Consent To Harm

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The case of *People v. Jovanovic*, dubbed by tabloids the "cybersex torture" case,[1] began in November 1996, when Jamie Ruzcek, a twenty-year-old Barnard student, reported to the police that she had been sexually assaulted by Oliver Jovanovic, a thirty-year-old doctoral candidate at Columbia University.[2] The alleged assault happened during the first "live" date between Jovanovic and Ruzcek, which took place after weeks of their on-line conversations and e-mail correspondence.[3] According to Ruzcek, "Jovanovic had hogtied her for nearly twenty hours, violently raped and sodomized her, struck her repeatedly with a club, severely burned her with candle wax, and repeatedly gagged her with a variety of materials."[4]

Jovanovoic was prosecuted, convicted of kidnapping, sexual abuse, and assault, and sentenced to a term of 15 years to life.[5] He was released after twenty months in prison when the appellate court ruled that the trial judge improperly denied admission of portions of Ruzcek's e-mails to Jovanovic, in which she discussed her sadomasochistic interests and experience.[6] The

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1. Jovanovic v. City of New York, No. 04-8437, 2006 U.S. Dist. LEXIS 59165, at *1 (S.D.N.Y. Aug. 17, 2006).
2. *Id.* at *4.
3. People v. Jovanovic, 700 N.Y.S.2d 156, 159 (App. Div. 1999).
4. *Jovanovic*, 2006 U.S. Dist. LEXIS 59165, at *4.
5. *Id.* at *9.
6. *Jovanovic,* 700 N.Y.S.2d at 159.

HeinOnline -- 28 Pace L. Rev. 683 2007-2008

court explained: "Because the jury could have inferred from the redacted e-mail messages that the complainant had shown an interest in participating in sadomasochism with Jovanovic, this evidence is clearly central to the question of whether she consented to the charged kidnapping and sexual abuse."[7] Since non-consent is an element of both offenses—kidnapping and sexual abuse—the appellate court properly reversed Jovanovic's convictions on both charges. But the court did not stop there; it also reversed Jovanovic's conviction of assault in the second and third degree.

Under New York law, a person is guilty of second-degree assault when, "[w]ith intent to cause physical injury to another person, he causes such injury to such person . . . by means of a deadly weapon or a dangerous instrument."[8] A person is guilty of third-degree assault when, "[w]ith intent to cause physical injury to another person, he causes such injury to such person . . . ."[9] Neither statutory provision lists the lack of consent as an element to be proven by the prosecution or allows for the defense of consent. And yet the appellate court did something quite remarkable: it reversed the assault conviction and at the same time (albeit in a footnote only) reiterated the traditional rule that "[t]here is no available defense of consent on a charge of assault . . . ."[10] The court elaborated:

> Indeed, while a meaningful distinction can be made between an ordinary violent beating and violence in which both parties voluntarily participate for their own sexual gratification, nevertheless, just as a person cannot consent to his or her own murder, as a matter of public policy, a person cannot avoid criminal responsibility for an assault that causes injury or carries a risk of serious harm, even if the victim asked for or consented to the act.[11]

In his opinion, concurring in part and dissenting in part, Judge Mazzarelli pointed out the obvious discrepancy between the majority's holding (consent is not a defense to assault) and decision (reversal of the assault conviction).[12] He also opined

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7. *Id.* at 168.
8. N.Y. PENAL LAW § 120.05(2) (McKinney 2006).
9. N.Y. PENAL LAW § 120.00(1) (McKinney 2004).
10. *Jovanovic*, 700 N.Y.S.2d at 169 n.5.
11. *Id.* (citations omitted).
12. *Id.* at 174 (Mazzarelli, J., concurring in part and dissenting in part).

