

The Right to Be Hurt: Testing the Boundaries of Consent

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Introduction

In late 2000, Armin Meiwes, a forty-two-year-old German computer technician, posted a message in an Internet chat room devoted to cannibalism: "[S]eeking well-built man, 18-30 years old, for slaughter."¹ A few months later, Bernd Juergen Brandes, a forty-three-year-old German microchip engineer, replied: "I offer myself to you and will let you dine from my live body. Not butchery, dining!!"²

The two men exchanged numerous e-mails, discussing details of the prospective killing and dining. Brandes even joked about their both being smokers: "Good, smoked meat lasts longer."³ On March 9, 2001, Brandes arrived at Meiwes's place.

Brandes swallowed twenty sleeping tablets and half a bottle of schnapps. Then Meiwes cut off part of Brandes's body and fried it as a snack for them both. Brandes was bleeding to death, but still not dead, when Meiwes stabbed him in the neck after a good-bye kiss. Then Meiwes butchered him and froze the flesh. Eventually he ate about twenty kilograms, washing it down with a South African red.⁴

¹ Peter Finn, *Cannibal Case Grips Germany; Suspect Says Internet Correspondent Volunteered to Die*, WASH. POST, Dec. 4, 2003, at A26.

² *Id.*

³ Michael Cook, *Moral Mayhem of Murder on the Menu*, HERALD SUN (Melbourne, Austl.), Jan. 15, 2004, at 17, available at <http://www.australasianbioethics.org/Media/2004-01-16-MC-cannibal.html>.

⁴ *Id.*

At his trial, Meiwes admitted to killing, dismembering, and eating Brandes. His principal defense was the victim's consent. Meiwes was convicted of manslaughter and sentenced to eight-and-a-half years in prison. The three-judge German court rejected the prosecution's plea for a murder conviction on the grounds that Meiwes had followed the victim's instructions.⁵ Both the prosecution and the defense appealed the verdict, and the Federal Constitutional Court, Germany's highest criminal court, ordered a retrial, saying that Meiwes's manslaughter conviction was too lenient. In May 2006, Meiwes was convicted of murder and sentenced to life in prison.⁶

The story attracted enormous publicity, both in Germany and abroad. In its macabre way, it raised some of the most fundamental questions of law and morality: What are the legal and moral effects of consent? Does one have an unlimited right to authorize another person to hurt him? Should the state prosecute a private wrongdoing between two legally competent, consenting adults? And if so, on what grounds?

These theoretical issues are in the middle of political, public, and academic debates in a number of countries. Only a few years earlier, the Law Commission for England and Wales ("Commission") issued two consultation papers that analyzed the law of consent and called for its reform.⁷ The event that prompted the work of the Commission was a controversial and very high-profile police investigation into the activities of a group of men involved in consensual sadomasochism.⁸ The investigation ended in a criminal prosecution and conviction of the defendants.⁹ The case, *R v. Brown*,¹⁰ was appealed first to the

⁵ Mark Landler, *Cannibal Convicted of Manslaughter; German Court Orders an 8 1/2-Year Sentence*, INT'L HERALD TRIB. (Paris), Jan. 31, 2004, at 3. Explaining the verdict, the judge said: "This was an act between two extremely disturbed people who both wanted something from each other." *Id.* For the legal opinion, see Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 22, 2005, 50 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 80 (F.R.G.), available at <http://www.bundesgerichtshof.de> (follow "Entscheidungen," then search the "Aktenzeichen" field at left for "2 StR 310/04").

⁶ See *Perverse Cannibal Killer Gets Life*, CNN, May 9, 2006, http://www.cnn.com/2006/WORLD/europe/05/09/cannibal.trial/index.html?section=cnn_latest.

⁷ See LAW COMM'N, CRIMINAL LAW: CONSENT AND OFFENCES AGAINST THE PERSON (Consultation Paper No. 134) (1993) [hereinafter LAW COMM'N, CONSENT AND OFFENCES AGAINST THE PERSON]; LAW COMM'N, CRIMINAL LAW: CONSENT IN THE CRIMINAL LAW, pt. X (Consultation Paper No. 139) (1995) [hereinafter LAW COMM'N, CONSENT IN THE CRIMINAL LAW].

⁸ See Paul Roberts, *Philosophy, Feinberg, Codification, and Consent: A Progress Report on English Experiences of Criminal Law Reform*, 5 BUFF. CRIM. L. REV. 173, 209–10 (2001). Paul Roberts served as a consultant to the Commission.

⁹ See *R v. Brown*, (1992) 2 All E.R. 552 (C.A.).

House of Lords and then to the European Court for Human Rights; both appeals failed when the courts refused to expand an individual's power to consent to injury beyond trivial harm and a few narrowly defined circumstances.¹¹

The court decisions in *Brown* provoked numerous discussions and publications, most of which were critical of the judicial reasoning and the outcome of the case. In the words of the Commission, *Brown* revealed "considerable disagreement about [the present law's] basis, policy, detailed limits, and possible future development."¹² The Commission assembled and analyzed numerous cases, attempting to develop general principles of the law of consent, but the attempt proved to be largely unsuccessful.¹³ The Commission issued no final report with legislative recommendations and no reforms followed.¹⁴ Eventually, in 2001, the Commission admitted its inability to reach consensus and terminated the consent project.¹⁵

Other countries have been struggling with the issue of consent as well, its application ranging from body piercing¹⁶ to sexual violence¹⁷

¹⁰ *R v. Brown*, (1992) 2 All E.R. 552 (C.A.).

¹¹ See *R v. Brown*, (1994) 1 A.C. 212 (H.L.) (appeal taken from Eng.); see also Roberts, *supra* note 8, at 210–11. Describing the procedural history of the case, Roberts wrote:

Their first appeal was rejected by the Court of Appeal, and their convictions were subsequently upheld, by the narrowest margin of three votes to two, in the House of Lords. With all domestic remedies exhausted, the way was open to launch a complaint to the European Court of Human Right But in a disappointing, poorly argued judgment, the Strasbourg Court simply endorsed the reasoning of the majority in the House of Lords, and unanimously rejected the applicants' complaint.

Id.

¹² LAW COMM'N, CONSENT IN THE CRIMINAL LAW, *supra* note 7, ¶ 1.5, at 2.

¹³ See Roberts, *supra* note 8, at 248 (observing that "the consent project has not been amongst the Commission's most conspicuous successes").

¹⁴ *Id.* at 233.

¹⁵ See LAW COMM'N, EIGHTH PROGRAMME OF LAW REFORM, 2001-2, H.C. 227, at 44. The Commission wrote:

The responses to the consultation papers were highly polarised, particularly on the issue of consent for non-sexual offences, and no consensus emerged. Bearing in mind the matters we have already reported on, the amount of work that would be required to reach conclusions on the very difficult and sensitive issues involved, and the urgency attaching to our other work, we have decided it would not be worthwhile for us to produce any further report on this topic.

Id.

¹⁶ See, e.g., Ian Freckelton, *Masochism, Self-Mutilation and the Limits of Consent*, 2 J.L. & MED. 48, 49 (1994) (analyzing the law of consent in New Zealand and Australia and opining that it remains unclear in the wake of *R v. Brown*, (1993) 2 W.L.R. 556 (H.L.)).

¹⁷ *Id.* at 60, 69–71.

to assisted suicide.¹⁸ The legislative and public interest in the defense of consent is understandable. The ability to consent is recognized in moral philosophy as a central manifestation of personhood and individual autonomy.¹⁹ Modern political theory sees the only source of legitimacy of the state power in the “consent of the governed.”²⁰ In contrast, today’s criminal law extends to an individual very limited authority to consent as far as his physical well-being is concerned.²¹ The rules governing individuals’ ability to consent to bodily harm are not merely strict; they are morally and conceptually incoherent. These rules need to be reexamined and revised to reflect the values of autonomy and dignity essential in a democratic society. It has been accurately observed that “American criminal law has yet to appreciate fully the central significance of the consent defense.”²²

Questions that I raise in this Article do not yield easy answers. The central ones among them are: Why does consent negate criminal harm in some but not all instances? And when should consensual death or injury be legitimate? Despite many excellent works about consent published in recent years,²³ those questions remain largely unresolved. The goal of this Article is to put forward a theory that might explain the treatment of consensual bodily harm in law and morality, and to outline a set of normative requirements for a general defense of consent.

¹⁸ See, e.g., Michael Cormack, *Euthanasia and Assisted Suicide in the Post-Rodriguez Era: Lessons from Foreign Jurisdictions*, 38 OSGOODE HALL L.J. 591, 598–99 (2000) (outlining the legislative struggle in Canada around the issue of assisted suicide during the past two decades).

¹⁹ See, e.g., Heidi M. Hurd, *The Moral Magic of Consent*, 2 LEGAL THEORY 121, 121, 124 (1996).

²⁰ See, e.g., Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 570 (2004).

²¹ *Id.* at 569–70.

²² *Id.* at 569.

²³ See, e.g., LAW COMM’N, CONSENT AND OFFENCES AGAINST THE PERSON, *supra* note 7; LAW COMM’N, CONSENT IN THE CRIMINAL LAW, *supra* note 7; DON HERZOG, HAPPY SLAVES: A CRITIQUE OF CONSENT THEORY (1989); PETER WESTIN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT (2004); Larry Alexander, *The Moral Magic of Consent (II)*, 2 LEGAL THEORY 165 (1996); Hurd, *supra* note 19; Roberts, *supra* note 8; Kenneth W. Simons, *Assumption of Risk and Consent in the Law of Torts: A Theory of Full Preference*, 67 B.U. L. REV. 213 (1987) [hereinafter Simons, *Assumption of Risk*]; Kenneth W. Simons, *The Conceptual Structure of Consent in Criminal Law*, 9 BUFF. CRIM. L. REV. 577 (2006) (reviewing WESTIN, *supra*); R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-coercively*, 75 B.U. L. REV. 1397 (1995). In addition, for discussion of consent in a larger context see, for example, JOEL FEINBERG, HARM TO SELF (1986) [hereinafter FEINBERG, HARM TO SELF]; GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 705 (1978); MICHAEL MOORE, PLACING BLAME (1997) [hereinafter MOORE, BLAME]; Dubber, *supra* note 20; and R.A. Duff, *Harms and Wrongs*, 5 BUFF. CRIM. L. REV. 13 (2001).

I start this Article with an analysis of the current U.S. law of consent—what it says,²⁴ how it is applied,²⁵ and what rationales for the law are usually given by the legislature, courts, and commentators.²⁶ After this analysis fails to produce sufficiently coherent answers, I proceed to explore the role of consent with respect to various offenses and conclude that, conceptually, consensual infliction of bodily harm differs from other consensual acts. In most instances, the role of consent is *inculpatory*, i.e., consent defeats even a *prima facie* harm. Consensual sex is not rape, consensual possession of other people's belongings is not theft, and consensual presence on other people's premises is not trespass. In contrast, the role of consent in cases of bodily harm is *exculpatory*: consensual injury or death is still regrettable, even when morally or legally justified.²⁷

The fact that it is regrettable leads me to reexamine the traditional meaning of harm, which, in the context of criminal law, is usually understood as wrongful violation of rights. Yet, if harm were only wrongful violation of rights, then consent, being a voluntary waiver of rights, would defeat it. Like a few other scholars, I conclude that we need a broader theory of harm and wrongfulness not limited to the violation of one's rights but encompassing other aspects of people's humanity as well, first and foremost human dignity. In this broader sense, a wrongful interference with one's interests includes not only violation of one's autonomy, but also violation of one's dignity.²⁸

This conclusion has two normative consequences. One is that consent should always be at least a partial defense, since it defeats at least one aspect of harm, namely, violation of rights.²⁹ The other conclusion is that consent alone does not suffice to justify bodily harm. To qualify for a full defense, the perpetrator must establish that he did not wrongfully interfere with the victim's well-being, i.e., that the consensual harmful act either did not significantly set back the victim's interests or did not disregard the victim's dignity.

Like other justification defenses, the defense of consent requires that the harmful act produce a positive "balance of evils" and that the perpetrator intend that outcome while causing harm.³⁰ The latter requirement is mandated by the fact that consent of the victim does not

²⁴ See *infra* Part I.B.

²⁵ See *infra* Part I.C.

²⁶ See *infra* Part I.D.

²⁷ See *infra* Part II.A.

²⁸ See *infra* Part II.B.

²⁹ See *infra* Part II.C.

³⁰ See *infra* Part II.D.

impose on the perpetrator an obligation to act. As a free moral agent, the perpetrator needs a good faith belief in the justifiability of interfering with another person's physical well-being. In other words, both objectively and subjectively, the perpetrator's reasons for the injurious act must be overall benevolent and negate harm either to the victim's interests or to his dignity.

This Article rejects the current dividing line between permissive and impermissive consensual harm based on the amount of injury and a few historically recognized exceptions. It also rejects the absolute character of today's law. Instead, it promotes a balancing test that takes into account the seriousness of the interference with the victim's interests and dignity, on the one hand, and the seriousness of the perpetrator's reasons for the harmful action, on the other. These considerations should guide policymakers and judges in their decisions, including those involving euthanasia, experimental medical treatment, and unconventional sex.

This Article begins a larger project related to the issues of consent and harm in criminal law. For now, unless specified otherwise, I limit my inquiry to a "perfect" case involving informed consent explicitly and voluntarily given by one rational adult to another, and a harmful action that takes place in private and does not exceed the boundaries of such consent.

I. The Current State of the Law of Consent

A. Development of the Volenti Principle

The principle underlying the defense of consent, *volenti non fit injuria*, was recognized in Roman law as early as the sixth century.³¹ The first reported case in England that mentions the *volenti* rule dates back to the beginning of the fourteenth century.³² By the seventeenth century, *volenti* had been established as a "maxim."³³ In *Maxims of Reason: Or, the Reason of the Common Law of England*, it is said that

³¹ *Volenti non fit injuria* articulates the concept that no wrong is done to one who consents. See BLACK'S LAW DICTIONARY 1575 (6th ed. 1990); see also Terence Ingman, *A History of the Defence of Volenti Non Fit Injuria*, 26 JURID. REV. 1, 1-2 (1981) (discussing the application of the principle in Justinian's Codex (529 A.D.) and Justinian's Digest (533 A.D.)).

³² *Randolf v. de Richmond*, Y.B. 33 Edw. 1 (1305). In that case, Walter Randolph complained that John de Richmond had tortiously taken his beasts. The defendant replied that he had a right to take them since they were on his land. And in the course of the argument one Hunt reportedly said: "Nay, volenti non fit injuria." *Id.* at 9.

³³ Ingman, *supra* note 31, at 4 (citing EDMOND WINGATE, *MAXIMS OF REASON: OR, THE REASON OF THE COMMON LAW OF ENGLAND* 482 (n.p. 1658)).

a person invited into a house to dine is not a trespasser for “*volenti non fit injuria*.”³⁴

Originally, consent was viewed as a complete ban on prosecution. A person was free to consent to practically anything. As a fourteenth-century case said, “the law will suffer a man of his own folly to bind himself to pay on a certain day if he does not make the Tower of London come to Westminster. ‘*Volenti non fit iniuria*.’”³⁵

Changes in the power of an individual to consent to personal harm came in the seventeenth century. They were a natural consequence of the monopolization of the system of punishment by the state. While in the early ages of criminal justice the victim was the central figure in the prosecution and settlement of any nonpublic offense,³⁶ in the normative and centralized judicial structure the victim became almost entirely excluded from the criminal process.³⁷ “In contrast to the understanding of crime as a violation of the victim’s interest, the emergence of the state developed another interpretation: the disturbance of the society.”³⁸ An increasing number of historically “private” offenses were reconceptualized as “public.”³⁹ The state (or king) became the ultimate victim and the sole prosecutor of a criminal act.⁴⁰ As a result, an individual lost the power to consent to what the state regarded as harm to itself.

In *Matthew v. Ollerton*,⁴¹ decided in the late seventeenth century, counsel argued that the victim’s consent is not a defense to assault and

³⁴ EDMOND WINGATE, *MAXIMS OF REASON: OR, THE REASON OF THE COMMON LAW OF ENGLAND* 482 (n.p. 1658).

³⁵ Ingram, *supra* note 31, at 3. Interestingly, this general principle determined the outcome of the case although it was in direct conflict with the “written law,” which provided for an excuse of impracticability to a breach of contract (“*Nemo obligatur ad impossibile*”). *Id.*

³⁶ See HARRY ELMER BARNES & NEGLEY K. TEETERS, *NEW HORIZONS IN CRIMINOLOGY* 342 (2d ed. 1951) (explaining that public offenses were those that exposed a “group to spiritual or human enemies, particularly the former”). “Crimes against persons were not controlled by the tribe or the family but by the clan under the principle of blood feud.” *Id.*

³⁷ See Clarence Ray Jeffery, *The Development of Crime in Early English Society*, 47 J. CRIM. L. CRIMINOLOGY & POLICE SCI. 647, 662 (1957) (“By 1226 an agreement between the criminal and the relatives of a slain man would not avail to save the murderer from an indictment and a sentence of death. The state no longer allowed a private settlement of a criminal case.”).

³⁸ STEPHEN SCHAFER, *VICTIMOLOGY: THE VICTIM AND HIS CRIMINAL* 22 (1977).

³⁹ By the eighteenth century, all crimes and misdemeanors were regarded as public wrongs. See WILLIAM BLACKSTONE, 4 COMMENTARIES *5 (explaining that “public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community”).

⁴⁰ See *id.* at *5–6.

⁴¹ *Matthew v. Ollerton*, (1692) 90 Eng. Rep. 438 (K.B.).

battery: “If I licence a man to beat me, such licence is void.”⁴² The court agreed—“because ‘tis against the peace.”⁴³ The new rule was followed. Fifty years later, a court said that consent of the victim to participate in an unlawful fight does not bar his action.⁴⁴ Similar considerations determined the adjudication of *R v. Wright*, which involved the offense of mayhem.⁴⁵ In that often-cited, early-seventeenth-century case, a man asked his friend to cut off his hand so that he would have “more colour to beg.”⁴⁶ The consent of the victim did not exculpate the perpetrator because, by “violently depriving another of the use of such of his members, as may render him less able in fighting, either to defend himself, or to annoy his adversary,”⁴⁷ he had deprived the king of the aid and assistance of one of his subjects.

The law of consent has undergone little change since the seventeenth century. In the following three sections, I explore its meaning in today’s legal theory and practice: what the law says; how courts apply it; and what rationales judges most commonly cite in support of their decisions.

B. What Does U.S. Law Say?

American law of consent is far from being clear. On the one hand, it is widely recognized that consent of the victim is not a defense in criminal prosecution.⁴⁸ On the other hand, it is equally widely recognized that consent may completely exculpate a nominally proscribed act:

What is called a “fond embrace” when gladly accepted by a sweetheart is called “assault and battery” when forced upon another without her consent; and the act of one who grabs another by the ankles and causes him to fall violently to the ground may result in a substantial jail sentence under some

⁴² *Id.* at 438.

⁴³ *Id.*

⁴⁴ See FRANCIS BULLER, INTRODUCTION TO THE LAW RELATIVE TO TRIALS AT NISI PRIUS 16–17 (London, Strahan & Woodfall 1772) (discussing the case of *Boulter v. Clark*). The distinction between criminal law and torts was not solidified until the nineteenth century. See, e.g., Wex S. Malone, *Ruminations on the Role of Fault in the History of the Common Law of Torts*, 31 LA. L. REV. 1, 2 (1970) (“[A]ny distinction between crime and tort was unknown.”).

⁴⁵ See SIR HUMPHREY DAVENPORT, AN ABRIDGEMENT OF THE LORD COKE’S COMMENTARY ON LITTLETON 131–32 (Garland Publ’g, Inc. 1979) (1651).

⁴⁶ *Id.*; 1 MATTHEW HALE, HISTORIA PLACITORUM CORONAE: THE HISTORY OF THE PLEAS OF THE CROWN 412 (London, Nutt, Nutt & Gosling 1736).

⁴⁷ BLACKSTONE, *supra* note 39, at *205.

⁴⁸ See, e.g., WAYNE R. LAFAVE, CRIMINAL LAW 360 (4th ed. 2003).

circumstances, but receive thunderous applause if it stops a ball carrier on the gridiron.⁴⁹

Under the Model Penal Code ("MPC"), consent is a defense if it "negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the law defining the offense."⁵⁰ Accordingly, valid consent precludes rape, kidnapping, theft, burglary and many other serious crimes, which are premised on the lack of consent.⁵¹

This general rule is of limited use, however, in the area of offenses involving bodily harm. MPC § 2.11(2) invalidates one's consent to personal harm in all but three sets of circumstances: one, when the injury is not serious;⁵² two, when the injury or its risk are "reasonably foreseeable hazards" of participation in a "lawful athletic contest or competitive sport or other concerted activity not forbidden by law";⁵³ and, three, when the consent establishes a justification for the conduct under Article Three of the MPC.⁵⁴

Unfortunately, this definition, which reflects the law in the absolute majority of states,⁵⁵ does not give much practical guidance. What

49 ROLLIN M. PERKINS, CRIMINAL LAW 962 (2d ed. 1969).

50 MODEL PENAL CODE § 2.11 (1985).

51 See *id.* cmt. 1 (noting that, for many crimes, including rape, false imprisonment, and criminal trespass, "it is essential to the commission of the crime that there be an unwilling victim of the actor's conduct"); see also LEO KATZ, ILL-GOTTEN GAINS 147 (1996) ("If consented-to, the taking isn't theft, the intercourse isn't rape, the tackling isn't battery, even the killing may not be murder.").

52 MODEL PENAL CODE § 2.11(2)(a).

53 *Id.* § 2.11(2)(b).

54 *Id.* § 2.11(2)(c); see also *id.* § 2.11 cmt. 2. Article 3 of the MPC is titled "General Principles of Justification."

