Self-direction, or Self-government," and James Madison celebrated "the capacity of mankind for self-government" some years later in the Federalist Papers. In sum, Meyer concludes,

[the general Enlightenment vision of human dignity . . . is tied inextricably to the human capacity and inclination for self-government. To make this assertion is not to advance the questionable notion that the Framers were Kantians. It is, rather, to say that the tenor of much Enlightenment moral, political, and legal thought clearly leads in the direction of the equal recognition of individual human dignity, and it does so because of a belief in the citizenry's capacity for self-government and a commitment to their equal right to the same.

Some two hundred years after Madison, the U.S. Supreme Court, in Planned Parenthood v. Casey, reemphasized the connection between personal dignity, autonomy, and personhood, and recognized the place of dignity thus understood at the center of its constitutional jurisprudence of the right to liberty:

Our law affords constitutional protection to personal decisions relating to marriage, procreation, contraception, family relationships, child rearing, and education. Our cases recognize "the right of the individual, married or single, to be free from unwarranted governmental intrusion into matters so fundamentally affecting a person as the decision whether to bear or beget a child." Our precedents "have respected the private realm of family life which the state cannot enter." These mat-

132. See Meyer, supra note 130, at 319, 327 (discussing THOMAS PAINE, RIGHTS OF MAN (1791) and MARY WOLLSTONECRAFT, A VINDICATION OF THE RIGHTS OF MAN (1790)).
134. THE FEDERALIST No. 39 (James Madison).
ters, 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. 137

Note that *Casey* was a constitutional criminal law case; as in *Roe*, and any of the other "substantive due process" cases, the Court reviewed the constitutionality of a criminal statute. In *Roe* and *Casey*, the statutes in question criminalized abortions; in *Poe v. Ullman*138 and in *Griswold v. Connecticut*, the crime was using "any drug, medicinal article or instrument for the purpose of preventing conception,"139 in *Eisenstadt v. Baird*, it was "to give away a drug, medicine, instrument, or article for the prevention of conception,"140 and in last term's *Lawrence v. Texas* it was "sodomy."141 And as in *Roe* (and in *Griswold* and *Eisenstadt* before it, and in *Lawrence* after it142), the Court in *Casey* invalidated parts of the criminal statute under review (in particular, the spousal notification requirement as an element of justification, criminally speaking). *Casey* thus demonstrated that constitutional criminal law review can have teeth. And *Casey* confirmed more specifically that the concept of human dignity as a principle of constitutional criminal law can have real bite.

The centrality of the concept of personal dignity through autonomy became particularly clear in another constitutional criminal law case decided a few years after *Casey*, *Washington v. Glucksberg*.143 *Glucksberg* addressed a due process challenge against a state statute making it a crime to "knowingly cause[] or aid[] another person to attempt sui-


139. 381 U.S. 479, 480 (1965). *Poe* and *Griswold* were about the same crimes, *CONN. GEN. STAT.* §§ 53-32, 54-196 (1958).

140. 478 U.S. 186 (1986).


142. I am not counting *Poe* because the Court did not decide on the merits of the constitutional attack. Justice Harlan's famous dissent, however, made a powerful case for the statute's unconstitutionality, had the Court decided to decide the issue, as it did four years later in *Griswold*. For an engaging discussion of Justice Harlan's *Poe* dissent in the context of constitutional criminal law, see Claire Finkelstein, *Positivism and the Notion of an Offense*, 88 CAL. L. REV. 335, 359 (2000) (arguing "the Harlan conception of liberty captures a prevalent and compelling intuition, namely that human beings have a generalized right to liberty").

The Court rejected the challenge. More important for our purposes, however, is that the entire case was framed in terms of human dignity, with the challengers explicitly, and persistently, invoking a right to "death with dignity." Further, the case was resolved in terms of human dignity. The decisive question was not whether human dignity was at stake, or whether human dignity deserves protection by the state through law, but whether human dignity could only be preserved by the invalidation of the criminal statute under review. The Court decided that no such constitutional interference was required, since the concededly central right of human dignity was sufficiently protected by the political process: "Public concern and democratic action are... sharply focused on how best to protect dignity and independence at the end of life, with the result that there have been many significant changes in state laws and in the attitudes these laws reflect." 

One may of course disagree with the Court's conclusion here, as many constitutional commentators have. The point remains, however, that the Court recognized personal dignity through autonomy as central to the right to liberty.

When Chief Justice Warren identified "the dignity of man" as "the basic concept underlying the Eighth Amendment," and when Justice Brennan referred to the Constitution in its entirety as "a charter of human rights, dignity and self-determination," they therefore fell squarely within a long and well-established tradition of American thought, and of modern political thought more generally. Within this framework, the task of American constitutional law—what Charles Black liked to call "the human-rights law of the United States"—is to work out the implications of this fundamental principle of human dignity characteristic of all persons as capable of self-government, or autonomy.

144. Id.
146. Glucksberg, 521 U.S. at 716 (emphasis added).
149. Brennan, supra note 4.
III. THE CHALLENGE OF CONSTITUTIONAL CRIMINAL LAW

This task is particularly important, and particularly difficult, in the case of the constitutional law of crime and punishment. For it is here that the temptation to violate human dignity, ironically in the rush to protect it, is particularly great. The reflex of responding to the violation of one person's right to autonomy through an equal and opposite violation of the offender's right is as powerful as it is familiar. Through the criminal law the state responds to the most potent threats to the rights of those whose rights it exists to protect. At the same time, the criminal law consists of the state's most potent, and most potentially intrusive, means of interfering with those very rights. The central concept of human dignity is at stake both in crime and in punishment. The constitutional law of crime and punishment thus faces the most difficult challenge of any branch of constitutional law.

A. CRIME AND PUNISHMENT RECONCEIVED

One way of understanding the challenge of constitutional criminal law in light of the concept of human dignity is to consider the implications of punishment for the social dignity of the punished. A constitutional criminal law committed to maintaining the human dignity of all persons as such, including those convicted of a crime, would face the difficult task of differentiating social indignity from human indignity. However socially degrading punitive labeling may be, constitutional criminal law would be charged with ensuring that it not impugn the offender's personal dignity. Ideally, of course, constitutional criminal law would prevent violations of human dignity altogether by precluding interference even with dignity in the social sense. If this should prove impossible, however, constitutional criminal law must at the very least set minimum standards of stigmatization consistent with the offender's dignity as a person.

As a factual matter, punishment deals a blow to the social dignity of its object. More troubling, punishment is regarded by many as designed to have that very effect, to a greater or smaller extent. Punishment is said to imply a stigma, which lowers the recipient's standing in "the" community. Under this view, punishment has a deterrent effect insofar as potential offenders wish to avoid its socially degrading effect.

151. See, e.g., Lawrence v. Texas, 123 S. Ct. 2472, 2482 (2003) (remarking that even as a misdemeanor, homosexual sodomy "remains a criminal offense with all that imports for the dignity of the persons charged").

In this regard punishment resembles what Harold Garfinkel has described as a degradation ceremony.\(^{153}\) Note, however, that it is not only punishment that degrades. It is the ascription of the label "offender" that degrades, with the degree of degradation depending not only (obviously) on the nature of the offense and of the offender, but also (less obviously) on the likelihood that the label has been accurately applied; the level of degradation thus increases as the suspect becomes a defendant becomes a convict becomes an inmate. Also, as Garfinkel observed, the term degradation may be misleading in that it implies a lowering of status. In fact, the ascription of criminal wrongdoing amounts to recognizing the offender's status, rather than reducing it. This is so because the offender is thought of as having revealed himself as lacking social dignity, and is therefore deserving of little or even no respect. The ascription of wrongdoing then simply reflects the offender's having revealed himself to be of low status. The offense reflects the offender's low status, and in turn is reflected in the ascription of the offender label.