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that the evidence produced at the trial was sufficient to support the defendant's conviction of assault,[13] and the majority did not dispute that conclusion.[14] Technically, Judge Mazzarelli was right, and the majority was wrong. The decision defied both formal logic and the established rule, according to which consent to assault, including private sadomasochistic activities, could not exculpate the perpetrator.[15]

However, from the perspective of fairness and internal consistency of criminal sanctions, the *Jovanovic* appellate decision was more justifiable than the current rule of law. Consider this: assuming Jovanovic indeed caused Ruzcek a lot of pain and anguish, why should her consent shield him from criminal liability for sexual violence and kidnapping, but not for assault? Clearly, this is not because rape or kidnapping is a less serious offense than assault. In fact, a person in danger of being raped or kidnapped has the right to use any physical force, including deadly force, to protect him or herself against that danger, whereas a person in danger of a simple assault does not have the same right. And yet consent of the victim "turns a rape into love-making, a kidnapping into a Sunday drive, a battery into a football tackle, a theft into a gift, and a trespass into a dinner party,"[16] but, except in a couple of narrowly defined circum-

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13. *Id.* Judge Mazzarelli wrote:

> [T]he complaining witness's testimony was sufficient to support both of these convictions, and, in the circumstances, hot candle wax was appropriately considered a dangerous instrument. Moreover, the complainant's testimony was corroborated by a neighbor who heard sounds as if someone were "undergoing [a] root canal" from defendant's apartment at the time in question, by the complaining witness's prompt outcries to five individuals, some of these individuals' observations of the complaining witness's injuries, the lab results as to her clothing, and the e-mails sent between the complaining witness and defendant subsequent to the incident.

Id. at 175 (citations omitted).

14. *See, e.g.*, *id.* at 198 n.5 (majority opinion) (accepting the jury finding that the victim was physically injured during her encounter with the defendant).

15. *See, e.g.*, People v. Samuels, 58 Cal. Rptr. 439, 513-14 (Ct. App. 1967); State v. Collier, 372 N.W.2d 303, 305-07 (Iowa Ct. App. 1985); Commonwealth v. Appleby, 402 N.E.2d 1051, 1059-61 (Mass. 1980); State v. Van, 688 N.W.2d 600, 613-15 (Neb. 2004); R v. Emmett, [1999] EWCA (Crim) 1710 (Eng.); R v. Brown, [1992] 2 All E.R. 552 (A.C.); R v. Donovan, (1934) 2 Eng. Rep. 498, 503 (K.B.).

16. Heidi M. Hurd, *Blaming the Victim: A Response to the Proposal that Criminal Law Recognize a General Defense of Contributory Responsibility*, 8 BUFF. CRIM. L. REV. 503, 504 (2005).

stances, it is powerless to change the moral and legal character of assault.

I. The Origins and Current Boundaries of the Rule of Consent

Historically, the special rule of consent to physical harm originated in Anglo-American jurisprudence in the 17th century. Prior to that, an individual was free to consent practically to anything, and consent was viewed as a complete ban on prosecution. As the famous maxim goes, *volenti non fit injuria*: "a person is not wronged by that to which he consents."[17] Changes came as a result 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,[18] in the normative and centralized judicial structure the victim became almost entirely excluded from the criminal process.[19] "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."[20] An increasing number of historically "private" offenses were reconceptualized as "public."[21] The state (or king) became the ultimate victim and the sole prosecutor of a criminal act.[22] Consequently, an individual lost the power to consent to what the state regarded as harm to itself.

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17. *See* Terence Ingman, *A History of the Defence of* Volenti Non Fit Injuria, 26 JURID. REV. 1, 8-9 (1981).

18. *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.*

19. *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.").

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

21. By the eighteenth century, all crimes and misdemeanors were regarded as public wrongs. *See* WILLIAM BLACKSTONE, 4 COMMENTARIES *5 ("[P]ublic wrongs, or crimes and misdemeanours, are a breach and violation of the public rights and duties due to the whole community . . . .").

22. *See id.* at *5-6.