55 Thirteen states explicitly recognize a general defense of consent in their statutes. See ALA. CODE § 13A-2-7 (2005); COLO. REV. STAT. § 18-1-505 (2004); DEL. CODE ANN. tit. 11, §§ 451-453 (2001); HAW. REV. STAT. §§ 702-233 to -235 (2003) (omitting equivalent of MODEL PENAL CODE § 2.11(2)(a)); ME. REV. STAT. ANN. tit. 17-A, § 109 (2006) (omitting equivalent of MODEL PENAL CODE § 2.11(3)(c)); MO. ANN. STAT. § 565.080 (West 1999); MONT. CODE ANN. § 45-2-211 (2005); N.H. REV. STAT. ANN. § 626:6 (1996) (omitting equivalent of MODEL PENAL CODE § (3)(c)-(d)); N.J. STAT. ANN. § 2C:2-10 (West 2005) (omitting equivalent of MODEL PENAL CODE § (3)(c)); N.D. CENT. CODE § 12.1-17-08 (1997) (omitting equivalent of MODEL PENAL CODE § 3(c)); 18 PA. CONS. STAT. ANN. § 311 (West 2005) (omitting equivalent of MODEL PENAL CODE § (2)(a)); TENN. CODE ANN. § 39-13-104 (2003) (omitting equivalent of MODEL PENAL CODE §§ 2(c), 3); TEX. PENAL CODE ANN. § 22.06 (Vernon 2003) (omitting equivalent of MODEL PENAL CODE §§ 2(c), 3). Other states have incorporated the concept of consent in the Special Part of their penal codes, making non-consent an element of an offense or providing for the defense of consent with respect to specific crimes. See, e.g., 720 ILL. COMP. STAT. 5/12-17 (2005) ("It shall be a defense to any offense under Section 12-13 through 12-16 of this Code [sexual crimes] where force or threat of force is an element of the offense that the victim consented."). Where the statute does not explicitly mention consent, case law usually defines in

harm is not serious? What harmful “concerted activities” are “not forbidden by law”? And in what circumstances does consent establish a justification for nominally criminal conduct under Article Three of the MPC? The following section addresses these issues.

C. What Does the Rule Mean Literally?

1. What Harm Is “Not Serious”?

The Official Commentary to the MPC explains that § 2.11(2) reflects traditional reluctance of the law to recognize consent as a defense to bodily injury.⁵⁶ The illustration of permissible, nonserious injury offered in the commentary is an “overenthusiastic embrace.”⁵⁷ If that example is what the drafters truly had in mind when they made allowance for a nonserious injury, this provision may be rather redundant. Section 2.12 already directs a court to dismiss prosecution if the perpetrator “did not actually cause or threaten the harm or evil sought to be prevented by the law defining the offense or did so only to an extent too trivial to warrant the condemnation of conviction.”⁵⁸

However, if the drafters intended anything beyond a trivial injury to be lawful, they did little to define the permissible boundaries. The existing rules are often puzzling as to why the line between the lawful and unlawful conduct was drawn where it was. For example, shortening one’s toes is so far quite lawful, and a growing number of fashionistas undergo the surgery in order to fit into stylish pointy-toed shoes.⁵⁹ Yet, if the same people wanted to cut off their fingers instead of toes, the legal outcome would likely be totally different.⁶⁰ One might say that the discrepancy is historically determined by the impact of the injury on people’s ability to fight. This rationale, however, is not only entirely outdated today,⁶¹ but it also fails to explain many other similar laws—for example, laws criminalizing tongue splitting.⁶²

what circumstances consent may function as a defense. *Compare* CAL. PENAL CODE § 240 (West 1999) (“An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another.”), *with* *People v. Gordon*, 11 P. 762, 762 (Cal. 1886) (stating that an attempt made with the victim’s consent “will not constitute an assault”).

⁵⁶ MODEL PENAL CODE § 2.11 cmt. 2, at 396.

⁵⁷ *Id.*

⁵⁸ *Id.* § 2.12(2).

⁵⁹ *See* Dawn Fallik, *High Heels Might Look Great but Can Put Feet in Ugly State*, AUGUSTA CHRON., May 29, 2005, at G08.

⁶⁰ *See* *State v. Bass*, 120 S.E.2d 580, 586 (N.C. 1961) (holding that consent of the victim to maiming, specifically cutting off fingers, is invalid).

⁶¹ *See, e.g., R v. Brown*, (1994) 1 A.C. 212 (H.L.) (Lord Mustill’s opinion).

⁶² *See, e.g.,* 720 ILL. COMP. STAT. 5/12-10.2 (2005); N.Y. PUB. HEALTH LAW § 470 (McKinney 2002); TEX. HEALTH & SAFETY CODE ANN. § 146.0126 (Vernon Supp. 2006).

Naturally, the meaning of “serious harm” has changed over time. In the early days of the common law, *A Digest of the Criminal Law* enunciated the following rule: “Every one has a right to consent to the infliction upon himself of bodily harm not amounting to a maim.”⁶³ According to Blackstone:

[T]he cutting off, or disabling, or weakening a man’s hand or finger, or striking out his eye or foretooth, or depriving him of those parts, the loss of which in all animals abates their courage, are held to be mayhems. But the cutting off his ear, or nose, or the like, are not held to be mayhems at common law; because they do not weaken but only disfigure him.⁶⁴

Today’s penal statutes classify a bodily injury as serious if it “creates a substantial risk of death or . . . causes serious, permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ.”⁶⁵ As this definition indicates, “serious harm” may be deemed to result from two kinds of actions: those that have caused permanent debilitating injuries, and those that caused *any* bodily injury, if such injury creates a “substantial risk of death.” The second category leaves so much room for interpretation that courts often inflate the risk of death to denounce an unwanted activity.

For example, in the case of *In re J.A.P.*,⁶⁶ a group of eighth graders played the game of “passout,” the object of which is for one player to make a fellow player faint.⁶⁷ The defendant grabbed his friend around the neck and proceeded to choke him for a few seconds until that boy lost consciousness and fell on the ground.⁶⁸ The victim suf-

⁶³ JAMES FITZJAMES STEPHEN, *A DIGEST OF THE CRIMINAL LAW* 141–42 (3d ed. London, Macmillan 1883). That proposition was reprinted verbatim in *A Digest of the Criminal Law of Canada*, which provided illustrations: “It is a maim to strike out a front tooth. It is not a maim to cut off a man’s nose. And castration is a maim.” GEORGE WHEELOCK BURBIDGE, *A DIGEST OF THE CRIMINAL LAW OF CANADA* 199 (Toronto, Carswell 1890).

⁶⁴ BLACKSTONE, *supra* note 39, at *205–06. Modern statutes define mayhem more broadly. See, e.g., CAL. PENAL CODE § 203 (West 1999) (“Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.”).

⁶⁵ MODEL PENAL CODE § 210.0(3) (1980). Following the MPC, many states have adopted an identical or similar definition. See, e.g., N.J. STAT. ANN. § 2C:11-1(b) (West 2005); TEX. PENAL CODE ANN. § 1.07(46) (Vernon 2005).

⁶⁶ *In re J.A.P.*, No. 03-02-00112-CV, 2002 Tex. App. LEXIS 7374 (Crim. App. Oct. 17, 2002).

⁶⁷ *Id.* at *3.

⁶⁸ *Id.* at *2.

ferred a few facial lacerations and chipped teeth.⁶⁹ By the time of the trial, all his injuries had been treated and healed.⁷⁰ Nevertheless, the juvenile court concluded that the defendant had engaged in delinquent conduct by committing aggravated assault, an offense which required a finding of “serious bodily harm.”⁷¹

On appeal, the *J.A.P.* court opined that, in determining whether the evidence supports a finding of such harm, “the relevant issue is the quality of the injury as it was inflicted, not after the effects are ameliorated by medical treatment.”⁷² The court concluded that a rational juror could determine that the act of choking presented a substantial risk of death; thus the “serious harm” element of the charged offense was established.⁷³ Accordingly, since one may not give valid consent to “serious harm,” whether or not the victim had consented to the choking was irrelevant for the defendant’s liability.⁷⁴ What the court apparently overlooked is that, under the state law, a “serious injury” was defined as an *injury* that created a substantial risk of death, not merely an *activity* that created such a risk.⁷⁵ Otherwise, following the court’s logic, a driver who exceeded the speed limit and was stopped by the police before he had a chance to get into any accident would be automatically guilty of causing serious injuries to his passengers even though none of them suffered a scratch.

In one particular context, courts have managed to find “serious harm” in virtually every single case, irrespective of the extent of injuries. Those are cases arising out of consensual sadomasochistic sexual activities. Examples include encounters during which one of the participants was beaten with a belt⁷⁶ or a riding crop,⁷⁷ or cut, burned, stabbed, and dragged by the hair.⁷⁸ In none of those cases did the consenting victim suffer a permanent debilitating injury or run a “substantial risk of death.”

⁶⁹ *Id.*

⁷⁰ *Id.* at *3.

⁷¹ *Id.* at *12–13.

⁷² *Id.* at *10 (citing *Brown v. State*, 605 S.W.2d 572, 575 (Tex. Crim. App. 1980)).

⁷³ *Id.* at *13.

⁷⁴ *Id.* at *12–13.

⁷⁵ *Id.* at *10 (interpreting TEX. PENAL CODE ANN. § 1.07(a)(46), which defines serious bodily injury as an “injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ”).

⁷⁶ See *State v. Collier*, 372 N.W.2d 303, 304 (Iowa Ct. App. 1985).

⁷⁷ See *Commonwealth v. Appleby*, 402 N.E.2d 1051, 1054 (Mass. 1980).

⁷⁸ See *United States v. Arab*, 55 M.J. 508, 514 (A. Ct. Crim. App. 2001).

As the MPC commentary acknowledges, the “iniquity of the conduct involved” tends to affect judicial assessment of the seriousness of the harm.⁷⁹ In *State v. Collier*,⁸⁰ for instance, the victim’s injuries consisted of “a swollen lip, large welts on her ankles, wrists, hips, buttocks, and severe bruises on her thighs.”⁸¹ The defendant was convicted of assault resulting in a serious injury, and the appellate court agreed,⁸² although, as the dissenting judge pointed out, the inflicted bodily harm did not constitute a serious injury within the meaning of the state statute.⁸³

Some state penal codes include physical pain in the definition of “bodily harm.”⁸⁴ In *State v. Guinn*,⁸⁵ for example, the defendant was convicted of inflicting “serious physical injury” in the course of a sexual encounter. There was no evidence that the victim “ever required any medical attention or suffered any wounds of any sort.”⁸⁶ Yet the appellate court sustained the assault conviction, reasoning that the sadomasochistic paraphernalia the defendant used must have caused serious physical pain (candle wax was “hot and it stung” and nipple clamps were “tight and cutting”),⁸⁷ and “serious physical pain” satisfied the definition of “physical injury.”⁸⁸ Naturally, under a statute of

⁷⁹ MODEL PENAL CODE § 2.11 cmt. 2, n.8 (1985). The commentary points out that the MPC provision does not explicitly foreclose resort to such judgments, though the envisioned emphasis is on the amount of injury itself. *Id.*

⁸⁰ *State v. Collier*, 372 N.W.2d 303 (Iowa Ct. App. 1985).

⁸¹ *Id.* at 304.

⁸² *Id.*; cf. *R v. Donovan*, (1934) 2 K.B. 498, 503 (Eng.) (finding “seven or eight red marks” on the body of a participant of a sadomasochistic encounter to be sufficient for an assault conviction); *R v. Emmett*, [1999] EWCA (Crim.) 1710 (Eng.) (finding that bloodshot eyes and a burn, which had completely healed by the time of the trial, sufficed for an assault conviction of a participant of consensual sadomasochistic sex).

⁸³ *Collier*, 372 N.W.2d at 309 (Schlegel, J., dissenting). In addition, courts may impose criminal punishment for consensual bodily harm even when the relevant statute does not require the finding of a “serious” injury. For an implicit revision of this rule, see *People v. Jovanovic*, 700 N.Y.S.2d 156, 168 n.5, 173 (App. Div. 1999) (declaring that consent of the victim may not serve as a defense to assault, yet at the same time reversing the defendant’s conviction of assault in the second degree and third degree because the trial judge improperly excluded evidence indicating the victim’s consent). But see *id.* at 175 (Mazzarelli, J., concurring in part and dissenting in part) (pointing out that the court’s decision goes against the rule adopted in a number of jurisdictions).

⁸⁴ See, e.g., WASH. REV. CODE § 9A.04.110(4)(a) (2004) (“‘Bodily injury,’ ‘physical injury,’ or ‘bodily harm’ means physical pain or injury, illness, or an impairment of physical condition.”); MODEL PENAL CODE § 210.0(2).

⁸⁵ *State v. Guinn*, No 23886-1-II, 2001 Wash. App. LEXIS 502 (Ct. App. Mar. 30, 2001).

⁸⁶ *Id.* at *34.

⁸⁷ *Id.*

⁸⁸ *Id.*

this type, practically any sadomasochistic activity automatically qualifies as criminal.

In sum, courts commonly exaggerate the seriousness of injury or pain and the risk of harm in order to condemn an unwanted activity. Like in other instances when an argument is used not for what it stands but as a proxy for an unspoken consideration, these decisions frequently reveal conceptual manipulation and poor reasoning.

2. What Harmful "Concerted Activities" Are "Not Forbidden by Law"?

Originally, MPC § 2.11(2)(b) recognized consent as a defense for the harmful conduct of the perpetrator and bodily injuries of the victim only when those harms were "reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport."⁸⁹ In 1962, this provision was expanded to add at the end: "or other concerted activity not forbidden by law."⁹⁰ According to the MPC commentary and materials of the American Law Institute ("ALI") proceedings, the new language was intended to cover activities that are "more appropriately characterized as exhibitions than as sports or athletic contests."⁹¹ But did the drafters intend to limit "other concerted activity not forbidden by law" only to exhibitions? The ALI reporters explicitly excluded certain activities, such as a duel⁹² or a scuffle,⁹³ from the protection of the new language in § 2.11(2)(b). It is likely, although not specifically provided, that other harmful, hostile activities, such as hazing, are also not covered by the revised section.⁹⁴ What is less clear is whether *nonhostile* consensual private encounters, such as religious mortification or sadomasochistic sex, may be entitled to legal protection under the MPC.

⁸⁹ MODEL PENAL CODE § 2.11(2)(b) (1985); *see also* 39th Annual Meeting, 39 A.L.I. PROC. 91 (1962) [hereinafter *ALI Proceedings*].

⁹⁰ MODEL PENAL CODE § 2.11(2)(b).

⁹¹ *Id.* cmt. 2, n.10; *see also* *ALI Proceedings*, *supra* note 89, at 92, 97–104 (explaining the need to broaden the language to permit activities like stunt flying or professional wrestling); *State v. Malone*, No. M2000-02265-CCA-R3-CD, 2001 Tenn. Crim. App. LEXIS 901, *9–10 (Crim. App. Nov. 16, 2001) (holding that Tennessee statutes allow consent to serve as a defense only "within the context of sporting activities, and the like, in which two parties agree to engage in conduct where some contact is expected or anticipated").

⁹² *ALI Proceedings*, *supra* note 89, at 101.

⁹³ *Id.* at 99–101.

⁹⁴ *See* Frank J. Wozniak, Annotation, *Validity, Construction, and Application of "Hazing" Statutes*, 30 A.L.R.5th 683, 689 (1995).

Historically, courts have viewed religious flagellation as a lawful activity.⁹⁵ In an 1847 Scottish case, the court said: "In some cases, a beating may be consented to as in the case of a father confessor ordering flagellation; but this is not violence or assault, because there is consent."⁹⁶ The practice still exists in a number of nations with a strong Roman Catholic tradition. The Philippines, for example, is famous for its bloody crucifixion reenactment ceremonies that happen every year on Good Friday and attract large crowds of local and foreign tourists.⁹⁷ Opus Dei, a conservative Catholic movement, encourages "corporal mortification," which can include flagellation done by another person.⁹⁸ "Such acts are said to help bolster self-discipline and recall the suffering of Christ."⁹⁹

In the United States, religious flagellation is practiced mainly in southwestern states.¹⁰⁰ Although courts have said that the law "may prohibit religiously impelled physical attacks,"¹⁰¹ my research has revealed no legal cases, which suggests that religious flagellation has not been subject to criminal prosecution. Moreover, some states have statutes regulating ritual mutilation. The Illinois Criminal Code, for instance, provides:

A person commits the offense of ritual mutilation, when he or she mutilates, dismembers or tortures another person as part of a ceremony, rite, initiation, observance, performance or practice, *and the victim did not consent or under such circumstances that the defendant knew or should have known that the victim was unable to render effective consent.*¹⁰²

The italicized language indicates that if the religious mutilation, dismemberment, or torture is done *with* the consent of the victim, such activity should be lawful.

⁹⁵ LAW COMM'N, CONSENT IN THE CRIMINAL LAW, *supra* note 7, ¶ 10.1.

⁹⁶ *Id.* (quotation omitted).

⁹⁷ See Ronald Hilton, Description of Good Friday Traditions in the Philippines (Apr. 14, 2001), http://wais.stanford.edu/Religion/religion_viernessantophilippines41401.html; Nikko Dizon & Christian Esguerra, *Tourists Here to See Filipinos Crucify Selves*, PHIL. DAILY INQUIRER, Mar. 22, 2005, at A1, available at http://news.inq7.net/nation/index.php?index=3&story_id=31317&published_site=16.

⁹⁸ See David Ruppe, *Opus Dei on the Rise, Conservative Catholic Group Grows Quietly*, DREAMS OF THE GREAT EARTH CHANGES, June 18, 2001, http://www.greatdreams.com/sacred/Opus_Dei.htm.

⁹⁹ *Id.*

¹⁰⁰ See LAW COMM'N, CONSENT IN THE CRIMINAL LAW, *supra* note 7, ¶ 10.4.

¹⁰¹ *United States v. Meyers*, 906 F. Supp. 1494, 1496 (D. Wyo. 1995); see also *Ogletree v. State*, 440 S.E.2d 732, 733 (Ga. Ct. App. 1994) (opining that, even had the victim consented, the severe beating ordered by a pastor would still constitute battery).

¹⁰² 720 ILL. COMP. STAT. 5/12-32(a) (2005) (emphasis added).

At the same time, if the primary motive for the infliction of pain is not religious but sexual, the perpetrator is likely to be convicted of assault.¹⁰³ Attempts to present sadomasochistic sex as “other concerted activity” have failed. In *State v. Collier*, for example, the court held that the legislature did not intend to include sadomasochistic activity in the list of “sport, social or other activity” under the Iowa Code.¹⁰⁴

The discrepancy in the treatment of the two kinds of flagellation is disturbing: in both instances the perpetrator may perform the exact same acts, with consent of the victim, and for the purpose of satisfying the emotional need of the victim. Yet, if that emotional need has a sexual undertone, the perpetrator is likely to be convicted of a felony. It appears that this rule is a typical example of moral legislation intended to punish the perpetrator for causing a “wrong” kind of pleasure.

3. What Is a “Recognized Form of Treatment”?

Finally, under MPC § 2.11(2)(c), consent may serve as a defense if it “establishes a justification for the conduct under Article 3 of the Code.”¹⁰⁵ In fact, Article Three contains only one provision that conditions justifiability of the actor’s conduct on another person’s consent. Section 3.08(4) provides that the use of force toward another is justifiable if the actor is a physician or his assistant and “(a) the force is used for the purpose of administering a recognized form of treatment that the actor believes to be adapted to promoting the physical or mental health of the patient; and (b) the treatment is administered with the consent of the patient.”¹⁰⁶ Thus, under § 2.11(2)(c), consent is a valid defense if the bodily harm was inflicted for the purpose of a “recognized form of treatment” intended to improve the patient’s physical or mental health.¹⁰⁷

Just as it is not easy to define “nonserious” harm, it is hard to draw the line between recognized and experimental forms of treatment.¹⁰⁸ Sometimes judicial characterization depends on the “regulatory status of a product or the novelty of a procedure, while in other

¹⁰³ See, e.g., *People v. Samuels*, 58 Cal. Rptr. 439, 447 (Ct. App. 1967) (“[C]onsent of the victim is not generally a defense to assault or battery, except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing or wrestling.”).

¹⁰⁴ See *State v. Collier*, 372 N.W.2d 303, 307 (Iowa Ct. App. 1985).

¹⁰⁵ MODEL PENAL CODE § 2.11(2)(c) (1985).

¹⁰⁶ *Id.* § 3.08(4).

¹⁰⁷ *Id.*

¹⁰⁸ Ironically, the illustration of such “recognized form of treatment” offered during the

instances an established product or procedure may become experimental simply because a research protocol aims to investigate its use.”¹⁰⁹ A few courts have invalidated as unconstitutionally vague state statutes that criminalized certain medical procedures characterized as “experimental.”¹¹⁰

Examples of the forms of treatment that are currently considered “recognized” reveal the law’s inconsistency. A woman who carries a breast cancer gene may choose to have a preventive mastectomy.¹¹¹ Such radical surgery is considered controversial in medical literature: there is little proof that, for purposes of cancer prevention, it is superior to less extreme and disfiguring alternatives.¹¹² For women with “familial breast cancer syndrome,” a condition indicating a high risk for developing breast cancer,¹¹³ the main advantage of surgery is that it helps to relieve chronic stress and anxiety over the substantial likelihood of developing the disease.¹¹⁴

Yet no amount of emotional pain legitimizes an elective surgery on a patient with Body Integrity Identity Disorder (“BIID”), a rare ailment whose victims seek to become amputees.¹¹⁵ The limited statistics seem to indicate that the quality of life improves dramatically in BIID patients who succeed in their pursuit.¹¹⁶ A surgeon who agrees to perform such an amputation, however, opens himself up to criminal liability because his patient’s consent is legally invalid.¹¹⁷ The BIID patients often compare themselves to those suffering from Gender

discussion of the draft consent provision at the ALI meeting was electric shock therapy in cases of “mental trouble.” See *ALI Proceedings*, *supra* note 89, at 92.

