

THE MORAL LIMITS OF CONSENT AS A DEFENSE IN THE CRIMINAL LAW

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In this paper I aim to examine the objective limitations of consent as a defense to criminal wrongdoing. This paper starts by briefly outlining the idea of objective morality (critical morality) as the proper basis for criminalization decisions and argues that there are also objective rather than mere conventional reasons (positive morality) for limiting the scope of consent as a defense in the criminal law. The idea of consent is in itself an objective reason for excusing wrongful wrongdoing to others. However, it can be overridden by other objective considerations of greater importance. In this paper, I argue that it is only wrongful wrongdoing that is criminalizable, as we do not criminalize mere accidents. Furthermore, I argue that a person can as an exercise of her personal autonomy consent to certain harms. But I note that there is a crucial difference between waiving rights that are grounded in an exercise of personal autonomy and waiving rights that violate a person's human dignity: rational autonomy. I conclude that regardless of consent, certain grave harms violate a person's dignity as a human being and therefore are wrongful and criminalizable.

A. Objective Reasons for Limiting the Scope of Consent as a Defense

The focus of this paper is on the moral limits of consent as a defense in the criminal law. Conventional morality would allow us to limit consent

*Faculty of Law, King's College London. I would like to thank Andrew von Hirsch for his comments on an earlier draft of this paper and for his lively discussions on this topic. I would also like to thank Scott Mann for the valuable discussion I had with him on this topic. Furthermore, I would like to thank the two anonymous referees for their in-depth and engaging reports. The views presented in this paper are the author's own.

New Criminal Law Review, Vol. 12, Number 1, pps 93–121. ISSN 1933-4192, electronic ISSN 1933-4206. © 2009 by the Regents of the University of California. All rights reserved. Please direct all requests for permission to photocopy or reproduce article content through the University of California Press's Rights and Permissions website, <http://www.ucpressjournals.com/reprintInfo.asp>. DOI: 10.1525/nclr.2009.12.1.93.

as a defense, but I ask whether *R. v. Brown*¹ (where the majority rejected consent as a defense to intentionally causing actual bodily harm) and *R. v. Konzani*² (where the majority asserted that fully informed consent could have provided the *reckless* HIV transmitter with a defense) are reconcilable with critical morality. Once there is a proper *prima facie* case for criminalization, then consent could be sufficient to provide a defense in certain circumstances. Conduct can only be criminalized when there are sound objective justifications for doing so. The classic objective principle for ensuring that criminalization decisions are morally justifiable is John Stuart Mill's Harm Principle.³ In this paper I adopt Feinberg's formulation of the Harm Principle, because it provides useful criteria for determining whether conduct is objectively harmful for the purposes of criminalization.⁴ Feinberg asserts: "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 others."⁵

It is not possible for me to provide a profound explanation of the objectivity of morality or of the objectivity of wrongful wrongdoing here. Instead, drawing on the rigorous account provided by Feinberg and my own research on this topic, I rely on the assumptions that there is a valid distinction between positive and critical morality and that wrongful harm to others provides an objective justification for invoking the criminal law.⁶ It is important to recognize the distinction between positive and objective morality, if we are going to ensure that criminalization decisions meet the

1. [1994] 1 A.C. 212.

2. [2005] EWCA (Crim) 706.

3. J. S. Mill, *On Liberty and Other Essays* 14 (1991).

4. The Harm Principle provides a necessary but not sufficient condition for criminalization. "It is important to point out that these proposed coercion-legitimizing principles do not even purport to state necessary and sufficient conditions for justified state coercion. A liberty-limiting principle does not state a sufficient condition because in a given case its purportedly relevant reason might not weigh heavily enough on the scales to outbalance the standing presumption in favor of liberty. That presumption is not only supported by moral and utilitarian considerations of a general kind; it is also likely to be buttressed in particular cases by appeal to the practical costs. . . ." 1 Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Others* 187–90 (1984).

5. *Id.* at 26.

6. Dennis J. Baker, *Constitutionalizing the Harm Principle*, 27 *Crim. Just. Ethics* 3 (Summer–Fall 2008).

requirements of justice.⁷ The positive/critical morality issue sparked the now famous debate between Patrick Devlin and Herbert Hart. Devlin argued that it was fair to criminalize conduct according to the dictates of positive morality. He asserted that it was fair to criminalize conduct such as homosexuality/lesbianism, because private vice might lead to social disintegration and anarchy.⁸ Devlin's arguments for criminalizing harmless homosexuality and so forth were not objective and therefore did not provide a sound basis for invoking the criminal law.⁹

Per contra, Hart asserted that fair and principled criminalization could only be determined by referring to objective standards.¹⁰ Fair criminalization is about producing objective reasons for invoking the criminal law. From an *ex ante* criminalization perspective this requires the legislature to also provide appropriate defenses so that people are not convicted unfairly at the *ex post* trial level. Criminalization is fair and just when it is deserved,¹¹ and when deservedness is determined by referring to objective¹²

7. Home Office, Report of the [Wolfenden] Committee on Homosexual Offences and Prostitution, 1957, Cmd. 247, paras. 13 and 61. The Committee referred to private morality (the privacy concept) in an attempt to find an objective basis for decriminalizing the activities. Privacy does provide an objective justification for tolerating certain kinds of behavior, but it can easily be outweighed by other objective countervailing considerations such as grave harm.

8. Patrick Devlin, *The Enforcement of Morals* 111 (1965).

9. "If I can argue for my own position only by citing the beliefs of others ('everyone knows homosexuality is a sin') you will conclude that I am parroting and not relying on moral conviction of my own. With the possible (though complex) exception of deity, there is no moral authority to which I can appeal and so automatically make my position a moral one. I have reasons, though of course I may have been taught these reasons by others." Ronald Dworkin, *Taking Rights Seriously* 250 (1977).

10. H.L.A. Hart, *Law, Liberty and Morality* 53–55 (1963).

11. Fairness is about making decisions based on notions of justice. The concept of justice in the criminalization context means treating people as they deserve, that is, in accordance with just deserts. Von Hirsch and Ashworth note that in the penal sense: "The desert rationale rests on the idea that the penal sanction should fairly reflect the degree of reprehensibility (that is, the harmfulness and culpability) of the actor's conduct." Andrew von Hirsch & Andrew Ashworth, *Proportionate Sentencing: Exploring the Principles* 4 (2005).

12. Baker, *supra* note 6. The theory of objectivity on which this article relies is agent relative. See Christine M. Korsgaard, *The Reasons We Can Share: An Attack on the Distinction Between Agent-Relative and Agent-Neutral Values*, 10 *Soc. Phil. & Pol'y* 24–51 (1993). See also Nicholas Rescher, *Objectivity: The Obligations of Impersonal Reason* (1997); Gerald Postema, *Objectivity Fit for Law*, in *Objectivity in Law and Morals* 99–143 (ed. Brian Leiter, 2001).

moral reasons such as harmdoing and culpability. Conduct should not be criminalized merely because the majority dislikes it. As Lee noted long ago: “Conventional morality is group sanction, and the public the great sophist now as truly as in the times of Plato. The public is interested in what appears to be persuasive [in a contemporary context penal populism], not in what is *rigorously rational* [sound normative principles based on fairness and justice]. And the most persuasive thing in the world is conventional morality, not ‘as it ought to be’ according to the sanctions of reason, but as it is. Therefore the body of conventional morality changes slowly”¹³ and not always according to the requirements of fairness and justice. For instance, many harmless acts that do not seem to warrant a penal response have been labeled as criminal in contemporary times, including homosexuality,¹⁴ possessing sex toys,¹⁵ watching nude dancing in private clubs,¹⁶ possessing marijuana for private use,¹⁷ and begging passively.¹⁸

An objective moral argument would speak against criminalizing many of these acts. A reasoned account of morality is objective, and draws on certain kinds of moral and metaphysical principles.¹⁹ Hart looked for objective justifications (namely, objective or factual harm to others) in an attempt to ensure that criminalization decisions would meet some kind of objective fairness standard.²⁰ Feinberg’s²¹ adaptation of the Harm Principle

13. Harold N. Lee, *Morals, Morality, and Ethics: Suggested Terminology*, 38 *Int’l J. Ethics* 450, 465 (1928).

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

15. *Williams v. Pryor*, 240 F.3d 944, 949 (2001).