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In one of the earliest English cases that rejected consent of the victim as a defense to serious bodily harm, the court opined that the defendant was guilty because, by maiming the willing victim, he deprived the king of the aid and assistance of one of his subjects.[23] Three centuries later, an American court used a very similar argument, explaining that the "commonwealth needs the services of its citizens quite as much as the kings of England needed the services of theirs."[24]

Today, American law continues to maintain that one's life and body do not quite belong to him. Accordingly, an individual has a very limited power to authorize an act that affects his physical well-being. For example, the Model Penal Code ("MPC") views consent of the victim as a defense "if such consent 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."[25] This general rule, however, does not apply to offenses involving bodily harm. In those cases, consent of the victim exonerates the perpetrator only in three sets of circumstances: (i) when the injury is not serious;[26] (ii) 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;"[27] and (iii) when the bodily harm was inflicted for the purpose of a "recognized form of treatment" intended to improve the patient's physical or mental health.[28]

This limited rule, which reflects the law in the absolute majority of states,[29] has been criticized for its narrow scope and

23. *Id.* at *205.

24. State v. Bass, 120 S.E.2d 580, 586 (N.C. 1961).

25. MODEL PENAL CODE § 2.11(1) (1980).

26. *Id.* § 2.11(2)(a).

27. *Id.* § 2.11(2)(b).

28. *Id.* §§ 2.11(2)(c), 3.08(4)(a).

29. 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, 702-235 (1993) (omits equivalent of subsection (2)(a)); ME. REV. STAT. ANN. tit. 17-A, § 109 (2006) (omits equivalent of subsection (3)(c)); VERNON'S ANN. MISS. STAT. §565.080; MO. ANN. STAT. § 565.080 (West 1999); MONT. CODE ANN. § 45-2-211 (2005); N.H. REV. STAT. ANN. § 626:6 (1996) (omits equivalent of subsections (3)(c) and (3)(d)); N.J. STAT. ANN. § 2C:2-10 (West 2005) (omits equivalent of subsection (3)(c)); N.D. CENT. CODE § 12.1-17-08 (1997) (omits equivalent of subsection (3)(c)); PA. CONS. STAT. ANN. § 311 (West 1998) (omits equivalent of subsection (2)(a)); TENN. CODE

arbitrary boundaries. As one judge remarked, 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."[30] Examples of the law's arbitrariness are abundant. Consider just a few.

A. *Familial Breast Cancer Syndrome, Body Integrity Identity Disorder, and Gender Identity Disorder*

A woman who carries a breast cancer gene may choose to have a preventive mastectomy.[31] Such radical surgery, although quite lawful, is considered to be controversial in medical literature: there is little proof that, for purposes of cancer prevention, it is superior to less extreme and disfiguring alternatives.[32] For women with "familial breast cancer syndrome," a condition indicating a high risk for developing breast cancer,[33] the primary advantage of the surgery is that it helps to relieve chronic stress and anxiety over the substantial likelihood of developing the disease.[34]

ANN. § 39-13-104 (2003) (omits equivalent of subsection (2)(c) and (3)); TEXAS PENAL CODE ANN. § 22.06 (Vernon 2003) (omits equivalent of subsection (2)(c) and (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 (2002) ("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 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").

30. R. v. Brown, [1994] 1 A.C. 212, 278 (H.L.) (Lord Slynn's opinion).

31. *See, e.g.*, Jane E. Brody, *Personal Health*, N.Y. TIMES, May 5, 1993, at C13.

32. 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).

33. *Id.* at 452.

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

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Yet, considerations of emotional pain fail to legitimize an elective surgery on a patient with Body Integrity Identity Disorder ("BIID"), a rare ailment whose victims seek to become amputees.[35] The limited statistics seem to indicate that, if BIID patients succeed in their pursuit, their quality of life improves dramatically.[36] A surgeon who agrees to perform such an amputation, however, opens himself up to criminal liability because his patients' consent is legally invalid.[37]

The BIID patients often compare themselves to those suffering from Gender Identity Disorders ("GID"), describing the common experience as being "stuck in the wrong body."[38] 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 sex organs,[39] whereas the BIID sufferers cannot consent to amputation of an arm or a leg.[40]

B. *Sadomasochistic Beating, Religious Flagellation, and Ritual Mutilation*

According to the current rule of consent, a person may not agree to physical injury. In practically every single case involving consensual sadomasochistic beating, the defendant was convicted of assault. In *State v. Collier*, for example, the court held that the legislature did not intend to include sadomasochistic

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

36. *Id.*

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

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

39. *See* G.B. v. Lackner, 145 Cal. Rptr. 555, 557 (Ct. App. 1978) (stating that "[t]he 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").