¹⁰⁹ Lars Noah, *Informed Consent and the Elusive Dichotomy Between Standard and Experimental Therapy*, 28 AM. J.L. & MED. 361, 377 (2002).

¹¹⁰ See *Jane L. v. Bangerter*, 61 F.3d 1493, 1500–02 (10th Cir. 1995), *rev’d on other grounds sub nom. Leavitt v. Jane L.*, 518 U.S. 137 (1996); *Margaret S. v. Edwards*, 794 F.2d 994, 999 (5th Cir. 1986) (“The whole distinction between experimentation and testing, or between research and practice, is . . . almost meaningless in the medical context.”); *Lifchez v. Hartigan*, 735 F. Supp. 1361, 1364–66 (N.D. Ill.), *aff’d mem.*, 914 F.2d 260 (7th Cir. 1990).

¹¹¹ See, e.g., Jane E. Brody, *Why Cancer-Free Women Have Breasts Removed*, N.Y. TIMES, May 5, 1993, at C13.

¹¹² Lane D. Ziegler & Stephen S. Kroll, *Primary Breast Cancer After Prophylactic Mastectomy*, 14 AM. J. CLINICAL ONCOLOGY 451, 453 (1991) (discussing controversial nature of prophylactic mastectomy and comparing it with less radical alternatives).

¹¹³ *Id.* at 452.

¹¹⁴ See Mal Bebbington Hatcher et al., *The Psychological Impact of Bilateral Prophylactic Mastectomy: Prospective Study Using Questionnaires and Semistructured Interviews*, 322 BRIT. MED. J. 76, 76 (2001).

¹¹⁵ Editorial, *When It Feels Right to Cut Off Your Leg*, GEELONG ADVERTISER (Austl.), July 4, 2005, at 15.

¹¹⁶ *Id.*

¹¹⁷ But see Tim Bayne & Neil Levy, *Amputees by Choice: Body Integrity Identity Disorder*

Identity Disorder (“GID”), describing the common experience as “being trapped in the wrong body.”¹¹⁸ The law, however, treats the two groups very differently: the GID patients can consent to a sex-change operation, which often involves removal of healthy sexual organs,¹¹⁹ whereas the BIID sufferers cannot consent to amputation of an arm or a leg.¹²⁰

In general, it is somewhat unclear whether an individual can consent to an experimental treatment that involves serious bodily harm or at least a risk of such harm. The commentary to MPC § 3.08 states: “Whether and how far consent should be effective to exclude liability for forms of treatment that are not ‘recognized’ and that involve risk of death or injury is a problem covered as part of the general treatment of consent.”¹²¹ Because the consent section of the MPC by and large does not allow for serious harm,¹²² it appears that, under the MPC, a patient may not validly consent to experimental treatment that involves a risk of a serious injury, even if the putative benefits significantly outweigh the risks.

D. How Do Courts Apply the Rule? Rationales for the Criminalization of Consensual Harm

When the law is ambiguously written and inconsistently applied, one way to make sense of it is to look at the rationales permeating various court decisions. These rationales are intended to justify the state’s interference with the right of an individual to make personal choices. As Paul Roberts states:

At the first stage, the advocate of any particular criminal prohibition needs to supply a good reason, not just for generalized state interference in the lives of individuals, but for that special form of state regulation represented by criminal

and the Ethics of Amputation, 22 J. APPLIED PHIL. 75, 84–85 (2005) (arguing that, as long as people are legally sane, they should be allowed to have their limbs amputated by a surgeon).

¹¹⁸ Carl Elliot, *A New Way to Be Mad*, ATLANTIC MONTHLY, Dec. 2000, at 73, 74.

¹¹⁹ See *G.B. v. Lackner*, 145 Cal. Rptr. 555, 557 (Ct. App. 1978) (“The severity of the problem of transsexualism becomes obvious when one contemplates the reality of the male transsexual’s desperate desire to have normally functioning male genitals removed because the male sex organs are a source of immense psychological distress.”).

¹²⁰ See Annemarie Bridy, *Confounding Extremities: Surgery at the Medico-ethical Limits of Self-Modification*, 32 J.L. MED. & ETHICS 148, 155 (2004) (“To the extent that society and its institutions remain committed to a norm of bodily integrity that excludes the disabled body, it will remain very difficult to collectively imagine that elective amputation could be good medicine for apotemnophiles.”).

¹²¹ MODEL PENAL CODE § 3.08 cmt. 5 (1985).

¹²² *Id.* § 2.11(2)(a).

sanctions: that is, hard treatment (with serious implications for personal autonomy) administered through procedures specially designed to communicate the sting of blame or "censure."¹²³

Of course, state invalidation of an individual's consent presents a problem only so far as consent is voluntary, that is, freely given and informed.¹²⁴ Consent obtained by duress or fraud regarding the nature of the perpetrator's act is void *ab initio*.¹²⁵ Certain groups of people (e.g., children, the mentally ill, or the intoxicated) in most instances are deemed incapable of granting valid consent.¹²⁶ For example, a minor's consent to sex is legally invalid.¹²⁷

Thus, if there is a problem with the quality of consent or the decision-making power of the consenter, the court should declare the consent null and void. Such decision enforces rather than impedes the victim's autonomy.¹²⁸ In contrast, paternalistic disregard of private arrangements made by fully responsible agents encroaches upon personal autonomy, which, at least in the liberal tradition, is believed to be essential for a free society.¹²⁹

¹²³ Roberts, *supra* note 8, at 217.

¹²⁴ See, e.g., Alexander, *supra* note 23, at 166–67 (observing that, to be able to give valid consent, one must be of a certain age, lack serious mental disease, irrationality, or intoxication, and have a certain minimum degree of self-control).

¹²⁵ W.E. Shipley, Annotation, *Consent as Defense to Charge of Criminal Assault and Battery*, 58 A.L.R.3d 662, 666 (2005) (“[C]onsent obtained by fraud, or from one without capacity to consent, will not be a defense to a charge of criminal assault and battery.”).

¹²⁶ See FEINBERG, HARM TO SELF, *supra* note 23, at 316 (“If he is so impaired or undeveloped cognitively that he doesn't really know what he is doing, or so impaired or undeveloped volitionally that he cannot help what he is doing, then no matter what expression of assent he may appear to give, it will lack the effect of genuine consent.”).

¹²⁷ See, e.g., MODEL PENAL CODE § 213.1 cmt. 6 (explaining that prepubescent children are “plainly incapable of giving any kind of meaningful consent to intercourse and manifestly inappropriate objects of sexual gratification”).

¹²⁸ See, e.g., *People v. Kevorkian*, 527 N.W.2d 714, 750–51 (Mich. 1994) (Levin, J., concurring in part and dissenting in part) (“Where an otherwise healthy person is depressed or mentally disturbed, the personal liberty interest is weak, and the state has a strong interest in protecting the person's interests in life.”).

¹²⁹ See JOHN STUART MILL, ON LIBERTY (1859), reprinted in *THE NATURE AND PROCESS OF LAW* 518 (Patricia Smith ed., 1993). Mill wrote:

Whenever . . . there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law.

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

For that reason, courts and policymakers have proposed various nonpaternalistic rationales for invalidating one's consent to personal harm. The most common of them can be organized around two considerations: "harm to self," and "harm to others." The first theory presumes that the apparent consent was not truly voluntary and rational and, therefore, is invalid. The second maintains that, unless the consensual injurious act is prohibited, society will suffer significant harm.

1. *Harm to Self: Victim's Apparent Consent Is Legally Invalid*

a. *The Victim Was Not Rational*

From time to time, courts deny the validity of factual consent, arguing that it was irrational or involuntary. In *People v. Samuels*,¹³⁰ for example, the defendant was convicted of aggravated assault for whipping an apparently willing victim in the course of production of a pornographic movie. The case was complicated by the fact that the victim could not be located to confirm his consent.¹³¹ The court dismissed the very possibility of such consent, however, saying: "It is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily injury."¹³²

The *Samuels* court's argument is a perfect example of circular reasoning: a person who consents to X is insane because one has to be insane to consent to X. After the victim's insanity is thus established, the conviction follows automatically because consent of an insane person is invalid.

It is easy to ridicule this logic. Yet there are situations when almost anyone would wonder about the rationality of the victim who consented to that kind of harm. For example, how rational was Brandes when he consented to being killed and eaten by Meiwes?¹³³ His consent to cutting off his penis some time before his death was hardly valid: by that time Brandes had consumed twenty sleeping tablets and half a bottle of schnapps.¹³⁴ But when he agreed to the killing, Bran-

Id. at 524.

¹³⁰ *People v. Samuels*, 58 Cal. Rptr. 439, 442 (Ct. App. 1967).

¹³¹ *Id.* at 443.

¹³² *Id.* at 447.

¹³³ See Finn, *supra* note 1.

¹³⁴ See Luke Harding, *Victim of Cannibal Agreed to Be Eaten*, GUARDIAN UNLIMITED (U.K.), Dec. 4, 2003, <http://www.guardian.co.uk/germany/article/0,2763,1099477,00.html>.

des was not intoxicated.¹³⁵ He was informed of every detail of the plan and gave it his full approval, as a video made by Meiwes shows.¹³⁶ Brandes was a mature man and an educated professional.¹³⁷ He was not clinically insane, although he apparently suffered from a “strong desire for self-destruction.”¹³⁸

This story raises a question of whether the same level of rationality or competency should be required for effective consent to bodily harm of different proportions, e.g., rough sex on the one hand, and a radical surgery on the other.¹³⁹ The Brandes example also reveals the empirical fallacy of the *a priori* assumption that anyone who consents to pain or injury is crazy: Brandes was not.¹⁴⁰ This is a disturbing thought. We can limit the defense of consent so as to require a written notarized request by the victim as well as the victim’s evaluation by several independent, court-appointed psychiatrists, but sooner or later we are doomed to encounter a mentally competent person who would wish to be killed or injured.

We may or may not sympathize with that wish. For example, both doctors and laypeople have conflicting views on preventive mastectomy and physician-assisted suicide. However, unless we want the character of our society to change dramatically, we may not assert that a person is insane or irrational merely because we disagree with his decisions. Coordinating the required level of rationality with the amount (and kind) of the desired harm is likely to be a good practical solution for the absolute majority of problematic cases. Still, with respect to the remaining small group of cases in which rational people desire socially objectionable self-regarding harm, we would either have to permit the harm or find a better argument for prohibiting it.

b. Consent Was Not Voluntary

Some courts and commentators have expressed concern that under certain circumstances, people may not act entirely voluntarily, even when they are not subject to formal duress or coercion.¹⁴¹ This,

¹³⁵ *Id.*

¹³⁶ *Id.*

¹³⁷ *Id.*

¹³⁸ *Id.*

¹³⁹ See Alexander, *supra* note 23, at 167 (discussing similar issues).

¹⁴⁰ See Harding, *supra* note 134.

¹⁴¹ See, e.g., Simons, *Assumption of Risk*, *supra* note 23, at 214 (advocating a change in the traditional tort doctrine of assumption of risk to reflect scope of information and choices available to an individual); Wright, *supra* note 23, at 1412–22 (discussing social, economic, and psychological considerations that can impair one’s freedom of choice).

for example, was a matter that troubled the court in the Canadian case of *R v. Carriere*:¹⁴²

[T]he “consent” in many of these “fair fights” with fists is often more apparent than real. Challengers are, most often, those who feel assured that they can overwhelm opponents. Those who accept the challenge often do so, not because they wish to fight, or truly consent to it, but because they fear being branded as cowards by their peers.¹⁴³

Similar issues have been raised in connection with the voluntariness of consent in the sadomasochistic context. Lord Templeman in *R v. Brown* classified consent of the masochists in the group as “dubious or worthless,” suggesting that these individuals were younger than the men on the sadist side and psychologically vulnerable.¹⁴⁴

But certainly the most serious concern about the rationality and voluntariness of consent arises in connection with assisted suicide and mercy killings. Those who attempt suicide usually suffer from depression or other mental disorders.¹⁴⁵ Often people feel particularly vulnerable due to constant pain, and this vulnerability may be exploited by others.¹⁴⁶ Courts have been duly suspicious of the claims that a sick individual has voluntarily requested death.¹⁴⁷

In *Gilbert v. State*,¹⁴⁸ the appellate court affirmed the defendant’s first-degree murder conviction for shooting his ill wife:

It is ridiculous and dangerous to suggest . . . that a constructive mercy will was left when [the wife] (or anyone else who is sick) said/says “I’m so sick I want to die.” Such a holding

¹⁴² *R v. Carriere*, [1987] 35 C.C.C. (3d) 276, 286–87 (Can.).

¹⁴³ *Id.*

¹⁴⁴ *R v. Brown*, (1994) 1 A.C. 212 (H.L.).

¹⁴⁵ See *Washington v. Glucksberg*, 521 U.S. 702, 730 (1997). The opinion cited the finding by the New York Task Force on Life and the Law that “more than 95% of those who commit[ted] suicide had a major psychiatric illness at the time of death.” *Id.*

¹⁴⁶ See generally Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. RICH. L. REV. 1, 2–3 (1996) (opposing euthanasia and physician-assisted suicide on both moral and practical grounds). The authors cite the New York State Task Force on Life and the Law to observe that “[i]llness is a quintessential state of vulnerability; it entails a loss of confidence in one’s body and one’s future.” *Id.* at 28 (internal citation omitted). They also express concern that physicians may influence their patients’ choices. *Id.* at 28–29.

¹⁴⁷ See, e.g., *Glucksberg*, 521 U.S. at 738 (O’Connor, J., concurring) (“The difficulty in defining terminal illness and the risk that a dying patient’s request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide.”).

¹⁴⁸ *Gilbert v. State*, 487 So. 2d 1185 (Fla. Dist. Ct. App. 1986).

would judicially sanction open season on people who, although sick, are also chronic complainers.¹⁴⁹

The court was right to demand compelling evidence of the victim's consent. The legal system should guard people, especially those in a vulnerable position, from abuse. Just as with the requirement of rationality, the riskier the conduct and the more irrevocable the risk of harm, the greater degree of voluntariness that should be required.¹⁵⁰ Particularly dangerous or irreparable decisions (e.g., consensual homicide) may even be presumed involuntary until proven otherwise.¹⁵¹

The fear of abuse, however, may not be the basis of a rule prohibiting consensual harm altogether. As I argued elsewhere, it is important to distinguish a rule from an abuse of that rule.¹⁵² The abuse is something that is *not* the rule, something that is *outside* of the rule. Practically anything, even a good thing, can be abused and turned into a bad thing, but this does not justify prohibiting the good thing itself. When the reason for a criminal ban lies in an uncertainty regarding the validity (voluntariness and rationality) of an individual's consent, the law should be directed at those uncertainties by demanding persuasive proof of the valid consent and not by taking away the power to give it.¹⁵³

c. People Are Incapable of Rational Voluntary Consent

Distinguished from the concerns about the validity of consent in specific circumstances is a truly paternalistic argument that people are inherently incapable of rational and voluntary choices and thus should not be trusted to make important decisions about their lives. For instance, H.L.A. Hart took this position and rejected John Stuart Mill's vision of liberty, citing numerous factors that "diminish the signifi-

¹⁴⁹ *Id.* at 1191.

¹⁵⁰ See FEINBERG, HARM TO SELF, *supra* note 23, at 117–21.

¹⁵¹ *Id.* at 124–27. Feinberg wrote:

In the cases of "presumably nonvoluntary behavior," what we "presume" is either that the actor is ignorant or mistaken about what he is doing, or acting under some sort of compulsion, or suffering from some sort of incapacity, *and* that if that were not the case, he would choose not to do what he seems bent on doing now.

Id. at 124.

¹⁵² Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 402 (2005) [hereinafter Bergelson, *Victims*].

¹⁵³ See, e.g., Franklin G. Miller et al., *Regulating Physician-Assisted Death*, 331 NEW ENG. J. MED. 119, 120 (1994) (arguing in favor of legislation legitimizing voluntary euthanasia upon adoption of "clear criteria, rigorous procedures, and adequate safeguards" protecting individuals' right to decide for themselves).

cance to be attached to an apparently free choice or to consent.”¹⁵⁴ Hart wrote:

Choices may be made or consent given without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when the judgment is likely to be clouded; or under inner psychological compulsion; or under pressure by others of a kind too subtle to be susceptible of proof in a law court.¹⁵⁵

Few would disagree that people can make “bad” decisions (no matter how we define this term) and that their choices are seldom, if ever, free from various influences. Moreover, as Robin West persuasively argued in her critique of Richard Posner’s rationalistic vision of the world, people are often driven by self-destructive forces, desires of failure or humiliation, and the ultimate yearning for authority.¹⁵⁶ In many instances, people’s consent is socially predetermined, and choices people make may not be in their best interest.¹⁵⁷

These are all potent arguments in support of the claim that people’s freedom of choice is not absolute. However, even limited as it is, that freedom has enormous personal and public value. We associate civil rights with people’s ability to control their lives and make social and political choices. The very concept of responsibility would lose sense if we took away people’s right to make their own mistakes and deal with the consequences. Finally, the fact that people’s choices may be imperfect does not mean that Big Brother is more likely to make better choices for them. As Paul Roberts correctly pointed out:

¹⁵⁴ H.L.A. HART, *LAW, LIBERTY AND MORALITY* 33 (1963).

¹⁵⁵ *Id.*

¹⁵⁶ See Robin West, *Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner*, 99 HARV. L. REV. 384, 384 (1985). Criticizing Posner’s simplistic understanding of human nature and comparing Posner’s vision of the world with Kafka’s, West wrote:

Kafka’s characters usually do what they do—go to work in the morning, become lovers, commit crimes, obey laws, or whatever—not because they believe that by doing so they will improve their own well-being, but because they have been told to do so and crave being told to do so. Whereas Posner’s characters relentlessly pursue autonomy and personal well-being, Kafka’s characters just as relentlessly desire, need, and ultimately seek out authority.

Id. at 387.

¹⁵⁷ See, e.g., Mary Gibson, *Rationality*, 6 PHIL. & PUB. AFF. 193, 214–16 (1977) (discussing how people’s choices are determined by their socialization); Robin L. West, *The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory*, 3 WIS. WOMEN’S L.J. 81, 96–97 (1987) (arguing that women consent and redefine relationships as consensual in order not to be violated).

Paternalism at its best entails well-meaning and justified interference with autonomous choice. But if in practice things do not work out for the best—if, for example, one's leaders are incompetent, corrupt, stupid, or evil—paternalism is the royal road to totalitarianism, since it invites government to substitute for its citizens' expressed preferences that which the state judges they "really" (objectively) want or need. This is a recipe for tyranny.¹⁵⁸

To summarize, laws that serve to ensure that people's harmful, self-regarding decisions are rational and voluntary (i.e., truly reflect their wishes) promote the values of liberty and autonomy. Such laws should be balanced to require higher proof of rationality and voluntariness as the amount of harm increases. At the same time, laws that deny people the power to make self-regarding decisions that hurt no one but themselves significantly encroach upon these people's autonomy and, in the absence of other reasons, are unacceptable in a free, democratic society.

2. *Harm to Others: Victim's Consent May Be Overridden by Other Considerations*

Most of the nonpaternalistic judicial arguments against private arrangements involving bodily harm draw on Mill's liberal theory and maintain that it is not the individual whom the state paternalistically seeks to protect from his own unwise decisions; it is rather society at large who will suffer if the individual is permitted to act as he wishes.¹⁵⁹ As Joel Feinberg, whose famous four-volume treatise seeks to apply Mill's principles to modern law, noted:

It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) *and* there is probably no other means that is equally effective at no greater cost to other values.¹⁶⁰

The long list of harms an individual can inflict upon society by consenting to physical injury or death includes military, economic, socio-political, and moral harms.

¹⁵⁸ Roberts, *supra* note 8, at 228.

¹⁵⁹ See MILL, *supra* note 129, at 518 ("[T]he only purpose for which power can rightfully be exercised over a member of a civilized community against his will is to prevent harm to others.").

¹⁶⁰ JOEL FEINBERG, HARM TO OTHERS 26 (1984) [hereinafter FEINBERG, HARM TO OTHERS] (defining the harm principle).

a. *Military Service*

Following the common-law tradition,¹⁶¹ some courts continue to invalidate consent to personal harm, opining that a person may not consent to an act that would deprive society of his military service.¹⁶² In *State v. Bass*,¹⁶³ the court remarked that the “commonwealth needs the services of its citizens quite as much as the kings of England needed the services of theirs.”¹⁶⁴ Considering the realities of the modern-day military operations, this argument is very much out of date.¹⁶⁵

In addition, military courts have found service-related arguments persuasive for invalidating consent to sadomasochistic activities, even when the harmed person was a civilian spouse. One cited reason was the correlation between “family violence or dysfunction and soldiers’ ability to properly perform their military duties.”¹⁶⁶ Another reason was the military’s interest in the servicemen’s reputation: some of the wife’s bruises were visible and could “lead friends and neighbors to form a negative opinion of her soldier-husband.”¹⁶⁷ The Army certainly has an interest in the well-being and good service of its members. Yet criminal sanctions are hardly appropriate when one’s crime amounts merely to jeopardizing the quality of one’s work and one’s reputation among neighbors.

b. *Public Charge*

A more general argument in favor of the state’s right to strike individuals’ self-regarding decisions is based upon the risk that these individuals would become a “public charge.”¹⁶⁸ Courts have held that the state has an “interest in preventing citizens who are capable of being productive members of society from disabling themselves if they or their dependents would be forced to rely either on the gifts of others or on the state itself for support.”¹⁶⁹

¹⁶¹ See *supra* notes 39–40 and accompanying text.

¹⁶² See Note, *Consent in the Criminal Law: Violence in Sports*, 75 MICH. L. REV. 148, 165 (1976).

¹⁶³ *State v. Bass*, 120 S.E.2d 580 (N.C. 1961).

¹⁶⁴ *Id.* at 586.

¹⁶⁵ See, e.g., *R v. Brown*, (1994) 1 A.C. 212 (H.L.) (Lord Mustill’s opinion) (pointing out that the military service rationale for punishing consensual bodily harm “is now quite out of date”).

