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VALUING AUTONOMY

*Youngjae Lee**

INTRODUCTION

In *Securing Constitutional Democracy*,¹ James Fleming elaborates a theory of the Constitution that “firmly connects privacy or autonomy to the substance and structures of constitutional democracy.”² Through what he calls “constitutional constructivism,” Fleming makes a forceful argument that “deliberative autonomy is rooted . . . in the language and overall design of the Constitution” and that deliberative autonomy, along with “deliberative democracy,” has “a structural role to play in securing and fostering our constitutional democracy.”³

In explaining the place of “deliberative autonomy” in the Constitution, Fleming provides the following list:

liberty of conscience and freedom of thought

freedom of association, including both expressive association and intimate association, whatever one’s sexual orientation

the right to live with one’s family, whether nuclear or extended

the right to travel or relocate

the right to decide whether to bear or beget children, including the rights to procreate, to use contraceptives, and to terminate a pregnancy

the right to direct the education and rearing of children

the right to exercise dominion over one’s body, including the right to bodily integrity and ultimately the right to die.⁴

Fleming points out two features of this list of rights. First, they are “fundamental rights” most of which the “Supreme Court has recognized . . . under the categories of privacy, autonomy, or substantive due process.”⁵ Second, these rights “reserve to persons the power to deliberate about and

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1. James E. Fleming, *Securing Constitutional Democracy: The Case of Autonomy* (2006).

2. *Id.* at 3.

3. *Id.* at 4.

4. *Id.* at 92.

5. *Id.*

decide how to live their own lives, with respect to certain matters unusually important for such personal self-governance, over the course of a complete life (from cradle to grave)."⁶ In other words, these are "basic liberties that are significant preconditions for persons' development and exercise of deliberative autonomy in making certain fundamental decisions affecting their destiny, identity, or way of life, and spanning a complete lifetime."⁷

There is much to say about this rich book, in particular about the idea of deliberative autonomy and about Fleming's explication of its role in our constitutional law. In this essay, I limit my remarks to two questions. First, if Fleming is right that autonomy is a core value that must be protected to "secure constitutional democracy," how should we make sense of our criminal justice system as a constitutional matter? Second, in understanding the scope of deliberative autonomy in constitutional law, does it make sense to see the Constitution, as Fleming does, as protecting "preconditions for persons' development and exercise of deliberative autonomy"? Or, should we think of the Constitution as going beyond protecting preconditions for exercise of autonomy and, in fact, making substantive judgments about what types of exercises of autonomy are worth protecting?

I. AUTONOMY, PUNISHMENT, AND THE CONSTITUTION

Given that autonomy is the central idea driving Fleming's book, there is a glaring, if not surprising, omission in the book—the topic of the constitutional status of the institution of punishment.⁸ Fleming's list of basic liberties protected by the Constitution appears accurate so long as we focus on law-abiding citizens. When we shift the focus to convicted persons, the picture of basic liberties looks very different. We routinely send people to prisons in this country for five, fifteen, twenty-five years, or for life. Sometimes we even kill them. According to the latest figures, a record seven million Americans (one in every thirty-two adults) were behind bars, on probation, or on parole at the end of 2005, and, of those, 2.2 million were in prison or jail.⁹

For most people, even spending just a three-month period in prison away from their work, friends, and families, would be a highly traumatizing, disruptive experience. Sentences significantly longer than that are nothing less than personal catastrophes for those convicted. And it is none other than the government, representing us, that brings about such catastrophes as a matter of routine and in the name of upholding the rule of law. If Fleming is right that autonomy is a core constitutional value necessary for securing

6. *Id.* at 93.

7. *Id.*

8. The omission is not surprising because the same omission is typical in most works of constitutional theory.

9. *A Record Seven Million Americans in Justice System*, Int'l Herald Trib., Nov. 30, 2006, available at <http://www.iht.com/articles/2006/11/30/news/prison.php>.

constitutional democracy, we have some explaining to do about our criminal justice system as a constitutional matter.

So what would a theory of criminal law constructed within Fleming's framework look like? There are some hints as to how such a theory would develop when Fleming argues that the nature of the Constitution is "essentially *positive*"¹⁰ in that it imposes "affirmative obligations to secure the preconditions for constitutional democracy."¹¹ Fleming suggests that we think about the Constitution as "first and foremost a charter of ends, goods, or benefits like national security."¹² When discussing the relationship of his conception of autonomy and the feminist critique of autonomy, Fleming stresses that "the protection of basic liberties includes protecting individuals not only from the government, but also from each other."¹³

The basic argument for an autonomy-promoting criminal justice system may be derived from these insights. As we can see from post-invasion Iraq, it is impossible to get a democratic government going if there is first no guarantee of basic physical safety of citizens. By removing Saddam Hussein from power, the American-led invasion may have eliminated one source of threats to Iraqis' basic liberties, but, by sparking disorder and internecine conflict, it has enabled the proliferation of another source of threats to basic liberties. In other words, deliberative autonomy may face threats from two directions, public and private. Cases like *Lawrence v. Texas*¹⁴ highlight threats to individual autonomy by the government, but autonomy can face threats from murderers, rapists, and thugs as well. If I am constantly worried about being physically attacked by those who seek to harm me, it would be very difficult for me to carry on a life that could be called autonomous in any meaningful sense.¹⁵ The Constitution may thus be thought of as a means to prevent the war of all against all and to bring about "domestic tranquility and the blessings of liberty."¹⁶