40. *See* Annemarie Bridy, *Confounding Extremities: Surgery at the Medico-Ethical Limits of Self-Modification*, 32 J.L. MED. & ETHICS 148, 148, 151-55 (2004). Bridy states that, "[t]o 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." *Id.* at 155.

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encounters in the list of "'sport, social or other activity'" permitted under the Iowa Code.[41] Religious flagellation, on the other hand, enjoys much more deferential treatment by authorities.[42] In a 19th century Scottish case, the court opined that "[i]n 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."[43] More recently, some courts have said that the law "may prohibit religiously impelled physical attacks,"[44] but research has revealed no actual legal cases. Some states even include the element of non-consent in the definition of 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.*[45]

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.

C. *Consensual Transmission of HIV*

Even though consensual beating constitutes a crime, consensual intentional transmission of HIV is most likely not punishable in a significant number of states. The phenomenon, known as "bug-chasing," involves "bug-chasers" (HIV-negative men who actively seek out infection by having unprotected sex with infected partners) and "gift-givers" (HIV-positive men willing to infect "bug-chasers"). According to a source, this practice is the cause of 25 percent of all new infections among American

41. *See* State v. Collier, 372 N.W.2d 303, 307 (Iowa Ct. App. 1985) (quoting IOWA CODE ANN. § 708.1 (West 2003)).

42. Law Commission, Consultation Paper 139, Consent in the Criminal Law 10.1-10.4 (1995).

43. *Id.* (citation omitted).

44. United States v. Meyers, 906 F. Supp. 1494, 1496 (D. Wyo. 1995). *See* 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).

45. 720 ILL. COMP. STAT. ANN. 5/12-32(a) (West 2005) (emphasis added).

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gay men.[46] These statistics have been questioned, but even if they are not entirely accurate, there is a general consensus that "bug-chasing" and "gift-giving" present a serious problem for the gay community.[47] Nevertheless, out of twenty-four states that have statutes criminalizing the act of knowingly exposing another human being to HIV, eight states explicitly recognize consent of the victim as an affirmative defense,[48] and another ten reach the same outcome by making failure to disclose one's HIV status an element of the crime.[49]

Since any harmful act that does not fit into the "athletic" or "medical" exception is, by definition, criminal, unless the inflicted injury is not serious, assessment of the seriousness of the victim's injury determines the outcome of many cases involving consensual harm. A typical penal statute classifies 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."[50] Pursuant to this definition, any short-term, non-life-threatening injury should not be deemed "serious." Yet, as the MPC acknowledges, the assessment of the seriousness of harm is often affected by judges' "moral judgments about the iniquity of the conduct involved."[51] Courts tend to inflate the risk and harmfulness of an activity they want to denounce. For example, any injury caused during a sadomasochistic encounter has been consistently classified as serious.

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46. Gregory A. Freeman, *Bug Chasers: The Men Who Long to Be HIV+*, ROLLING STONE, Jan. 23, 2003, *available at* http://www.rollingstone.com/news/story/5939950/bug_chasers.

47. Amanda Weiss, Comment, *Criminalizing Consensual Transmission of HIV*, 2006 U. CHI. LEGAL F. 389, 389-90 (2006).

48. Those states are: Florida, Idaho, Illinois, Iowa, Nevada, North Dakota, South Dakota, and Tennessee. Leslie E. Wolf & Richard Vezina, *Crime and Punishment: Is There a Role for Criminal Law in HIV Prevention Policy?*, 25 WHITTIER L. REV. 821, 854 (2004).