¹⁶⁶ *United States v. Arab*, 55 M.J. 508, 517 (A. Ct. Crim. App. 2001).

¹⁶⁷ *Id.*

¹⁶⁸ See, e.g., *Bass*, 120 S.E.2d at 586 (“Our government is deeply concerned, financially and otherwise, for the health of its citizens and that they not become a public charge.”).

¹⁶⁹ Note, *supra* note 162, at 165.

Joel Feinberg suggested an autonomy-respecting argument that would allow the state to intervene in its citizens' private decisions.¹⁷⁰ He points out that we cannot let people gamble recklessly with their lives and then turn our backs on them because that would "render the whole national character cold and hard."¹⁷¹ To avoid that harm, society is forced to intervene:¹⁷²

Realistically, we just can't let people wither and die in front of our eyes; and if we intervene to help, as we inevitably must, it will cost us a lot of money. There are certain risks then of an apparently self-regarding kind that persons cannot be permitted to run, if only for the sake of others who must either pay the bill or turn their backs on intolerable misery.¹⁷³

The problem with this argument lies in its assumption that people may not behave in a way that imposes moral or economic costs on society, and that society is justified in restricting people's rights solely on utilitarian grounds. According to this logic, people who live below the poverty line may be criminally banned from having children, and the mentally retarded may be sterilized against their will. This is exactly the kind of reasoning that Justice Holmes used in his infamous *Buck v. Bell*¹⁷⁴ opinion: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind."¹⁷⁵ Needless to say, society that respects its members may not use this logic as a basis for its social policies.

c. *Breach of Peace*

Another common argument that has been successfully invoked for the past three hundred years is that the state has the right to intervene in consensual activities if they constitute a breach of peace.¹⁷⁶

¹⁷⁰ See FEINBERG, HARM TO SELF, *supra* note 23, at 80–81.

¹⁷¹ *Id.* at 81.

¹⁷² *Id.*

¹⁷³ *Id.*

¹⁷⁴ *Buck v. Bell*, 274 U.S. 200 (1927).

¹⁷⁵ *Id.* at 207 (upholding a Virginia statute providing for involuntary sexual sterilization of committed "feeble minded" patients).

¹⁷⁶ See *Wright v. Starr*, 179 P. 877, 877–78 (Nev. 1919) (holding that consent of the parties is invalid because fighting is a wrong committed against the public peace); *R v. Coney*, (1882) 8 Q.B.D. 534 (Eng.) (holding that individuals may not consent to prize fights and "by such consent, destroy the right of the Crown to protect the public and keep the peace"); *Matthew v.*

Duels and prize fights have been held to threaten peace; therefore, an agreement to fight has been held invalid.¹⁷⁷ Similarly, the defense of mutual combatants has been rejected because unregulated fights disturb public order.¹⁷⁸ The reasoning behind this policy has been that when assaults are committed publicly or in the presence of others, they tend to incite riotous and disorderly or offensive behavior.¹⁷⁹

To the extent this argument is supported by data, it may have merit. But then sports that generate violence should be outlawed as well, because spectator violence is a major sports-related problem.¹⁸⁰ To be fair, the law has to be consistent. Moreover, as the English Court of Appeals has admitted, in the times of a well-established police force and numerous statutory offenses directed at specific instances of public disorder, the “breach of peace” rationale for overriding people’s autonomy is outdated and unpersuasive.¹⁸¹

d. Social Utility

To distinguish between sports and unregulated fights, some courts have invoked the rationale of “social utility.” That rationale validates or invalidates certain consensual behavior based on the resulting harms and benefits to the public. For example, the common law recognizes lawful sports calculated to give bodily strength, skill, and activity, and “to fit people for defence, public as well as personal, in time of need.”¹⁸² Conversely, “it is not in the public interest that people

Ollerton, (1692) 90 Eng. Rep. 438 (K.B.) (holding that, if one licensed another to beat him, such license is no defense because it is against the peace).

¹⁷⁷ See *Bundrick v. State*, 54 S.E. 683, 685 (Ga. 1906) (“If two men deliberately agree to fight a duel with deadly weapons, and the duel is fought pursuant to the agreement and one of them is killed, his slayer will be guilty of murder.”); *Bissell v. Starzinger*, 83 N.W. 1065, 1066 (Iowa 1900) (holding that consent is not a defense for fighting based on the public policy against breaches of the peace).

¹⁷⁸ See, e.g., *United States v. Wilhelm*, 36 M.J. 891, 893 (A.F. Ct. Crim. App. 1993) (holding that both parties to a mutual combat are wrongdoers, thereby precluding a claim that each participant in the affray consented to the touching of his person).

¹⁷⁹ See, e.g., *State v. White*, 28 A. 968, 970 (R.I. 1894) (“‘Besides actual breaches of the peace,’ . . . ‘anything that tends to provoke or excite others to break it is an offense of the same denomination.’” (quoting WILLIAM BLACKSTONE, 4 COMMENTARIES *150)).

¹⁸⁰ See, e.g., Ismat Abdal-Haqq, *Violence in Sports*, ERIC DIGEST 1-89 (1989), available at <http://www.ericdigests.org/pre-9214/sports.htm> (observing that group solidarity with players and coaches leads fans to view the opposing teams as enemies and “fosters hostility towards the ‘outgroup’ and, by extension, [to] its supporters, geographical locale, ethnic group, and perceived social class”).

¹⁸¹ A-G Reference, [1981] A.C. 715, 719 (Q.B.).

¹⁸² *Commonwealth v. Collberg*, 119 Mass. 350, 353 (1876).

should try to cause, or should cause, each other actual bodily harm for no good reason.”¹⁸³

Whether the utility of violent sports is high enough to justify their special treatment is an open question.¹⁸⁴ Quoting a British judge, it is “very strange that a fight in private between two youths where one may, at most, get a bloody nose should be unlawful, whereas a boxing match where one heavyweight fighter seeks to knock out his opponent and possibly do him very serious damage should be lawful.”¹⁸⁵

Not surprisingly, sadomasochistic activities have not passed the utility test.¹⁸⁶ In that context, a person may not give valid consent even to minor injuries, such as those caused by hot wax or needles.¹⁸⁷ Courts are much more tolerant, however, if they can find a reason, other than sexual pleasure, behind the injurious acts. In a British case, a man was convicted of assaulting his wife when, at her request, he branded his initials on her buttocks with a hot knife.¹⁸⁸ The appellate court reversed the conviction, finding what the defendant did rather akin to tattooing and, therefore, legitimate.¹⁸⁹

Aside from the obvious problems, such as inconsistency of treatment and poorly camouflaged moralism, the social utility rationale is hardly defensible even on the most basic level. It presumes that the state has the right to criminalize any conduct merely for not being useful to society. This presumption extends dangerously the “moral limits” of criminal law. Consider, for instance, one of the biggest public health problems in the United States today: the fact that a significant portion of the population is overweight or obese. Should this fact allow the state to criminalize possession and distribution of unhealthy food substances?

¹⁸³ *A-G Reference*, [1981] A.C. at 719.

¹⁸⁴ See, e.g., *R v. Jobidon*, [1991] S.C.R. 714, 762 (Can.) (“Our social norms no longer correlate strength of character with prowess at fisticuffs.”).

¹⁸⁵ *R v. Brown*, (1994) 1 A.C. 212, 278 (H.L.) (Lord Slynn’s opinion).

¹⁸⁶ *R v. Brown*, (1992) 2 All E.R. 552, 559 (C.A.) (“[T]he satisfying of sado-masochistic libido does not come within the category of good reason . . .”).

¹⁸⁷ *State v. Guinn*, No. 23886-1-II, 2001 Wash. App. LEXIS 502, at *33–34 (Ct. App. Mar. 30, 2004).

¹⁸⁸ *R v. Wilson*, [1997] A.C. 47, 50 (Q.B.) (explaining that the defendant assisted his wife in “what she regarded as the acquisition of a desirable piece of personal adornment, perhaps in this day and age no less understandable than the piercing of nostrils or even tongues for the purposes of inserting decorative jewellery”).

¹⁸⁹ *Id.*

e. Social Order and Respect to Law

The rationale of social order and respect to law typically is used to explain why one set of rules is “good for all” and why the state may not permit individuals to contract around the law. In *State v. Brown*,¹⁹⁰ an alcoholic wife and her husband agreed that, every time the wife became drunk, the husband would beat her up.¹⁹¹ As problematic as this arrangement is, it was invalidated not because of the apparent inadequacy of consent given by the wife (an alcoholic, quite likely suffering from the battered-spouse syndrome, and more likely than not objecting to the beating at the very time of the beating). Had the court convicted the husband because it found that the wife’s consent was either not given voluntarily or given voluntarily but later revoked, such a decision would have been consistent with recognition of personal autonomy, a key category underpinning criminal responsibility.

Instead, the court expressed complete indifference to the circumstances surrounding the wife’s consent, saying that, in a criminal prosecution, “there is more at stake than a victim’s rights.”¹⁹² The court held that “[t]o allow an otherwise criminal act to go unpunished because of the victim’s consent would not only threaten the security of our society but also might tend to detract from the force of the moral principles underlying the criminal law.”¹⁹³

Preserving the rule of law certainly has public value. Respect for law on each level of governance is the essence of a legal society. That respect, however, would only suffer if citizens perceive laws applied in particular cases as unfair or unnecessarily intrusive. The appellate court in *Wilson* (the case in which a man was convicted for branding his initials on his wife’s buttocks),¹⁹⁴ reversed the conviction, prudently observing that “[c]onsensual activity between husband and wife, in the privacy of the matrimonial home, is not, in our judgment, normally a proper matter for criminal investigation, let alone criminal prosecution.”¹⁹⁵

Suppose we change the facts in *Brown* to eradicate doubts about the validity of the alcoholic wife’s consent. Suppose she is not an alcoholic. Instead, assume she is a deeply religious woman, like the one

¹⁹⁰ *State v. Brown*, 364 A.2d 27 (N.J. Super. Ct. Law Div. 1976).

¹⁹¹ *Id.* at 28.

¹⁹² *Id.*

¹⁹³ *Id.* at 31–32.

¹⁹⁴ See *supra* note 188 and accompanying text.

¹⁹⁵ *R v. Wilson*, [1997] A.C. 47, 50 (Q.B.).

sympathetically described by the U.K. Law Commission in a consultation paper about consent in criminal law:

She is on the liberal edge of the Roman Catholic church and was catechised in the pre-Vatican II church. She takes her religion seriously. . . .

For many years she has occasionally found self-mortification the appropriate penance, if she has behaved in a way that falls gravely short of what a committed Christian faith involves. . . . Now that she is married, her husband helps her. He inflicts an adequate level of pain to ensure that the punishment is full and effective. As she put it, the threshold for "actual bodily harm" is clearly exceeded.¹⁹⁶

People may approve or disapprove of the way this couple practices religion. However, under the current law, both in theory and in practice, the "religious" husband is not guilty of any offense. Comparing the two situations, I suggest that the rationale of *Brown* is misleading and the real question the court should have dealt with was the highly suspicious character of the wife's consent to beating rather than an individual's ability to consent to beating as such.

By invalidating private consensual arrangements that have no significant public impact, society disempowers and alienates its citizens, often jeopardizing the very values it seeks to protect. It is well documented that the public's view of consensual harm differs dramatically from the one promoted by law. A famous study of the American jury has shown that from the jury's perspective, "insofar as the victim is disqualified from complaining, there is no cause for intervention by the state and its criminal law."¹⁹⁷ As a result, jurors tend to use the power of nullification, disregarding both the formal instructions and their own oath to follow these instructions, when they perceive that the law goes against the community's principles of appropriate liability and punishment.¹⁹⁸

f. Immorality

The immorality argument¹⁹⁹ is similar to the "social order and respect to law" argument. American courts have used this argument

¹⁹⁶ LAW COMM'N, CONSENT IN THE CRIMINAL LAW, *supra* note 7, ¶¶ 10.5–10.6.

¹⁹⁷ HARRY KALVEN, JR. & HANS ZEISEL, THE AMERICAN JURY 193–347 (Neill H. Alford, Jr. et al. eds., Spec. Ed. 1993) (1966).

¹⁹⁸ See generally Paul H. Robinson & John M. Darley, *The Utility of Desert*, 91 NW. U. L. REV. 453, 457 (1997) (proposing reforms to enhance the criminal system's moral credibility).

¹⁹⁹ Here I address only the immorality argument within the paradigm of "harm to others." It should be distinguished from the argument promoted by legal moralists, according to whom an

primarily to ban perceived sexual transgressions. Historically, examples of moral legislation criminalizing consensual conduct have included laws against sodomy, fornication, bigamy, adultery, adult incest, and prostitution. In addition, courts have routinely disqualified sadomasochistic activities from any defense or statutory exclusion. In *State v. Collier*, for example, the court opined: “[I]t is obvious to this court that the legislature did not intend [to legitimize] an activity which has been repeatedly disapproved by other jurisdictions and considered to be in conflict with the general moral principles of our society.”²⁰⁰

Until recently, there has been little doubt that protecting morality, even within private relationships of grown-up citizens, is a legitimate state interest.²⁰¹ Lately, however, the immorality rationale has started to lose legal ground. In *Lawrence v. Texas*,²⁰² the Supreme Court invalidated antisodomy laws and overturned its conflicting earlier decision, holding: “*Bowers* was not correct when it was decided, and it is not correct today.”²⁰³ The Court admitted that for centuries homosexual conduct was condemned as immoral, and for many people it is still completely unacceptable.²⁰⁴ Yet, these considerations were held not to be sufficient for criminal prosecution.²⁰⁵

It is noteworthy that at the time the Court decided *Bowers v. Hardwick*,²⁰⁶ twenty-four states and the District of Columbia criminalized consensual sodomy.²⁰⁷ Logically, if *Bowers* was a wrong decision, despite the legislative condemnation of sodomy by half of the nation,

act may be criminalized simply because it is immoral. See *infra* notes 289–96 and accompanying text.

²⁰⁰ *State v. Collier*, 372 N.W.2d 303, 307 (Iowa Ct. App. 1985) (affirming conviction for assault stemming from sadomasochistic sexual activity).

²⁰¹ See, e.g., *Bowers v. Hardwick*, 478 U.S. 186, 196 (1986) (upholding constitutionality of antisodomy laws), *overruled by* *Lawrence v. Texas*, 539 U.S. 558 (2003); see also *Williams v. Pryor*, 240 F.3d 944, 949 (11th Cir. 2001) (citing *Bowers* in upholding Alabama’s prohibition on the sale of sex toys on the ground that safeguarding public morality is a legitimate government interest).

²⁰² *Lawrence v. Texas*, 539 U.S. 558 (2003).

²⁰³ *Id.* at 578.

²⁰⁴ *Id.* at 571.

²⁰⁵ *Id.* (“Our obligation is to define the liberty of all, not to mandate our own moral code.” (quotation omitted)); see also *R v. Brown*, (1994) 1 A.C. 212, 219 (H.L.) (“There is a realm of sexual behaviour which, although the majority of people would condemn on moral grounds, should not be the subject of the criminal law.”).

²⁰⁶ *Bowers v. Hardwick*, 478 U.S. 186 (1986), *overruled by* *Lawrence*, 539 U.S. 558.

²⁰⁷ *Bowers*, 478 U.S. at 193–94.

then the *Collier* court's deference to the moral disapproval of sado-masochism in other jurisdictions may be equally unwarranted.²⁰⁸

Criticizing the Court's changed views in *Lawrence*, Justice Scalia wrote in his dissenting opinion:

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are "immoral and unacceptable"—the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. *Bowers* held that this *was* a legitimate state interest. The Court today reaches the opposite conclusion This effectively decrees the end of all morals legislation.²⁰⁹

Indeed, the *Lawrence* opinion seems to prohibit any legislation adopted on purely moral grounds. Some of the laws listed by Justice Scalia (e.g., against fornication, adultery, and, to some extent, adult incest) had been repealed even prior to *Lawrence*.²¹⁰ The *Lawrence* decision has added strength to the argument that "immorality" alone is insufficient to rationalize prosecution for private intimate conduct by consenting adults, and it has been cited, for example, to strike down laws criminalizing "fornication" by unmarried partners.²¹¹

Yet, in other contexts featured in Justice Scalia's parade of horrors, such as incest or polygamy, *Lawrence* has not had much impact.²¹² In *State v. Van*,²¹³ the Supreme Court of Nebraska found *Lawrence* inapplicable to sadomasochistic activities, explaining that, in that decision, the U.S. Supreme Court "did not extend constitutional protection to *any* conduct which occurs in the context of a consensual

²⁰⁸ This is particularly so if we consider that researchers estimate that five to ten percent of the U.S. population engages in sadomasochistic sex on at least an occasional basis. See JUNE M. REINISCH & RUTH BEASLEY, KINSEY INSTITUTE NEW REPORT ON SEX: WHAT YOU MUST KNOW TO BE SEXUALLY LITERATE 162-63 (Debra Kent ed., 1990).

²⁰⁹ *Lawrence*, 539 U.S. at 599 (Scalia, J., dissenting) (citations omitted).

²¹⁰ See N.J. STAT. ANN. § 2A:114-2 (criminalizing incest), *repealed by* 1978 N.J. Laws c.95 § 2C:98-2 (1979); R.I. GEN. LAWS §§ 11-6-3 to -4 (criminalizing fornication and incest), *repealed by* 1989 R.I. Pub. Laws 563; VT. STAT. ANN. tit. 13, §§ 201, 202 (criminalizing adultery), *repealed by* 1981 Vt. Acts & Resolves 223, § 24.

²¹¹ See *Martin v. Zitherl*, 607 S.E.2d 367, 370-71 (Va. 2005) (holding that a statute prohibiting sexual contact between unmarried persons is unconstitutional under *Lawrence*).

²¹² See, e.g., *Bronson v. Swensen*, 394 F. Supp. 2d 1329, 1334 (D. Utah 2005) ("[T]his court cannot hold that *Lawrence* can be read to require the State of Utah to give formal recognition to a public relationship of a polygamous marriage."); *Beard v. State*, No. M2004-02227-CCA-R3-PC, 2005 Tenn. Crim. App. LEXIS 568, at *6 (Crim. App. June 7, 2005) ("[I]ncestuous relationships are not protected by our state constitution and the *Lawrence* decision in no way alters our holding . . .").

²¹³ *State v. Van*, 688 N.W.2d 600 (Neb. 2004).

sexual relationship,”²¹⁴ but only to such that does not involve injury to a person or abuse of an institution protected by law.²¹⁵

To sum up various “public harm” rationales, it appears rather uncontroversial that the state may legitimately criminalize public behavior to the extent it harms or offends others. Therefore, laws directed at conduct that constitutes a public nuisance or is likely to incite violence are completely justifiable.²¹⁶ As for private conduct between consenting adults, the standard rationales cited by courts do not seem compelling.

In addition to specific flaws discussed above, these rationales do not explain one major contradiction. If we truly criminalize certain behavior in order to avoid negative consequences to society, why is an individual free to cause himself all the same harms and not be liable? Neither attempted suicide nor any form of self-inflicted torture or mayhem is criminally punishable today.²¹⁷

One might argue that by criminalizing assistance to harm, we significantly reduce the number of instances when that harm is actually done.²¹⁸ That may be true. Yet we ought to acknowledge that by reducing the sheer number of harmful incidents, we impose significant pain and indignity on the ultimate victims, namely, those whose exercise of autonomy is thus infringed.²¹⁹ Consider some examples of what the BIID sufferers encounter in order to achieve their goal, the amputation of unwanted limbs:

In May of 1998 a seventy-nine-year-old man from New York traveled to Mexico and paid \$10,000 for a black-market leg amputation; he died of gangrene in a motel. [In] October 1999 a mentally competent man in Milwaukee severed his arm with a homemade guillotine, and threatened to sever it again if surgeons reattached it. That same month a legal in-

²¹⁴ *Id.* at 615.

²¹⁵ *Id.*

²¹⁶ See Duff, *supra* note 23, at 39–44; FEINBERG, HARM TO OTHERS, *supra* note 160, at 11.

²¹⁷ See WAYNE R. LAFAYE, SUBSTANTIVE CRIMINAL LAW 543 n.3 (2d ed. 2003) (“No state has a statute making successful suicide a crime.”).

²¹⁸ See, e.g., *Washington v. Glucksberg*, 521 U.S. 702, 730–34 (1997) (“The State has an interest in preventing suicide, and in studying, identifying, and treating its causes.”).

²¹⁹ See, e.g., JOSEPH RAZ, THE MORALITY OF FREEDOM 413 (1986) (“Depriving a person of opportunities or of the ability to use them is a way of causing him harm.”); Duff, *supra* note 23, at 30 (opining that limiting one’s ability to make self-regarding choices is, “in some sense, an evil that seriously impairs the life, the flourishing, the well-being . . . of the person whose exercise of autonomy is thus infringed”).

vestigator for the California state bar, after being refused a hospital amputation, tied off her legs with tourniquets and began to pack them in ice, hoping that gangrene would set in, necessitating an amputation. She passed out and ultimately gave up. Now she says she will probably have to lie under a train, or shoot her legs off with a shotgun.²²⁰

Choices regarding death are even more dramatic. The Supreme Court signified that one has no constitutionally protected right to assisted suicide.²²¹ The Court suggested, however, that one may have the right to starve oneself to death.²²² It is quite plausible that fewer people choose this torturous way of dying compared to death by lethal injection. But does this justify continued criminalization of assisted suicide?

To answer this question, suppose that a legislature considers a bill that advocates a new level of capital punishment for particularly egregious crimes: death by starvation. Assume further that the bill is accompanied by a convincing study, which shows that by this simple change in the form of the death penalty, we can reduce the violent-crime rate by fifty percent. Deterrence is one of the main priorities of criminal justice. Yet it is highly unlikely that the reduction of crime (and even the accompanying reduction in the number of death penalties) would make us adopt such a law. If we are not willing to make criminals suffer a painful and degrading death despite any potential decrease in the number of crimes and executions, how then can we use the same numerical argument to prohibit humane forms of dying to noncriminals?