Could we, then, make sense of our denial of basic liberties to criminals as part of this design? Fleming writes about how it may be necessary to violate the Constitution in order to save it—the way Lincoln suspended the writ of habeas corpus during the Civil War in order to save the Union.¹⁷ Similarly, perhaps the criminal justice system could be thought of as everyday restrictions on the basic liberties of certain groups of people that are necessary in order to secure constitutional democracy. What this line of thinking suggests is a balancing framework that makes autonomy versus

10. Fleming, *supra* note 1, at 208.

11. *Id.* at 207.

12. *Id.* at 206.

13. *Id.* at 139.

14. 539 U.S. 558 (2003).

15. See Thomas Hobbes, *Leviathan* 183-88 (C.B. MacPherson ed., Penguin Books 1968) (1651).

16. Fleming, *supra* note 1, at 196.

17. *Id.* at 200-01.

autonomy determinations between the autonomy of offenders and the autonomy of everyone else. Every time the government steps in to punish a criminal, it interferes with the offender's autonomy by taking his liberties away, but at the same time, the government maintains a broader system of crime prevention that is necessary to protect people's autonomy from being curtailed by their fellow citizens. The question then is how the balancing is to be done.

Some of the balancing has already been done by the framers of the Constitution, as the Constitution places various limits on the government's power to criminalize and to punish. The Constitution makes some of the limiting principles explicit in the Due Process Clause¹⁸ (here, I mean procedural, not substantive), Double Jeopardy Clause,¹⁹ Confrontation Clause,²⁰ Self-incrimination Clause,²¹ the right to counsel,²² the jury trial guarantee,²³ and the Cruel and Unusual Punishments Clause.²⁴ The Constitution also has implicit limiting principles in the form of fundamental rights, such as freedom of expression and various liberties recognized under substantive due process. As opposed to provisions that are explicitly designed as criminal procedure provisions, these are implicit limitations on criminal law, as one of the implications of calling something a "fundamental right" is that the government cannot prohibit a person's exercise of it by criminalizing it. Regulation of these fundamental rights through means other than criminal prohibitions may be unconstitutional as well, but criminal law is one of the bluntest and most powerful instruments the government has at its disposal to regulate society.

The Constitution therefore constrains criminal law in two ways—it takes certain things off the list of things that the government may criminalize, and it imposes various restrictions on how the government may go about enforcing the criminal law.²⁵ One might summarize the current state of constitutional restrictions on criminal law in the following way:

1. Do not criminalize *A*, *B*, and *C*... (*A*, *B*, and *C*... being exercises of fundamental rights).
2. So long as fundamental rights are not inhibited, the government may criminalize any conduct²⁶—from speeding to murder—as the government sees fit.

18. U.S. Const. amend. XIV, § 1.

19. *Id.* amend. V.

20. *Id.* amend. VI.

21. *Id.*

22. *Id.*

23. *Id.*

24. *Id.* amend. VIII.

25. I ignore various doctrines associated with the principle of legality in this essay. See U.S. Const. art. I, § 9 ("No Bill of Attainder or ex post facto Law"); *id.* § 10; *City of Chicago v. Morales*, 527 U.S. 41 (1999) (vagueness).

26. The "conduct" requirement is minimal. See generally *Powell v. Texas*, 392 U.S. 514 (1968).

3. When the government enforces criminal law (enacted within constraints 1 and 2), it must do so without violating constraints *X, Y, Z . . .* (i.e., constraints relating to search and seizure, right to counsel, trial by jury, confrontation of witnesses, cruel and unusual punishments, etc.)

Autonomy is rightly taken very seriously when it comes to fundamental rights. But what about conduct that lies outside the scope of fundamental rights (those covered under constraint 2)? It cannot be the case that our concern for autonomy is entirely suspended once we step outside the narrow world of fundamental rights. Neither do procedural rules (those referred to in constraint 3) provide sufficient safeguards for autonomy. If a government passes a law that prohibits eating cheeseburgers near elementary schools as a way of dealing with obesity, as long as the crime is defined in a way that does not interfere with constitutionally recognized fundamental rights, the government is free to punish a person after proving beyond a reasonable doubt to a jury that he ate a cheeseburger in front of an elementary school. Even the most aggressive interpretation of *Apprendi v. New Jersey*²⁷ could not prevent such an outcome.²⁸ This state of affairs should be highly disturbing to anyone who cares about interpreting the Constitution as an autonomy-protecting instrument, considering the degree of liberty deprivation that criminalization permits.²⁹

A truly autonomy-respecting constitution would require different ground rules for criminal law than what the current case law provides. Here are a few different ways of going about it:

Autonomy Theory A

1A. Do not criminalize *A, B, and C . . .* (*A, B, and C . . .* being exercises of fundamental rights) unless doing so would maximize autonomy (or minimize violations of autonomy).