49. Those states are: Arkansas, California, Georgia, Louisiana, Michigan, Missouri, New Jersey, Ohio, Oklahoma, and South Carolina. *Id.*

50. MODEL PENAL CODE § 210.0(3) (1980). Following the Model Penal Code, 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).

51. MODEL PENAL CODE § 2.11 cmt. 2 n.8 (1980). 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.*

In *State v. Collier*, the victim's injuries consisted of "a swollen lip, large welts on her ankles, wrists, hips, buttocks, and severe bruises on her thighs."[52] The defendant was convicted of assault resulting in a serious injury, and the appellate court agreed, although, as the dissenting judge pointed out, the inflicted bodily harm did not constitute a serious injury within the meaning of the state statute.[53]

Some state penal codes include physical pain in the definition of "bodily harm."[54] In *State v. Guinn*, the defendant was convicted of inflicting "serious physical injury" in the course of a sexual encounter.[55] There was no evidence that the victim "'ever required any medical attention or suffered any wounds of any sort.'"[56] Yet the appellate court sustained the assault conviction, reasoning that the sadomasochistic paraphernalia used by the defendant must have caused serious physical pain (candle wax was "'hot and it stung'" and nipple clamps were "'tight and cutting'"),[57] and "physical pain" satisfied the definition of "physical injury."[58] Naturally, under a statute of this type, practically any sadomasochistic activity may be characterized as criminal.

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52. State v. Collier, 372 N.W.2d 303, 304 (Iowa Ct. App. 1985). *See* R v. Donovan, (1934) 2 Eng. Rep. 498, 502-03 (K.B.) ("seven or eight red marks" on the body of a participant of a sadomasochistic encounter found to be sufficient for an assault conviction); R v. Emmett, [1999] EWCA (Crim) 1710 (Eng.) (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).

53. *Collier*, 372 N.W.2d at 309 (Schlegel, J., dissenting).

54. *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) (1980). In *State v. Guinn*, the relevant statute did not define "serious physical injury." *State v. Guinn*, No. 23886-1-II, 2001 Wash. App. LEXIS 502, at *33 (Ct. App. March 30, 2001). But "'substantial bodily harm'" was defined as "'bodily injury which involves a temporary but substantial disfigurement, or which causes a temporary but substantial loss or impairment of the function of any bodily part or organ, or which causes a fracture of any bodily part.'" *Id.* (quoting WASH. REV. CODE § 9A.04.110(4)(b) (2004)). And "'great bodily harm'" was defined as "'bodily injury which creates a probability of death, or which causes significant serious permanent disfigurement, or which causes a significant permanent loss or impairment of the function of any bodily part or organ.'" *Id.* (quoting WASH. REV. CODE § 9A.04.110(4)(c) (2004)).

55. *Guinn*, 2001 Wash. App. LEXIS 502, at *32.

56. *Id.* at *34.

57. *Id.*

58. *Id.*

HeinOnline -- 28 Pace L. Rev. 692 2007-2008

The current rule of consent to harm is problematic on many levels: not only is it arbitrary and strict; it is also autocratic and absolute. People are allowed to consent to harm only if their activities are on the list of things approved by the state. The law envisions no balancing or accommodation of conflicting interests of an individual and society. The disregard for an individual, inherent in this rule, goes against the basic principles of autonomy and personal responsibility defining American criminal law. Moreover, the authoritarian presumption that it is not an individual, but rather the state that is the victim of every crime is plainly wrong because, if that were so, then consent would not be a defense to any harm.[59] Yet we know that individuals are free to consent to all kinds of harm—emotional, financial, reputational—as long as these harms are not physical.

This critique prompts two questions: one, why do we perceive consent to bodily harm so differently than consent to any other activity, specifically, why does consent preclude such offenses as theft, rape, or kidnapping but not murder or battery; and two, if we were to revise the current law of consent, where should we draw the line between permissible and impermissible bodily harm?