16. *Barnes v. Glen Theatre, Inc.*, 501 U.S. 560 (1991).

17. Cf. *Gonzales, Attorney General v. Raich*, 545 U.S. 1 (2005); see also Malmø-Levine, [2003] 3 *S.C.R.* 571. Cf. David Richards, *Symposium on Punishment: Critiques and Justifications: Drug Use and the Rights of the Person: A Moral Argument for Decriminalization of Certain Forms of Drug Use*, 33 *Rutgers L. Rev.* 607 (1980–1981).

18. *Vagrancy Act*, 1824, § 3 (U.K.). For an example in the United States, see *Young v. New York Transit Authority*, 903 F.2d 146 (2d Cir. 1990), upholding an anti-begging ordinance.

19. For an excellent example of reason-sensitive morality see Joseph Raz, *The Morality of Freedom* (1986).

20. Hart’s theory is “strongly associated with a specific conception of morality as a uniquely true or correct set of principles—not man made, but awaiting discovery by the use of reason . . . [Whereas legal moralism] is associated with a relativist conception of morality, which has no rational or other specific content.” H.L.A. Hart, *Social Solidarity and the Enforcement of Morality*, in *Essays in Jurisprudence and Philosophy*, 248 et seq. (1983).

21. Feinberg, *supra* note 4, at 187–90.

provides a wide-reaching objective justification for criminalizing conduct. The Harm Principle catches not only conduct that causes actual harm, but also conduct that poses a real risk of harm to others.²² Harm to others is not the only objective justification for invoking the criminal law,²³ but it is the relevant justification for present purposes as it is serious physical harm to others that is being criminalized. Feinberg also constructed other objective standards in an attempt to ensure that the criminalization of harmless wrongs would also meet the requirements of justice and fairness. His Harm Principle differs from Mill's in that it is not an exclusive ground for criminalizing conduct. He supplements the Harm Principle with a further principle that holds that morally wrongful "offense to others" is criminalizable in appropriate circumstances.²⁴ In his *magnum opus*, Feinberg persuasively argues that under a liberal scheme for criminalization "the Harm and Offense Principles, duly clarified and qualified, between them exhaust the class of good reasons for criminal prohibitions."²⁵ In his two later volumes he makes it explicitly clear that "legal moralism" and "legal paternalism" are insufficient grounds for criminalizing conduct.²⁶

In this paper I examine consent as a defense. In the defense context, the harmdoer raises consent as a defense when she is being prosecuted for criminally harming the consentor. I accept that consent annuls wrongdoing when the conduct causes trivial harm or where it changes the nature of the conduct. For example, when a person consents to sexual intercourse she converts what otherwise would be a criminal harm into a harmless and desirable activity.²⁷ But if a person consents to having her hands amputated

22. Feinberg states: "Other kinds of properly prohibited behavior, like reckless driving and the reckless discharging of lethal weapons, are banned not because they necessarily cause harm in every case, but because they create unreasonable risks of harm to other persons." Feinberg, *supra* note 4, at 11. Attempts are also another area where we do not require actual harm. For a deeper analysis of this issue see Dennis J. Baker, *The Harm Principle vs. Kantian Criteria for Ensuring Fair, Principled and Just Criminalization*, 33 *Austl. J. Legal Phil.* 66, 80–85 (2008).

23. Cf. Andrew von Hirsch & Andrew P. Simester, *Incivilities: Regulating Offensive Behavior* (2006).

24. 2 Joel Feinberg, *The Moral Limits of the Criminal Law: Offense to Others* (1985). See also Dennis J. Baker, *The Sense and Nonsense of Criminalizing Transfers of Obscene Materials*, 26 *Singapore L. Rev.* 126 (2008).

25. 2 Feinberg, *supra* note 24, at xiii.

26. 4 Joel Feinberg, *The Moral Limits of the Criminal Law: Harmless Wrongdoing*, 323–24 (1988); 3 Joel Feinberg, *The Moral Limits of the Criminal Law: Harm to Self* (1986).

27. George P. Fletcher, *Basic Concepts of Legal Thought* 109 (1996).

with a chainsaw, her consent would not convert what otherwise would be a serious harm into a harmless or justifiable activity. I am concerned with consent in the context of serious harmdoing to others (e.g., breaking the bones of the consentor, blinding the consentor, killing and eating the consentor, seriously wounding the consentor, etc.).

Consent provides an objective reason for allowing a person to make choices that may involve consenting to harm, but consent is not absolute. Consent protects personal autonomy, but it does not allow a person to degrade or destroy the human dignity of the consenting party. Rational autonomy in the Kantian sense differs from personal autonomy, as it only allows “one set of principles which people can rationally legislate and they are the same for all. Nobody can escape [his or her] rule simply by being irrational and refusing to accept them. Personal autonomy, by contrast, is essentially about the freedom of persons to choose their own lives.”²⁸ Respecting personal autonomy is fundamentally different from respecting human beings as ends in themselves (rational autonomy: dignity). One cannot alienate her right to be treated with a *minimum* degree of respect as a human being merely by being irrational.²⁹ A person can forfeit or alienate her personal autonomy, but she cannot alienate her human dignity. For example, a prisoner forfeits her personal autonomy by wronging others, but should still be treated as a human being. As Dworkin notes:³⁰

28. Raz, *supra* note 19, at 371. See also Deryck Beyleveld & Roger Brownsword, Human Dignity in Bioethics and Biolaw (2001); Deryck Beyleveld & Roger Brownsword, Human Dignity, Human Rights, and Human Genetics, 61 *Mod. L. Rev.* 661 (1998); Neil C. Manson & Onora O’Neill, Rethinking Informed Consent in Bioethics 20–21 (2007).

29. Onora O’Neill, *Constructions of Reason: Explorations of Kant’s Practical Philosophy* 53–54, 66 (1989); Onora O’Neill, *Public Health or Clinical Ethics: Thinking Beyond Borders*, 16 *Ethics & Int’l Aff.* 35, 36–37 (Fall 2002).

30. Ronald Dworkin, *Life’s Dominion* 236 (1993). Dworkin draws on Kant’s second formulation of the Categorical Imperative where consent in the personal autonomy context does not alter the rightfulness or wrongfulness of disrespecting human dignity. “[A] normative moral theory—a theory that purports to reveal what features of an action at bottom make the action right or wrong—is just a theory of moral relevance. . . . The Humanity formulation of the Categorical Imperative serves this role in Kant’s ethics. [I]t is facts about the bearings of one’s actions on the maintenance and flourishing of humanity (as Kant understands this notion) that are the morally relevant facts determining the (objective) deontic status of an action.” Mark Timmons, *Kant’s Metaphysics of Morals: Interpretative Essays* 285–86 (2002).

[W]hen we jail someone convicted of a crime in order to deter others, we do not treat him with beneficence; on the contrary, we act against his interests for the general benefit. But we insist that he be treated with dignity in accordance with our understanding of what that requires—that he not be tortured or humiliated, for example—because we continue to regard him as a full human being, as someone whose fate we continue to treat as a matter of concern. . . . We understand we are jailing a human being whose life matters, that our reasons for doing so are reasons we believe both require and justify this imprisonment, that we are not entitled to treat him as a mere object at the full disposal of our convenience, as if all that mattered was the usefulness, of the rest of us, of locking him up.