2A. When regulating behaviors that do not fall within the scope of exercises of fundamental rights, use criminal law only when it is the option that maximizes autonomy (or minimizes violations of autonomy).

3A. When the government enforces criminal law (enacted within constraints 1A and 2A), it must do so while observing procedural rules that maximize autonomy (or minimize violations of autonomy).

27. 530 U.S. 466 (2000).

28. One might try a Cruel and Unusual Punishments Clause violation as an argument, but unless we are talking about the death penalty, it is very difficult to get the Court to pay attention. See *Ewing v. California*, 538 U.S. 11 (2003). The only other option may be jury nullification—a highly unreliable, unpredictable, and uncalibrated safety valve that we do not even like mentioning as an option to juries. For a recent bibliography of writings on the jury nullification controversy, see Teresa L. Conaway et al., *Jury Nullification: A Selective, Annotated Bibliography*, 39 Val. U. L. Rev. 393 (2004).

29. This oddity has been noted by many. See, e.g., Sherry F. Colb, *Freedom from Incarceration: Why Is This Right Different from All Other Rights?*, 69 N.Y.U. L. Rev. 781 (1994); Alice Ristroph, *Proportionality as a Principle of Limited Government*, 55 Duke L.J. 263, 328 (2005).

Autonomy Theory B

1B. Do not criminalize *A*, *B*, and *C* . . . (*A*, *B*, and *C* . . . being exercises of fundamental rights).

2B. When regulating behaviors that do not fall within the scope of exercises of fundamental rights, use criminal law only as last resort.³⁰ The government has many regulatory tools, and the total deprivation of physical liberty that accompanies imprisonment should be used only when it is necessary. This means, among other things, that the government should attempt to protect the value of autonomy by devising various “alternative sanctions” that restrict offenders’ autonomy only to the extent that it is necessary, and that if imprisonment is the only option that makes sense for certain offenders, the government should not hold them in prisons for longer than it is necessary.

3B. When the government enforces criminal law (enacted within constraints 1B and 2B), it must do so without violating constraints *X*, *Y*, *Z* . . . (i.e., search and seizure, right to counsel, trial by jury, confrontation of witnesses, cruel and unusual punishments, etc.).

We can also mix and match and produce, say, the following configuration:

Autonomy Theory AB

1B. Do not criminalize *A*, *B*, and *C* . . . (*A*, *B*, and *C* . . . being exercises of fundamental rights).

2A. When regulating behaviors that do not fall within the scope of exercises of fundamental rights, use criminal law only when it is the option that maximizes autonomy (or minimizes violations of autonomy).

3B. When the government enforces criminal law (enacted within constraints 1B and 2A), it must do so without violating constraints *X*, *Y*, *Z* . . . (i.e., search and seizure, right to counsel, trial by jury, confrontation of witnesses, cruel and unusual punishments, etc.).

Borrowing from Nozick, Autonomy Theory A may be called a “utilitarian of rights” view, and Autonomy Theory B a “side constraints” view.³¹ Autonomy Theory AB is a two-tier system: side constraints for

30. Some scholars have suggested limits on criminalization along these lines. See generally Douglas Husak, *The Criminal Law as Last Resort*, 24 Oxford J. Legal Stud. 207 (2004); Nils Jareborg, *Criminalization as Last Resort (Ultima Ratio)*, 2 Ohio St. J. Crim. L. 521 (2005).

31. Robert Nozick, *Anarchy, State, and Utopia* 30 (1974). Although Autonomy Theory B allows trade-offs and balancing (through narrow-tailoring principles, as in constraint 2B), that does not necessarily make the label “side constraints” inaccurate. It is true that Nozickian theories of rights are commonly thought to require something like “absolute rights,” but that is not the only version of the “side constraints” notion. One might also have a “stringency or resistance to trade-offs” view that does not degenerate into the “utilitarian of rights” view. See Youngjae Lee, *The Constitutional Right Against Excessive Punishment*, 91 Va. L. Rev. 677, 708 n.147 (2005). Nozick himself left this question largely unexplored. See Nozick, *supra* at 30.

fundamental liberties and procedural guarantees but “utilitarian of rights” when it comes to criminalization and punishment issues that do not involve criminalizing exercises of “fundamental rights.”

For the purposes of this essay, I make three points about these frameworks. First, stressing the value of autonomy by itself cannot tell us which framework is the correct one, and it does not seem that any one of them conflicts with Fleming’s constitutional theory. There is no question that there is a deontological flavor to Fleming’s theory (especially in his discussions of deliberative democracy and its relationship to equality and the Dworkinian idea of equal concern and respect) that makes Autonomy Theory B more Fleming-esque than Autonomy Theory A. However, the constitutional status of those convicted of crimes in Fleming’s theory is not clear—unless the law that authorizes their convictions criminalizes an exercise of a fundamental liberty. One relevant statement I found is Fleming’s observation that “when the Constitution is suspended, the executive has restorative obligations, affirmative obligations to work actively toward restoring conditions in which the Constitution can function as law.”³² Analogously, the government may have an ongoing duty to minimize deprivations of liberty, but that sentiment, too, is compatible with all of the frameworks proposed above.