E. Where to Go from Here?

In this Part, I reviewed the current state of the law of consent. My goal was to identify a principle or set of principles pursuant to which certain forms of consensual harmful behavior are permitted while other forms are criminally banned. The existing legislation did not prove to be particularly helpful in that regard. As is often the case with basic categories, the line between permissible and impermissible may be better explained in historic rather than logical terms.

²²⁰ Elliott, *supra* note 118, at 73.

²²¹ See *Glucksberg*, 521 U.S. at 736 (O'Connor, J., concurring) (interpreting the Court's decision to recognize that "our Nation's history, legal traditions, and practices" do not support one's right to commit suicide).

²²² See *Cruzan v. Dir., Mo. Dep't of Health*, 497 U.S. 261, 279 (1990) (confirming one's constitutionally protected right to refuse lifesaving hydration and nutrition).

I then explored how courts apply statutory provisions to various instances of consensual harm. The results of that quest were not quite satisfactory either. Over the years, courts have treated similar cases very differently, allowing or disallowing particular harm depending on judges' personal moral beliefs, often without much consistency or explanation.

Finally, I looked at the rationales cited by judges in support of their decisions. Not surprisingly, in different times and circumstances, courts have used different rationales for the rule. One thing, however, remained constant: most rationales are based on the autocratic concept of the law. In the world of these rationales, an individual is incapable of looking after himself and has no personal interests deserving legal protection separate from, or opposite to, the interests of society.

In addition to being autocratic, the rule of consensual harm is absolute. People are allowed to consent to harm only if their activities are on the list of things approved by the state. A mere inconvenience to the state overrides individuals' interests in autonomy and personal fulfillment. The law envisions no balancing or accommodation of conflicting interests. The disregard for an individual, inherent in that rule, goes against the basic principles of personal responsibility defining American criminal law. Moreover, the authoritarian presumption that it is not individuals but rather the state that is the victim of every crime is plainly wrong because, if this were so, then consent would not be a defense to any, not merely physical, harm.²²³

This critique prompts a difficult question: if the statutory line between the lawful and unlawful activities is arbitrary, the application of the law is inconsistent, and the articulated rationales for the law are unpersuasive, shall we get rid of any limitations on one's power to consent to personal harm? Were we to choose this route, we could certainly accommodate some of the valid legislative and judicial concerns. For instance, to avoid breach of peace and "offense to others,"²²⁴ we could limit permissible harm to private activities outside of the public view.²²⁵ And to address legitimate worries about the vol-

²²³ See Dubber, *supra* note 20, at 570 (pointing out that, "if the state were indeed the victim of every crime, then consent should be a defense to none").

²²⁴ See FEINBERG, HARM TO OTHERS, *supra* note 160, at 26 (defining "The Offense Principle": "It is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offense to persons other than the actor and would probably be an effective means to that end if enacted").

²²⁵ This is the approach taken by the United Kingdom with respect to prostitution. See THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 133 (Stein & Day 1963).

untariness and rationality of consent to harm, we could provide for strict procedural requirements that would guard putative victims from abuse. We should understand, however, that these substantive and procedural concessions would not necessarily outlaw such phenomena as consensual deadly torture, live cannibalism, or gladiatorial contests.

But if we reject that solution, there is only one other option left: to identify what really bothers us in the permissibility of one's unrestrained power to consent to physical harm. To do that, we need to offer an alternative rationale for the limitation on the power to consent and to try to draw the line between lawful and unlawful activities based on that rationale. For these purposes, in the next Part, I will: (a) analyze the role of consent in application to bodily harm, as opposed to other offenses; (b) identify the harm that may and should be criminalized, despite the victim's valid consent; (c) discuss how the victim's consent affects the wrongfulness of the perpetrator's act; and (d) outline a set of conditions necessary for the perpetrator's acquittal.

II. *Understanding and Revising the Defense of Consent*

A. *Two Roles of Consent*

1. *Offense or Defense: Why Does It Matter?*

An unavoidable question for anyone contemplating the boundaries of consent in criminal law is why the victim's consent to sex renders the defendant not guilty of rape, whereas the victim's consent to injury has no similar effect. Clearly, this is not because we regard rape as a less serious offense than injury. If necessary for their defense, victims of sexual assault are allowed to kill, not merely injure, their attackers.²²⁶

That question, in fact, reveals an important conceptual confusion, specifically, the legislative and judicial failure to distinguish the two roles that consent may play in connection with an offense.²²⁷ First, the lack of consent may be a part of the definition of an offense, i.e., a part of "the minimal set of elements necessary to incriminate the actor."²²⁸ For example, a person may not be guilty of rape if his sexual

²²⁶ See, e.g., MODEL PENAL CODE § 3.02 (1985).

²²⁷ These two roles are widely recognized, for example, in German criminal jurisprudence. See Gregor Bachmann, *Volenti Non Fit Iniuria—How to Make a Principle Work*, 4 GERMAN L.J. 1033, 1038 (2003) (pointing out that most scholars accept the distinction between an element of an offense and a defense as helpful systematization).

²²⁸ FLETCHER, *supra* note 23, at 705.

partner has given him valid consent.²²⁹ Non-consent plays an *inculpatory* role in the offense of rape.

In contrast, the second role of consent is *exculpatory*. In its exculpatory capacity, consent is a defense of justification that serves to negate a *prima facie* criminal violation. Consent to physical harm in a lawful athletic contest, as we remember, is such a defense under the MPC.²³⁰ How shall we determine in which case consent plays which role and why does that matter?

Let's start with the second part of the question. The role of consent matters, among other things, because it defines the boundaries of specific conduct rules communicated to the community. George Fletcher perceptively observed that inculpatory and exculpatory functions of an element reflect the difference between a duty to obey a prohibitory legal norm and a privilege to violate it when justificatory circumstances are present:²³¹

Take the offense of reckless driving. Logically, one could claim that the norm was directed against all driving. In exceptional cases, safe (or non-reckless) driving would justify a violation of the norm. In this mode of thinking, a case of safe driving would be treated as a justified violation of the norm; if recklessness were an element of the definition, non-reckless or safe driving would not violate the norm.²³²

Fletcher is certainly right that in our society it would be unthinkable to prohibit driving altogether. The only morally coherent norm would be one that prohibits reckless driving.²³³ It follows that "recklessly" is an element of the definition and not a defense.²³⁴ The above example is rather uncontroversial. Consent raises more serious problems. Fletcher, for instance, leaves the question open in its application to larceny.²³⁵ "We find it hard to determine whether taking and

²²⁹ Naturally, consent may be legally invalid (e.g., due to minority of age or mental incapacity). In that case, a court should disregard the factual consent. See, e.g., MODEL PENAL CODE § 213.1(1)(d) (providing that the perpetrator is guilty of rape if the female is less than ten years old); *id.* § 213.1(2)(b) (finding the perpetrator guilty of rape if he knows that the female "suffers from a mental disease or defect which renders her incapable of appraising the nature of her conduct").

²³⁰ *Id.* § 2.11(2)(b); see also Hurd, *supra* note 19, at 123 (pointing out the difference between consent that can transform a wrong act into a right act, and consent that merely grants another a right to do wrong).

²³¹ FLETCHER, *supra* note 23, at 562, 564.

²³² *Id.* at 567.

²³³ See *id.*

²³⁴ *Id.*

²³⁵ *Id.* at 568 ("The issue of consent in larceny is particularly difficult to classify.").

using another's property is sufficiently incriminating to constitute an incriminating event."²³⁶

I disagree with this expansive vision of criminal law. The law that creates a presumption of guilt whenever there is a mere suspicion of foul play paves the road to a police state. Such law would discourage socially useful behavior and unjustifiably interfere with people's autonomy. For instance, all trade that involves the exchange of goods (i.e., taking and using another's property) would be under criminal suspicion.²³⁷ For these reasons, consent should play an inculpatory role in the offense of larceny.

How we classify an element not only affects a social norm of conduct, but also has two important consequences in a criminal trial: one deals with the burden of proof, the other with the mens rea required for the defendant's acquittal.

The allocation of burdens of production and persuasion between the government and the defendant often depends on whether the element in question is a part of an offense or an affirmative defense. In the first case, both burdens are on the prosecutor.²³⁸ He must prove each element of an offense beyond a reasonable doubt.²³⁹ In the second case, the burden of production is usually on the defendant.²⁴⁰ If he produces evidence with respect to self-defense but not with respect to insanity, the judge will have to instruct the jury on the law of self-defense but not insanity, and the defendant will not be entitled to have the issue of insanity considered by the jury in its deliberations.²⁴¹ Who has the burden of persuasion with respect to an affirmative defense depends on the jurisdiction: in some states, it is the government; in other states, the defendant.²⁴² Clearly, it is in the defendant's interest that an element be characterized as included in the definition of an offense rather than as a defense, because in that case the full burden of proof will be on the prosecution.

The second important consequence of treating consent as an exculpatory rather than inculpatory element involves the defendant's mens rea. The specific question is: must the defendant be aware of the victim's consent in order to be acquitted? If non-consent is an ele-

²³⁶ *Id.*

²³⁷ Fletcher himself made a similar point in his earlier work. See George P. Fletcher, *The Right Deed for the Wrong Reason: A Reply to Mr. Robinson*, 23 UCLA L. REV. 293, 319 (1975).

²³⁸ JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 64 (3d ed. 2001).

²³⁹ *Id.*

²⁴⁰ *Id.*

²⁴¹ *Id.* at 65.

²⁴² *Id.* at 73.

ment of the charged offense, the answer is no, because the very presence of consent negates an element required for conviction. For example, consensual sex is not rape, even if one of the partners is not aware of the other's consent.²⁴³

When consent is a defense, however, the defendant must have the knowledge of the justifying circumstance.²⁴⁴ This difference stems from the very nature of a privilege-based justification available to those who have committed a *prima facie* wrongdoing but whose actions "the law does not condemn, [and] even welcomes."²⁴⁵

For example, we want people to defend themselves against unlawful aggression; therefore, we justify harm and even killing committed in the proper exercise of self-defense. This justification is tailored for a specific purpose—protection of an innocent party. Its teleological nature mandates that the defendant do no more harm than is necessary for his protection.²⁴⁶ This conduct rule would lose any sense, however, if we disregarded the defendant's subjective knowledge of the justifying circumstances. How shall people determine what actions are permissible if they are not aware of the threat against which they are supposed to measure these actions?

²⁴³ But it may be an attempted rape under MPC § 5.01(1)(a) and its state analogues. See MODEL PENAL CODE § 5.01(1)(a) (1985) ("A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he [] purposely engages in conduct that would constitute the crime if the attendant circumstances were as he believes them to be . . ."). In most states, an attempt is treated as a less serious crime than the target offense. See SANFORD H. KADISH & STEPHEN J. SHULHOFER, CRIMINAL LAW AND ITS PROCESSES: CASES AND MATERIALS 554 (7th ed. 2001).

²⁴⁴ See *R v. Dadson*, (1850) 4 Cox 358 (Crim. App.) (Eng.) (holding that a defendant's knowledge of the justifying circumstances is necessary for a successful justification defense); MODEL PENAL CODE § 3.02 cmt. 2 (stating that, to qualify for the defense of necessity, "the actor must actually believe that his conduct is necessary to avoid an evil"); see also FLETCHER, *supra* note 23, at 318–21 (arguing that, when the absence of consent is an element of an offense, even uncommunicated consent releases the actor from liability; when consent serves as a defense, however, the actor must be aware of it); Anthony M. Dillof, *Unraveling Unknowing Justification*, 77 NOTRE DAME L. REV. 1547, 1595–99 (2002) (arguing in favor of the subjective theory of justification, according to which the actor is justified when he is aware of justifying circumstances and takes them into account when choosing his course of action). But see Larry Alexander, *Lesser Evils: A Closer Look at the Paradigmatic Justification*, 24 LAW & PHIL. 611, 626–31 (2005) (arguing that self-defense, but not other defenses, requires defendant's knowledge of justifying circumstances); Paul H. Robinson, *A Theory of Justification: Societal Harm as a Prerequisite for Criminal Liability*, 23 UCLA L. REV. 266, 288–91 (1975) (arguing that claims of justification should prevail regardless of the actor's state of mind).

²⁴⁵ H.L.A. HART, PUNISHMENT AND RESPONSIBILITY 13 (1968) [hereinafter HART, PUNISHMENT].

²⁴⁶ See, e.g., MODEL PENAL CODE § 3.04(2) (listing limitations on the use of force).

This discussion shows that how we treat consent may have important consequences for societal norms of conduct. In addition, the role assigned to consent may affect the outcome of a criminal trial. On balance, the defendant is in a much better position if non-consent is viewed as an element of the offense: the prosecutor has to prove beyond a reasonable doubt that the victim did not consent to the defendant's actions, and if he fails that burden, the defendant may not be found guilty of the completed offense even if he mistakenly thought that he was acting against the victim's will. If, however, consent of the victim is viewed as a defense, the defendant may be required to establish not only the fact of the victim's consent, but also his subjective awareness of that fact.

Considering the importance of proper characterization of consent, how shall courts resolve it in each particular case? An easy way would be to use the formal criteria and rely on the wording of the relevant statute. This approach, however, is problematic for at least two reasons. One is the conceptual incoherence of legislative labeling of consent, and the other is the questionable constitutionality of such random labeling and relabeling.

2. *The Problem of Conceptual Incoherence*

For an illustration of the first problem, take the offense of criminal mischief (destruction of property of another), punishable in all states and under the MPC. Pursuant to thirty-one state codes, non-consent is, explicitly or implicitly, an element of the offense.²⁴⁷ In the remaining jurisdictions, consent is either included in the penal code as an affirmative defense²⁴⁸ or is not specifically part of the code.²⁴⁹ In

²⁴⁷ See ALA. CODE § 13A-7-21 (2006); ALASKA STAT. § 11.46.475 (2004); ARIZ. REV. STAT. ANN. § 13-1604 (2001); ARK. CODE ANN. § 5-38-203 (2006); CAL. PENAL CODE § 594 (West 1999); CONN. GEN. STAT. § 53a-115 (1997); FLA. STAT. ANN. § 806.13 (West Supp. 2006); GA. CODE ANN. § 16-7-21 (2003); HAW. REV. STAT. § 708-820 (Supp. 2005); IDAHO CODE ANN. § 18-7001 (Supp. 2006); 720 ILL. COMP. STAT. 5/21-1 (2005); IND. CODE § 35-43-1-2 (Supp. 2001); IOWA CODE § 716.1 (2003); KAN. STAT. ANN. § 21-3720 (1996); KY. REV. STAT. ANN. § 512.020 (West 2002); LA. REV. STAT. ANN. § 14:56 (1997); ME. REV. STAT. ANN. tit. 17-A, § 109 (2006); MASS. GEN. LAWS ch. 266, § 104 (2004); MINN. STAT. ANN. § 609.595 (West 2003); MONT. CODE ANN. § 45-6-101 (2005); N.H. REV. STAT. ANN. § 634:2 (1996); N.M. STAT. § 30-15-1 (2004); N.Y. PENAL LAW § 145.12 (McKinney 1988); OHIO REV. CODE ANN. § 2909.07 (LexisNexis 2006); OR. REV. STAT. § 164.365 (2005); S.D. CODIFIED LAWS § 22-34-1 (1998); TENN. CODE ANN. § 39-14-408 (Supp. 2005); TEX. PENAL CODE ANN. § 28.03 (Vernon Supp. 2006); VT. STAT. ANN. tit. 13, § 3701 (1998); WIS. STAT. § 943.01 (2003-2004); WYO. STAT. ANN. § 6-3-201 (2005); MODEL PENAL CODE § 220.3.

²⁴⁸ See DEL. CODE ANN. tit. 11, § 811 (2001); N.D. CENT. CODE § 12.1-21-07 (1997); 18 PA. CONS. STAT. ANN. §§ 311, 3304 (West 1998).

²⁴⁹ See COLO. REV. STAT. § 18-4-501 (2005); D.C. CODE § 22-303 (2001); MD. CODE ANN.,

the case of any ambiguity, courts have to interpret the functional meaning of consent, and these interpretations differ quite dramatically.

For example, neither in New Jersey nor in Pennsylvania is non-consent explicitly listed as an element of criminal mischief.²⁵⁰ Each statute describes the offense through damage to the “property of another” but fails to define the term “property of another” either in the relevant section or generally. A comment to the New Jersey Penal Code, however, explains that “‘property of another’ has been defined in other sections of the Code to include any property in which a person other than the defendant has an interest and which the defendant is not privileged to infringe.”²⁵¹ This explanation, similar to the one offered in an MPC commentary,²⁵² effectively incorporates the requirement of non-consent into the definition of criminal mischief.

A Pennsylvania court, however, reached an opposite conclusion when it held that the criminal mischief statute did not require the prosecution to prove the lack of consent by the owner of the property.²⁵³ “All that is required under [the statute] regarding the owner is that the property belong to another person.”²⁵⁴

Moreover, even when the statutory language implies that the owner’s non-consent is an element of the offense but does not say so specifically, courts may conclude that proof of this element is unnecessary for conviction. Under New York law, for instance, a person is guilty of criminal mischief when he intentionally damages property of another person, “having no right to do so nor any reasonable ground to believe that he has such right.”²⁵⁵ Despite this rather suggestive language, a court held that the prosecution did not need to prove the

CRIM. LAW § 6-301 (LexisNexis 2002); MICH. COMP. LAWS ANN. § 750.377a (West 2004); MISS. CODE ANN. § 97-17-67 (West 1999); NEB. REV. STAT. § 28-519 (Supp. 2002); NEV. REV. STAT. § 206.310 (2005); N.J. STAT. ANN. § 2C:17-3 (West 2005); N.C. GEN. STAT. § 14-127 (2005); OKLA. STAT. tit. 21, § 1760 (2002); R.I. GEN. LAWS § 11-44-1 (2002); S.C. CODE ANN. § 16-11-510 (2003); UTAH CODE ANN. § 76-6-106 (2003); VA. CODE ANN. § 18.2-137 (2004); WASH. REV. CODE ANN. § 9A.48.090 (West 2000); W. VA. CODE ANN. § 61-3-30 (LexisNexis 2005).

²⁵⁰ N.J. STAT. ANN. § 2C:17-3; 18 PA. CONS. STAT. ANN. §§ 311, 3304.

²⁵¹ 33 GERALD D. MILLER, NEW JERSEY PRACTICE SERIES CRIMINAL LAW § 14.6 (4th ed. 2005) (commenting on N.J. STAT. ANN. § 2C:17-3).

²⁵² The MPC does not list non-consent as an element of criminal mischief and does not define “property of another” with respect to criminal mischief. A commentary to the criminal mischief section, however, says that “there would seem to be no reason not to apply the term ‘property of another’ as defined in [the section for Theft and Related Offenses].” MODEL PENAL CODE § 220.3 cmt. 3.

²⁵³ *Commonwealth v. Zambelli*, 695 A.2d 848, 850 (Pa. Super. Ct. 1997).

²⁵⁴ *Id.*

²⁵⁵ N.Y. PENAL LAW § 145 (McKinney 1988).

owner's lack of consent to convict the defendant of, among other things, criminal mischief for breaking into a tavern and stealing money.²⁵⁶

These discrepancies make it hard to rely on the statutory language for purposes of determining the role of consent in a particular case. For the sake of a coherent message to the community and the fair treatment of defendants charged with similar violations, it is essential to determine the proper meanings of consent in relation to various offenses and, if necessary, revise the penal codes accordingly.

3. *The Problem of Questionable Constitutionality*

The constitutionality problem may be even more serious: it is unclear to what extent states are free to define traditional offenses so that an important element be transformed into a defense. Pursuant to the *Winship* doctrine developed by the U.S. Supreme Court in the 1970s, the Due Process Clauses of the Fifth and Fourteenth Amendments require that the prosecution prove beyond a reasonable doubt every fact necessary to constitute the crime charged.²⁵⁷ This rule was further developed in *Mullaney v. Wilbur*²⁵⁸ and *Patterson v. New York*.²⁵⁹

Those two cases were similar in that in each the state had attempted to present "heat of passion" or "extreme emotional disturbance" as a defense that the defendant had to prove in order to reduce the charge from murder to manslaughter.²⁶⁰ In *Mullaney*, the Supreme Court unanimously held the state's theory unconstitutional because it was the prosecutor's, not the defendant's, task to prove that the killing was premeditated and not provoked.²⁶¹ According to a commentator, *Mullaney* "clearly carried within it the potential to invalidate all 'affirmative defenses' that shifted the burden of persuasion to the defendant on any matter relating to guilt, innocence, or degrees of culpability."²⁶²

However, in *Patterson*, decided only two years later, the narrowly divided Supreme Court significantly weakened the import of *Mullaney* by declining "to adopt as a constitutional imperative, operative

²⁵⁶ *People v. Battle*, 609 N.Y.S.2d 716, 717 (App. Div. 1994).

²⁵⁷ *In re Winship*, 397 U.S. 358, 361-63 (1970).

²⁵⁸ *Mullaney v. Wilbur*, 421 U.S. 684, 699-704 (1975).

²⁵⁹ *Patterson v. New York*, 432 U.S. 197, 205 (1977).

²⁶⁰ *Mullaney*, 421 U.S. at 686; *Patterson*, 432 U.S. at 200.

²⁶¹ *Mullaney*, 421 U.S. at 698.