This degradation process may not be pretty, but it is not necessarily illegitimate, as long as the offender's status at stake is social, rather than moral, so that his human dignity remains intact no matter how little social dignity he retains—or rather turns out to have possessed in the first place. Here it might be helpful to think of social dignity in terms of honor, and crime not only as undignified, but as dishonorable.\(^{154}\) The notion of crime as dishonorable has a long history in Anglo-American criminal law, where the distinction between social and legal meanness was often fluid. Felony, for instance—and perhaps even murder—was at its historical root a violation of the vassal's duty of loyalty to his lord.\(^{155}\) A felony revealed a "meanness" of character, a malice, that called for degrading punishment, in Garfinkel's sense of recognition of low status. Pollock and Maitland tell us that in the old common law, "[f]elon is as bad a word as you can give to man or thing[,] and it will stand equally well for many kinds of badness, for ferocity, cowardice, craft."\(^{156}\)

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156. 2 Pollock & Maitland, *supra* note 120, at 2.
Historically, criminal punishment more closely resembled degradation in the strict sense of reduction in the offender's status, when the offender had a status to lose. The most dramatic instance of such a fall from social status, and the concomitant loss of social dignity, came in the form of the traditional limitation upon the householder's authority to discipline members of his household, including wife, children, and servants. While that authority originally was almost boundless, it was always understood that a householder who disciplined not in the exercise of his householderly duty to maintain the welfare of the household, but due to a "malignant heart," malice, or sadism,\(^{157}\) if in short a householder proved himself unworthy of his elevated status, he would be stripped of his authority and would himself be reduced to (and by) punishment, at the hands of the state.\(^{158}\)

In these dramatic—and rare—cases, where the householder would be transformed from a subject of punishment to its object, the householder was forced to acknowledge the superior dignity of the state. The state's punishment of the householder reminded him that he was but a member of the macro household of the state, and as such enjoyed disciplinary power over "his" household only by delegation from the state, which claimed a monopoly on violence. As the householder's dignity might justify the discipline of disobedient or disloyal subordinates, so the state's dignity justified the punishment of each and every one, householder or not, who committed "an offense against its peace and dignity."\(^{159}\) In doing so, the state is doing nothing more than "exercising its own sovereignty,"\(^{160}\) or, in other words, its police power, that power of governance generally recognized in American law as the foundation of criminal law.\(^{161}\)

The notion of crime as an affront to the sovereign's dignity has deep roots in Anglo-American law. From time immemorial, every householder enjoyed extensive authority to protect the "peace" of his house-

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158. Even in less extreme cases, the householder might not lose his authority altogether, but still might see his honor compromised in the eyes of his peers, or at very least in his own eyes, i.e., his conscience. Cf. Richard Wasserstrom, Rights, Human Rights, and Racial Discrimination, 61 J. PHIL. 628 (1964) (discussing constraints on Southern slaveholders' treatment of their slaves).


160. Id.

hold. "The sheriff has his peace, the lord of a soken has his peace; nay, every householder has his peace; you break his peace if you fight in his house, and, besides all the other payments that you must make to atone for your deed of violence, you must make a payment to him for the breach of his mund."  

Disciplinary authority over household members was one aspect of that authority. Violations of the householder's peace were, in the end, affronts to his authority, his social dignity qua householder. The origins of English criminal law, as a state-centered system of punishment, lay in the expansion of the king's "peace" to cover the entire realm. The expansion of royal power thus was the expansion of the king's power as householder over his royal household, which included everyone, and everything, within his realm, including those freemen who claimed households of their own.

The police power is the modern manifestation of the power of the king/householder over his realm/household. As Blackstone explained, the king, as the "father" of his people, and "pater-familias of the nation," was charged with

the public police and economy[, i.e.,] the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behaviour to the rules of propriety, good neighbourhood, and good manners: and to be decent, industrious, and inoffensive in their respective stations.

It is this very same police power that today grounds the power to punish in American constitutional law:

A state . . . may declare activities to be criminal without the necessity of finding some express or implied authority therefor in its constitution. It is commonly said that a state has regulatory power (usually termed its "police power") to regulate its internal affairs for the protection or promotion of public health, safety and morals, or—somewhat more vaguely—for the protection or promotion of the public welfare.

And just as in English law crimes—as breaches of the king's peace constituted an affront to the king's dignity—so today crimes as breaches

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162. 1 Pollock & Maitland, supra note 120, at 2.
163. Id. at 1; see also O'Brien, supra note 155, at 348; S.F.C. Milson, Historical Foundations of the Common Law 427 (2d ed. 1981) ("[A]nything done against the king's command was done against his peace . . . .").
164. See 4 William Blackstone, Commentaries *162.
165. Id. at *127.
166. Id. at *162.
167. 1 LaFave & Scott, supra note 80, § 2.9.
of the state’s peace constitute an affront to the dignity of the state. A crime, in short, is an “offense against the peace and dignity” of the state as sovereign.

In fact, it is this specifically offensive quality that is often said to distinguish a crime from another, legal or moral, wrong. A crime does not become a crime unless it violates the “peace and dignity” of the state. This is obviously true of so-called malum prohibitum crimes—also known as “public welfare offenses” or “police offenses”—which are crimes only because they violated a state prohibition, rather than because they violated a personal right (malum in se). But it is also true of crimes that do inflict serious injury on persons, rather than merely manifesting disobedience of a state issued norm fortified by criminal sanctions (like driving on the right side of the road). According to this view, a crime without an affront to the dignity of the state is not a crime, but a tort. Even murder, generally considered the most serious, and most paradigmatic, of crimes, does not become a crime unless it also constitutes an offense against the peace and dignity of the state. As an illustration, consider the indictment in a well-known constitutional criminal law case on the so-called “dual sovereignty” exception to the double jeopardy prohibition, Heath v. Alabama:

Larry Gene Heath did intentionally cause the death of Rebecca Heath, by shooting her with a gun, and Larry Gene Heath caused said death during Larry Gene Heath’s abduction of, or attempt to abduct, Rebecca Heath with intent to inflict physical injury upon her, in violation of § 13A-5-40(a)(1) of the Code of Alabama 1975, as amended, against the peace and dignity of the State of Alabama.

The notion of crime as state contempt, i.e., as an act of disrespect toward the state, was central to the decision in Heath, as it is to the doctrine of double jeopardy as a whole, including its dual sovereignty exception. Heath was convicted of murder not once, but twice, first in Georgia and then in Alabama. (He had hired two men to kill his wife; unfortunately for him, they kidnapped her in Alabama and then killed her across the border in Georgia. This was enough to establish jurisdiction in both states, according to the traditional law of criminal jurisdiction, which concerns itself exclusively with the locus criminis.)

Although there was only a single act of murder, Heath was twice punishable for that one act, on its face a straightforward violation of the double jeopardy clause which provides that no “person [shall] be subject for the same offense to be twice put in jeopardy of life or limb.” (Heath actually saw both his life and his limb put in jeopardy—he was sentenced

to death in Alabama after having been sentenced to life imprisonment in Georgia after pleading guilty.) For that one act amounted to two offenses, "against each sovereign whose laws are violated by that act." In other words, it offended both the state of Georgia and the state of Alabama by being "against the peace and dignity" of each. And so it fell under the dual sovereignty exception to the double jeopardy principle, for "each government in determining what shall be an offense against its peace and dignity is exercising its own sovereignty." Note, in fact, that the dual sovereignty exception is not really an exception. The reason why Heath, and others like him, can—but need not—be punished by Georgia and Alabama is that his one act constituted two offenses (one against each state), literally speaking, and there is no prohibition against punishing someone twice for two offenses, only against punishing him twice for one and the same offense.