Second, valuing autonomy does not necessarily lead to more robust protections of constitutional rights when dealing with rights of private actors who threaten autonomy interests of others. Autonomy Theory A has no qualms about violating the autonomy of certain individuals if such violations can bring greater returns in terms of autonomy overall. Although its “utilitarian” (or aggregative) feature might make the theory vulnerable in many ways, it does not have the weaknesses of some of the more crude versions of utilitarianism that justify, say, torturing an individual if a sufficient number of people derive amusement from it, since the theory is firmly rooted in the value of autonomy. For instance, the “proof beyond a reasonable doubt” rule can be weakened under this theory although it is currently a constitutional requirement.³³ The “reasonable doubt” rule is, after all, not explicitly required by the text of the Constitution, and the autonomy-maximizing strategy may counsel us to relax the standard of proof when we are dealing with particularly dangerous people or serious crimes.³⁴ A recent defense of the death penalty by Cass Sunstein and Adrian Vermeule is an argument of this sort.³⁵

Finally, none of the proposed sets of principles is even close to our present-day constitutional jurisprudence. These principles are so far from

32. Fleming, *supra* note 1, at 207.

33. *In re Winship*, 397 U.S. 358, 361-64 (1970).

34. For a more general discussion of the possibility of adjusting levels of constitutional protection of criminal defendants according to the seriousness of crimes, see Eugene Volokh, *Crime Severity and Constitutional Line-Drawing*, 90 Va. L. Rev. 1957 (2004).

35. Cass R. Sunstein & Adrian Vermeule, *Is Capital Punishment Morally Required? Acts, Omissions, and Life-Life Tradeoffs*, 58 Stan. L. Rev. 703 (2005).

the current practice and mainstream constitutional scholarship that they may even be called utopian. Some combination of the ban on cruel and unusual punishments and substantive due process doctrines can probably be used to generate these rules, but that seems very unlikely to happen any time soon. The question is how this can be, why it is that we do not experience this state of affairs as a national scandal with a constitutional dimension—or in Fleming’s terms, a “constitutional tragedy”³⁶—and whether we should be more troubled about it—as a constitutional problem, not just as a policy problem—than we currently are.³⁷ The ultimate solution to this puzzle will have to take the form of rationalization of the status quo and some proposals for reform, and I merely offer the puzzle as a challenge to constitutional theorists, especially those who are sympathetic to Fleming’s theory.

II. AUTONOMY AND CONSTITUTIONAL LAW THICK AND THIN

As Fleming recognizes, any theory that places a value as abstract and potentially expansive as autonomy in the Constitution must confront the question of “the meaning, scope, and constitutional status” of the right.³⁸ An instructive discussion for the purposes of understanding the way Fleming resolves this issue can be found in chapter seven of the book where he contrasts his approach against that of Michael Sandel.³⁹ To illustrate the difference between the approaches, Fleming focuses on the issue that *Lawrence v. Texas* decided: criminalization of homosexual sodomy.

For Fleming, *Lawrence* is an easy case, as criminalization of homosexual sodomy is a clear violation of the right to autonomy. Sandel, on the other hand, would justify cases like *Lawrence* in different terms.⁴⁰ As Fleming puts it, Sandel would say that the *Lawrence* Court “should have justified protecting homosexuals’ right to privacy not on the basis of homosexuals’ freedom to make personal choices, but on the ground of the goods or virtues

36. Fleming, *supra* note 1, at 220.

37. It is not easy to explain away the Court’s lack of attention to autonomy interests of criminals as a legitimate form of judicial underenforcement. When it comes to economic liberties, Fleming finds judicial underenforcement to be appropriate given that economic liberties “can and do fend well enough for themselves in the political process.” *Id.* at 136. That argument does not apply in the criminal context. As many have argued, interests of criminal defendants are underrepresented in our political process, and representation-reinforcing arguments for aggressive judicial interventions seem particularly appropriate in this context. William J. Stuntz, *Substance, Process, and the Civil-Criminal Line*, 7 J. Contemp. Legal Issues 1, 20 (1996). Some have argued that the fact that punishment is expensive and that state budgets are limited can compensate for criminal defendants’ lack of representation. See, e.g., Rachel E. Barkow, *Federalism and the Politics of Sentencing*, 105 Colum. L. Rev. 1276 (2005). Such economy-based arguments, however, have troubling implications that need to be thought through carefully. See Emily Bazelon, *Sentencing by the Numbers*, N.Y. Times, Jan. 2, 2005, § 6 (Magazine), at 18.