The prisoner may forfeit certain personal autonomy rights. Likewise, sadomasochists and HIV consenters may exercise their personal autonomy to waive certain rights, but forfeiting or waiving rights that merely involve an exercise of personal autonomy is not the same as alienating one's human dignity.³¹ Hence, a person may exercise her personal autonomy to forfeit or waive many rights without being subject to state interference, but she cannot waive or forfeit rights that result in a serious loss of dignity. I argue below that the importance of personal autonomy means that consent is a valid defense unless the harm crosses the threshold of degrading the human dignity of the consentor to a serious degree. The threshold has to be very high if we are to protect personal autonomy. When a harmdoer treats a consentor as a mere means to her end rather than as end in itself, she violates the consentor's dignity. Only serious physical harm or death would be a sufficient violation of human dignity for the purposes of rejecting consent as a defense in the criminal law. Anything less would unduly restrict a person's personal autonomy. It is the gravity of the harm in cases such as *R. v. Konzani* and arguably *R. v. Brown* that violates the dignity of the consenting parties. It is not the gravity of the harm alone that overrides consent as a defense, but rather it is the fact that the harm is directly inflicted on the personhood of a human being.

A person could consent to being harmed in a grave way by having all her property destroyed (i.e., a person could consent to having her livelihood destroyed, her Caravaggio and Rembrandt paintings destroyed, her Rolls-Royce crushed, and so forth), as this does not degrade her dignity. *Per contra*, since grave harms such as transmitting fatal diseases, throwing

31. See generally Thomas E. Hill, *Autonomy and Self-Respect* 14–17 (1991).

acid in a person's eyes so as to blind her, amputating her legs, etc. degrades the consentor's dignity in a serious way, it is objectively fair to reject consent as a defense in such cases. When you leave a person permanently disabled you degrade her dignity in significant terms. Dworkin³² draws on Kant's respect for human dignity principle to develop the wider normative concept of humanity on which these types of arguments can be grounded.³³

Feinberg does not recognize that consent is a defeasible concept. According to Feinberg, the type of wrongful harm inflicted in *R. v. Brown* and *R. v. Konzani* would be morally acceptable, because genuine consent nullifies the wrongfulness of such activities. Most of the academic criticisms of *R. v. Brown* have focused on the legal moralistic type arguments presented in the majority judgments and have asserted that there is no case for criminalization because any intervention would be paternalistic.³⁴ Ashworth asserts that criminalizing the activities in *Brown* invades "the realm of personal autonomy where each competent, responsible adult should reign supreme."³⁵ Simester and Sullivan³⁶ assert that: "[i]n *Brown* the House of Lords held that, in the context of sadomasochistic sexual activity, the infliction of actual bodily harm upon a consenting adult 'victim' was an offense. From the perspective of the Harm Principle, there is no

32. Dworkin, *supra* note 30, at 33–37. For a much deeper analysis see Stanley I. Benn, *A Theory of Freedom* (1988).

33. In a narrower sense, it is Hill's interpretation of Kant's principle that is the core basis of my argument for rejecting consent as a defense: Hill, *supra* note 31.

34. In *R. v. Brown*, [1994] 1 A.C. 212, Lord Mustill and Lord Slynn of Hadley in dissent attempt to provide an objective moral justification for permitting consent as a defense. However, their arguments are less than convincing, as they refer to "private morality" rather than to objective morality more generally. The idea of private morality as stated in the Wolfenden Committee Report (see *supra* note 7) does not provide an objective basis for allowing consent to act as a defense against serious harmdoing to others, so long as the conduct is of an intimate nature or takes place in a private home. Surely their Lordships are not suggesting that it would be permissible to kill and eat another human being for sexual gratification, so long as the victim consents and the conduct is of an intimate nature or takes place in a private home. Privacy would only protect innocent conduct or trivial harmdoing of an intimate or private nature. See *Lawrence v. Texas*, 539 U.S. 558 (2003). Cf. Matthew Weait, *Harm, Consent and the Limits of Privacy*, 13 *Feminist Legal Stud.* 97, 109 (2005).

35. Andrew Ashworth, *Principles of Criminal Law* 41 (5th ed. 2006).

36. A.P. Simester & G.R. Sullivan, *Criminal Law: Theory and Doctrine* 16 (2d ed. 2004).

wrong to V since the activity occurs with V's consent. But from the perspective of *legal moralism*, D's conduct may be regarded as inherently wrong—and therefore legitimately criminalizable. Indeed, V's consent simply makes V, too, a participant in the offense.”

In *R. v. Brown* the majority makes reference to the need to protect society from sadomasochism, but do not demonstrate that this type of conduct is harmful to anyone other than the actors involved. Furthermore, Lord Jauncey of Tullichettle makes reference to the potential remote harms that might flow from allowing a person to consent to direct harm, as a further basis for rejecting consent as a defense. His Lordship stated:³⁷ “the possibility of proselytization and corruption of [other] young men is a real danger.” I have argued elsewhere that a person can only be held responsible for influencing the harmful criminal choices of others when the eventual harm can be fairly imputed to the influencer.³⁸ Nevertheless, the majority was persuaded just as much by the gravity of the objective harm involved.

I assert that even though the majority made reference to conventional morality, its decision is reconcilable with objective morality. I argue that the criminalization of the actions in *R. v. Brown* was *prima facie* fair, because the actions were wrongfully harmful in an objective sense rather than that of legal moralism. I assert that consent is not sufficient to override this type of wrongful harmdoing, because it degrades the dignity of the consenters. The HIV cases³⁹ are distinguishable in that the harm was inflicted recklessly rather than intentionally, but the harmdoing in those cases was irreparable and of a permanent nature. I argue below that consent should not be a defense to this type of harmdoing, because it also degrades the dignity of the consenter.

B. Harm and Consent: Stubborn Counterexamples

It is important to recognize that it is wrongful harmdoing that is criminalizable, not mere harmdoing. The focus has to be on nullifying the wrongfulness of infecting another with a fatal disease, blinding her, amputating her legs, and so forth, as the harmfulness of such conduct cannot be nullified

37. *Brown* at 246.

38. Dennis J. Baker, *The Moral Limits of Criminalizing Remote Harms*, 10 *New Crim. L. Rev.* 370 (2007).

39. *R. v. Konzani*, [2005] EWCA (Crim) 706; *R. v. Dica*, [2004] 3 All E.R. 593.

by consent. Harm to others is only criminalizable if it involves wrongdoing. Feinberg⁴⁰ expounds harm in three senses: (i) harm as damage, (ii) harm as a setback to interests, and (iii) harm as wrongdoing. The harm as used in the harm principle is an amalgamation of senses two and three. Harm must be caused by *wrongful* conduct to be a candidate for criminalization. Harm occurs under the Harm Principle when *x*'s interests are set back by the wrongful conduct of *y*.⁴¹ The concept of harm as used by Feinberg represents "the overlap of senses two and three: only setbacks of interests that are wrongs, and wrongs that are setbacks to interest, are to count as harms in the appropriate sense."⁴²

No plausibly interpreted harm principle could justify the criminalization of actions that cause setbacks to interests without violating rights. A person has the right not to be harmed by the intentional (inexcusable/unjustifiable) actions of others.⁴³ If a person loses a leg by walking into the pathway of an automobile whilst in a state of inebriation, she would clearly be harmed. There is no doubt that her interests have been set back. If the driver of the car was driving carefully, took proper precautions, and was not at fault, then he has not wronged the harmed party. Accidents are harmful but not wrongful. Our interests can be blocked or defeated by events impersonal in nature or by inadvertent misfortune. But only the intentional unjustifiable/inexcusable behavior of a human agent can harm our interests in the legal sense. "One person harms another in the present sense by invading, and thereby thwarting or setting back, his interest."⁴⁴ However, our interests may be set back in the ordinary sense, to a great degree, by a tsunami, earthquake, plague, famine, etc.⁴⁵

40. 1 Feinberg, *supra* note 4, at 215.

41. *Id.* at 33–34.

42. *Id.* at 36.

43. Inculpatory factors such as intention and exculpatory considerations such as excuse and justification are important aspects of the wrongness of harming others and are relevant in a putative sense from the *ex ante* criminalization perspective. Feinberg uses these factors to make a putative claim about culpability as an aspect of wrongness for the purposes of justifying *ex ante* criminalization decisions. Feinberg makes an *ex ante* generalization that culpable wrongdoing ought to be the business of the criminal law, because this type of wrongdoing is wrongful in a way that negligent and/or unintentional wrongdoing is not. Of course, whether a particular individual acted with intention (or unjustifiably/inexcusably) is a question of fact for a court to decide in individual cases at the *ex post* trial stage.