Note also that the nature of crime as an offense against the dignity of the sovereign implies discretion on the sovereign's part regarding how—and even if—to respond to the affront. Much as it traditionally was up to the householder to decide just how to maintain respect for his dignity among his subordinates, and much as judges still enjoy considerable discretion in deciding how to deal with "contumacious" or "insolent" conduct in their courtroom or other forms of disrespect (say, by violating one of their orders) through a summary conviction for criminal contempt as an "immediate penal vindication of the dignity of the court," so the state too is free to decide how to best respond to criminal offenses, as the virtually unfettered charging discretion of prosecutors in American criminal law makes clear.

This view of criminal law, where even murder is regarded as "'contempt' to the king for depriving him of a subject," is fundamentally at odds with a constitutional regime dedicated to the protection of human dignity. It is a view that conceives of the criminal law power as an instance of unconstrained sovereignty preserving its own dignity whenever and however it deems appropriate. It knows nothing of the obligation of the state to invoke the law, and the criminal law in particular, to safeguard human dignity, either as a reason for punishing, or as a reason for punishing less, or in a particular way.

169. Id. at 89 (quoting United States v. Lanza, 260 U.S. 377, 382 (1922)).
170. See, e.g., N.Y. JUDICIARY LAW ART. 19 § 750A.
171. United States v. Abascal, 599 F.2d 752, 756 (9th Cir. 1975).
172. In civil law countries, by contrast, state law enforcement officials, including the prosecution and the police, are subject to a general principle of compulsory prosecution. See, e.g., § 152 StPO (F.R.G.).
B. Offenders' Rights

The task of constitutional criminal law thus consists of nothing less than replacing this preconstitutional, state-centered, and deeply hierarchical system of criminal law with a person-centered egalitarian one committed to the protection of human dignity. Most immediately, a commitment to human dignity means developing constitutional constraints that prevent the criminal law from interfering with minimum protections of the human dignity of offenders, suspected or convicted. More specifically, it means making a concerted effort to devise a law of crime and punishment that prevents the regrettable, though perhaps inevitable, social degradation that accompanies the criminal process from compromising the offender's basic human dignity, thus threatening the offender's status as a person, rather than merely as a member of some social group.

1. General Principles of Liability (The General Part)

In the so-called general part of criminal law, which is concerned with the general principles of criminal liability, the commitment to preserving the human dignity of the offender while punishing her assault on the human dignity of the victim has motivated, most importantly, persistent calls for the recognition of a constitutional principle of culpability, or blameworthiness, and more narrowly of a requirement of mens rea for all crimes—or at least all "true" crimes. In a constitutional regime of criminal law, mens rea would no longer appear as a mark of inferior social dignity, of meanness, but as the manifestation of the offender's capacity for autonomy, which marks her as a person, and therefore as entitled to respect for his human dignity. Mens rea does not make a crime a crime because it reflects the offender's social meanness, but because it reflects the offender's capacity for self-determination, the hallmark of her personhood, even in the commission of a crime against another person.


175. On the distinction between the general part and special part of criminal law, see, for example, Dubber, supra note 103, at 14–23 (2002). See also Stuart P. Green, Prototype Theory and the Classification of Offenses in a Revised Model Penal Code: A General Approach to the Special Part, 4 BUFF. CRIM. L. REV. 301 (2000).


Likewise, in constitutional criminal law the *actus reus* requirement no longer rests on shaky evidentiary ground, as a symptom of mens rea.\(^{178}\) It instead stands on its own two feet, deriving its strength from the commitment to respecting human dignity, which in this case means refraining from punishing mens rea—understood in its traditional sense of meanness, or *contemptus*—for its own sake.\(^{179}\) The act is not merely an outward manifestation of low status. It is instead the manifestation of a person’s exercise of her capacity for autonomy. Act in this sense is a uniquely human event, as the exercise of the uniquely human capacity of self-determination. Doctrinally speaking, constitutional criminal law cannot extend to “involuntary acts” (in fact, “involuntary act” becomes an oxymoron),\(^ {180}\) nor to nonhuman acts (another oxymoron), including “corporate” or “group” criminality.\(^ {181}\) Likewise, membership in a communal entity, like a corporation, by itself could not result in attributing criminal liability to any of its members, as every person could be held criminally responsible only for her own act, as an expression of his personhood. At the same time, membership in a communal entity also does not *insulate* any of its members from criminal liability either. Each person is criminally responsible for only *and all* of her own acts.

To punish someone for a *status*, rather than act, is to treat her as less than a person. It is to treat her as a thing, a nonhuman animal, or a natural phenomenon, each of which is incapable of acting in the sense of voluntary behavior. Only in the case of a person is there a sharp line between status and act, between being and doing, as only the person can choose to act independently of—and inconsistently with—her status. A “felon,” for instance, may decide to refrain from criminal activity, just as a “vagrant” may decide to settle down.\(^ {182}\) To the extent that a person is incapable of acting against her status (as, for instance, a drug addict), she is incapable of exercising her capacity for autonomy, and for that reason is not punishable as a *person*.

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178. *See*, e.g., 4 *BLACKSTONE*, *supra* note 164, at *21 (“In all temporal jurisdictions an *overt* act or some open evidence of an intended crime, is necessary, in order to demonstrate the depravity of the will . . . .”).


181. No statutory definition, no matter how explicit, can bestow the status of personhood upon an entity other than a human individual. *Contra* N.Y. *PENAL* LAW § 10.00(7) (1998) (“*Person* means a human being, and where appropriate, a public or private corporation, an unincorporated association, a partnership, a government or a governmental instrumentality.”).

182. Vagrancy statutes thus are unconstitutional not because they are vague, see *Papachristou v. City of Jacksonville*, 405 U.S. 156, 162 (1972), but because they punish status. *See* *Pottinger v. City of Miami*, 810 F. Supp. 1551, 1562 (S.D. Fla. 1992).
At the same time, punishing someone for mere nonactualized thought is not constitutionally impermissible because it would mistreat her as a nonperson, for nothing is more human, and personal, than thought. Trees may fall and dogs may bite, but they do not hatch murderous schemes. It is not enough simply to say that a nonactualized thought may not be punished because the absence of an act indicates insufficient commitment to that thought. For it is not an evidentiary deficit that bars punishing thought, but its inherently private nature. The autonomy of the person, after all, manifests itself—and must be respected—also in the right to be free from intrusion, by the state or another person, i.e., in what is commonly referred to as the “right to privacy.” It is, literally, the freedom of thought that prevents its punishment in a constitutional regime of criminal law.

So much for the constitutional constraints on the minimum elements of a criminal offense: actus reus and mens rea. Constitutional criminal law also calls for a rethinking of the law of defenses. Defenses are no longer discretionary, and gratuitous, exercises of sovereign mercy. They are instead based on the recognition of the putative offender as a person capable of choosing rightly, as well as wrongly. Under the preconstitutional view of criminal law, for example, self-defense was a type of discretionary pardon. Any homicide was an offense against the sovereign, “for depriving him of a subject,” so that it was only right and proper that homicide in self-defense be considered “excusable” (and therefore pardonable), rather than “justifiable” (and therefore not unlawful to begin with and thus in no need of a pardon). In a constitutional regime of criminal law, by contrast, self-defense is based on an assertion of right, rather than a plea for mercy. As Richard Wasserstrom has observed, “[t]o claim or to acquire anything as a matter of right is crucially different from seeking or obtaining it as through the grant of a privilege, the receipt of a favor, or the presence of a permission.” That difference, be-

183. See 4 BLACKSTONE, supra note 164, at *151-*152 (“[T]he will of individuals is still left free: the abuse only of that free will is the object of legal punishment.”).
184. BAKER, supra note 173, at 601 (finding homicide se defendendo only “excusable” (and therefore pardonable), rather than “justifiable” because any homicide deprives the king of a subject). The constitutionalization of criminal law thus may require not only the recognition of certain defenses, but also the transformation of excuse defenses into justifications.
186. See 4 BLACKSTONE, supra note 164, at *177-*188 (discussing justifiable and excusable homicide).
187. Richard Wasserstrom, Rights, Human Rights, and Racial Discrimination, 61 J. PHIL. 628, 630 (1964). Note, however, the use of “privilege” in the fourteenth amendment (“privileges and immunities”) and in tort law, where “privilege” is used as analogous to “justification” in criminal law.
tween right and mercy, between entitlement and gratuity, is the difference between a constitutional and a preconstitutional system of criminal law.188