II. Why Consent to Physical Harm is Treated Differently Than Any Other Waiver of Rights

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.[60] For example, by promising a neighbor that I will sell him my car, I give him a claim against me with regard to that promise. By consenting to a root canal procedure, I give my dentist a privilege to perform it. By inviting a friend to dinner, I give him a power to visit me. In all those instances, I waive a right I used to have and give other people rights they did not have before. And yet there is an important difference in *how* consent

59. *See* Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 570 (2004) (pointing out that "if the state were indeed the victim of every crime, then consent should be a defense to none").

60. *See generally* WESLEY NEWCOMB HOHFELD, FUNDAMENTAL LEGAL CONCEPTIONS (1923). *See also* JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 360-61 (1990).

changes the relevant relationship between the parties in some of these scenarios.

Recall the MPC consent provisions. Under the MPC, voluntary consent of a legally competent individual may trigger two different rules, either the general rule or the specific rule for consent to bodily harm. We already reviewed the latter; now let's have a closer look at the former. The MPC general rule of consent provides that consent of the victim is a defense if it either "*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."[61] What is peculiar in this rule is that both grounds for the defense have little to do with the theory of defenses.

Any defense presumes that a criminal act has been committed; however, it was committed under the circumstances that may either justify or excuse the perpetrator. An act is criminal only if it encompasses all elements of the offense. If an element is missing, no defense is needed simply because the perpetrator is not guilty even of a prima facie criminal wrongdoing.[62] For example, each of the offenses of rape, kidnapping, and theft includes in its definition the element of non-consent.[63] If that element is negated by the victim's acquiescence, the defendant is completely exonerated by the so-called failure of proof. In these circumstances, consent of the victim does not serve as a defense; instead, it defeats the very possibility of an offense.

The second, alternative ground for the MPC defense of consent is also puzzling: on the one hand, it almost verbatim repeats a segment of Section 3.02, which summarizes generic requirements for a defense of justification; on the other hand it differs from Section 3.02 in a meaningful way. Section 3.02 maintains that conduct is justifiable if "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."[64] The itali-

61. Model Penal Code § 2.11(1) (1980) (emphasis added).

62. "Justification and excuses do not seek to refute any required element of the prosecution's case; rather they suggest further considerations that negate culpability even when all elements of the offense are clearly present." Sanford H. Kadish, Stephen J. Shulhofer & Carole S. Steiker, Criminal Law and Its Processes: Cases and Materials 737 (8th ed. 2007).

63. *See, e.g.*, Model Penal Code §§ 212.1, 213.1, 223.2 (1980).

64. Model Penal Code § 3.02(1)(a) (1980) (emphasis added).

HeinOnline -- 28 Pace L. Rev. 694 2007-2008

cized words coincide with the language of Section 2.11. However, if the general justification provision requires only that the inflicted harm or evil be *lesser* than the harm or evil that was avoided, the consent provision talks about complete *preclusion* of any harm or evil that is sought to be prevented by the law defining the offense. The consent provision, thus, exculpates the defendant only when social harm is entirely avoided. But if there is no social harm, why should the defendant even need a defense? Isn't this provision merely a broader version of the first part of the section (i.e. negation of an element of the offense charged)?

The materials of the American Law Institute ("ALI") proceedings confirm this supposition. According to MPC Reporter Herbert Wechsler, the alternative ground for relief in Section 2.11(1) was intended to cover a situation when the definition of an offense, which logically should have incorporated the nonconsent language, by legislative oversight or for some other reason, is omitted.

> There are also cases where in the definition of a crime the words "without consent" have not been put in, but where it is perfectly clear that in the legislative conception of the offense the idea was intended, and that is the purpose for the rest of part (1); that if consent precludes the infliction of the harm or evil sought to be prevented by the legislature, then even though it does not negative the formal element, it still ought to be a defense.[65]

In other words, the defense of consent set forth in Section 2.11(1) of the MPC is *not* a defense at all. Instead it is another way to state the rule that a person is not guilty of an offense unless each element of the offense is proven beyond a reasonable doubt.[66] In that sense, Section 2.11(1) is redundant, and the drafters of the MPC have acknowledged that by calling it

65. AMERICAN LAW INSTITUTE, PROCEEDINGS OF THE AMERICAN LAW INSTITUTE 39TH ANNUAL MEETING, 90-91 (1962). A typical case envisioned by the drafters of the MPC would involve damage of property with the owner's consent. *Id.* at 91 ("Obviously the whole idea of the crime is misusing somebody else's property.").