44. *Id.* at 34.

45. *Id.*

Feinberg does not deny that those who consent to serious harming are harmed, but asserts that the harm is not wrongful because consent nullifies the wrongdoing involved.⁴⁶ The issue here is not whether the sadomasochists, HIV consenters, gladiators, and so on were harmed, but whether they were wrongfully harmed. As I noted above, mere harming is not sufficient for invoking the criminal law. Feinberg asserts that consent is absolute in that it nullifies the wrongfulness (culpableness) of harming others⁴⁷ regardless of the gravity of the harm involved.⁴⁸ According to the *volenti non fit injuria* doctrine, we cannot complain that we have been wronged if we have authorized the harming.⁴⁹ Consent will provide a valid defense in certain circumstances, but the defense will be denied when there are objective justifications for doing so.

Before I move on, it is worth noting that Feinberg also postulates that although the wrongness of killing another and eating her for sexual gratification would be nullified by consent, it could be criminalized because of the difficulty in determining the genuineness of the consent involved, as the consenter is dead. Feinberg asserts that: "To the extent that *B*'s consent is not fully voluntary, the law is justified in intervening 'for his sake.'"⁵⁰ However, I focus on the limits of genuine consent rather than on issues concerning the authenticity of consent. Authenticity is about consent that is considered to be defective, because the consenting parties did not give their consent autonomously, and were not sufficiently rational, well informed, free from duress, and so on.⁵¹ McConnell also argues that if certain rights such as the right to life and so forth became alienable, the rights of others would be jeopardized.⁵² He asserts that allowing consent to justify

46. 4 Feinberg, *supra* note 26, at 20.

47. *Id.* at 329.

48. *Id.* at 68–173, 328.

49. *Id.* at 11, 100.

50. Feinberg asserts: "Given the uncertain quality of evidence on these matters, and (in the case of slavery) the strong general presumption of non-voluntariness, the state might be justified in presuming non-voluntariness conclusively in every case as the least risky course." In the case of euthanasia Feinberg notes that "the only possible reason for maintaining the present absolute prohibition is that it is necessary to prevent mistakes and abuse." 3 Feinberg, *supra* note 26, at xviii–xix.

51. *Id.* at 125–26, 269–343.

52. See generally Terrance McConnell, *Inalienable Rights: The Limits of Consent in Medicine and Law* (2000).

killing would make all our lives statistically less secure, because it would be difficult to determine the genuineness of consent in those cases where the victim has been killed.⁵³

This is an independent argument for limiting consent as a defense, but it does not deal with the sadomasochist/HIV transmitter where the genuineness of the consent can be ascertained. When we see someone consenting to harmful treatment or to a violation of his or her core rights we tend to focus on the authenticity of the consent. But as O'Neill observes, "this is a desperate line of argument: there is all too much evidence that people sometimes genuinely consent to action which may seem deeply unacceptable, even to action that profoundly injures, oppresses or degrades them. Across the board insistence that any consent to such action must be flawed merely suggests an underlying refusal to consider the possibility that justification requires more than actual consent."⁵⁴

C. Objective Moral Arguments for Limiting Consent in the *R. v. Konzani* Context

Feinberg's harm principle allows a person to consent to all kinds of gross harms. A person might consent to death, permanent disablement of a severe kind such as blinding, and so forth. Is it morally right to let people consent to *irreparable* injury of an extraordinary grave kind such as being permanently blinded? Clearly, if a person allows another to infect her with a fatal disease or to kill and eat her for sexual gratification⁵⁵ she would be irreparably harmed. But is she wrongfully harmed? How much harm can a person inflict on others before the criminal law can be invoked to protect the human dignity of the consentor? In this section, I consider whether it is permissible for a person to consent to being infected with a deadly disease. Duff⁵⁶ has argued that Kant's idea of respect for humanity could be invoked to limit consent in such cases. However, Duff does not develop his argument. Nor does he consider the distinction between degrading humanity (that is, consenting to grave harm that does not end the

53. *Id.*

54. Onora O'Neill, Kant and the Social Contract Tradition, in *Kant Actuel: Hommage à Pierre Laberge 185–200* (F. Duchesneau, G. Lafrance & Claude Piché eds., 2000).

55. Ray Furlong, Frenzy Builds for German "Cannibal" Trial, BBC News, Dec. 2, 2003, <http://news.bbc.co.uk/2/hi/europe/3258226.stm>. (published: 12/02/2003).

56. R.A. Duff, Harms and Wrongs, 5 *Buff. Crim. L. Rev.* 13 (2001–2002).

life of the consentor) and alienating humanity (that is, consenting to death: alienating a person's whole freedom—powers of rational choice). It is one thing to demonstrate a loss of dignity when a person alienates her right to life,⁵⁷ but determining when harm degrades a person's human dignity for the purposes of criminalization in those other cases is not so straightforward. It is not easy to establish a serious loss of dignity when the consentor has merely been harmed, especially when the harm is reparable.

There are two ways in which a person could degrade her humanity. Firstly, a person might alienate her right to life, which she cannot do without also forfeiting her humanity. Secondly, a person could alienate her right to maintain a minimum degree of dignity as a human being. The deontological force of this argument comes from the principle that a person's rational nature incorporates an absolute worth in the sense of *dignity*, and this intrinsic value admits of no equivalent and thus cannot be compromised or replaced.⁵⁸ A human's rational nature gives her dignity and worth as a person, which means she has a value beyond price.⁵⁹ If a substitute or equivalent can be found for a thing, then it has a price.⁶⁰ It has dignity (an intrinsic value) if there is no substitute or equivalent for it.⁶¹ It is the priceless and nonsubstitutable dignity and worth of persons that makes them objects of respect. Kant uses humanity to demonstrate how a categorical imperative or practical law is "connected (wholly *a priori*) with the concept of the will of a rational being as such."⁶²

The ground for this moral principle is: *Rational nature exists as an end in itself*. This is the way in which a man necessarily conceives his own existence: it is therefore so far a *subjective* principle of human actions. But it is also the way in which every other rational being conceives his existence on the same rational ground which is valid also for me; hence it is at the same time an *objective* principle, from which, as a supreme practical ground, it must be possible to derive all laws for the will. The practical imperative will therefore

57. See Dworkin, *supra* note 30. Cf. Lance K. Stell, *Dueling and the Right to Life*, 90 *Ethics* 7 (1979).

58. Immanuel Kant, *Groundwork of the Metaphysics of Morals* 96 (H.J. Paton trans., *The Moral Law: Kant's "Groundwork of the Metaphysics of Morals*, Hutchinson University Library 1972) (1785).

59. *Id.* at 35.

60. *Id.*

61. *Id.*

62. *Id.* at 111.

be as follows: *Act in such a way that you always treat humanity whether in your own person or in the person of any other, never simply as a means, but always at the same time as an end.*⁶³

There are two separate aspects to fulfilling the requirements of the second formulation of the Categorical Imperative. Firstly, one must not act on maxims that (negatively) use persons as mere means, because this would be to act on maxims that no other *rational* being could possibly sanction.⁶⁴ Secondly, we are required to avoid the pursuit of ends that others cannot share. We do this by treating them (positively) as ends in themselves.⁶⁵ It is this formulation of the Categorical Imperative that is the foundation of the principle of respect for persons. Persons are ends in themselves and can be a source of definite laws, because they have an absolute worth. Rational agents differ from inanimate things in that they are self-legislating, because they give themselves the laws by which they act. *Per contra*, inanimate objects (including nonhuman animals) such as a rock act according to the laws of nature. A rock cannot give itself the moral law.⁶⁶

Arguably, the Kantian principle of respect for persons provides a stronger case for limiting consent in the *R. v. Konzani* context than it does in the *R. v. Brown* context. There are two alternative bases for this claim. Firstly, it is arguable that the HIV consenter in *R. v. Konzani* alienates her inalienable right to life. However, this is a controversial claim, because there is no guarantee that the consenter will die in the immediate future. In fact, with modern treatments the HIV consenter could live for decades.⁶⁷ But even if the consenter lives for some years, it cannot be denied that any shortening of a person's life regardless of the length of time is irreparable (treatable but not repairable) harm of an extraordinary grave kind. Since the harm is of an extraordinary grave kind and is irreparable, *R. v. Konzani* provides a stronger case for claiming that the consenter's

63. *Id.* at 91.