²⁶² Joseph L. Hoffmann, *Apprendi v. New Jersey: Back to the Future?*, 38 AM. CRIM. L. REV. 255, 269 (2001).

countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.”²⁶³ The Court recognized that its holding “may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some elements of the crimes now defined in their statutes.”²⁶⁴ At the same time, the *Patterson* majority warned that “there are obviously constitutional limits beyond which the States may not go in this regard.”²⁶⁵

Unfortunately, neither in *Patterson* nor in later cases did the Court identify those “constitutional limits,” except for the basic requirement that the legislature may not “declare an individual guilty or presumptively guilty of a crime.”²⁶⁶ As one scholar pointed out, the “*Winship/Mullaney/Patterson* line of ‘affirmative defense’ decisions essentially died out, with barely a whimper.”²⁶⁷

It cannot, therefore, be determined with certainty how the Supreme Court would regard an attempt to move consent across the boundary line between offenses and defenses. On the one hand, the existing inconsistency in the treatment of consent (e.g., criminal mischief) suggests that making consent an affirmative defense, at least in some instances, may be permissible. On the other hand, it would be unthinkable to make consent a mere defense in the case of many other offenses (e.g., theft, kidnapping, or criminal trespass). Removing the reference to consent from the definition of theft, for example, would eliminate the only wrongful element (the absence of the owner’s consent) in that definition and would, in fact, render the defendant “presumptively guilty.”

Due to these conceptual and constitutional uncertainties, one may not rely on the historically settled statutory language. Instead, it is important to identify a coherent principle that would allow one to distinguish permissible and impermissible conduct.

4. Determining the Role of Consent

Determining the role of an element in a particular case is not always easy. George Fletcher correctly maintains that, to distinguish a definition from a defense, we need to identify a prohibitory norm, which “must contain a sufficient number of elements to state a coher-

²⁶³ *Patterson*, 432 U.S. at 210.

²⁶⁴ *Id.*

²⁶⁵ *Id.*

²⁶⁶ *Id.*

²⁶⁷ Hoffmann, *supra* note 262, at 272.

ent moral imperative.”²⁶⁸ What Fletcher does not tell us is how to apply this norm to the suspect element in order to determine its function, and without that, this methodology is of limited practical use.²⁶⁹

I suggest that to understand the role of consent with respect to a particular offense, we should identify the prohibitory norm underlying that offense and then apply it to the perpetrator’s *voluntary act* (its nature and result, using the MPC categories).²⁷⁰ In other words, we should evaluate the moral quality of the act *independently* of the justifying circumstance of consent.²⁷¹ If there is no *prima facie* moral prohibition against that act, non-consent should play the inculpatory role and be an element of the definition. Only when the act itself violates a prohibitory norm should consent be a defense.

Consider the offenses of rape, kidnapping, theft, and trespass,²⁷² to name just a few. In all of them, the *act itself* does not violate a prohibitory norm. Having sex, transporting someone to a different location, taking other people’s property, or entering someone’s home is not bad *per se*. The act becomes bad *only* due to the attendant circumstance, namely, the lack of consent; unless consent is missing, the conduct is outside the boundaries of criminal law. Therefore, in each of these offenses, non-consent should be included in the language of the definition.

Conversely, killing or hurting another is bad *per se*. The fact that a person may be legally justified in, say, killing another in self-defense does not make the killing as morally neutral as borrowing a book; it is still regrettable.²⁷³ It is still regrettable that a dental patient has to suffer pain, even though the dentist is justified in causing it. To lose or reduce its inherent wrongfulness, the act of killing or hurting requires

²⁶⁸ FLETCHER, *supra* note 23, at 568.

²⁶⁹ Fletcher himself admits that his methodology may be insufficiently precise to resolve cases in the borderline between definition and justification. *See id.*

²⁷⁰ *See* MODEL PENAL CODE § 1.13(9)–(10) (1985); *see also id.* § 2.02 cmt. 1 (observing that “material elements” of an offense include the nature of the conduct, attendant circumstances, and the result set forth in the description of the offense).

²⁷¹ I use the term “voluntary act” rather than “actus reus” because the latter has been traditionally used to include the absence of justification and sometimes even excuse. *See, e.g.*, MICHAEL MOORE, ACT AND CRIME 177–83 (1993) (including justification but not excuse); GLANVILLE WILLIAMS, CRIMINAL LAW 20 (2d ed. 1961) (including both justification and excuse); Meir Dan-Cohen, *Actus Reus*, in *ENCYCLOPEDIA OF CRIME AND JUSTICE* 15 (Sanford H. Kadish ed., 1983) (including both justification and excuse).

²⁷² For definitions of these offenses, *see*, for example, MPC sections 213.1 (rape), 212.1 (kidnapping), 223.2 (theft), and 221.2 (trespass).

²⁷³ *See* Douglas N. Husak, *Partial Defenses*, 11 CAN. J.L. & JURISPRUDENCE 167, 172 (1998) (“No one who believes that killings in self-defense are completely justified need suppose that the quantum of wrongfulness in all such killings is equivalent to that in, say, scratching one’s head.”).

justification. To the extent consent can affect the moral character of that act, its role is exculpatory. Consent should, therefore, be a defense, full or partial, and not an element of the definition.

Thus, to decide how to treat consent in each particular case, we should ask: what conduct rule do we want to convey to the community? Do not have sex? Do not take other people's possessions? Do not break other people's property? Certainly not. Even the last rule, the most controversial of the three, would be unmerited and impracticable. There is nothing wrong with breaking things. People may need to break things, including those belonging to others, in the process of construction, repair, cleaning, cooking, curing, or just having fun. We do not want to prohibit useful or morally neutral activities. What we want to prohibit is engaging in these activities *under the circumstances* that make such activities wrongful.

In contrast, causing pain, injury, or death is not morally neutral.²⁷⁴ Bringing about a regrettable state of events is bad and should be avoided.²⁷⁵ Therefore, we would want a conduct rule that prohibits the very *act* of killing or hurting, providing, of course, for the necessary exceptions (e.g., medical treatment, minimal harm, or self-defense in a nonconsensual context).

In this regard, I disagree with those who view consent only as an event of noncriminalization.²⁷⁶ Among them is, for instance, Paul Roberts, who objects to the treatment of consent as a general defense.²⁷⁷ In Roberts's view, consent is neither "general" nor a "defen[s]e."²⁷⁸ Instead, according to Roberts, "the significance of consent in the criminal law can only be ascertained through particularistic inquiries into specific types of injury . . . such as may result from con-

²⁷⁴ See, e.g., *R v. Brown*, (1994) 1 A.C. 212, 250 (H.L.) (Lord Lowry's opinion) ("[F]or one person to inflict any injury on another without good reason is an evil in itself (*malum in se*) and contrary to public policy.").

²⁷⁵ See, e.g., JOEL FEINBERG, *HARMLESS WRONGDOING* 18 (1988) [hereinafter FEINBERG, *HARMLESS WRONGDOING*] (defining evil in the most generic sense as "any occurrence or state of affairs that is rather seriously to be regretted").

²⁷⁶ See, e.g., Dubber, *supra* note 20, at 569 (suggesting that consent is "less a defense than a general limitation"); Roberts, *supra* note 8, at 252–53 (opining that the British consent project failed because consent was conceptualized as a general defense instead of a part of the definition of each relevant offense); Paul H. Robinson, *Rules of Conduct and Principles of Adjudication*, 57 U. CHI. L. REV. 729, 753–54 (1990) (criticizing the view that consent is a justification). It is possible that Robinson's claim was affected by the examples he reviewed. All of them are indeed cases of noncriminalization and not justification. *Id.*

²⁷⁷ Roberts, *supra* note 8, at 252–53.

²⁷⁸ *Id.* at 252.

sensual fighting, dangerous sports, risky sex, medical treatment, cosmetic surgery, and euthanasia.”²⁷⁹

I strongly object to this approach. If we follow the proposed route, we may end up with a list of rules that are entirely situation-specific and virtually useless because they are not based on a common legal principle, and, therefore, give neither judges nor the general public an opportunity to resolve new conflicts. Rejecting a categorical approach in favor of this essentially case-by-case method may present a serious legality problem and may jeopardize the law’s fairness and moral authority.

Moreover, a coherent legal system that accounts for important moral distinctions must conceptualize consent to bodily harm as an affirmative defense. Think of a mountaineer *A* who cuts off the leg of his injured friend *B* in order to save *B*’s life. Assuming *B* has consented to the procedure, *A* should be justified.²⁸⁰ This is a justification and not a noncriminalization case because justified conduct always has a negative side effect, which we accept and forgive, yet we would much prefer if that accompanying evil could be avoided. For instance, we justify people who kill in self-defense or violate property rights of others in order to prevent a greater harm or evil. Similarly, we justify *A*, although we are sorry for *B*’s loss. In contrast, we have no need to justify people who have consensual sex, visit each other, or exchange property; their actions leave no undesirable residue that requires justification.

What follows is that we need two sets of consent rules: one for cases in which non-consent plays the inculpatory role, and the other for cases in which the role of consent is exculpatory. Instances of bodily harm all fit into the second category, which explains why analogies of consensual killing with consensual “theft” or “rape” do not work; the latter examples belong to the first category of consent. Consent alone is sufficient to make theft or rape impossible. Significantly more is required to justify killing or maiming.

Recognizing this difference, among other things, can help in drafting more consistent and fair legislation. For example, in sexual offenses and offenses against property such as burglary and trespass,

²⁷⁹ *Id.* at 253.

²⁸⁰ I also assume that *A* was right in his assessment of *B*’s condition. If he was wrong but his mistake was reasonable, he should also be acquitted but pursuant to the defense of excuse. See, e.g., FLETCHER, *supra* note 23, at 696–97, 762–69 (arguing that a mistake regarding the presence of justifying conditions negates justification); see also Bergelson, *Victims*, *supra* note 152, at 406–08 (discussing why mistake should be a defense of excuse but not of justification).

the absence of consent²⁸¹ should be expressly included in the relevant definition. This revision is particularly needed and overdue in the area of sexual offenses. Most states still define rape through “forcible compulsion” and do not list the absence of consent as an element of the statute.²⁸² This is unfair to both the victim and the defendant charged with rape. As far as the victim is concerned, “[n]onconsensual intercourse is the gist of rape; force is merely an important evidentiary and aggravating factor.”²⁸³ The use of force or its absence can be taken into account at various stages of the trial without being a requisite element of the offense. As David Bryden persuasively argued:

Let the jury take account of the absence of force in determining whether the encounter was consensual, and whether the defendant had the required mens rea; let the judge (or the statutory degree structure) take account of it in fixing the sentence. But if the jury is satisfied beyond a reasonable doubt that the penetration was nonconsensual, and that the defendant had the appropriate mens rea, why should the absence of force lead to an acquittal?²⁸⁴

The revision of the statute would also be in the interest of the defendant. Many states view consent merely as an affirmative defense.²⁸⁵ If the statute is revised, it will no longer be the defendant’s job to raise the defense or (as is now the case in some jurisdictions)²⁸⁶ persuade the fact-finder that consent has been granted.

In sum, it is important to distinguish offenses in which the act becomes wrongful due to the lack of consent from offenses in which the very conduct constitutes a *prima facie* norm violation. All offenses involving injury or death belong to the second group; therefore, with respect to those offenses, the victim’s consent may play only an

²⁸¹ By “absence” of consent, I mean its either factual or legal deficiency. For example, consent given under duress or consent of a minor is legally invalid regardless of the fact that it was factually granted. See, e.g., MODEL PENAL CODE § 2.11(3) (1985).

²⁸² See, e.g., ARK. CODE ANN. § 5-14-103 (2006) (defining rape as sexual intercourse with another person by forcible compulsion); KY. REV. STAT. ANN. § 510.040 (West 2002) (same); 18 PA. CONS. STAT. ANN. § 3121 (West 2000) (same).

²⁸³ David P. Bryden, *Redefining Rape*, 3 BUFF. CRIM. L. REV. 317, 355 (2000).

²⁸⁴ *Id.*

²⁸⁵ See, e.g., CONN. GEN. STAT. § 53a-70 (1997); HAW. REV. STAT. § 707-730 (Supp. 2005); MICH. COMP. LAWS ANN. § 750.520b (West 2004); N.M. STAT. § 30-9-11 (2004); OHIO REV. CODE ANN. § 2907.05 (LexisNexis 2006); WASH. REV. CODE § 9a.44.040 (2004).

²⁸⁶ See WESTEN, *supra* note 23, at 129 n.1 (observing that the state of Washington and the District of Columbia impose the burden of proof with respect to consent on defendants while at the same time imposing the burden of proof with respect to the use of force on the prosecution).

exculpatory role. Accordingly, those criminal statutes should be drafted without reference to consent.

To understand in what circumstances consent may serve as a defense to bodily harm, it is first necessary to establish what constitutes *criminal harm* that a valid defense needs to override. In the next section, I discuss what kinds of harm warrant criminal punishment.

B. *Kinds of Harm and Wrongdoing*

Traditional Anglo-American legal theory distinguishes two kinds of harm to an individual.²⁸⁷ One is a setback to interests not accompanied by a violation of rights.²⁸⁸ Usually, this kind of harm is insufficient for criminal liability. A person may suffer an injury or a loss due to a completely innocent act of another. For example, a competitor's success may financially harm a neighboring business owner, yet the competitor has done nothing wrong.

The second kind of harm is a "morally indefensible"²⁸⁹ rights violation, which is often conceptualized as an unjustifiable setback to interests.²⁹⁰ Voluntary consent eliminates this kind of harm to the consenting individual.²⁹¹ For example, I have a right not to be physically hurt by others. By giving consent to a dental treatment, I waive my claim of physical inviolability against my dentist and transfer to him the privilege and power of doing things that otherwise would constitute assault and battery. But does consent always have the power to change the moral and legal character of another person's actions? What about the previously mentioned acts that remain intuitively wrongful despite the valid consent of the victim, such as consensual

²⁸⁷ See FEINBERG, HARM TO OTHERS, *supra* note 160, at 31–36.

²⁸⁸ For a detailed discussion of harms as setbacks to interests, see *id.* at 31–64. The most essential are "welfare" interests, which are interests "in the necessary means to . . . more ultimate goals, whatever the latter may be, or later come to be." *Id.* at 37. Those include, among other interests, "the interests in the continuance for a foreseeable interval of one's life, and the interests in one's own physical health and vigor, the integrity and normal functioning of one's body, the absence of absorbing pain and suffering or grotesque disfigurement, minimal intellectual acuity, [and] emotional stability . . ." *Id.*

²⁸⁹ *Id.* at 107–08.

²⁹⁰ See, e.g., Hamish Stewart, *Harms, Wrongs, and Set-Backs in Feinberg's Moral Limits of the Criminal Law*, 5 BUFF. CRIM. L. REV. 47, 65–66 (2001). It is important to understand that one's interest in personal liberty is violated even when the violation advances other victims' interests. For example, a person who was wrongfully prevented from taking a plane could turn out to be lucky if everyone on board was killed in a crash. Yet the happy outcome does not relieve the wrongdoer from liability.

²⁹¹ FEINBERG, HARM TO OTHERS, *supra* note 160, at 115–17; JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 348–53, 361 (1990) (explaining that consent is a mechanism by which a person may divest himself of a claim and transfer to another a privilege, power, or immunity).

gladiatorial contests, live cannibalism, deadly torture, and organ-harvesting killings?

Historically, these “free-floating evils”²⁹² have been criminalized to avoid moral harm to the community. As Michael Moore put it, it is “plausible to think that the world is a morally better place when moral obligations are kept than when they are not, so it is plausible to motivate criminal legislation with this end.”²⁹³

There may be many reasons to reject moral legislation. Thinking of Moore’s premise, I wonder whether a society in which people follow *all* moral obligations is even viable. It appears that if duty always wins over desire, curiosity, passion, and desperation, such a society will inevitably stagnate and fall into demise. But even if we assume that society is at its best when reliable, predictable, and transparent, it still does not follow that criminal law is the appropriate mechanism for achieving that goal. For example, even the most selfish and cynical breach of a contract has remedies outside of criminal law.

Criminalization of all moral transgressions (and that is what the legal moralist legislator, according to Moore, should do)²⁹⁴ would require a lot of police enforcement, which is likely to result in a society marked with fear, persecution, and alienation. Moreover, the majority of citizens in this Brave New World would likely be criminals. To give just one example, for a legal moralist legislator, “adultery should be made illegal because it is immoral.”²⁹⁵ Recent studies show that, were we to criminalize adultery today, we might end up with fifty percent of married adults being criminals.²⁹⁶ And there are many more ways besides adultery to breach a moral obligation.

Granted, there are private immoralities that deserve condemnation. However, they are simply “not the law’s business.”²⁹⁷ Not punishing someone’s conduct does not mean approving it; instead, that can mean the lack of standing to judge or condemn it.²⁹⁸ But if moral

²⁹² See FEINBERG, *HARMLESS WRONGDOING*, *supra* note 275, at 3–33.

²⁹³ MOORE, *BLAME*, *supra* note 23, at 649.

²⁹⁴ *Id.* at 645.

²⁹⁵ *Id.*

²⁹⁶ See Nathan Tabor, *Adultery Is Killing the American Family*, NAT’L LEDGER, Sept. 22, 2005, <http://www.nationalledger.com/cgi-bin/artman/exec/view.cgi?archive=1&num=846> (reporting that, according to Peggy Vaughan, the author of *The Monogamy Myth*, “about 60 percent of married men and 40 percent of married women will have an affair at some point during marriage”).

²⁹⁷ Duff, *supra* note 23, at 36–37 (noting that interfering with someone who may be acting immorally violates the person’s privacy).

²⁹⁸ *Id.* at 37.

legislation is not a desirable option, do we necessarily have to permit any consensual harm?

Recently, a number of scholars have suggested that the concept of criminal harm should not be limited to a rights violation.²⁹⁹ In their view, gladiatorial contests and similar acts are impermissible because they violate the participants' dignity, and dignity is so essential to our humanity, that, in cases of conflict between legally valid consent and dignity, the former ought to yield.³⁰⁰ Accordingly, consent may not serve as a defense to the violation of dignity.

Meir Dan-Cohen, for example, argues that the reason society should outlaw slavery, even in the hypothetical case of voluntary "happy slaves,"³⁰¹ is because slavery represents a "paradigm of injustice," which "by its very terms denies people's equal moral worth and thus treats them with disrespect."³⁰² Similarly, R.A. Duff finds voluntary gladiatorial contests unacceptable because of the "dehumanization or degradation perpetrated by the gladiators on each other, and by the spectators on the gladiators and on themselves."³⁰³

I agree with both Duff and Dan-Cohen that certain degrading behavior may be harmful, even though it does not violate the victim's rights.³⁰⁴ Society may be concerned about human dignity even in cases in which a prohibitory norm does not originate in a rights violation, such as experiments involving fresh cadavers as "crash dummies"³⁰⁵ or pieces of art made with body parts of dead fetuses.³⁰⁶

²⁹⁹ See, e.g., Meir Dan-Cohen, *Basic Values and the Victim's State of Mind*, 88 CAL. L. REV. 759, 770 (2000) [hereinafter Dan-Cohen, *Basic Values*]; Dubber, *supra* note 20, at 568 (opining that criminal harm 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"); Duff, *supra* note 23, at 39–44 (referring to the harm as violation of humanity); Wright, *supra* note 23, at 1399.

³⁰⁰ Wright, *supra* note 23, at 1399; see also Dan-Cohen, *Basic Values*, *supra* note 299, at 777–78; Dubber, *supra* note 20, at 568 (arguing that personal autonomy includes dignity, and that the concept of criminal harm should be based on protection of a person rather than a state).

³⁰¹ See generally HERZOG, *supra* note 23 (exploring nonutilitarian value of autonomy, dignity, and freedom).

³⁰² Dan-Cohen, *Basic Values*, *supra* note 299, at 770. Dan-Cohen defines "dignity" as "an expressive value demanding that people's behavior, physical and verbal, convey a certain attitude to other people, namely, an attitude of respect." *Id.* at 771.

³⁰³ Duff, *supra* note 23, at 39.

³⁰⁴ See *id.* at 38–39, 42 (arguing that a dehumanizing act may be criminalized only if it is a "public" rather than "private" wrong, i.e., such that it "concerns the whole political community as a kind of wrong that should (in principle) be publicly condemned by the criminal law"); see also Dan-Cohen, *Basic Values*, *supra* note 299, at 770.

³⁰⁵ See Joel Feinberg, *The Mistreatment of Dead Bodies*, 15 HASTINGS CENTER REP. 31, 31–32 (1985).

³⁰⁶ See *Seagull Body and Fetus Head*, POOR MOJO NEWSWIRE, <http://www.poormojo.org/pmjadaily/archives/004388.php> (last visited Jan. 1, 2007) (observing that "a sculpture made with

Moreover, no matter how respectfully Armin Meiwes treated his victim,³⁰⁷ cannibalism *by its very terms* denies people equal moral worth and thus assaults the victim's dignity. The concept of dignity, therefore, does not refer to the subjective state of mind of the perpetrator or the victim, but instead has an "objective" meaning.

Where should society look for this meaning? Dan-Cohen suggests that the meaning of dignity ought to be determined by deference to the community in which the nominally criminal act occurred.³⁰⁸ In this regard, he criticizes the court's decision in *People v. Samuels*, which convicted the defendant for a sadomasochistic beating of his partner.³⁰⁹ Dan-Cohen argues that, since violence does not have a meaning of disrespect in the sadomasochistic community, Samuels should have been acquitted.³¹⁰

This approach appears flawed. Following Dan-Cohen's logic, we would have to allow voluntary crucifixions, similar to the ones practiced in the Philippines, because the person who volunteers for the ritual is treated with the utmost respect in his religious community.³¹¹ What about cannibalism? There are hundreds of people in Europe alone interested in cannibalism.³¹² Should we defer to them for the ethical meaning of cannibalism?

Dan-Cohen would answer these questions in the negative. According to him, we may be able to do both—accept the meaning that is assigned to a particular act by a cultural group, and morally assess the act based on our own moral views.³¹³ Thus, we may criticize and outlaw female circumcision even though it does not mean indignity to women in those communities where it is practiced.³¹⁴

I doubt that this method adds much to our understanding of dignity. If we are to use dignity as an objective moral criterion, it should not matter how a degrading act is perceived by the perpetrator, the victim, or their neighbors. And conversely, if, as Dan-Cohen main-

the pickled head of a dead fetus attached to a seagull's body has fueled a furor in Switzerland about the boundaries of art").