To see the constitutional basis for the right of self-defense (and, analogously, the right to defend another person, or to defend one's—or another's—property), one must first jettison the conception of crime as an affront to the dignity of the state. Once crime is reconceptualized as an interpersonal phenomenon, in which one person interferes with the rights of another, the right of self-defense arises straightforwardly out of the purposes of criminal law. The state is authorized to use the criminal law to protect the rights of its constituents, and for no other purpose. To the extent that it is incapable of performing this protective function in a particular case—where the potential victim is faced with the immediate need to protect himself against an imminent attack189 which, by hypothesis, was not deterred by the threat of state punishment—a person has a right to perform this function himself.190 To deny him this right is to reduce him to a mere object of government, rather than its one and only subject, for the state has no function, and no reason for being, other than to do that which it is incapable of doing in a situation giving rise to self-defense. Only a preconstitutional system of criminal law that, like traditional English common law, concerns itself with protecting the state's dignity—and once the king's, or now the public's, "peace"—as an end in itself could mistake self-defense for an excuse requiring the discretionary dispensation of mercy by the state.

Likewise, a state could not constitutionally do away with the necessity justification. Depriving a person of the authority to balance the merits of a particular course of action in light of the fundamental values of the—his—legal system, even in emergency situations not of his own making, would treat him as incapable of the most basic tasks of self-

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188. Contrast Rowe v. DeBruyn, 17 F.3d 1047, 1052 (7th Cir. 1994) ("[W]e find no precedent establishing a constitutional right of self-defense in the criminal law.") with Griffin v. Martin, 785 F.2d 1172, 1187 n.37 (4th Cir. 1986) ("It is difficult to the point of impossibility to imagine a right in any state to abolish self defense altogether, thereby leaving one a Hobson's choice of almost certain death through violent attack now or statutorily mandated death through trial and conviction of murder later."); Isaac v. Engle, 646 F.2d 1129, 1140 (6th Cir. 1980) (en banc) (Merritt, J., dissenting) ("I believe that the Constitution prohibits a state from eliminating the justification of self-defense from its criminal law.").

189. For a typical formulation of self-defense, see MODEL PENAL CODE § 3.04(1) (1985) ("[T]he use of force upon or toward another person is justifiable when the actor believes that such force is immediately necessary for the purpose of protecting himself against the use of unlawful force by such other person on the present occasion."). See also N.Y. PENAL LAW § 35.15 (McKinney 1998).

190. Cf. Finkelstein, supra note 185, at 1397–1403 (finding self-defense a legal right based on "the conditions of political legitimacy for a liberal state").
government. Only someone who utterly lacks the capacity for autonomy, because he cannot identify norms, cannot apply them to particular situations, or cannot act according to them, could constitutionally be denied the necessity defense.

Whether this individual would be constitutionally entitled to raise a defense based on his very incapacity is another question altogether. Is there, in other words, a constitutional right to an insanity defense? There is no question that a system dedicated to the principle of autonomy must exculpate anyone who lacks the capacity for autonomy—or, in the words of the insanity defense, the “capacity either to appreciate the criminality of his conduct or to conform his conduct to the requirements of law.”

The problem here is that, strictly speaking, someone with no capacity for autonomy, and no chance of ever attaining this capacity, would not satisfy the minimum requirement for personhood and therefore also lack standing to assert constitutional rights in general, and a constitutional right to an insanity defense in particular. Such a radically incapacitated person would indeed be incapable of self-government and therefore could not be a subject of government and, as an object of government, would have to rely on considerations of mercy, rather than principles of justice. In this case, the state therefore would not be constitutionally barred from refusing to recognize insanity as a defense.

And yet, just as American criminal law in fact protects fully autonomous persons along with individuals who lack all capacity for autonomy as victims, so it in fact recognizes the defense of insanity for offenders. Even jurisdictions that have abandoned insanity as a separate excuse defense do not go so far as to declare incapacity by reason of mental disease irrelevant for purposes of criminal liability. Whether this is so because mercy is extended to those who lack minimum mental

191. See, e.g., Model Penal Code § 3.02(1) (“Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that . . . the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged . . . .”); N.Y. Penal Law § 35.05(2).

192. Still, though an individual who lacks the capacity for self-government would not be constitutionally entitled to raise a necessity defense, a state would certainly not be prohibited from permitting him to do so.

193. Model Penal Code § 4.01(1); N.Y. Penal Law § 40.15.

194. See, e.g., Finger v. State, 27 P.3d 66 (Nev. 2001) (discussing “mens rea” approach to insanity, which abandons insanity as a separate defense but affirms its relevance for purposes of determining mens rea); cf. State v. Strasburg, 110 P. 1020 (Wash. 1910) (affirming state constitutional right to insanity defense); Sinclair v. State, 132 So. 581, 582 (Miss. 1931) (same). Note, however, that thinking of incapacity due to insanity as a mens rea defense runs the risk of obscuring the connection between insanity and the capacity for autonomy, and thus deprives the insanity defense of its basic rationale. The insanity defense turns on the incapacity to identify norms, apply them, or follow them, which renders an individual incapable of self-government.
capacities for attribution of blame or because no human, no matter how incapacitated in fact, is thought to have been deprived of any and all potential for (re)attaining that capacity, we cannot say.\footnote{195}{See supra text accompanying notes 122–26 (discussing extension of criminal law to protect individuals lacking the capacity for autonomy).}

The constitutional status of other excuse defenses, which turn on a person’s inability to exercise her capacity for autonomy rather than the lack of that capacity, is somewhat more straightforward.\footnote{196}{On the distinction between inability and incapacity excuses, see Dubber, supra note 103, at 267.} A person acting under duress, for instance, cannot be held criminally responsible for a choice that is not truly hers, even if the act itself might be described as her own, so that she meets some minimum voluntary act requirement. Acts committed under the exceptional and extreme circumstances that give rise to duress as an excuse defense—the actual or threatened use of force that “a person of reasonable firmness in [her] situation would have been unable to resist”\footnote{197}{Model Penal Code § 2.09(1) (emphasis added); see also N.Y. Penal Law § 40.00.}—cannot be described as manifestations of the actor’s capacity for autonomy, i.e., of the capacity that makes her a person. To punish her for such an act thus would amount to treating her as something other—and less—than a person, in violation of her personal dignity.\footnote{198}{Cf. Jeremy Horder, Autonomy, Provocation and Duress, 1992 Crim. L. Rev. 706.}

Whether the defense of entrapment can claim a similar constitutional basis—at least as a matter of substantive, rather than procedural, criminal law—is doubtful. As a rule, the entrapment defense does not require the sort of overbearing pressure that duress requires. There is no requirement that the entrapped person—or some reasonable person in his situation—have been unable to withstand the pressure. Insofar as entrapment requires merely that the police officer “induce[] or encourage[]”\footnote{199}{Model Penal Code § 2.13; see also N.Y. Penal Law § 40.05.} the suspect, entrapment applies even if the suspect is not prevented from exercising his capacity for autonomy by not engaging in criminal conduct. Ironically, however, it is the defense of entrapment that enjoys constitutional backing, at least in certain—in practice largely hypothetical—cases that rise to the level of “outrageous government conduct.”\footnote{200}{See United States v. Russell, 411 U.S. 423, 431 (1973) (regarding U.S. Constitution); People v. Isaacson, 378 N.E.2d 78 (N.Y. 1978) (regarding N.Y. Constitution).} This anomaly, however, is attributable to the familiar anomaly that restricts constitutionalization to matters of criminal procedure, rather than of substantive criminal law. For the outrageous conduct defense serves the procedural function of deterring police misconduct, rather than the substantive one of...
deterring, or simply appropriately punishing, the defendant's criminal conduct. 201