64. O'Neill, *Constructions of Reason*, supra note 29, at 113.

65. "The failure is dual: The victim of deceit cannot agree to the initiator's maxim, so is used, and a fortiori cannot share the initiator's end, so is not treated as a person. Similarly with a maxim of coercion: Victims cannot agree with a coercer's fundamental principle or maxim, which denies them the choice between consent and dissent, and further cannot share a coercer's ends." *Id.*

66. Benn, supra note 32, chs. 1 & 5.

67. See the discussion *infra*.

dignity has been degraded in a serious way. *R. v. Konzani* is distinguishable from *R. v. Brown* not only because the harm is serious and of an irreparable kind, but also because it is inflicted recklessly rather than intentionally.

In *R. v. Konzani*⁶⁸ the appellant learnt in 2000 that he was HIV positive and was informed on that occasion, and on subsequent occasions, of the risks of transmitting the infection, and of the potential harmful consequences of doing so. Nevertheless, the appellant had sexual relationships with three young women without informing any of them of his condition. He repeatedly had unprotected sexual intercourse with the young women knowing that by doing so that he was exposing them to a *real* risk of serious harm. As a result, all three of his sexual partners contracted the HIV virus. He withheld vital information about his condition from them, and it was found that none of the complainants had consented to the risk of contracting HIV. The defendant argued that infection with the HIV virus is something you risk by having unprotected sexual intercourse and therefore the complainants had impliedly consented to the risk of contracting the HIV virus.

The Court held that “before the consent of the complainant could provide the appellant with a defense, it was required to be an informed and willing consent to the risk of contracting H.I.V.”⁶⁹ In particular, the Court noted that there is a crucial difference between taking a risk of the potentially adverse consequences of unprotected sexual intercourse, “and giving informed consent to the risk of infection of a fatal disease.”⁷⁰ For the purposes of section 20 of the *Offences Against the Person Act 1861* (U.K.), the required mental ingredient of the offense is established if the defendant was reckless.⁷¹ Thus, so long as the defendant knew or foresaw that his nonconsenting partner might suffer bodily harm and chose to expose her to that risk, recklessness would be established.

I assert that the Court was wrong to hold that informed consent would have been sufficient to provide the defendant in *Konzani* with a defense. A person should not be able to rely on consent as a defense when he *knows* that

68. [2005] EWCA (Crim) 706, paras. 10–22.

69. *Id.* para. 18.

70. *Id.* para. 22.

71. *R. v. Cunningham*, [1957] 2 Q.B. 396, as approved in *R. v. Savage*, [1992] 1 A.C. 699.

there is a very real risk that the consentor will suffer grave harm. Of course, it is important that there be a real risk of harm. If a person has full knowledge that her partner has HIV but freely chooses to have unprotected sexual intercourse, then she is consenting to more than a remote risk of grave harm. It is not easy to draw a clear line, as surely those who engage in unprotected casual sex are also risking their human dignity. The mental element for criminalization in this context would require that the harmdoer knew that there was a real risk (i.e., a high degree of endangerment as opposed to low-level endangerment) of harm transpiring. A consentor should be able to take remote chances, as this preserves her personal autonomy. Thus, promiscuous people (swingers) who risk infection by having unprotected sexual relations with strangers could not be criminalized for infecting others for merely knowing their sexual practices make it likely that they are carriers of the virus. This would be too great an extension of criminal responsibility. The harmdoer would have to have actual knowledge that she or he has the disease and therefore realized that she or he posed a substantial and unreasonable risk to the consentors. Criminalization would only be permissible if the risk eventuated—that is if the consentor were in fact endangered from a serious attempt to kill her or attempt to harm her in a serious way (attempted murder, attempted serious injury such as blinding and amputation, etc.). Inchoate liability criminalization is about punishing harmless wrongs to prevent serious wrongdoing from transpiring.

A further problem with the HIV cases is that it is not possible to predict the eventual harm with any exactitude. The current treatment for HIV infection is a highly active antiretroviral therapy. This treatment is reasonably effective and offers increased life expectancy for many HIV sufferers. Research in the United States suggests that current treatment methods could give many sufferers a life expectancy of 32.1 years from the time of infection, if treatment was started soon after the patient became infected.⁷² However, the highly active antiretroviral therapy does not always achieve optimal results, and in some situations it has had a success rate of below 50 percent, as some patients are intolerant to the medication and there are drug-resistant strains of HIV.⁷³ Thus, it is not possible to predict

72. Bruce R. Schackman et al., *The Lifetime Cost of Current H.I.V. Care in the United States*, 44 *Med. Care* 990 (2006).

73. Stephen L. Becker et al., *Young H.I.V.-infected Adults Are at Greater Risk for Medication Nonadherence*, 4(3) *Medscape Gen. Med.* 21 (2002).

with any certainty the eventual outcome of being infected with HIV. But it is safe to say that the carrier's life will probably be shortened and that, barring medical advances, she will have to undergo regular treatment for the rest of her life.

The HIV cases pose some problems as the consentor is only consenting to a risk of harm, and it is not certain what that harm might be. Nonetheless, we are able to turn to other straightforward examples to strengthen the case for limiting consent as a defense. For instance, if a person intentionally amputates a consentor's arms and legs with a chainsaw, or intentionally pokes the consentor's eyes out so as to blind her, or intentionally kills and eats the consentor for the sake of achieving sexual gratification, then the consentor will suffer irreversible harm of an extraordinary grave kind. The difference with these examples is that the violence is intentional and the harm easy to measure. There is no reason why *recklessness* cannot take the place of *intention*, or why serious endangerment cannot substitute for actual harm. For example, when *x* drives an automobile at 160 miles per hour in a 30-mile-per-hour speed zone whilst intoxicated, she does not aim to harm anyone, but her recklessness poses a real risk of harm to others. There is no need to be able to identify the exact *ex post facto* harm at the *ex ante* criminalization stage, so long as the reckless behavior generally poses a real risk of grave harm.

It is only the activities of the harmdoer that are subject to criminalization. A person can take risks with her own safety so long as it does not involve another party. There is a difference between a person risking her own life by taking an unseaworthy vessel into rough seas and someone else risking her life by transporting her in a vessel that is not seaworthy. The organizers of people-smuggling often take risks with the lives of those they smuggle. Should the operators of a vessel that is not seaworthy be able to escape liability for manslaughter by asserting that their drowned (or asphyxiated)⁷⁴ passengers consented to dying at sea, as they knew the risks of traveling with such operators?

Similarly, masochism is not a mere case of self-harm, because we are not criminalizing the consentor. Instead, it is the actions of the harmdoer that are criminalized. The issue is whether *x* can gravely harm *y* when *y* freely

74. The authorities suggest not. See Wacker, [2003] Q.B. 1207, where fifty-eight illegal immigrants suffocated whilst being trafficked into England in a shipping container on the back of a truck, because the driver forgot to open an air duct.

consents to the wrongdoing. It is not merely about *y* using herself as a mere means to an end, but about a second party using her as a mere means to an end. If *x*, a sadomasochist, consents to *y* (who is also a sadomasochist) poking her eyes out, she has not only used herself as a mere means, but has also allowed *y* to use (wrong and harm) her to a grave degree. *Y* has used *x* as a mere means and is criminally liable for wrongfully harming her without excuse or justification. In effect sadomasochists and gladiators wrong not only themselves, but also each other. Conversely, the apotemnophilic⁷⁵ or suicidal manic wrongfully harm themselves.