³⁰⁷ See *supra* notes 1–6 and accompanying text.

³⁰⁸ See Dan-Cohen, *Basic Values*, *supra* note 299, at 777.

³⁰⁹ *People v. Samuels*, 58 Cal. Rptr. 439, 449 (Ct. App. 1967).

³¹⁰ Dan-Cohen, *Basic Values*, *supra* note 299, at 777 ("Acquitting Samuels could, accordingly, be an expression of the court's deference to a community other than its own and to a meaning the court does not share.").

³¹¹ See Hilton, *supra* note 97.

³¹² See Cook, *supra* note 3, at 17.

³¹³ See MEIR DAN-COHEN, *HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY* 164 (2002) [hereinafter DAN-COHEN, *HARMFUL THOUGHTS*].

³¹⁴ See *id.*

tains, Samuels should have been acquitted, it is not because pain does not mean indignity in the sadomasochistic community; it may only be because, in general, pain does not necessarily mean indignity.

In my view, “harm to dignity,” unaccompanied by a rights violation, should be limited to treatment that denies the victim the basic respect to which every person is entitled just by virtue of being a human being, no matter where he lives or to what cultural group he belongs.³¹⁵ To be morally convincing, this understanding of dignity has to be shared by the community at large, not merely some of its segments.

Furthermore, we should recognize that every time we use the “dignity” argument to criminalize consensual behavior, we override an individual’s liberty—partly paternalistically, but mostly for the benefit of society at large. Therefore, as with any imposition on individual liberty, the threat to society should be serious enough to warrant the use of criminal sanctions. For example, it is not unreasonable to believe that “The Fear Factor,” a popular television reality show, violates its participants’ dignity;³¹⁶ however, the magnitude and nature of the personal or societal harm involved are insufficient to justify a criminal ban.

The foregoing discussion illustrates several points. Perhaps the most important among them is that we need a broader theory of harm than one based entirely on rights. Criminal law should protect human dignity and other aspects of humanity, not merely autonomy.³¹⁷ As Duff convincingly argued, the reason we criminalize violations of au-

³¹⁵ I agree with Markus Dubber that criminal law should protect only moral dignity, or dignity of personhood, as opposed to social dignity, or dignity of rank. See Dubber, *supra* note 20, at 567. Distinguishing the two kinds of dignity, Dubber explains:

Social dignity is not only hierarchical and relative. It is also nonessential; it can be gained and lost, at least in a society that permits social mobility upward and downward. . . .

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.

Id. at 535. Meir Dan-Cohen makes a similar point when he observes that the term “dignity” should be understood as “moral worth” and not “social status.” See DAN-COHEN, *HARMFUL THOUGHTS*, *supra* note 313, at 169 n.23.

³¹⁶ As one journalist commented, “Do we really need to see people buried under 400 rats, each biting the exposed body parts of the desperate contestants? No. And it doesn’t get any more palatable when someone yells out, ‘Keep your butt cheeks clenched!’” Tim Goodman, *Reality TV Hits a Tailspin with NBC’s ‘Fear Factor,’* S.F. CHRON., June 11, 2001, at E1.

³¹⁷ See Duff, *supra* note 23, at 44 (noting that there are reasons to criminalize violations against a victim’s humanity).

tonomy is because we view autonomy as an essential aspect of humanity.³¹⁸

But if we then recognize the inadequacy of a Kantian conception of humanity, which focuses only on our autonomy as formally rational beings, and develop a richer conception that does justice to the morally significant aspects of our nature as social, embodied and impassioned beings, we will see that there are more ways to deny or radically fail to respect humanity than by violating autonomy. We will then also see that we therefore have good reason—reason of the same kind as we have to criminalize violations of autonomy—to criminalize other modes of conduct that deny or radically fail to respect the humanity of those against or on whom they are perpetrated.³¹⁹

Developing such theory is far beyond the goals of this Article. A few thoughts, however, may be relevant for the theory of consent advocated here.

Conceptually, a rights violation is a wrongful setback to an interest.³²⁰ Traditional criminal theory protects most essential welfare interests from wrongful interference by others, where “wrongfulness” is understood as violation of autonomy.³²¹ In my view, the concept that requires revision, in order to reflect a broader meaning of harm, is the concept of wrongfulness: what we find morally objectionable is not only disregarding one’s will but also rejecting one’s human dignity.

If we include violation of dignity in the concept of “wrong,” then harm can continue to be defined as a wrongful setback to an interest, where “wrongful” means either that which violates a right (i.e., autonomy) or that which violates the victim’s dignity. The two kinds of harm would include the same evil—objectification of another human being—which may happen through a rights violation (e.g., murder) or, alternatively, through a setback to interests combined with the disregard of the victim’s dignity (e.g., consensual deadly torture).

A setback to interests alone (e.g., due to a successful competitor) or disrespect to dignity alone (e.g., during a “Fear Factor”-like competition) should not be criminalized. I am underscoring this point in order to express a concern connected to the practical application of

³¹⁸ *Id.*

³¹⁹ *Id.*

³²⁰ FEINBERG, HARM TO OTHERS, *supra* note 160, at 33–34; *see also* Stewart, *supra* note 290, at 65–66 (proposing to redefine harm as a setback to interests).

³²¹ FEINBERG, HARM TO OTHERS, *supra* note 160, at 62 (explaining that criminal law protects “welfare interests of the most vital kind”).

dignity-related arguments. It is only to be expected that such a broad and politically charged concept as human dignity would cause profound disagreement among people.³²² To avoid overcriminalization yet capture the kind of harm most of us would want to ban despite its consensual nature, I suggest that disregard of one's dignity should be criminalized only if it is combined with a setback to interests protected by criminal law.³²³

Based on this broader theory of harm, society should prosecute two kinds of conduct. One is a violation of rights protected by criminal law, regardless of any additional setback to interests. As an example, consider *Gilbert v. State*,³²⁴ in which a court convicted a seventy-five-year-old man of first-degree murder for shooting his wife.³²⁵ Roswell and Emily Gilbert had been married for fifty-one years.³²⁶ For the last few years of her life, Emily suffered from osteoporosis and Alzheimer's disease, and her condition rapidly deteriorated.³²⁷ Testifying at his trial, Roswell Gilbert tried to explain the killing: "[T]here she was in pain and all this confusion and I guess if I got cold as ice-water that's what had happened. I thought to myself, I've got to do it, . . . I've got to end her suffering"³²⁸ Roswell admitted that Emily had never asked him to kill her.³²⁹

As dramatic and sad as this case is, the appellate court was right to affirm the defendant's conviction. Even though he was motivated by compassion and a desire to protect his wife's dignity, and, in fact, did everything he could to make her death as painless as possible,³³⁰ she did not consent to being killed. An unauthorized mercy killing of an autonomous human being is, and should be, murder. No one has the right to decide for another person that his life is not worth living.

³²² For instance, Dan-Cohen and Duff seem to hold opposite views on whether sadomasochistic activities deny participants their dignity. Compare Dan-Cohen, *Basic Values*, *supra* note 299, at 777 (maintaining that sadomasochistic beating does not necessarily mean disrespect of the victim), with Duff, *supra* note 23, at 41–43 (observing that the sadomasochistic activities discussed in *R v. Brown* dehumanize and degrade the participants).

³²³ Here, and throughout the Article, I am talking only about situations that do not provide grounds for criminalization pursuant to the "offense to others" rationale. See FEINBERG, *HARM TO OTHERS*, *supra* note 160, at 31–64 (discussing harms as setbacks to interests).

³²⁴ *Gilbert v. State*, 487 So. 2d 1185 (Fla. Dist. Ct. App. 1986).

³²⁵ *Id.* at 1186–87.

³²⁶ *Id.* at 1187.

³²⁷ *Id.*

³²⁸ *Id.*

³²⁹ *Id.* at 1188.

³³⁰ *Id.* (explaining that he used a gun because it causes instantaneous death).

The second kind of harm that should be criminalized under the broader theory of harm outlined above happens when an important interest normally protected by criminal law is set back (albeit consensually) in a way that denies the victim his equal moral worth. For example, by killing Brandes, Meiwes did not violate the former's right to life.³³¹ However, he not only defeated the most essential interest of Brandes (his interest in continued living), but also used Brandes as an object, a means of obtaining a desired experience, and thus disregarded his dignity.

One other point may be worth making. All criminal offenses are wrongful by definition. Either violation of rights or setback to interests combined with disrespect to the victim's dignity should be sufficient for criminal prosecution. However, to be fair, the law should distinguish the *relative* wrongfulness of an act, which depends on the importance of the affected rights,³³² the extent of a setback to an interest,³³³ and the seriousness of the failure to respect the victim's dignity. For example, theft is a serious offense that violates the victim's property rights and sets back his interests (the larger the amount, the more substantial the setback). However, it is not as serious as, say, rape, which not only violates a more essential, personal interest and the corresponding right in physical and sexual inviolability, but also involves the indignity of using the victim as an object, and not a subject, of sexual intercourse. Accordingly, the rapist deserves a more severe punishment than a thief. And a thief who stole \$100,000 deserves a more severe punishment than a thief who stole \$100.

C. Consent as a Partial Justification

The conclusions of the previous two sections allow us to place consensual physical harm within two paradigms: the paradigm of consent and the paradigm of harm. Because valid consent eliminates violation of rights, the only instance in which we should criminalize consensual injury or death is when it both sets back victims' essential interests and violates their dignity. At the same time, we now know that consent in cases of consensual injury or death may play only an exculpatory role.

³³¹ See Finn, *supra* note 1.

³³² For an interesting discussion of different degrees of "stringency" of rights, see Judith Jarvis Thomson, *Some Ruminations on Rights*, 19 ARIZ. L. REV. 45, 51–58 (1977).

³³³ For example, according to Feinberg's typology, interests may be "set back," "defeated," "thwarted," and "impeded." To "set back" an interest is to reverse its course, turn it away, put it back toward the point from which it started." FEINBERG, HARM TO OTHERS, *supra* note 160, at 53.

What follows is that, in order to be entitled to a full defense, the perpetrator has to prove that the *prima facie* criminal violation did not, in fact, set back the victim's essential interests or did not violate his dignity in a way that may hurt society at large. This proposal is very commonsensical: if no welfare interests protected by criminal law are at stake, the mere violation of dignity is most likely a private matter in which society has no business to interfere (e.g., sexual role-playing that involves humiliation of one partner). If, on the other hand, people's dignity is not violated, there is no reason to disregard their autonomy (i.e., not to let them make important, even if hurtful, personal choices).

Suppose that the defendant has failed this task. Does this mean that the victim's consent has no impact on his culpability? In this section, I argue that, even in this case, the defendant should be entitled to partial justification. Partial justification does not make a wrongful act right; it merely renders the act *less wrongful* compared to what it would have been in the absence of the mitigating circumstance (in this case, consent).³³⁴

Take a lifeboat scenario, in which all will die unless a few sacrifice their lives by jumping overboard. Assume that the necessary number of people have volunteered, but for whatever reason (perhaps they are too weak to be able to move), they cannot complete the suicidal act on their own. Would it be wrong to push them off? I agree with Michael Moore that even if it would be wrong, it would certainly be less wrong than drowning those who have not volunteered.³³⁵

Why would this consensual killing be less wrongful? Now that we have briefly reviewed various kinds of harm, we can answer this question. This is so mainly because, compared to an identical nonconsensual act, the consensual killing would not involve a certain kind of harm, namely, violation of rights.³³⁶ It was the victims' choice to sacrifice their lives; therefore, the victims are to a large degree responsible for the harm. Accordingly, the perpetrator has brought about less harm than in a nonconsensual act and thus deserves a lesser punishment.

The idea that a less harmful act deserves a lesser punishment, although not universally accepted,³³⁷ has strong support in both our

³³⁴ See Husak, *supra* note 273, at 170.

³³⁵ See MOORE, BLAME, *supra* note 23, at 708.

³³⁶ It is plausible that a consensual act also causes less indignity because it at least respects the victim's autonomy.

³³⁷ Compare Michael Moore, *Victims and Retribution: A Reply to Professor Fletcher*, 3

law and our morality.³³⁸ We decide whether people deserve praise or penalty based, in part, on the end result of their actions. A sprinter who almost won the race does not deserve the same medal as the sprinter who, in fact, came in first. Similarly, a driver who almost hit a pedestrian does not deserve the same punishment as a driver who did, in fact, hit and kill someone.

Many criminal law doctrines implicitly or explicitly draw on the moral significance of harm. For example, the defense of necessity presumes that the actor has violated a legal (and often moral) norm. Yet he may be completely absolved of criminal liability if he committed the *prima facie* offense in order to avoid a greater harm or evil.³³⁹ If the amount of the resulting harm did not affect the wrongfulness of an act, the actor who has made the right choice and, say, saved the lives of several mountaineers by breaking into a deserted house would not be justified in what he did.

The moral significance of harm makes the attribution of harm essential to the idea of fair punishment.³⁴⁰ In a nonconsensual act, the perpetrator bears full responsibility for the harm. When the act is consensual, however, the victim shares the responsibility and the perpetrator's criminal liability should reflect that.

In fact, the victim's consent or participation is already taken into account at the sentencing stage of a criminal trial.³⁴¹ The victim's con-

BUFF. CRIM. L. REV. 65, 87 (1999) ("It's not culpability alone that counts in determining desert. . . . Rather, the amount of harm caused determines the seriousness of the wrong done, and the amount of wrong done does affect desert . . ."), with HART, PUNISHMENT, *supra* note 245, at 131 ("Why should the accidental fact that an intended harmful outcome has not occurred be a ground for punishing less a criminal who may be equally dangerous and equally wicked?"). The debate over the moral and legal significance of the resulting harm has a long history and still continues. For an insightful analysis of the advocated positions on both sides of the debate, see, for example, MOORE, BLAME, *supra* note 23, at 191-247.

³³⁸ See, e.g., Sanford H. Kadish, *The Criminal Law and the Luck of the Draw*, 84 J. CRIM. L. & CRIMINOLOGY 679, 701 (1994). Kadish conceded that:

While in principle it's difficult to find good reasons for making desert turn on chance, here's the rub: most of us do in fact make judgments precisely of this kind. Doesn't it seem natural for a parent to want to punish her child more for spilling his milk than for almost spilling it, more for running the family car into a wall than for almost doing so?

Id. at 688.

³³⁹ See, e.g., MODEL PENAL CODE § 3.02 (1985).

³⁴⁰ See *Mills v. Maryland*, 486 U.S. 367, 397 (1988) ("If a jury is to assess meaningfully the defendant's moral culpability and blameworthiness, one essential consideration should be the extent of the harm caused by the defendant.").

³⁴¹ Presently, twenty-three states and the federal government recognize either the victim's participation in the crime or consent to the criminal conduct, or both, as a mitigating factor. See Bergelson, *Victims*, *supra* note 152, at 436.

sent to homicide is a mitigating factor for capital sentencing purposes in twenty-four of the thirty-one death penalty jurisdictions listing statutory mitigating factors.³⁴² The MPC comments that in the situation of a mercy killing, “the defendant’s homicidal act may not have occurred had the victim not consented to it. [In that case], the conduct of the victim in bringing about his own death deserves consideration as a mitigating factor in assigning a death sentence.”³⁴³

However, reducing the role of consent to a sentencing mitigator is unwarranted: a consideration that changes the very wrongfulness of an act should be taken into account at all stages of a criminal trial.³⁴⁴ If consent of the victim is legally valid, the actor should be entitled to at least a partial justification, which should result in conviction of a lesser offense, not merely a milder punishment.³⁴⁵

D. Consent as a Complete Justification: A “Good Reason” to Cause Harm

Assuming the valid consent of the victim provides partial justification (which, depending on the circumstances of the case, may or may not significantly affect the perpetrator’s punishment),³⁴⁶ how much more is required for full justification? To answer this question, we need to provide a plausible rationale for criminalizing consensual injury. We already know the kind of evil we want to prevent—a setback to essential interests combined with a substantial offense to dignity.

Certainly, human dignity and the ability to pursue one’s life plans are important values on a personal as well as societal level. However, if the reason for criminalizing consensual harm stemmed only from the desire to promote those values, we would continue to prosecute a person who has attempted to commit a suicide or severely tortured himself. The fact that we do not punish self-dehumanizing and self-destructive acts, yet punish identical acts when they are done by an-

³⁴² See James R. Acker & Charles S. Lanier, *In Fairness and Mercy: Statutory Mitigating Factors in Capital Punishment Laws*, 30 CRIM. L. BULL. 299, 320–21 (1994); see also Bergelson, *Victims*, *supra* note 152, at 437–38, nn.191–93.

³⁴³ MODEL PENAL CODE § 210.6 cmt. 6(b).

³⁴⁴ See Bergelson, *Victims*, *supra* note 152, at 430–39 (discussing why the victim’s actions should be considered at the guilt-adjudication stage and not merely at the sentencing stage); see also Kyron Huigens, *Rethinking the Penalty Phase*, 32 ARIZ. ST. L.J. 1195, 1251–54 (2000) (explaining the difference between the “fault” and the “eligibility” mitigators).

³⁴⁵ See Vera Bergelson, *Conditional Rights and Comparative Wrongs: More on the Theory and Application of Comparative Criminal Liability*, 8 BUFF. CRIM. L. REV. 567, 594–97 (2004) (discussing practical implementation of the proposed mitigation of offenses).

³⁴⁶ See *supra* Part II.B (last paragraph).

other person, suggests that the real moral difference lies in the involvement of that other person. That supposition brings us back to the theory of rights and the role of consent.

To have a right means to have a certain moral status. Consent is a way to change this status unilaterally by transferring to another person a claim, privilege, power, or immunity.³⁴⁷ For example, by promising a colleague to read his piece, I give him a claim against me with regard to that promise. By consenting to a surgery, I give the physician a privilege to perform it. By telling my daughter that she may do whatever she wants with an extra copy of *Harry Potter*, I give her a power to do so.

In all those instances, I waive a right I used to have and give other people rights they did not have before. My consent or promise does not impose any obligations on them; it merely provides them with an option. Even when I combine my waiver of rights with a request, these other people still have no duty to follow it. For example, I may request (and simultaneously consent to) a surgery. If my doctor does not believe I need it or does not want to perform it himself, he is under no duty to do so. In other words, my consent or even request creates a very weak content-independent reason for action, compared to, say, threats or orders of an authority.³⁴⁸

When a child breaks a rule, we demand: “Why did you do that?” This is a question about a moral reason for action and effectively about the availability of defenses. What we want to know is whether the child had a good reason for violating a rule of conduct. We are unlikely to accept “because such-and-such asked me to” as a valid reason or defense. The classic parental reply to that would be: “And what if he asked you to jump off the Brooklyn Bridge?” By this reply, we in fact say: “You are a free moral agent. Why, being a free moral agent, did you choose to break the rule (cause harm)?”

The question about a “good reason” addresses both prongs of the evil we want to prevent by criminalizing consensual acts that set back important human interests and disregard victims’ dignity. The “good reason” to hurt another must negate either kind of harm (since, as

³⁴⁷ See THOMSON, *supra* note 291, at 360–61. See generally WESLEY NEWCOMB HOHFELD, *FUNDAMENTAL LEGAL CONCEPTIONS* (1923) (exploring and defining various aspects of legal rights).

³⁴⁸ See, e.g., RAZ, *supra* note 219, at 437. Based on Raz’s definition, a “reason is content-independent if there is no direct connection between the reason and the action for which it is a reason.” *Id.* at 35; see also MOORE, BLAME, *supra* note 23, at 708–11 (discussing the victim’s assumption of risk as a consideration reducing wrongfulness of the perpetrator’s action).

discussed earlier, only the combination of the two harms warrants criminal sanctions for a consensual act) on the objective and subjective levels.³⁴⁹

1. *The Objective Meaning of a "Good Reason" to Cause Harm*

Generally, if the perpetrator's actions do not violate rights and produce a positive balance of harms/evils and benefits, he is entitled to the defense of complete justification. For example, a mountaineer *A* who, in order to save the life of his friend *B* and with *B*'s consent, has cut off *B*'s leg would be completely exonerated from criminal liability.

Similarly, a consensual setback to the victim's interests that protects the victim's dignity should be justifiable. For instance, a mercy killing of a suffering terminally ill patient certainly destroys his interest in continued living. However, when based on the patient's plea, such killing respects and preserves the dignity of the dying individual and, therefore, should not be subject to criminal liability.³⁵⁰ That was the story behind *People v. Kevorkian*,³⁵¹ in which the state prosecuted Dr. Kevorkian for administering a lethal injection to a former race-car driver who, due to Lou Gehrig's disease, was no longer able to move, eat, or breathe on his own.³⁵² Even the patient's family had accepted his choice to escape the suffering and indignity of the slow demise.³⁵³ But not the trial court nor the appellate court: the former convicted Dr. Kevorkian of second-degree murder, and the latter affirmed the conviction.³⁵⁴ In my view, both decisions were erroneous.

Naturally, the more serious (disabling and irreversible) is the impediment to the victim's interests, the more serious must be the reason for the injurious action. A sadomasochistic beating, which leaves no permanent damage, should be justified by the mere fact that its participants desired it. Even those who believe that such beating violates the victim's dignity would probably agree that it does not significantly affect the victim's long-term interests. On the other hand, it is

³⁴⁹ In addition, as discussed before, to qualify for either full or partial justification, (a) the harmful act must be based on legally sufficient consent, and (b) the perpetrator must be aware of that consent. See *supra* notes 123–53, 243–46 and accompanying text.

³⁵⁰ See, e.g., *People v. Kevorkian*, 527 N.W.2d 714, 727 (Mich. 1994) (discussing the defendant's unsuccessful claim that assisted suicide is crucial to "personal autonomy").

³⁵¹ *People v. Kevorkian*, 639 N.W.2d 291 (Mich. Ct. App. 2001).

³⁵² *Id.* at 298.

³⁵³ *Id.*

³⁵⁴ *Id.* at 296.

hard to imagine any “good reason” that would justify a consensual deadly torture.