66. MODEL PENAL CODE § 1.12(1) (1980) ("No person may be convicted of an offense unless each element of such offense is proved beyond a reasonable doubt. In the absence of such proof, the innocence of the defendant is assumed.").

"merely tautological"[67] and contrasting it with the specific rule of consent to bodily harm stated in Section 2.11(2):

> Now, the second part is more than tautological. There is a real need to indicate when and how far consent should be a defense to bodily injury crimes, because again you wouldn't draft a murder statute in terms of killing somebody without his consent. Obviously, the idea is that it's a crime whether he consents or not, and how far consent to bodily injury should go involves some deep questions of policy.[68]

The conceptual imprecision of Section 2.11 would be of little interest today had it not reflected an important intuition of the MPC drafters apparent in their attempt to differentiate between two entirely different roles of consent in criminal law. Compare cases of rape, kidnapping, or theft on the one hand, and cases of killing or maiming on the other. In the first group of cases, the *act itself* does not violate a prohibitory norm. Having sex, transporting someone to a different location, or taking other people's property is not bad *in itself*. It becomes bad *only* due to the absence of consent. In other words, no matter how we draft the statute, in cases of theft, rape, or kidnapping the role of consent is *inculpatory*—non-consent is a part of the definition of the offense.[69]

In contrast, causing pain, injury, or death is not morally neutral; it is regrettable.[70] Bringing about a regrettable state of events is bad and should be avoided.[71] Therefore, the law should promote a conduct rule that prohibits the very *act* of killing or hurting, providing, of course, for the necessary exceptions, such as self-defense. However, the fact that a person may be legally justified in killing an aggressor does not make the killing as morally neutral as borrowing a book—it is still regret-

67. *See* PROCEEDINGS OF THE AMERICAN LAW INSTITUTE, *supra* note 65, at 90.

68. *Id.* at 91.

69. *See* GEORGE P. FLETCHER, RETHINKING CRIMINAL LAW 705 (1978); Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165, 202-03 (2007).

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

71. *See, e.g.*, JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 18 (1988) (defining evil in the most generic sense as "any occurrence or state of affairs that is rather seriously to be regretted").

HeinOnline -- 28 Pace L. Rev. 696 2007-2008

table. It is still regrettable that a dental patient has to suffer pain, even though the dentist is justified in causing it,[72] whereas there is nothing regrettable in consensual sex or consensual change of ownership. To lose or reduce its inherent wrongfulness, the act of killing or hurting requires justification. The role of consent here is *exculpatory*; it may only serve as a defense.

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 coherent moral imperative."[73] In the case of killing or inflicting pain, this imperative is quite straightforward: do not kill, do not inflict pain. But what conduct rule do we want to convey to the community in cases of rape, theft, or criminal mischief? Should it say: 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, 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. Accordingly, the conduct rule applicable to killing or hurting does not require the non-consent language, whereas the conduct rule prohibiting rape, theft, or criminal mischief simply makes no sense without the non-consent element.

In practical terms, this distinction means that consent precludes even a prima facie case of rape, theft, or criminal mischief, regardless of whether the consensual act brings about more good than harm, and regardless of whether the defendant is aware of the victim's consent. Significantly more is required

72. *See, e.g.*, Peter Westen's persuasive argument that consent to injury does not eliminate its harmfulness. PETER WESTEN, THE LOGIC OF CONSENT: THE DIVERSITY AND DECEPTIVENESS OF CONSENT AS A DEFENSE TO CRIMINAL CONDUCT 115 (2004) (stating that it would be "patently false to say that a person who consents to conduct, *e.g.*, a medical patient who consents to surgical amputation of an eye or limb or a breast, suffers no burdens or setbacks to her interests of any kind from it").