The constitutional status of the provocation defense is also problematic, though probably less so. Like entrapment, it does not require that the defendant be unable to exercise his capacity for autonomy in certain circumstances, only that he act "under the influence of extreme mental or emotional disturbance for which there is reasonable explanation or excuse." 202 Then again, unlike entrapment, it does not result in complete exculpation, but only in a mitigation of punishment, presumably on the ground that the actor's ability to exercise his capacity for autonomy was only partly compromised or "influenced." Clearly, under a constitutional regime of criminal law, the defendant would have a right to have the fact-finder consider any factor that pertains to his inability to exercise his capacity for autonomy. Whether the legislature, however, is constitutionally obligated to mitigate punishment for provoked conduct in the traditional way, by reducing liability from murder to manslaughter, is another question. In fact, if the defendant had a right to the provocation defense, one would expect it to extend beyond the historical boundaries of the law of homicide. The inability—or partial inability—to exercise one's capacity for autonomy is always relevant to an assessment of criminal liability, no matter what the conduct.

2. Punishment

There is general agreement that American constitutional law places limits on what punishment the state may threaten to inflict, and actually inflict, on a person who is convicted of criminal conduct. Although, as we have seen, the general requirements for criminal liability are mostly beyond constitutional scrutiny, the consequences of meeting these requirements are not. Thus, the Constitution is oddly enough said to be silent on who may be convicted, but not on how he may be punished once he has been convicted.

a. Appropriateness

Even in the constitutional law of punishment (as opposed to the constitutional law of crime), however, the protection of the offender's personal dignity has not received sufficient attention. The constitutional law of punishment instead tends to be reduced to the question of "proportionality," which, as we have already noted above, does little to structure analysis without a clear understanding of what is to be proportionate to what. 203 Further, this exclusive focus on proportionality ignores the prior

202. Model Penal Code § 210.3(1)(b); see also N.Y. Penal Law § 125.20(2).
question of appropriateness. There may be punishments that are unconstitutional regardless of the crime committed. Corporal punishments, including whipping, come to mind. Here it is interesting to note that whipping—or other essentially demeaning punishments like the stock or the pillory—were never ruled unconstitutional. They were discontinued in the course of the nineteenth century, but not on account of their unconstitutionality, or more precisely a judicial finding of unconstitutionality. In particular settings—most notably in prisons—whipping continued to be used until well into the twentieth century.\footnote[4]{Since the constitutionality of demeaning punishments was never at issue, it goes without saying that the reason for their unconstitutionality was never made explicit either. Still, we may presume that a statute providing for a punishment of whipping would not pass constitutional muster today, though not necessarily because it is inconsistent with the dignity of the punished, but because it is “unusual” given that it has fallen into disuse over time. If, however, all or most (or perhaps many) states would decide to reintroduce the pillory as a criminal sanction, the federal Constitution—as currently interpreted by the U.S. Supreme Court—presumably would not stand in their way, since it may be “cruel,” but it would not be “cruel and unusual.”\footnote[5]{The only substantive—rather than relative—limitations on the appropriateness of a punishment derive from the fact that the cruel and unusual punishments clause “was designed to outlaw particular modes of punishment,”\footnote[6]{in particular “the rack or the stake, or any of those horrid modes of torture, devised by human ingenuity for the gratification of fiendish passion.”\footnote[7]{In other words, it is not any interference with the dignity of the punished that renders certain types of punishment inappropriate from a constitutional standpoint, but whatever evidence they provide for the inappropriateness of the motivations driving the punisher. The state—or the official acting in behalf of the state—could not constitutionally punish if it was motivated by “fiendish passion” or, more generally, “malice.”}}}

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It is no accident that these limits reflect the constraints that—in theory, if not generally in practice—traditionally had been placed on the authority of the householder and the slaveholder to discipline those under his charge. In fact, they manifest a hierarchical view of government that draws a sharp distinction between the governor and the governed, between the punisher and the punished, a view that considers the objects of government as rightless and, literally, at the mercy of their superiors.

It bears repeating that this view is radically inconsistent with the idea of constitutional criminal law, which rests on a basic commitment to respecting the dignity of all persons, no matter where they might fall in the social hierarchy of a given political community, and no matter “on what side of the law” they may find themselves in a particular case. In a constitutional regime of criminal law demeaning punishments are inappropriate, not because they reflect badly on the punisher, but for the simple reason that they are demeaning to the punished. No matter how not “unusual” demeaning punishments may be, they are inappropriate because they treat their object as something other—and less—than a person. They are unconstitutional even if they are not motivated by malice, a malignant heart, or fiendish passion, but by a calculated desire to demean—no matter what their ultimate purpose might be—for it is that very desire that makes them inappropriate.

Whipping and spectacles of public humiliation—such as the stock and the pillory—are incompatible with personal dignity because they are so firmly associated with disciplinary measures traditionally used by householders, and by preconstitutional states built on the model of a patriarchal household, that they treat, and are perceived to treat, their objects as wayward inferior members of the household who dared to challenge the householder’s unlimited authority to govern. They powerfully and unequivocally manifest the unbridgeable power gap between the governor and the governed. As such, they are entirely inconsistent with the deep commitment to autonomy, or self-government, that undergirds the constitutional state, and therefore also a constitutional regime of criminal law.

Some demeaning punishments also offend the dignity of their object by affixing to them a label, or a status. The more permanent the label, the greater the incompatibility of the punishment with the autonomy of the punished. There was a time, of course, when offenders were regularly branded with markers identifying their crime of conviction. These

209. See supra text accompanying notes 157–58.
210. See generally Dubber, supra note 2.
markers became identifying features that defined the person bearing them and denied the possibility of behavior inconsistent with them. A branded forger could not ever be anything but a forger and it was only the brand—and whatever other forms of state interference deemed necessary—that kept him from acting according to his identity. The capacity for autonomous choice was denied, and—as a matter of fact—so was the opportunity to exercise it.

Recently, attempts have been made to reintroduce demeaning punishments into American criminal law. Although these punishments—including forcing offenders to wear placards listing their crime of conviction, having them display bumper stickers identifying their crime of conviction, or broadcasting their faces and, in many cases, personal information on television, on the Internet, or in public places in their neighborhood—avoid the physical components of more traditional demeaning punishments like whipping, the stock, and the pillory, they do not make any effort to change their import. In fact, the elimination of distracting physical aspects of the new shaming punishments only serves to emphasize their demeaning message. As such, they are clearly incompatible with the dignity of their objects and for that reason have no place in a constitutional regime of criminal law.

But shaming punishments—traditional or contemporary—are not the only types of punishment that are inconsistent with the dignity of the punished. So is any perpetual punishment, most importantly life imprisonment without the possibility of parole. The infliction of perpetual punishment categorically denies the punished's capacity for autonomy by dismissing the possibility that he will ever lead a law-abiding life, i.e., a life inconsistent with his categorization as a "lifer." In the words of the German Constitutional Court, "the state strikes at the very heart of human dignity if [it] treats the prisoner without regard to the development of his personality and strips him of all hope of ever regaining his freedom." Accordingly, the Court recognized the right of a prisoner serving a life sentence to have his eligibility for release reviewed on a regular basis after having served fifteen years. To comply with the Court's ruling, the German Penal Code now provides that a court shall release the life

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also id. (pillory for grand larceny (thirty minutes) and petty larceny (fifteen minutes)); U.S. CONST. ART. I, § 9 (prohibiting bills of attainder).


prisoner if "the particular gravity of the convicted person's guilt does not require...continued execution" of the prison sentence. Early release "can be justified upon consideration of the security interests of the general public," and—as a final prerequisite that reemphasizes the significance of the prisoner's autonomy—"the convicted person consents."\footnote{\textsection 57a StGB (F.R.G.).}

The constitutionality of life imprisonment without the possibility of parole has never been seriously questioned in the United States. The only mode of punishment, in fact, that has attracted any sustained constitutional attention has been the death penalty. Efforts to end capital punishment, however, have relied on a "death is different" strategy, which emphasized the uniqueness of the death penalty—most importantly its irrevocability. This strategy has been remarkably successful. The U.S. Supreme Court for decades has recognized that death is indeed different. At the same time, however, the Court has affirmed the constitutionality of capital punishment. As a result, the "death is different" strategy has become a victim of its own success. Not only is capital punishment constitutional so is, \textit{a fortiori}, any other mode of punishment. If the death penalty is constitutional, so is, \textit{a fortiori}, any other—lesser—penalty is constitutional as well, including life imprisonment without the possibility of parole.