If adopted by courts, this balancing test would significantly improve the current rule, which completely disregards both people’s reasons for harmful actions and the relative amount of harm as soon as the injury reaches the threshold of being “serious.” The revised rule would be a step forward not only compared to the current U.S. law but also compared to the preliminary proposal of the Law Commission for England and Wales, which, to the disappointment of many, merely raised the level of permissible injury by “one notch” instead of completely rejecting the quantitative approach to consensual harm.³⁵⁵ This new rule would promote individual privacy and liberty, while at the same time guard society from frivolous abuse of people’s essential interests and dignity.

I realize that it may be difficult sometimes to determine what qualifies as a “good reason” and to measure harm to interests or dignity against the benefits produced by an injurious act. Yet there is little new in this task. The justificatory defense of necessity is based on very similar considerations.³⁵⁶ In order to claim successfully necessity, the defendant must establish that the harm or evil sought to be avoided by his conduct was greater than the harm or evil sought to be prevented by the law he has breached.³⁵⁷

In fact, practically all justification defenses have this “balance of evils” component. For example, a target of a wrongful deadly attack may kill in self-defense not merely because if he does not, he himself may be killed, but also because he is “right” and the aggressor is “wrong.”³⁵⁸ By attacking an innocent person, the attacker loses moral parity with him.³⁵⁹ That is why the law prefers the life of an innocent person to the life of an aggressor and concludes that, on balance, the

³⁵⁵ See LAW COMM’N, CONSENT AND OFFENCES AGAINST THE PERSON, *supra* note 7, ¶ 16.1; Roberts, *supra* note 8, at 253.

³⁵⁶ See, e.g., MODEL PENAL CODE § 3.02(1) (1985) (“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.”).

³⁵⁷ *Id.*; see also *id.* § 3.02 cmt. 2 (explaining that “the balancing of evils is not committed to the private judgment of the actor; it is an issue for determination at the trial”).

³⁵⁸ If the target of the attack was also at fault, he may lose the right to use deadly force in response to a deadly attack either completely or until he satisfies certain rather onerous requirements (e.g., the initial aggressor has a heightened obligation to retreat). See, e.g., *id.* § 3.04(2)(b).

³⁵⁹ See, e.g., SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENSE JUSTIFICATION OF HOMICIDE 198 (1994) (suggesting that “the aggressor sacrifices something morally very

death of the aggressor is a lesser evil than the death of an innocent person.

Similarly, consent of the victim may serve as a defense of justification only if the perpetrator's act results in the objectively positive balance of harms/evils and benefits. For example, consensual gladiatorial matches are unacceptable not only because of the potential for death and injury (i.e., setback to the participants' vital interests) and the indignity of turning human death into a show, but also because the benefits they produce (entertainment for the spectators and a chance to strike it rich for the participants) are quite frivolous compared to the quantity and quality of the harm involved. In contrast, many advocate legalization of organ sale because donation does not produce nearly enough needed organs.³⁶⁰ There is a sound argument that the setback to sellers' health may be balanced by benefits purchased with the proceeds of the sale, and that the sellers' dignity will not suffer more than in the currently legal sale of blood, sperm, or ova. At the same time, the benefit of saved human lives would add dignity to the transaction and, on balance, produce more good than evil.

As is clear from the previous examples, the positive balance of harms/evils and benefits is not limited only to the victim's interests. An act is justifiable if it produces an overall positive balance of harms/evils and benefits (to society, a third party, or even the perpetrator) as long as the harm (i) is consensual and (ii) does not significantly setback the victim's interests while, at the same time, disregarding his dignity. Recall the lifeboat hypothetical in which volunteers who agreed to sacrifice their lives had to be pushed overboard.³⁶¹ I cited it as an example of at least partial justification. I would now argue that those who pushed the volunteers off the boat deserve not merely partial but complete justification: they destroyed the victims' interests in continued living but neither violated their rights nor disregarded their dignity and, in addition, they saved numerous human lives which otherwise would have been lost.

One might claim that if an act produces a measurably positive outcome, that act is justified by the outcome alone, and consent of the victim is irrelevant. This claim is untrue. If the victims in the lifeboat

weighty when he becomes an unjust immediate threat; and if he does not forfeit the right to life itself, then he forfeits moral parity in respect of that right").

³⁶⁰ See, e.g., Steve P. Calandrillo, *Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage*, 13 GEO. MASON L. REV. 69, 69 (2004) (observing that over one-half of 85,000 Americans waiting to receive kidneys, livers, hearts, or other human organs will die while waiting).

³⁶¹ See *supra* note 335 and accompanying text.

hypothetical did not volunteer, no number of saved lives would justify their killing.³⁶² Moreover, even if the victim himself benefited from the violation of his rights, the harm would not be justifiable. If *B*, the injured friend of the mountaineer *A* discussed in the beginning of this section, vehemently objected to the impromptu surgery, unwilling to take its risks and consequences, but *A* overpowered him and cut off his leg anyway, *A* would not be justified under the “balance of evils” defense. We penalize even medical doctors for operating on nonconsenting patients, and medical doctors normally have a stronger claim than a layperson that violating a patient’s autonomy was a lesser evil compared to taking the risk that the patient’s condition may deteriorate. Conceptually, the “balance of evils” argument would be denied to *A* because hurting a conscious, rational person against his will constitutes an evil of such magnitude that it cannot be outweighed either by *A*’s best intentions or by the overall advancement of the victim’s interests.

2. *The Subjective Meaning of a “Good Reason” to Cause Harm*

An objectively justifiable outcome of a harmful consensual act is a precondition of the perpetrator’s justification, yet it is not enough. To be completely exonerated, the perpetrator must demonstrate more. As we have already seen, the proper *mens rea* is essential for the availability of justification.³⁶³ The basis for this requirement, once again, may be explained by the limited scope and the teleological nature of the defense: we do not give people an open license to break rules and cause harm; instead, we tolerate the harm to the extent it is necessary to achieve the “lesser evil” outcome.

What should be the level of the perpetrator’s awareness of the justifying circumstances to deserve moral and legal justification? There are grounds to believe that it should be purpose.³⁶⁴ For example, under the MPC, a person may not defend his life with deadly force if he provoked the attack “*with the purpose* of causing death or serious bodily harm” to the current attacker.³⁶⁵ In comparison, an initial aggressor who did not have such a purpose still retains the right to

³⁶² See, e.g., *R v. Dudley & Stephens*, (1884) 14 Q.B.D. 273 (Eng.) (holding the defense of necessity inapplicable to a nonconsensual killing).

³⁶³ See *supra* notes 243–46 and accompanying text; see also FLETCHER, *supra* note 23, at 320–21 (arguing that objective necessity is not enough for justification).

³⁶⁴ By “purpose,” I mean “a causally effective desire that is the actor’s actual reason for acting.” Kenneth W. Simons, *Rethinking Mental States*, 72 B.U. L. REV. 463, 544 (1992).

³⁶⁵ MODEL PENAL CODE § 3.04(2)(b)(i) (1985) (emphasis added); see also *id.* § 3.04 cmt. 4(b) (observing that an actor is deprived of the privilege of self-defense if he “provokes a strug-

use deadly force.³⁶⁶ An earlier wrongful purpose thus destroys the privilege of self-defense by putting a cloud on the current purpose for deadly actions. That would not be the rule if the subjective reason for one's objectively justified actions were irrelevant.

Take another example: suppose person *A* hates his enemy *B* and wants him dead. Knowing that *B* frequents a certain bar, *A* spends night after night outside the bar waiting for an occasion. While he is waiting, he witnesses numerous fights, sexual assaults, even murders; however, he never interferes, until finally one day he sees *B* attacking another patron *C* with deadly force. Knowing the law of defense of another,³⁶⁷ *A* intervenes and kills *B*. At his trial, *A* honestly tells his story of patience and determination. Should he be rewarded for these qualities and completely exonerated, even though we know that he would not have defended *C* but for his desire to kill *B*?

I think most of us would view such acquittal as a mockery of justice. Justification defenses are not intended to provide people with convenient opportunities to commit crimes. Any justifiable conduct requires good faith;³⁶⁸ and, in the context of a limited license to overstep a prohibitory norm, the requirement of good faith should be satisfied only when the subjective purpose of the perpetrator is directed towards the goals for which that license is granted.³⁶⁹

Furthermore, the "choice of evils" is not available as a defense against a negligent (or reckless) crime if the defendant was negligent (or reckless) in bringing about the situation that made the injurious choice necessary.³⁷⁰ Under this logic, should not a defendant who *intentionally* placed himself in a situation in which he would be able to use the defense of another as a cover up for *intentional* homicide be denied the defense of justification?

All these arguments support my view that, to qualify for the defense of justification, one must have both the knowledge of the justify-

gle [with the] purpose that the outcome shall be the death of his victim or his serious bodily harm").

³⁶⁶ See *id.* § 3.04(2)(b)(i); see also *id.* § 3.04 cmt. 4(b) ("Subsection 2(b)(i), depriving [the actor] of his justification on the ground of initial aggression, would not become operative unless [the actor] entered the encounter with the purpose of causing death or serious bodily harm.").

³⁶⁷ See, e.g., *id.* § 3.05.

³⁶⁸ See FLETCHER, *supra* note 23, at 565 (arguing that justification is an exception to a prohibitory norm and, as such, should be available only to those who merit special treatment).

³⁶⁹ In contrast, when consent plays an inculpatory role, the perpetrator is not required to act in good faith to avoid criminal liability.

³⁷⁰ MODEL PENAL CODE § 3.02(2). In a number of states, the rule is even more strict: the defense of necessity is completely foreclosed for an actor who was at fault in bringing about the situation requiring the choice of harms or evils. See *id.* § 3.02 cmt. 5, n.27.

ing circumstance and a purpose specifically directed at it.³⁷¹ Pursuant to this reasoning, self-defense or defense of another should require knowledge as to the fact of the attack, its imminence and seriousness, and the purpose to protect oneself or another from that attack. Similarly, the “balance of evils” defense should require the knowledge of a threat and the purpose to avoid it. What about consent? Certainly, in order to use the victim’s consent as a defense, the perpetrator should be aware of that consent. The perpetrator should also have a justificatory purpose, but what should that purpose be?

Fletcher suggests that it may be “fulfilling the desires of another person.”³⁷² I think that view is both under- and over-inclusive. It is overinclusive because fulfilling another person’s desires is not always necessary for a lawful, yet harmful, act. For example, a boxing champion may use another as a sparring partner (punching bag) without focusing much on that person’s desires.

At the same time, Fletcher’s proposition is underinclusive. As far as we know, Meiwes dutifully fulfilled all of Brandes’s desires.³⁷³ He even managed to cook a part of Brandes’s body, satisfying the latter’s fancy of letting his killer “dine from [his] live body,”³⁷⁴ and shared the snack with his bleeding but still-alive victim.³⁷⁵ Yet Meiwes is hardly entitled to complete justification.

What appears a better theory is that consent is related to other justification defenses on a slightly more abstract level: like other justifications, it requires both the subjective awareness of the necessary and permissive conditions, and a “good reason,” namely, the purpose to bring about a better balance of harms/evils and benefits than that which would exist without the perpetrator’s action. Just as with the requirement of an objectively positive outcome, this subjective purpose may include interests of other people and not merely of the victim. At the same time, similarly to the objective requirement for justification, the perpetrator may not aim at significantly setting back the victim’s interests while, at the same time, disregarding his dignity.

This theory makes sense both theoretically and practically. From the theoretical perspective, it places consent squarely within the fam-

³⁷¹ See *id.* § 3.02 cmt. 2 (“It is not enough that the actor believes that his behavior possibly may be conducive to ameliorating certain evils; he must believe it is ‘necessary’ to avoid the evils.”).

³⁷² Fletcher, *supra* note 237, at 320–21.

³⁷³ See Finn, *supra* note 1.

³⁷⁴ *Id.*

³⁷⁵ *Id.*

ily of justification defenses. These defenses all seek to overcome the deontological constraint against intentional infliction of harm. The ethical doctrine of double effect directed at the same moral constraint maintains, for instance, that an act that produces harm may be permissible if the harm is outweighed by good consequences and the harm is not directly intended.³⁷⁶

Even those who do not subscribe to the doctrine of double effect would perhaps agree that there is a moral difference in choosing a certain course of action *despite* its negative effects as opposed to *for the sake of* its negative effects.³⁷⁷ Aiming at evil makes one more culpable.³⁷⁸ For example, “[k]illing, torturing, or disfiguring for the sheer joy of it seems rather paradigmatic of true evil.”³⁷⁹ In that sense, consensual killing, torturing, or disfiguring for the sheer joy of it is not much different. I concur with Thomas Nagel that, when a person volunteers to be subjected to some kind of pain or damage, either for his own good or for some other end which is important to him, the evil at which the perpetrator is constrained not to aim is his “victim’s evil, rather than just a particular bad thing.”³⁸⁰ Nagel’s observation corresponds with my claim that the evil criminal law should seek to prevent is objectification of another human being, which, in a consensual act, is a combination of a significant setback to interests and a violation of dignity.

This test also makes sense as a practical matter. On the one hand, it requires proof of the perpetrator’s good faith and benevolent purpose. In that, it is similar to other justification defenses; therefore, the

³⁷⁶ THOMAS NAGEL, *THE VIEW FROM NOWHERE* 179 (1986) (“The principle says that to violate deontological constraints one must maltreat someone else intentionally. The maltreatment must be something that one does or chooses, either as an end or as a means, rather than something one’s actions merely cause or fail to prevent but that one doesn’t aim at.”).

³⁷⁷ See, e.g., Antony Duff, *Intention, Responsibility and Double Effect*, 32 *PHIL. Q.* 1, 1–2 (1982).

³⁷⁸ MOORE, *BLAME*, *supra* note 23, at 409 (“We are the authors of evil when we aim to achieve it in a way we are not if we merely anticipate that evil coming about as a result of our actions.”).

³⁷⁹ *Id.* at 408.

³⁸⁰ See NAGEL, *supra* note 376, at 182. I do not completely agree with Nagel’s further argument that “each individual has considerable authority in defining what will count as harming him for the purpose of this restriction.” *Id.* To be more accurate, I accept the individual’s limited authority to determine harm, as long as we are looking at the issue from a purely moral perspective. However, it is both impracticable and improper to construct criminal law on this basis. Otherwise, using Leo Katz’s hypothetical, a criminal who followed his victim’s plea to kill rather than rape her would be right to claim that his punishment should be no greater than punishment for rape: after all, the victim herself preferred murder to rape (i.e., regarded it as a lesser evil). See KATZ, *supra* note 51, at 147.

requirement will not be new either to the general public or to the judiciary. On the other hand, to be justified in a consensual harmful act, the defendant would not have to prove that he was motivated by a noble goal of a particular kind.

Realistically, people seldom have just one motive for their actions. Dr. Kevorkian, for instance, admitted that his motive for killing the Lou Gehrig's disease victim was "to relieve [his] pain and suffering and to bring the issue of euthanasia to the forefront."³⁸¹ Most sadomasochistic encounters presumably are motivated by altruistic as well as egotistic feelings. A surgeon who has agreed to perform a risky innovative surgery may be driven by compassion as well as intellectual curiosity and career ambitions. We may not like some of the perpetrator's motives; however, as long as (i) the perpetrator intended to achieve, and in fact achieved, a positive "balance of evils," and (ii) the consensual harmful act neither aimed at, nor resulted in, substantial harm to the victim's interests and dignity, the perpetrator should be justified.

The corollary to this conclusion is a thesis that the perpetrator who cannot satisfy those requirements should be entitled only to partial justification. More specifically, the perpetrator should not be completely justified if any of the following are true:

(i) the harmful consensual act has brought about more bad than good (e.g., the euthanized patient was not in pain and had excellent prospects of recovery);

(ii) the harmful consensual act has significantly set back the victim's interests and dignity (e.g., the Meiwes-Brandes case of murder and cannibalism);

(iii) the perpetrator's conscious goal was to bring about evil results (e.g., killing a consenting terminally ill patient out of sheer hatred for him and his family who will be broke when he dies); or

(iv) the perpetrator's conscious goal was to set back significantly the victim's interests and dignity (e.g., hiring the victim for severe and humiliating beating with the intent of injuring the victim's body and self-esteem).

The first example is typically a case of a mistake of judgment. Like any other mistake, that case should be treated as an instance of excuse and not justification.³⁸² If the perpetrator's mistake was rea-

³⁸¹ *People v. Kevorkian*, 639 N.W.2d 291, 332 (Mich. Ct. App. 2001).

³⁸² See, e.g., Bergelson, *Victims*, *supra* 152, at 407-08 (discussing why mistake should be a defense of excuse and not justification and citing conflicting views on the issue).

sonable, he should be completely exonerated from criminal punishment. For members of the medical profession, it may be advisable to add a rebuttable presumption that, when in the course of consensual treatment they cause pain or injury to their patients, they act appropriately and in the interests of those patients, i.e., to shift the burden of production with respect to any alleged wrongdoing to the prosecution.

The second example involves the kind of harm which, as discussed above, should be prohibited by criminal law, irrespective of the parties' intentions and preferences.³⁸³

The third and fourth examples involve situations in which the perpetrator's reasons for causing consensual harm are malevolent. Even if we assume that the perpetrator's purpose was frustrated (e.g., in the third example, the terminally ill man was spared the suffering of his final days, and his family found a way out of financial trouble; and in the fourth example, the victim's injuries were not particularly severe), still the malicious purpose, combined with the voluntary act, makes the perpetrator guilty. In the third example, the perpetrator simply lacks a good reason necessary for justification: hatred does not justify intentional killing.

In the last example (still assuming the frustration of purpose), the perpetrator's wrongdoing is similar to an attempt. In the case of an attempt, the perpetrator commits a wrongful act with a culpable state of mind but does not bring about the social harm proscribed by the completed offense. In an attempted murder, for instance, the perpetrator shoots with the purpose to kill but misses his victim. His act is wrongful because its objective is to violate the rights of the victim: people have a right not to be physically attacked without provocation. In the fourth example, the perpetrator also commits a wrongful act with a culpable state of mind, namely, he beats the victim with the purpose of causing injury to the victim's body and dignity. This act does not violate the victim's rights because it is consensual. It is, nevertheless, wrongful under the theory of harm advocated here because its objective is to damage the victim's essential welfare interests and dignity. Due to the wrongfulness of his purpose, the perpetrator is not entitled to complete justification. Unlike in the case of attempt, the perpetrator in the last example does cause the social harm proscribed by the underlying offense, yet *not all* of the proscribed harm. Thus, he is guilty of the completed, albeit mitigated, offense.

³⁸³ See *supra* notes 304–30 and accompanying text.

Naturally, the extent of partial justification attributed to the victim's consent should depend on the facts of each case and, at a minimum, reflect the importance of the victim's interests (both harmed and intended to be harmed), the extent of the actual and intended damage to the victim's interests and dignity, and the actual and intended balance of harms/evils and benefits. In many instances, partial justification will reduce the perpetrator's punishment to the minimal level. In the third example above, the perpetrator's fault is not very significant. He does not violate the victim's dignity, and while he destroys the victim's interest in continued living, he advances the victim's interest in avoiding pain and suffering. Due to his overall evil purpose, the perpetrator does not deserve full justification, but this does not mean he ought to go to jail. Community service or its equivalent may be much more appropriate. Conversely, the perpetrator in the second example is guilty of a serious wrongdoing, and his partial justification should not translate into the same mitigation of punishment as the partial defense in the third example.

In this Part, I discussed what roles consent may play with respect to a criminal offense. As my analysis shows, in the case of a bodily injury, that role is exculpatory. It is exculpatory because even when an injurious act does not merit punishment, it is still harmful and thus requires justification, unlike, for example, consensual kissing. At the same time, a consensual act is always less harmful than an identical nonconsensual act because the former does not involve one kind of harm included in a paradigmatic offense: violation of rights. For that reason, consent of the victim should always be at least a partial defense.

To be entitled to a complete defense, the perpetrator has to establish that, in addition to the victim's consent, he had a "good reason" for his harmful action: he intended to achieve a better balance of harms/evils and benefits (compared to that which would have resulted from his inaction) and, in fact, managed to achieve it. This positive balance of harms/evils and benefits may include interests of people other than the victim as long as the perpetrator's harmful act neither aims at nor actually harms *both* the victim's essential welfare interests and his dignity.

Instead of the current absolute rule, which recognizes consent to serious bodily harm only in a few circumstances, I propose a balancing test that takes into account the severity of harm to the victim's inter-

ests and dignity as well as the importance of the reasons that have prompted the perpetrator's act. If adopted, this approach would provide judges and jurors more freedom to balance relevant considerations and thus bring about more fine-tuned and fair decisions. Additionally, by limiting punishment only to cases of double injury to the victim's interests and dignity, this approach would put an end to the prosecution of "harmless immoralities." Ultimately, the new rule would better reflect the goals of a free democratic society that respects the autonomy and dignity of its members.

Conclusion

Current criminal law does not recognize consent of the victim as a defense to bodily harm, except in a few historically defined circumstances. That rule has been criticized in the United States and abroad for its arbitrary scope, outdated rationales, and potential for moralistic manipulation. Yet, despite those criticisms, no principled alternative has been devised. This Article is an attempt to outline a set of normative requirements for a new rule governing consensual bodily harm.

It is hoped that the advocated rule will provide a basis for revising the law of consent. Under the revised law, the victim's consent to injury or death would function as an affirmative defense of complete or partial justification. A complete defense would exonerate the perpetrator from any criminal liability, whereas a partial defense would only mitigate it. In either case, the law would explicitly take into account the victim's shared responsibility by reducing the perpetrator's fault.

The new rule would also strike a good balance between private and public interests. On the one hand, by giving legal weight to the victim's self-regarding decisions, the rule would show respect for the autonomy of the victim as well as the perpetrator. On the other hand, by protecting the victim's dignity from most egregious harm, the rule would guard our collective interest in preserving humanity. Overall, adopting a rule based on a uniform principle common to other justification defenses would lead to more fair, consistent, and morally sustainable verdicts.