The lawmaker is entitled to prevent people from harming and wronging others when the harm is exceptionally grave, but it is not entitled to criminalize self-harm. The Harm Principle provides an important limit here, because suicide and self-harm also involve disrespect for dignity. It may be morally wrong to attempt suicide, but self-harm falls outside the purview of the Harm Principle.⁷⁶ The Harm Principle limits criminalization to those situations where a person *harms others*. We are all morally bound to respect humanity in our own person as well as in the persons of others, but that does not mean that those who consent to being harmed by others (e.g., the victim of a failed euthanasia or the HIV consentor) or those who harm themselves should be criminalized. It means we ought to criminalize those who inflict the harm in such cases.

The degree of moral wrongdoing involved in serious self-harm and serious harm to others is equal, but self-wrongs are not criminalizable because they do not wrong or harm others. The smoker may damage her health, but this would be self-harm. It is morally wrongful to harm oneself in a grotesque way or to commit suicide and this might give the lawmaker reasons for providing health care programs to help those self-harmers who seek help, but the criminal law cannot be used to punish those who attempt suicide or are suffering from apotemnophilia, etc. The legislature's remedies here are limited to providing appropriate health care. Hence, it is only those who recklessly subject others to a real risk of harm or intentionally inflict harm on others who should be subject to

75. An apotemnophilic is one who self-harms. A common case is where the apotemnophilic keeps cutting his or her arms. See generally Russ Shafer-Landau, *Liberalism and Paternalism*, 11 *Legal Theory* 169, 170 (2005).

76. Feinberg presents a powerful case against criminalizing harm to self. 3 Feinberg, *supra* note 26.

penal sanction. Once the victim reciprocates the harm, then she too would be criminally liable. But reciprocation and mutual participation differ from paternalism, because criminalization is only available when one party harms another.

Let us look at the detail of the aforementioned arguments. Clearly, if a person gives a cannibal permission to kill and eat her for the sake of sexual gratification she has been wronged regardless of consent, because the cannibal has violated her inalienable right to life.⁷⁷ According to Kant, one owes oneself the same respect as one owes others.⁷⁸ Kant states that:⁷⁹

[A] human being is regarded as a person, that is, as the subject of a morally practical reason, is exalted above any price; for as a person (*homo noumenon*) he is not to be valued merely as a means to the ends of others or even his own ends, but as an end itself, that is, he possesses a dignity (an absolute inner worth) by which he exacts respect for himself from all other rational beings in the world. . . . *Humanity in his person* is the object of the respect which he can demand from every other human being, but which *he must also not forfeit*.

Hence, when *x* allows *y* to kill and eat her, *x* not only allows *y* to use (wrong) her as a mere means—violate her dignity to a serious degree, but also alienates her humanity—she ceases to be a person.

The foundational assumption in Kantian morality is that human freedom has unconditional value, and both the *Categorical Imperative* and the *Universal Principle of Right* flow directly from this fundamental normative claim: the Categorical Imperative tells us what form our actions must take if they are to be compatible with the universal value of freedom, and the universal principle of right tells us what form our actions must take if they are

77. “[S]imilarly, a Kantian might argue that a person cannot release others from the obligation to refrain from killing him: consent is no defense against a charge of murder. To accept principles of this sort is to hold that rights to life and dignity are, as Kant believed, rather like a trustee’s rights to preserve something valuable entrusted to him: he has not only a right but a duty to preserve it.” Hill, *supra* note 31. See also Terrance McConnell, *supra* note 52, at 31 et seq.; Arthur Kiflik, *The Inalienability of Autonomy*, 13 *Phil. & Pub. Aff.* 271, 275 (1984); Immanuel Kant, *The Philosophy of Law: An Exposition of the Fundamental Principles of Jurisprudence as the Science of Right* 119 (William Hastie trans., T. & T. Clark, 1887).

78. John Rawls, *Lectures on the History of Moral Philosophy* 191–92 (2000).

79. Mary J. Gregor, *Practical Philosophy* 557 (1999).

to be compatible with the universal value of freedom, regardless of our maxims and motivations.⁸⁰

The *Universal Principle of Right* holds: “Freedom (independence from being constrained by another’s choice), insofar as it can coexist with the freedom of every other in accordance with a universal law, is the only original right belonging to every other man by virtue of his humanity.”⁸¹ Freedom is about having the power to choose. A person is free if she is independent from being compelled by the choices of others. A person alienates her humanity if she rids herself of the capacity of choice. Maintaining humanity is about retaining a sufficient degree of your freedom and powers to set and pursue your own purposes. “You need more than the ability to pursue purposes you have set; you also need to be able to decline to pursue purposes unless you have set them. When I usurp your powers, I violate your sovereignty precisely because I deprive you of that veto.”⁸² When a person consents to death she allows her powers of choice to be put to an end.⁸³

Consent will not override the *prima facie* wrongdoing involved, as the moral duty to maintain your humanity is absolute. Hill⁸⁴ notes that there may be no specific range of inalienable rights, but that there is at least one cardinal right that cannot be waived. That is, the right to maintain a certain level of respect as a rational being. Hill holds that: “[N]o matter how willing a person is to submit to harm by others, they ought to show him some respect as a person. . . . This respect owed by others would consist of a willingness to acknowledge fully, in word as well as action, that person’s basic equal moral status as defined by his other rights.”⁸⁵ Wellman⁸⁶ argues that, given the time delay between being infected with HIV and

80. Timmons, *supra* note 30, at 286.

81. Gregor, *supra* note 79, at 393.

82. Arthur Ripstein, *Beyond the Harm Principle*, 34 *Phil. & Pub. Aff.* 215, 234–35 (2006).

83. *Id.*

84. Hill, *supra* note 31, at 15–16.

85. “To the extent that a person gives even tacit consent to [harms] incompatible with this respect, he will be acting as if he waives a right which he cannot in fact give up.” *Id.* at 16.

86. Carl Wellman, *The Inalienable Right to Life and the Durable Power of Attorney*, 14 *Law & Phil.* 245, 257 (1995).

when those infected might actually die, such consenters forfeit their humanity rather than alienate it. But the consenter of HIV has not really forfeited her humanity. Instead, she has postponed its alienation by consenting to HIV infection, which can take a considerable period of time to end her life. The actual alienation of life only takes place at some unknown and unpredictable time in the future.

When a person kills another and eats her for sexual gratification, consent will not be sufficient to nullify the wrongdoing involved because the victim ceases⁸⁷ to be a person immediately—her powers are put to an end at once. However, in the HIV cases the victim's whole freedom (humanity) is not alienated immediately, but rather alienation is certain to take place at some time in the future—that is, when the victim eventually passes away. The eventual result is that the consenter to HIV puts her powers to an end at some future stage. If the victim is only sixteen and is able to live for the maximum of thirty-two years that current treatment might achieve, she would pass away at the age of forty-six, which is young in contemporary times. In the HIV cases nonviolent means are used to inflict grave harm, but this does not alter the wrongness of infecting others with deadly diseases. A person might use slow-acting poison that does not involve any violence to kill someone, but that does not alter the fact that the victim ceases to be a person at some stage in the future when the poison works.

The point to keep in mind apropos the HIV cases is that the consenter does not cease to be a person straight away. She is still alive, fit, alert, and able to make rational choices. Nonetheless, HIV transmission results in irreparable harm of an extraordinary kind regardless of whether the consenter has alienated her right to life, because the grave harm involved more generally degrades the consenter's dignity in a serious way. The irreparable nature of the harm involved in infecting others with HIV provides a sound alternative objective justification for limiting consent. The consenter might change her mind after the moment of passion has passed. It is one thing to consent to reversible or curable harm; it is something entirely different to consent to irreparable harm of an extraordinary grave kind.

87. *R. v. Konzani*, [2005] EWCA 706; *R. v. Dica (Mohammed)*, [2004] EWCA (Crim) 1103; and *R. v. Barnes (Mark)*, [2004] EWCA (Crim) 3246.