But to say that death is different is not to say that death is different because it is more serious. Death is different in quality, not in quantity. It is this qualitative difference that makes possible the Supreme Court’s pursuit of a death penalty jurisprudence independent of the jurisprudence of other punishments, most importantly imprisonment. But this same qualitative difference means that the constitutionality of capital punishment does not imply the constitutionality of life imprisonment any more than the unconstitutionality of capital punishment would imply the unconstitutionality of life imprisonment.

In constitutional criminal law, the appropriateness of the death penalty as a type of punishment turns on the same question as that of any other punishment: Is it compatible with the dignity of the person of the punished, specifically his capacity for autonomy? Now insofar as the death penalty is inflicted on the basis of a diagnosis of an unalterable characteristic, be it dangerousness (incapacitation) or wickedness (character-based retributivism), it is as incompatible with the principle of autonomy as is life imprisonment without the possibility of parole (or any other disability manifesting the inability to exercise one’s capacity
for autonomy, such as the disenfranchisement of felons\(^{216}\)). And indeed Justice Brennan argued in \textit{Furman v. Georgia} that capital punishment is unconstitutional precisely because it treats “members of the human race as nonhumans, as objects to be toyed with and discarded” in violation of “the fundamental premise of the [Cruel and Unusual Punishments] Clause that even the vilest criminal remains a human being possessed of common human dignity.”\(^{217}\)

\(\textit{b. Proportionality}\)

Under a preconstitutional state-focused view of criminal law, the proportionality of punishment is analyzed like its appropriateness. Punishment is disproportionate and therefore “cruel and unusual” only insofar as it reveals the punisher’s improper motivation. If the punishment inflicted is “manifestly excessive and disproportionate to the fault,” and employs “unusual or unlawful instruments,” then and only then is it unconstitutional.\(^{218}\)

In noncapital cases, the Supreme Court has decided that the Eighth Amendment prohibits only certain “grossly disproportionate” penalties. A noncapital punishment is unconstitutionally disproportionate only if it is grossly disproportionate to the “severity of the crime” (and is therefore cruel) and is significantly more severe if compared to penalties inflicted in similar circumstances by the punisher as well as by others (and therefore unusual as well).\(^{219}\)

No punishment has been found unconstitutional by the U.S. Supreme Court under this test. A mandatory sentence of life imprisonment without the possibility of parole for simple possession (i.e., possession without the intent to distribute) of more than 650 grams cocaine is not unconstitutionally disproportionate,\(^{220}\) nor is a prison sentence of twenty-five years to life under California’s “three-strikes” law\(^{221}\) for shoplifting three golf clubs from a pro shop.\(^{222}\)


\(^{218}\) \textit{JOEL PRENTISS BISHOP, NEW COMMENTARIES ON THE CRIMINAL LAW} 532 (Chicago, T.H. Flood 1892) (quoting Butler v. McClellan, 4 F. Cas. 905, 909, 910 (D. Me. 1831) (No. 2242)).


\(^{221}\) \textit{CAL. PENAL CODE} §§ 667(b)–(i), 1170.12(a)–(d) (West 1999).

\(^{222}\) \textit{Ewing}, 123 S. Ct. at 1189–90.
The Supreme Court's proportionality jurisprudence in noncapital cases can best be explained as a continuation of the long standing practice of granting householders virtually unlimited discretion to discipline members of their household. Most important is the almost complete absence of constraint. Just as householders traditionally were free to enforce their authority—and to protect their "peace"—by any means necessary, so the Supreme Court today shows "substantial deference" to the states when it comes to deciding how to protect their peace or dignity. It is no accident that most noncapital proportionality cases before the Supreme Court dealt with harsh recidivist penalties. No one flaunts the authority of the state more openly and insistently than the repeat offender. As a blatant threat to the authority and dignity of the state, recidivists must be dealt with decisively and harshly. In a series of cases, and most recently in last term's *Ewing v. California*, the Supreme Court has made it clear that it is not willing to interfere with the states' discretion to discipline recidivists as they see fit.

At the same time, constraints are not entirely absent, even though they have very little bite in practice. Note that to be deemed unconstitutionally disproportionate, a penalty must not only be "grossly disproportionate" to the offense, a hurdle that is very difficult to clear. (Ewing's life sentence for shoplifting did not clear it, for example.) But a finding of gross disproportionality is not enough. As long as the state in question punishes similar conduct with similar gross disproportionality or enough other states do, the punishment is not sufficiently unusual to be unconstitutional. In other words, only the most incontrovertible evidence of malice on the part of the punisher (i.e., the state) will test the constitutional limits on punishment. Only a truly exceptional episode of brutality will threaten the state's impunity regarding punishment.

In capital cases, the Supreme Court has developed a less toothless proportionality test. (It has actually invalidated some sentences under it.) Instead of gross disproportionality, simple disproportionality is enough, with no need to undertake an intra- and interjurisdictional analysis. This exception too is consistent with the traditional practice of granting deference to the householder disciplinarian. For already the medieval lord was prohibited from depriving his serf of "life or limb," or

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223. See, e.g., *Harmelin*, 501 U.S. at 999 (Kennedy, J., concurring); *id.* at 1016, 1021 (White, J., dissenting).


"slaying or maiming" him.²²⁶ Likewise, even the slaveholder was prohibited—in theory—from killing or disabling his slave.²²⁷ (There were two reasons for these limitations. First, the householder was not authorized to deprive the king of the life or use of a subject. Second, killing one’s serf or slave made no economic sense, except in extraordinary circumstances, so that it gave rise to a suspicion of malice.²²⁸) One would therefore expect the Supreme Court to take a harder look at both capital punishment and serious corporal punishment causing permanent injury.

Still, the Supreme Court’s capital proportionality jurisprudence—and to a lesser extent even its noncapital version—can also be read as pointing in the direction of a view of proportionality less beholden to a preconstitutional regime of criminal law. In constitutional criminal law the focus of proportionality analysis is shifted from the punisher to the punished, and from the norms of proper household governance to the rights of persons. Like inappropriate punishment, disproportionate punishment is not objectionable because it reveals malice on the part of the punisher, but because it treats the punished as something less than a person.

There are glimpses of this approach in the Court’s proportionality opinions. Where it has undertaken a proportionality analysis, the Court has compared the punishment to the “seriousness” of the offense, which it has interpreted as encompassing both the harm caused—or threatened—and the offender’s culpability. In capital cases, for instance, the Court has paid particular attention to the proportionality of punishment to the defendant’s mental state, understood as “a critical facet of the individualized determination of culpability required in capital cases.”²²⁹ Similarly, it has struck down a statute prescribing capital punishment for rape of an adult woman on the ground that the punishment was disproportionate to the seriousness of the harm.²³⁰

The Supreme Court’s limited proportionality jurisprudence thus contains within itself the seeds of its own expansion. In fact, the Court’s occasional explorations of proportionality in capital cases might be rounded out into a fuller theory of proportionality, which then could be extended past the “death is different” hurdle to cover all cases of punishment, and—yet more comprehensively—to all cases of state action,


²²⁷. ARTHUR P. SCOTT, CRIMINAL LAW IN COLONIAL VIRGINIA 199 (1930).