38. Fleming, *supra* note 1, at 1.

39. See *id.* at 141-71.

40. Michael J. Sandel, *Democracy’s Discontent: America in Search of a Public Philosophy* 103-08 (1996).

fostered by homosexuals' intimate associations." 41 Sandel's approach would require us to make distinctions between good choices and bad choices, good associations and bad associations, and good activities and bad activities. The reason to protect homosexual intimate associations is not because homosexuals' autonomy should be protected, according to Sandel, but because such associations promote "important human goods" that the government should foster.⁴²

Fleming makes a number of criticisms of Sandel's approach. First, Sandel does not value autonomy enough by "reject[ing] . . . the moral principle of autonomy and its value" and "exclu[ding] . . . such autonomy from his conception of self-government."⁴³ Second, liberals that Sandel criticizes in fact take human goods and virtues more seriously than Sandel suggests that they do. That is, according to Fleming, Sandel exaggerates the difference between his own theory and theories of liberals like Fleming himself and Dworkin and statements found in various Supreme Court opinions.⁴⁴ In short, it is not that Sandel's theory is "too thick" but that (1) it is "too thin" in parts that matter (in its failure to recognize the value of choice), and that (2) liberals' theories are "thicker" than Sandel portrays.

Fleming's discussion of Sandel pushes Fleming away from his "thin" conception of autonomy and towards what he calls "thicker" conceptions of autonomy,⁴⁵ such as that of Joseph Raz.⁴⁶ Raz occupies the space between Sandel and Fleming in that he values autonomy but says that autonomy is "valuable only if it is directed at the good" and "does not extend to the morally bad and repugnant."⁴⁷ Fleming says such thick theories are "compatible with, and have affinities to" his own model, but he at the same time seems reluctant to embrace it as part of his theory.⁴⁸ Given Fleming's persuasive criticism that Sandel's own theory may not be generous enough to recognize liberals' emphasis on virtues and also not liberal enough in its lack of emphasis on autonomy, perhaps a more interesting and instructive question to ask is why it is that Fleming shies away from what he calls the "thicker" theories of autonomy.

One clue to this question is indicated in another argument that Fleming makes against Sandel, which is that "Sandel's civic republicanism is too thick."⁴⁹ He says that Sandel underestimates the depth and persistence of moral disagreements surrounding cases like *Lawrence*. The kinds of conversations about values of homosexual intimate relations that Sandel wants us to engage in, Fleming thinks, are too controversial and too risky in

41. Fleming, *supra* note 1, at 141.

42. Sandel, *supra* note 40, at 104.

43. Fleming, *supra* note 1, at 149.

44. *Id.* at 148-51.

45. *Id.* at 99.

46. Joseph Raz, *The Morality of Freedom* (1986).

47. *Id.* at 411; *see also id.* at 378-81 (discussing autonomy and value).

48. Fleming, *supra* note 1, at 99.

49. *Id.* at 142, 151-53.

terms of inviting intolerant viewpoints into the public sphere. Fleming appears to be concerned that encouraging a substantive moral conversation in public legislative and judicial fora would open a can of worms that we may have trouble containing in the end. It is far better, Fleming argues, to conduct the debate in terms of autonomy and its value, as opposed to how autonomy is used to promote other human goods. He thus concludes that “[i]n some cases of persistent moral conflict, liberal toleration is a necessary starting point and may even be the most that can be achieved.”⁵⁰ Presumably, similar arguments could be made against attempts to bring “thicker” theories of autonomy such as Raz’s to bear on constitutional law.

The question I want to explore is whether Fleming can successfully stay at his preferred level of “thickness” in defending autonomy and interpret the Constitution as not engaging in substantive evaluations of people’s choices, about lives well and poorly lived, freedoms well and poorly exercised.

Let me begin my discussion here with the gruesome case of Armin Meiwes, who was recently convicted of murder and sentenced to life in Germany.⁵¹ Meiwes was no ordinary murderer; he was also a cannibal. Meiwes, a computer technician in his forties, posted an ad on the Internet in 2000, looking for men to be killed and eaten by him.⁵² The ad stated that he was “seeking well-built man, 18-30 years old, for slaughter.”⁵³ Meiwes testified that more than 200 people answered his ad.⁵⁴ A detective testified that there was, in fact, a large cannibal scene in Germany involving “people who come from the middle reaches of society,” including “dentists, teachers, cooks, government officials, and handymen.”⁵⁵ Not all of these people wanted to be eaten. Five people actually traveled to meet Meiwes in his home in Rotenberg, to discuss the act of being killed and eaten. One of these visitors, Jorg Bose, a thirty-four year old cook, let Meiwes hang him from the ceiling to be killed, but changed his mind and backed out. Dirk Moller, a twenty-seven year old hotel worker, was another would-be victim, and although he went as far as being chained to a bed and marked for butchery, he, too, backed out after seeing a video of Bose hanging from the ceiling.⁵⁶ Apparently, once these people withdrew their consent, they were able to leave unharmed—each instance simply turning into a relationship that did not work out because the parties involved wanted different things from each other.

50. *Id.* at 153.