However, both Dworkin⁸⁸ and Hill⁸⁹ allow for serious violations of dignity in special circumstances. Weait⁹⁰ refers to the kinds of relationships and contexts in which consent might provide a permissible defense. In particular, he refers to the loving Roman Catholic couple that is conscientiously prevented from using prophylactics and wishes to have a child. If the father is HIV positive, is it permissible for the mother to consent to the real risk of infection for the purpose of having a child? The type of relationship and the religious background of the consenter do not provide an objective justification for tolerating consent as a defense. But the importance of having a child might provide an objective justification for tolerating disrespect for the mother's dignity. There are too many variables to make a firm conclusion in this paper (e.g., the couple may already have children, the child might be born with HIV, and so on). Nevertheless, there may be a case for making exceptions in such circumstances. What is clear is that consenting to gross harm (HIV infection) for no purpose other than to have sexual intercourse will not relieve the reckless transmitter of liability, because the couple can easily take the negligible precaution of using a prophylactic. If the disease is accidentally transmitted even though the couple took reasonable precautions, then there should be no criminal liability.

D. R. v. Brown: Purposeless Harm and Respect

I digress, to emphasize that the Categorical Imperative is not equivalent to the so-called Golden Rule, *Quod tibi non vis fieri*.⁹¹ Kant held that there is no equivalence between this precept and his Categorical Imperative, because the Golden Rule can only provide moral guidance if one presumes a prior moral judgment: the judgment of how others should treat oneself.⁹² The convicted criminal could say to the judge: "If you were me you would not want to be sentenced, therefore. . . ." The Golden Rule does not provide a basic justification for moral judgments, but rather provides a means

88. See generally Dworkin, *supra* note 30.

89. See generally Hill, *supra* note 31.

90. Matthew Weait, *Criminal Law and the Sexual Transmission of H.I.V.: R. v. Dica*, 68 *Mod. L. Rev.* 121, 132 (2005).

91. Do unto others as you would have others do unto you.

92. Rawls, *supra* note 78, at 198–99.

of converting self-regarding moral judgments (judgments about how others should treat the moral agent) into other-regarding judgments (judgments about how the agent should treat others).

The sadomasochist (who wishes to be harmed) could not derive the principle of nonmaleficence from the Golden Rule. In fact the sadomasochist could draw the opposite conclusion, that is, that she ought to harm others. She could harm them as she is only doing what she is asking them to do to her. The Golden Rule would allow for such a conclusion. Deriving a principle of nonmaleficence requires the moral condemnation of the masochist's self-regarding desire that others harm her. Kant argued that the universal law formulation of the Categorical Imperative requires no presumed moral judgments. Kant's Categorical Imperative can be invoked, as it does not require self-regarding moral judgments as the basis of other-regarding moral judgments. Furthermore, the Golden Rule cannot be used to derive judgments concerning one's moral duties to oneself. One such duty, Kant argued, was that of not committing suicide. Suicide contradicts the fundamental desire of self-preservation just as the act of intentionally killing another does.⁹³

Kant's⁹⁴ second formulation of the Categorical Imperative can be invoked in certain paradigm cases to demonstrate that the wrongness of inflicting grave harms on others cannot be negated by consent, not even if the consent is fully informed and the harm is a source of great pleasure for the victim. Duff⁹⁵ rightly notes that harmdoers in *R. v. Brown* treated their victims with a lack of respect as persons. But it is more convincing to claim that a person's dignity has been violated in a serious way when the harm is of an irreparable and extraordinary grave kind such as in those cases where the consentor is killed and eaten by a cannibal for sexual gratification, is blinded with acid, has her legs and arms cut off, or contracts a fatal disease. The case is not so clear in the *R. v. Brown* situation where the harm is repairable and more borderline.

93. "What is wrong with the Golden Rule (in both its positive and negative versions) is that as stated it allows natural inclinations and the special circumstances to play an improper role in our deliberations. But in saying this Kant implies that the Categorical Imperative procedure specifies the proper role." *Id.* at 199.

94. Gregor, *supra* note 79.

95. Duff, *supra* note 56.

The Categorical Imperative is a deontological constraint that does not provide the type of criteria that is needed to give legislatures proper guidance as to whether a particular violation of dignity is worthy of criminalization. For instance, mere false promising and common assault would treat those affected with a lack of respect as persons according to the Categorical Imperative. I have argued elsewhere that a core problem with using Kant's Categorical Imperative in criminalization decisions is that it alone cannot be used to distinguish moral wrongs that warrant a criminal law response from those that require a civil law response or no response at all.⁹⁶ The wrongness of false promising and rape is equal according to a literal application of Kant's second formulation of the Categorical Imperative. Hence, serious physical injury and trivial physical injury to humans is equally wrongful according to the Categorical Imperative. Thus, it is necessary to also consider objective consequences to determine whether the violation of dignity is worthy of criminalization. It is the gravity of harm that determines whether the violation of dignity is worthy of criminalization. If *x* throws acid in *y*'s eyes thereby blinding *y*, she violates *y*'s dignity, and because of the gravity of the irreversible harm, it is a violation that is not only morally wrongful in Kantian terms, but criminalizable.

R. v. Brown can be contradistinguished from the HIV cases in a number of ways. Firstly, the harm was inflicted intentionally and was certain to transpire. Secondly, the harm was not of an irreparable kind. And thirdly, the harm was not of a kind that was likely to alienate the consentor's right to life at some time in the future. In *R. v. Brown*⁹⁷ a group of homosexual sadomasochists voluntarily and enthusiastically committed acts of violence against each other, because they achieved sexual gratification from being subjected to violence and pain. The appellants were arraigned on various counts under sections 20 and 47 of the Offences Against the Person Act 1861 (U.K.), for inflicting wounds and actual bodily harm on the genital and other areas of the body of the consenting victims. A core issue in that case concerned consent and whether it could be used to nullify the *prima facie* wrongfulness of the sadomasochistic activities.

The trial judge stated that consent was not a viable defense to intentionally inflicting harm beyond a certain threshold (actual bodily harm or

96. Baker, *supra* note 22.

97. [1994] 1 A.C. 212.

greater). The appellants appealed unsuccessfully to the House of Lords. The majority of the Law Lords held that: “although a prosecutor had to prove absence of consent in order to secure a conviction for *mere assault* it was not in the public interest that a person should wound or cause actual bodily harm to another for no good reason and, in the absence of such a reason, the victim’s consent afforded no defense to a charge under section 20 or 47 of the Offences Against the Person Act 1861 (U.K.).”⁹⁸ The court said that satisfying sadomasochistic desires did not provide the appellants with a good reason for inflicting gross harm on each other. Consent was not a permissible defense, because the appellants had admitted that they had committed the harmful acts and the acts were clearly aimed at interfering with the health and comfort of the mutual participants.⁹⁹ The *gravity* of the harm influenced the decision, as this was not merely a case of common assault.¹⁰⁰ The appellants had committed violent acts against each other including nailing their prepuces and scrota to a board, inserting hot wax into their urethras, burning their penises with candles, and incising their scrota with scalpels, which caused the exudation of blood and put them at risk of contracting septicemia and HIV.¹⁰¹

The harm in *Brown* was distinguished from the type of harm that flows from mere assault, but it was not irreparable or permanent. It certainly violated the dignity of the consenters, but was the violation of dignity serious enough to justify criminalizing the harmdoers? The *volenti non fit injuria* doctrine does pull some weight and provides a defense for less serious harmdoing to others. Nonetheless, it has to be reconciled with the more fundamental concept of humanity as an end in itself. I am ripping Kant’s Categorical Imperative out of its original context by making exceptions for different degrees of disrespect for dignity. But such an approach is feasible, because the distinctions I draw are for the purposes of identifying criminalizable violations of dignity, rather than violations of dignity per se. In the current context, I argue that criminalizable disrespect for dignity is disrespect that violates the consenter’s dignity in a serious way.