²²⁸. See DUBBER, supra note 2.


thereby integrating the *ultima ratio* principle, which scrutinizes the state's decision to invoke the criminal law in the first place, and not just a particular criminal sanction. Whatever federalist constraints one might then place on federal courts' federal constitutional review of state statutes is another question.\(^{231}\)

The Court's recent decision in *Ewing* is a step in the wrong direction. There the Court upheld a life sentence imposed under California's "three-strikes" law\(^{232}\) for shoplifting three golf clubs, arguing that this punishment was proportionate to the "gravity" of Ewing's offense, given that the state had a legitimate interest in incapacitating him on the basis of his criminal record.\(^{233}\) The seriousness of an offense, however, should not be confused with its significance as a symptom of future dangerousness. Seriousness instead functions as a principled limit on the sanction that might be indicated on the basis of a dangerousness diagnosis.

Still, *Ewing* did reaffirm the Court's focus on the gravity of the offense as the relevant point of comparison in proportionality analysis. To the extent that offense seriousness factors in both the offender's culpability and the harm caused, this approach is not inconsistent with a proportionality analysis under a regime of constitutional criminal law. An inquiry into the offender's culpability is clearly relevant to an appreciation of the crime as the act of a person choosing to exercise his capacity for autonomy, albeit in a violation of criminal norms. An inquiry into harm is similarly appropriate, provided the harm is restricted to violations of the rights of persons, rather than offenses against the dignity of the state.

C. **Victims' Rights: The Special Part and the Right to Consent**

The much overdue transformation of American criminal law from a tool for the discretionary maintenance of royal, and then state, dignity to the most intrusive, but not necessarily most effective, means for the principled protection of the dignity of *persons* also has wideranging implications for the so-called "special part" of criminal law.\(^{234}\) This is a vast subject and much of it is beyond the scope of this Article. Still, some illustrative examples will be discussed.

\(^{231}\) This two-step approach also is implicit in the Court's two-part proportionality test for non-capital cases, which calls for a "seriousness" inquiry first and for intra- and interjurisdictional comparison second. *Harmelin v. Michigan*, 501 U.S. 957, 1004-05 (1991).

\(^{232}\) *Cal. Penal Code* §§ 667(b)-(i), 1170.12(a)-(d) (West 1999).


\(^{234}\) The special part deals with the particular offenses that define the content and the scope of criminal law, rather than the general principles of criminal liability that apply to all offenses across the board. *Cf. supra* note 178.
Homicide, for instance, would be reconceptualized as a violation of the dignity of the person who saw his life taken by another, rather than as a violation of the "peace and dignity" of the state.\textsuperscript{235} This shift in the focus from state dignity to human dignity would have implications for, among other things, the law of double jeopardy. As we saw earlier on, a murder would constitute a single offense, against the murder victim.\textsuperscript{236} It therefore could not be punished twice, \textit{contra Heath}, no matter how many different sovereigns might find their dignity to have been offended, for no "person [shall] be subject for the same offense to be twice put in jeopardy of life or limb." The abandonment of the so-called dual sovereignty exception would significantly reshape American criminal law, as it would not only bar successive prosecutions for the same offense by different states (as in \textit{Heath}), but by the states and the federal government as well.\textsuperscript{237}

While criminal law would concern itself with protecting the dignity of persons, rather than of sovereigns, states, or institutions, it would not seek to safeguard their \textit{social} dignity—or their \textit{human} dignity—in other words, their dignity as persons. Social status, by itself, is of no concern to the law, as something to be upgraded, maintained, or degraded for that matter. The special part of criminal law therefore has no place for crimes against social dignity, such as libel or slander, as they have traditionally been understood, and as they remain on the books to this day.\textsuperscript{238} While the interest in one's honor is not a right worthy of protection by the criminal law, any act that violates the human dignity of another and thereby disrespects another as a person, would qualify for state intervention. Whether it \textit{requires} state intervention, and more specifically state intervention in the form of criminal law, is another matter, of course. Needless to say, offenses against the social dignity of \textit{nonhuman} entities—like states, for instance—are likewise excluded.

This revision of the notion of an offense also implies a revision of the notion of criminal harm, a notoriously important, and notoriously under-

\begin{itemize}
\item \textsuperscript{235} Heath v. Alabama, 474 U.S. 82, 93 (1985).
\item \textsuperscript{236} See \textit{supra} text accompanying notes 168–69.
\item \textsuperscript{237} Currently, the matter of successive and dual prosecutions under federal and state law is not governed by law, constitutional or statutory, but by an entirely discretionary "statement of policy." U.S. \textit{DEP'T OF JUSTICE, UNITED STATES ATTORNEYS' MANUAL § 9-2.031} (2002) ("Petite Policy"). This policy makes no mention of double jeopardy or other rights, but instead is formulated exclusively in terms of matters of "substantial federal interests," convenience, and efficiency.
\end{itemize}
specified, concept in self-consciously liberal accounts of criminal law, ever since John Stuart Mill set out the “harm principle” in On Liberty. 239 In a constitutional regime of criminal law, criminal harm is not simply pain, discomfort, or unease, all of which are phenomena that may be experienced by many creatures. Harm instead is harm to human rights, and in particular to the basic human right to autonomy, which gives rise to human dignity. As Jefferson understood, it is this harm that persons constitute political communities to prevent and, if it cannot be prevented, to punish. 240 Criminal harm, in other words, is harm to a person, and harm to a person’s very personhood, as opposed to his morally irrelevant attributes, such as his social dignity. That means criminal harm is not harm to the state, nor harm to the state’s dignity, nor harm to a community, or entity, or corporation, or interest, however “public.” 241

Conduct that qualifies as harmless under this autonomy-based reinterpretation of Mill’s harm principle cannot be criminalized in a constitutional regime of criminal law. One example of such harmless conduct is consensual homosexual (or, more broadly, “deviate”) sex. Only last term, in Lawrence v. Texas, 242 the Supreme Court struck down a homosexual sodomy statute on the ground that the proscribed conduct does not inflict harm in the relevant sense. (The statute prohibited “engag[ing] in deviate sexual intercourse with another individual of the same sex.”) Just seventeen years earlier, in Bowers v. Hardwick, 243 the Court had upheld a similar statute on the ground that homosexual sex offended the moral sensibilities of the public or, more precisely, of “a majority of the electorate in Georgia.”

In Lawrence, the Court recognized the constitutional impropriety of using the power of the criminal law to protect not the human dignity of individual state constituents, but the sensibilities of the state community as a whole (and as presumably reflected in legislation). 244 The point here is not simply that the majority may not use the criminal law to protect or manifest its moral sensibilities and thereby oppress a minority it defines

239. MILL, supra note 73, at 10–11 (“[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 . . . .”); see also 1 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS (1984); Finkelstein, supra note 1, at 371–82.
240. JEFFERSON, supra note 211, § 1.
241. For a more detailed discussion of this point, see DUBBER, supra note 3.
243. TEX. PENAL CODE ANN. § 21.06(a) (Vernon 2003).
244. 478 U.S. 186, 196 (1986).
as “deviate.” Not even the “moral health” of the public as a whole counts as a protected interest in a constitutional regime of criminal law.

Homosexual sodomy as proscribed by the Texas statute could not be criminalized because it did not violate anyone’s autonomy. As with heterosexual intercourse, whether “deviate” or not, there are of course cases where homosexual sex may—and indeed must—be criminalized, i.e., whenever the conduct is not consensual. Lawrence thus illustrates a more general point about the significance of consent as a defense, or rather as a bar against criminalization. In the presence of consent, invoking the criminal law is inappropriate not only because the conduct is harmless in the relevant sense—so that punishing the “offender” would violate his autonomy without vindicating the autonomy of the “victim”—but also because doing so would violate the autonomy of the “victim.” The victim, in other words, has a right to consent.