51. Luke Harding, *German Court Finds Cannibal Guilty of Murder*, *Guardian* (London), May 10, 2006, at A3.

52. Peter Finn, *Cannibal Case Grips Germany*, *Wash. Post*, Dec. 4, 2003, at A26.

53. *Id.*

54. Jeffrey Fleishman, *Germans Get a Look at Dark Side of Cyberspace*, *L.A. Times*, Dec. 31, 2003, at A3.

55. Luke Harding, *Dentists and Teachers Part of Vast Cannibal Scene, Court Told*, *Guardian* (London), Dec. 9, 2003, at 13; *see also* Ben Aris, *Cannibalism Trial Told of Suspected New Cases*, *Guardian* (London), Jan. 6, 2004, at 14.

56. Kate Connolly, *I Asked Cannibal To Eat Me, Says Would-Be Victim*, *Daily Telegraph* (London), Dec. 16, 2003, available at 2003 WLNR 4237778.

The only one, as far as we know, who went through the act of being killed by Meiwes was Bernd-Juergen Brandes, a forty-three year old engineer for Siemens in Berlin.⁵⁷ It appears that Brandes had a desire to be sexually mutilated and had talked about this to a former boyfriend, but the former boyfriend testified that Brandes did not otherwise show any signs of depression or suicidal tendencies.⁵⁸ One ex-girlfriend also testified that there was nothing outwardly wrong with Brandes and that he had in fact been “an easygoing, domestic type.”⁵⁹ After answering Meiwes’s ad, Brandes corresponded with Meiwes over email for several weeks. The email messages explicitly discussed cannibalistic acts in detail and in a sexually charged manner.⁶⁰ Brandes traveled to Rotenberg to meet Meiwes in March, and on the evening of March 9, 2001, Meiwes stabbed Brandes to death in his home and carved him up.⁶¹ Brandes’s body was kept in a freezer, and Meiwes ate much of it over the next several months. The act of killing itself was videotaped, and, apparently, the video, lasting four and a half hours, shows that the victim willingly gave his consent to be killed and eaten.⁶² Meiwes, who declared in court that he believed “everyone should be able to decide what he wants to do with his own body,” was convicted of murder in May 2006.⁶³

Consent is no defense to homicide.⁶⁴ For most of us, it would not be considered a serious violation of sexual autonomy or the right to die for the government to fail to make the consent defense available in cases like the Meiwes case. If Meiwes was facing charges for murder in the United States and he raised a constitutional argument against the prosecution citing *Lawrence*, his constitutional argument would not go very far. The doctrinal argument is simple. In *Lawrence*, the Court was very clear in outlining limits to its holding when it said, “The present case does not involve minors. It does not involve persons who might be injured or coerced or who are situated in relationships where consent might not easily be refused. It does not involve public conduct or prostitution.”⁶⁵ The Meiwes case does not involve minors. It appears that there was no coercion here, judging from the e-mail exchanges between Meiwes and Brandes, the video, and

57. Tony Paterson, *Cannibal Says He Was Lonely and Dreamt of ‘Brother’ to Disembowel*, Independent (London), Dec. 4, 2003, at 15.

58. *No Death Wish for Cannibal Victim*, Australian, Jan. 14, 2004, available at 2004 WLNR 7582367; Tony Paterson, *Cannibal’s Victim Was Obsessed with Sexual Mutilation*, Independent (London), Jan. 13, 2004, at 12.

59. *No Death Wish for Cannibal Victim*, *supra* note 58.

60. Ben Aris, *Self-Confessed Cannibal Is Ruled Sane by Psychiatrist*, Guardian (London), Dec. 30, 2003, 14; Roger Boyes, *Cannibalism Fantasy E-mails Sicken Court*, Times (London), Dec. 30, 2003, at 13.

61. Luke Harding, *Victim of Cannibal Agreed to be Eaten*, Guardian, Dec. 4, 2003, at 3.

62. Roger Boyes, *Cannibal’s Video Reveals Mutilation and Slaughter*, Times (London), Dec. 9, 2003, at 13; Harding, *supra* note 55.

63. Roger Boyes, *Cannibalism Is Murder—Even If the Victim Requests To Be Eaten*, Times (London), May 10, 2006, at 3.

64. Wayne R. LaFave, Criminal Law § 15.6(c) (4th ed. 2003).

65. *Lawrence v. Texas*, 539 U.S. 558, 578 (2003).

evidence that several people who traveled to see Meiwes for the purpose of being killed were able to leave unharmed once they decided to withhold their consent. The act of killing and eating took place in the privacy of Meiwes's own home. The Meiwes case, therefore, cannot be distinguished on those grounds. Rather, the key distinction here is that there is obviously a serious physical injury in this case.