R. v. Brown involved a borderline dignity violation (as the harm was only borderline). There is no doubt that the consenters were harmed. The

98. *Id.*

99. *Id.*

100. Cf. *R. v. Orton*, [1878] 39 L.T. 293.

101. *R. v. Brown*, [1994] 1 A.C. 212 at 246.

harm was wrongful not because it violated the consenters' rights not to be harmed (as would be the case under the Harm Principle), but because it violated their dignity as human beings. A person can waive his right not to be harmed, but he cannot waive his right to maintain a certain level of dignity as a human being. It is not the disrespect in itself that makes the conduct in *R. v. Brown* criminalizable, but the *degree* of the disrespect. We measure the degree of disrespect by evaluating the gravity of the wrongdoing involved. Respect at this level means that when wrongful harm goes beyond a certain cutoff point, consent will not provide a defense. However, *Brown* really seems to sit right on the line, as personal autonomy is a powerful countervailing consideration and the harm was not of a permanent or irreparable nature.

E. Other Considerations

The threshold for overriding consent has to be very high. The physical wounds involved in unnecessary plastic surgery could be worse than those witnessed in *R. v. Brown*, but the overriding consideration is its impact on the dignity of the consenter. A person is able to consent to dangerous plastic surgery that is not necessary, such as a facelift. The benefits of this sort of unnecessary plastic surgery are not as valuable as life-saving surgery or surgery that is needed to correct disfigurement. At best one would argue that this kind of cosmetic surgery merely provides psychological benefits that are associated with vanity. What makes plastic surgery morally permissible? Surgery involves intentional violence that may cause serious bodily harm, but the purpose of the surgery is to advance the patient's long-term interests—dignity. Any long-term harm is a mere side effect of the surgery, which is aimed at advancing the patient's interests and human dignity. In the case of tattooing, ear piercing, football, etc., the purpose (*telos*) of participating is not to cause harm, but to allow the consenters to freely express themselves. These types of practices do not violate the dignity of the consenter and have long-term benefits. In the case of football, there is a remote risk of serious harm transpiring, but the harm is a mere side effect of playing a risky sport. The participants in a football match do not intentionally or recklessly aim to harm their fellow players—any harm is only a side effect. We do not criminalize accidents. If a surgeon is grossly negligent the criminal law could be invoked. Similarly, if a football player deliberately or recklessly harms another player the criminal law could be invoked.

A patient can consent to having unnecessary plastic surgery in order to advance her interests in the long term. She risks the side effects for the long-term benefit of improving her health or appearance. The ephemeral setback (wounds and suffering) results in a long-term benefit: it advances the recipient both physically and psychologically in the long term and therefore does not degrade her dignity. It might also cause long-term physical and psychological harm, if it all goes horribly wrong. Nevertheless, unlike sadomasochism, plastic surgery is not conduct that aims (or is intended) to cause harm or violate the dignity of the consentor. The only harm that is likely to eventuate is attributable to the unintended risks of surgery. The harm is separable from the overall aim or purpose of this type of surgery, which maintains the dignity of the patient rather than degrades it. The surgeon does not *aim* or have it as her purpose to leave her patient permanently disfigured or disabled. If a surgeon amputates a patient's legs to prevent gangrene spreading, this maintains the patient's dignity, but if she amputates them merely because the patient does not want his legs anymore, she would violate the dignity of the patient. Likewise, it is arguable that many forms of unnecessary plastic surgery could fall within the scope of the criminalization theory presented in this paper. If a surgeon causes gross irreparable harm by operating repeatedly on a patient who is addicted to unnecessary and nonbeneficial surgery, then the criminal law could be invoked. In some cases plastic surgeons put profits above the interests of their patients, for example, by providing profit-making surgery to mentally unstable patients who are obsessively addicted to surgery (I have a particular rock star in mind). A patient should not be able to consent to this type of gross and unnecessary harmdoing.

The sadomasochists might object. They might argue that the *telos* of participant's activities in sadomasochism is merely to achieve sexual gratification. But this ulterior aim cannot be separated from the harmdoing—violation of dignity. The harm has to be repeated each time the recipient wants to receive sadomasochistic pleasure. The two are inseparable—the sexual gratification can only be achieved while the harm is being inflicted. *Per contra*, a legitimate and reasonable medical operation has a different *telos*. Surgery's *telos* involves a one-off wound for a long-term benefit and the long-term aim is separable from the short-term setback to the physical health of the patient. But this does not mean that a person could consent to all kinds of surgery. The surgery would have to be aimed at advancing the interests of the patient. For example, a person could not

consent to a lobotomy, because it would violate her dignity in a morally unacceptable way. The *telos* of sadomasochism is to achieve sexual gratification but this cannot be separated from the harmdoing—which involves a violation of dignity each time the participant wants to achieve sexual gratification. The crucial difference is that surgery aims to advance the interests and dignity of patients whereas sadomasochism is about advancing personal autonomy in a way that is not reconcilable with maintaining dignity. Hence, the sexual gratification can only be achieved by violating the dignity of the participants—there is no overall advancement of dignity involved.

F. Concluding Remarks

Harm plays a crucial role, as the state cannot criminalize conduct without an objective justification. In Feinberg's scheme a person's right not to be wrongfully harmed derives from the idea of preserving personal autonomy. Feinberg allows a person to exercise her personal autonomy to waive the right not to be harmed. Hence, Feinberg's scheme does not explain the wrongness of gravely harming a consentor. And because we need something more than mere harm to justify criminalizing conduct, we have to look for an alternative account of the wrongness of certain grave harms. Furthermore, mere wrongdoing per se does not provide an objective basis for criminalizing conduct. For instance, if a woman falsely promises her husband that she will not let anyone use his automobile whilst he is overseas, she wrongs him in Kant's scheme, but unless there are some objective bad consequences (such as harm) this type of wrongdoing alone could not give a legislature proper guidance about what to criminalize. Thus, we need an account of wrongdoing that links up with harm to provide the lawmaker with an objective justification for invoking the criminal law. I have argued above that Kant's theory of respect for dignity coupled with serious harmful consequences shows why it might be fair to criminalize certain harmful activities even where consent is present.

I have argued that in those cases where the consentor alienates her dignity, she is wronged and the seriousness of that wrong can be determined by examining the objectively bad consequences it has for her personhood. Similarly, when a person consents to blinding, unnecessary amputation, a lobotomy, being poisoned, or being infected with a deadly substance, the harm is irreversible and of an extraordinary grave kind and therefore there

is a strong case for claiming that the consentor's dignity has been violated in a serious way. I noted that HIV transmission poses some problems, because the harm is not instant and the long-term harm is not as remarkable as immediate death. In fact, the worst of the harm during the intervening years would be psychological distress and the traumas associated with receiving treatment. I have also concluded that *R. v. Brown* raises greater problems, as it is a borderline case. The harm is reparable, the conduct involved an exercise of personal autonomy, and the wounds, while severe, did not seem to involve anything life threatening. Nevertheless, the wounds were not mild either. Coupled with this, it is arguable that we have a collective interest in preventing people becoming desensitized to inflicting such violence on their fellow humans. Arguably, we also have a collective interest in preventing the wanton spreading of deadly diseases.

In conclusion, I assert that there are critical moral reasons for criminalizing the actions in *R. v. Brown* and *R. v. Konzani*. I would go as far as to argue that boxing and some forms of plastic surgery also fall within the purview of the limits of consent doctrine presented in this paper. It is arguable that the level and *type* of harm inflicted in such cases is sufficient to nullify any consent. But the case for limiting consent in these types of cases is weaker, as the harmdoing is reparable and somewhat borderline. It is important to set a high threshold if we are to protect the cardinal right to personal autonomy. Nonetheless, there comes a point when the gravity of the harm is of a degree that it degrades the consentor's humanity. In those cases where the victim alienates her powers of choice (consents to death either immediately or in the long term) and the harm is irreparable, the case for criminalization is clear-cut. But in other cases it is not possible to draw a perfectly clear line, other than to hold that a person ought not rely on consent as a defense when the harm inflicted on the person of her fellow human is of an exceptionally serious kind (broken bones, deep wounds, gun wounds, first-degree burns, and so on). The deep wounds inflicted in *Brown* seem to fall into this category.