“Consent” is the main doctrinal category in substantive criminal law that functions as a placeholder for considerations of the victim’s personhood, i.e., his capacity for autonomy. American criminal law has yet to appreciate fully the central significance of the consent defense. That defense stands as a constant reminder that criminal law is about persons first. Consent as a reflection of the criminal law’s basis in personal autonomy is less a defense than a general limitation, less an exception than the rule. It finds its broadest recognition in the Model Penal Code. According to the Code, consent is a defense if non-consent is an element of the offense charged, or if it “precludes the infliction of the harm or evil sought to be prevented by the law defining the offense.” That harm, however, is always the interference with the victim’s basic human right, to be free from interference with her autonomy. That interference is absent in the presence of consent.

One therefore would expect consent to be a defense to, or non-consent an implicit element of, every offense. It is not, however, not even in the Model Code. The Code instead preserves the traditional, and traditionally ill-supported, exception for “serious bodily harm.”

Attempts to justify exceptions to a general consent defense tend to consist of general references to the preconstitutional view of criminal law. The criminal law ignores individual victims’ consent, so it is said, be-


cause it is not about individual victims, but about the state (or the king). This view of the criminal law, however, is not only inconsistent with the basic principles of a constitutional system of government. (Consent, after all, is the central manifestation of the capacity for autonomy in modern political theory, which recognizes the "consent of the governed" as the only source of legitimacy.) It also proves too much. For if the state were indeed the victim of every crime, then consent should be a defense to none.

A failure to recognize consent as a defense amounts to a violation of the prima facie victim's fundamental right to autonomy. It also violates the apparent offender's right to autonomy, assuming his facially criminal conduct manifested an agreement between the offender and the apparent victim (as opposed to merely carrying out the "victim's" orders, say). Punishing the apparent offender therefore would do nothing to vindicate autonomy. On the contrary, it would deny the autonomy of offender and victim alike.

The Supreme Court recently has explored the constitutional significance of consent to homicide, one of the most dramatic applications of the defense. In Glucksberg v. Washington and Vacco v. Quill, it affirmed states' authority to criminalize assisted suicide, which is easily reconceptualized as consensual homicide. To the extent Glucksberg and Quill disavow any constitutional constraints on the state's authority to reject a consent defense, they are clearly inconsistent with a constitutional regime of criminal law. Perhaps, however, they can be read not as affirming the constitutional irrelevance of victim consent, but more narrowly as scrutinizing the effectiveness of that consent. Clearly, in every case of consent, and in none more urgently than in cases of consent to homicide, the victim's assent must in fact qualify as consent; i.e., it must actually reflect an exercise of the victim's capacity for autonomy.

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248. See, e.g., LaFave & Scott, supra note 80, at 481.
249. See, e.g., The Declaration of Independence para. 1 (U.S. 1776) ("[T]o secure these rights, governments are instituted among men, deriving their just powers from the consent of the governed ... ").
252. The Model Penal Code's general provision on consent conveniently sets out guidelines for determining the effectiveness of consent in a particular case, as opposed to as a general matter of constitutional, or criminal, law:

Ineffective Consent. Assent does not constitute consent if:

(a) it is given by a person who is legally incompetent to authorize the conduct charged to constitute the offense; or

(b) it is given by a person who by reason of youth [or age, more generally], mental disease or defect or intoxication is manifestly unable or known by the actor to be unable to make a
CONCLUSION

American criminal law today remains rooted in a preconstitutional model of crime and punishment. Crime, in this model, is an offense to the dignity of the state, and punishment the reaffirmation of that dignity. It is basic blackletter law that criminal law is an exercise of the state's power to police, which is the modern manifestation of the householder's ancient authority to discipline the members of his household. Like that age-old patriarchal power, the police power is largely unconstrained in theory, virtually unconstrained in practice, and differentiates categorically between the superior householder and his household, between governor and governed, and between punisher and punished.

Constitutionalizing criminal law requires a reconception and revision of American criminal law as the most radical means by which the modern democratic state discharges its function: to protect its constituents against interference with their rights as persons, be it by another person or by the state itself. A constitutionalized criminal law must respect and safeguard the inviolability of all persons, offenders and victims alike. The offender does not cease to be a person upon commission of a crime, nor upon conviction or punishment for it. At the same time, the victim retains her personhood even in the face of the offender's assault.

Attempting to protect the dignity of offenders as persons therefore is only one side of the coin that is constitutional criminal law. What is at stake is the protection of the dignity of persons as persons, be they "offenders" or "victims." Insofar as constitutions embody the state's fundamental obligation to uphold the personal dignity of its constituents, and the basic right to autonomy that underlies it, constitutional criminal law must concern itself with the autonomy of offenders and victims alike. Constitutional criminal law thus limits the state's law of crime and punishment on both ends: protecting victims' personal autonomy against violation by other persons may require the use of criminal law, while protecting offenders' personal autonomy against violation by the state may prohibit it. Given the enormous scope and continuing expansion of reasonable judgment as to the nature or harmfulness of the conduct charged to constitute the offense; or

(d) it is induced by force, duress or deception of a kind sought to be prevented by the law defining the offense.

MODEL PENAL CODE § 2.11(3).

253. Examples of a constitutional duty to criminalize might not only include conduct that violates constitutional rights (such as the right to life, liberty, and property)—so that a legislature, for instance, could not constitutionally decide to do away with the crime of theft, for instance—but also conduct identified in the constitution as punishable (e.g., treason (U.S. Const. art. III, § 3), "piracies and felonies committed on the high seas, and offenses against the law of nations" (U.S. Const. art. I, § 8)).
modern criminal law, the latter, prohibitory prong of constitutional
criminal law will require our most immediate attention. The problem
with criminal law in the war on crime of the past thirty years, after all,
has not been undercriminalization but the systematic erosion of basic
principles of criminal law, including actus reus, mens rea,254 and defenses
such as insanity,255 intoxication,256 and even self-defense.257

This Article has focused on substantive criminal law. Still, the basic
principle of “dignity and self-determination” that underlies not only the
Eighth Amendment’s proscription of cruel and unusual punishments and
the Fifth and Fourteenth Amendments’ guarantee of due process, but
the Constitution as a whole, guides the constitutionalization of all
aspects of criminal law, including not only the definition of criminal norms (sub-
stantive criminal law), but also their application (criminal procedure) and
the infliction of sanctions for their violation (prison law). Constitutional
substantive criminal law eventually must be integrated into a compre-
hensive account of constitutional criminal law. The first step toward such
an integration, however, is ending substantive criminal law’s status as the
poor constitutional cousin of procedural criminal law, which has long at-
tracted the Supreme Court’s attention as a form of state action that de-
mands close constitutional scrutiny. This Article suggests why, and how,
this first step should be taken.

Many cases of undercriminalization may be characterized as underinclusive criminalization, and thus
deprive certain persons of equal protection of the (criminal) law. An obvious example would be the
failure to criminalize assault by whites upon blacks if assault by blacks upon whites is criminal, a com-
mon characteristic of American law prior to the Civil War. Some of the Supreme Court’s opinions re-
jecting constitutional challenges to criminalization, particularly the recent opinions upholding assisted
suicide statutes, can be read as recognizing a constitutional duty to criminalize violations of constitu-
tional rights, such as the right to life in the case of the assisted suicide cases. See, e.g., Washington v.
519, 520–21 (Canadian Supreme Court upholding criminal prohibition of assisted suicide as protection
of right to life); Tiedemann, supra note 15, at 50–55 (discussing constitutional duty to criminalize in
German law).

254. See generally Dubber, supra note 3.