Therefore, as a doctrinal matter, there may not be a difficult issue here. Due to the narrowness of the ruling, the Supreme Court need not worry about having to grant someone like Meiwes a constitutionally mandated defense of "consent of victim." However, the issue is not so simple for a theorist committed to autonomy like Fleming. His approach of "[c]onstitutional constructivism," while "draw[ing] . . . from our constitutional democracy's ongoing practice, tradition, and culture," is not merely interpretive but also normative.⁶⁶ The principles that he extracts from our constitutional practice are "aspirational," and "they enable us to criticize some of those practices for failing to live up to our constitutional commitments."⁶⁷ Thus, he considers the Court's refusal to acknowledge the right to die in *Washington v. Glucksberg*⁶⁸ to be mistaken.⁶⁹ The question for Fleming, who presumably would not recognize convicting Meiwes as a constitutional violation, is why the seeming restriction of both sexual autonomy and the right to die, both rights recognized by Fleming as fundamental rights necessary for securing preconditions for constitutional democracy, is not thought to be constitutionally problematic. I am not making the cultural conservative argument that a case like *Lawrence* would lead to constitutional protection of "adult incest, prostitution, masturbation, adultery, fornication, bestiality, and obscenity."⁷⁰ The question, rather, is why *Lawrence* was correctly decided and what kinds of arguments surface when we try to articulate a distinction between *Lawrence* and the hypothetical constitutional challenge brought by Meiwes.

How would a case like this be analyzed under Fleming's framework? I will focus on the victim's right since the claim would be that it is his right to sexual autonomy and right to die that would be violated by the unavailability of the consent defense in the Meiwes case. Drawing from Rawls, Fleming stresses persons' "capacity for a conception of the good" and builds his case for deliberative autonomy on such capacity.⁷¹ He elaborates that "a conception of the good is a conception of what is valuable in human life" and that "liberty of conscience and freedom of association enable citizens to exercise . . . their capacity for a conception of the good . . . in forming, revising, and rationally pursuing their conceptions of the good, individually and in association with others, over the course of a

66. Fleming, *supra* note 1, at 6.

67. *Id.*

68. 521 U.S. 702 (1997).

69. Fleming, *supra* note 1, at 221-24.

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

71. Fleming, *supra* note 1, at 68.

complete life—that is, to apply their power of deliberative reason in deciding how to live their own lives.”⁷²

One option that Fleming has is to bite the bullet and argue that a consent defense should be a constitutional requirement in a case like this in order to protect the value of deliberative autonomy. But that is only one of several options that Fleming has available; there are at least four other options. First, deny that the right to be killed and eaten is included in his conception of basic liberties. Second, deny that a genuine, voluntary consent in a case like this is possible. Third, allow some level of paternalism. Fourth, stress the “constructivist” character of his theory to reject proposals that sound too radical or too dissonant with our existing constitutional practice. I will examine each in turn.

First, perhaps the right to be killed and eaten is not significant enough to be protected as a basic liberty. Fleming stresses that his conception of autonomy extends only to “significant basic liberties” and denies that he is interested in a general “right to be different” or “a right to wear one’s hair as long as one pleases.”⁷³ However, it is not obvious why the right to be killed and eaten should be dismissed as one of those insignificant liberties. Freedom of association, “including both expressive association and intimate association,” and “the right to exercise dominion over one’s body, including the right to bodily integrity and ultimately the right to die” are at stake in the cannibalism case.⁷⁴ The right to die, of course, means the right to choose the time and manner of one’s own death. As the Court that tried the *Meiwes* case stated at one point, Brandes and Meiwes were “looking for the ultimate kick.”⁷⁵ Brandes’s desire to satisfy his longing to be eaten in this way may be a particularly perverse way in which these liberties are being exercised, but, the point of our respect for autonomy is to avoid making judgments about people’s decisions on such matters. Just as, as Fleming points out, one’s right to vote may be exercised poorly by a thoughtless individual,⁷⁶ one’s freedom of association and right to die may be exercised in a disastrous manner, but that should not threaten our commitment to leaving that decision to each individual.

Second, Fleming might question whether Brandes actually made a fully voluntary, informed choice that deserves our respect. Perhaps Brandes showed signs of a psychiatric disorder. Maybe no one “in his right mind” would enter into the kind of agreement that Brandes entered into. There may be additional evidentiary problems as to whether he did give his full consent to be killed and eaten. But along all those dimensions, it seems that the case is not obviously problematic. Brandes was an educated adult in his early forties, seemingly living a normal, adult life with a job as an engineer

72. *Id.*

73. *Id.* at 133.

74. *Id.* at 92.

75. Mark Landler, *German Court Convicts Internet Cannibal of Manslaughter*, N.Y. Times, Jan. 31, 2004, at A3 (internal quotation marks omitted).

76. Fleming, *supra* note 1, at 159-60.

for Siemens. There was a videotape that appeared to show that he was making a voluntary decision. There were no other signs of coercion. If the question is whether there is genuine consent in cases like this, we could regulate it so that consent is a defense only when there is full legal representation by all parties involved, there is a contract laying out exactly what will happen during the ritual, a clear exit option is provided, and so on. Unless we can get some independent verification from an expert that Brandes might have been insane, it seems that we cannot apply a reasonable person test here and say that Brandes could not possibly have been reasonable when he entered into this agreement. That would be a failure to respect his autonomy with autonomy-restricting consequences for other sane people with idiosyncratic desires.

Third, Fleming makes room in his theory for "certain commonplace, minimal forms of paternalism"⁷⁷ and gives some hints as to what he means by "minimal" when he says that "a constitutional democracy dedicated to securing deliberative autonomy might adopt many legislative measures aimed at preventing or discouraging persons from "destroying those basic rational capacities that make them moral beings worthy of respect."⁷⁸ The reason this sort of paternalism is limited is because it is directed at fostering autonomy-promoting capacities but not directed at regulating how such capacities are exercised. But once we recognize the right to die as one of the basic liberties, it is unclear to me how that distinction can be sustained. Drug regulations may be justified on the "minimal" paternalist ground that certain drugs can have the effect of permanently destroying rational capacities, but, if that is the case, why allow the right to die, which appears to be the ultimate permanent destruction of capacities, rational or otherwise? And once we let the right to die in as a fundamental right, why not require the government to recognize consent as a defense in cases like the German cannibalism case?

Fourth, Fleming says that his framework "is a theory of constructing our Constitution, not one that is perfectly just" and that it, accordingly, "draws our principles and rights from our constitutional democracy's ongoing practice, tradition, and culture."⁷⁹ What this means is that there is a built-in safeguard to prevent the theory from running wild and uprooting established practices left and right. This is why Fleming says that no general argument against paternalistic practices (at least the ones he considers "minimal") can be squared with our practice.⁸⁰ Murder-cannibalism cases then might not raise a problem for Fleming since allowing the consent defense in such cases would be a radical departure from our current practices. The puzzle here is how this built-in conservatism as a limiting principle works. Is it not the case then, that

77. *Id.* at 136.

78. *Id.* (quoting Stephen Macedo, *Liberal Virtues: Citizenship, Virtue, and Community in Liberal Constitutionalism* 209 (1990)).

79. *Id.* at 6.

80. *See id.* at 136.

whether the theory recommends one course or another will then depend on whether the conservatism switch is on or off at crucial moments? It seems that whatever aspirational, normative force the ideal of deliberative autonomy can muster—which is one of the most attractive features of Fleming’s theory—can be shut off depending on how we characterize “our constitutional democracy’s ongoing practice, tradition, and culture.”⁸¹ And if our ongoing practice, tradition, and culture is that criminal defendants’ interests are not represented in the democratic process, and that the judiciary generally stays out of criminalization and punishment questions and lets the democratic process take care of things, then would the theory recommend that we stay silent about the status quo, too?

The point of this exercise is not to show that there is some knock-down argument against Fleming’s framework. In fact, what this discussion shows is that a theory as rich and nuanced as Fleming’s has many conceptual resources to handle difficult cases. At the same time, I think the discussion also shows how complex and, at times, awkward, it is to limit the scope of autonomy if the theory stays at the level of “thinness” that Fleming prefers.

By contrast, I think a “thick” theory would easily distinguish between *Lawrence v. Texas* and the case of Armin Meiwes. The reason *Lawrence* was rightly decided was that it protected a freedom that was worth protecting. Intimate relationships are important aspects of human flourishing and well-being, and the government accordingly has an interest in promoting a culture in which people are (and feel) free to enter into relationships that are important for living good lives. No analogous argument can be made about killing and eating a human being or being killed and eaten. Fleming is correct to point out the importance of the element of choice in intimate relations, meaning that there is an independent value in *choosing* to enter into an intimate relationship as opposed to being thrust into a relationship that one has not chosen, no matter how loving, fulfilling, and meaningful that relationship may turn out to be. But in valuing autonomy in that scenario, it would be a mistake to lose sight of the value of the activity that is being chosen through one’s exercise of autonomy, and avoiding such a mistake need not lead one to overlook the importance of autonomy altogether. It is unclear to me how the value of autonomy can be enforced and appropriately limited without engaging in these sorts of “thick” analyses.

At the same time, it is true that an argument that a “thick” analysis has to be part of protecting the value of autonomy does not necessarily imply that the federal judiciary is in the best position to engage in such analyses. But would it not be better for the Court to openly admit the kinds of “thick” analyses that are explicitly or implicitly going on in cases like *Lawrence* and think in terms of how to balance the need to enforce constitutional values and the need to devise judicially manageable tools to do so? I think

81. *Id.* at 6.

Fleming's theory of autonomy has room for these sorts of arguments, but, if that is the case, can his theory be as "thin" as he prefers?

CONCLUSION

This essay has raised two questions having to do with Fleming's central argument that autonomy is a core value that must be protected to "secure constitutional democracy." First, if Fleming is correct about the place of autonomy in our constitutional practice, can we make sense of the current level of constitutional regulation of criminalization? Second, in understanding the scope of deliberative autonomy in constitutional law, can we read the Constitution in a way that frees our constitutional practice from making evaluative judgments about good and bad exercises of autonomy? The answer I suggest for both questions is no.