73. FLETCHER, *supra* note 69, at 568.

to establish a successful defense, and a failure to satisfy the requirements is significantly more costly. For example, under the current law, as Paul Robinson correctly pointed out, the defendant's lack of knowledge of a legally relevant fact has different consequences in cases of "impossible" attempts on the one hand and cases of "unknowingly justified" actors on the other.[74] In cases of the first kind, the most serious offense of which the defendant may be convicted is attempt (e.g., a perpetrator who proceeds with intercourse while—mistakenly—believing his partner to be a minor is guilty of attempted statutory rape), whereas in cases of the second kind, the defendant is guilty of a completed offense (e.g., a perpetrator who shoots his enemy to death is guilty of murder even if, unbeknownst to the perpetrator, the enemy was about to attack him with a deadly weapon). Since in most jurisdictions a completed offense is punished more severely than an attempt,[75] the perpetrator who was unaware of a "lucky" fact that negated an element of an offense is treated better than the perpetrator who was unaware of a "lucky" justifying fact.

Why is that so? Mainly because we view a defense of justification as a limited license to commit an otherwise prohibited act in order to achieve a socially and morally desirable outcome.[76] For instance, if a group of mountaineers, caught by a snowstorm, took refuge in a deserted cabin and consumed the owner's provisions, they would be justified under the defense of necessity.[77] This limited license is teleological in nature; it presumes an objective need, an objectively preferable outcome, and the good faith of the actors. If, say, the mountaineers com-

74. *See* Paul H. Robinson, *Competing Theories of Justification: Deeds v. Reasons*, in: HARM AND CULPABILITY 45 (A.P. Simester & A.T.H. Smith eds., 1996).

75. *See* KADISH, SHULHOFER & STEIKER, *supra* note 62, at 544-45. Note, however, that the MPC and a substantial minority of states that follow the MPC impose the same punishment for an attempt as for the crime attempted (except for the crimes punishable by death or life imprisonment). *See, e.g.*, CONN. GEN. STAT. ANN. §53a-51 (West 2008); 18 PA. STAT. ANN. § 905 (West 2007); MODEL PENAL CODE § 5.05(1) (1980). In these states, the defendants guilty of an "impossible" attempt and the "unknowingly justified" defendants would be, in most instances, treated identically.

76. Fletcher, *supra* note 69, 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).

77. *See, e.g.*, MODEL PENAL CODE § 3.02 cmt. 1 (1980).

HeinOnline -- 28 Pace L. Rev. 698 2007-2008

mitted the break-in because, in their minds, it was a lesser evil than remaining hungry for the next few hours, they would not be entitled to the defense.[78] Nor would they be justified if the reason for breaking in was a desire to have an impromptu party in the cabin. The mountaineers would not be justified even if, unknowingly, they in fact saved their lives by hiding from the upcoming snowstorm.[79]

Thus, in order to be justified, the mountaineers must establish three elements:

(i) the basis for the defense (actual necessity);

(ii) an objectively preferable outcome (a positive balance of harms and evils); and

(iii) the subjective belief in the necessity of overstepping a prohibitory norm in order to achieve this preferable outcome.[80]

Similarly, to be justified for hurting someone in self-defense or defense of another, the defendant must establish:

(i) the basis for the defense (immediate necessity to fend off an unlawful attack);[81]

(ii) an objectively preferable outcome (it is preferable to harm an aggressor rather than allow the aggressor to harm an innocent victim); and

(iii) the subjective belief in the necessity of overstepping a prohibitory norm in order to achieve this preferable outcome.

If the perpetrator used force in the absence of necessity (no basis for defense) or injured several innocent bystanders in order to immobilize the aggressor (not an objectively preferable outcome), he would not be justified (although he may be ex-

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78. *See id.* § 3.02 cmt. 2 (pointing out that "one who takes a life in order to avoid financial ruin does not act from a justifying necessity").

79. *But see* 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).

80. *See* MODEL PENAL CODE § 3.02 cmt. 2 (1980) ("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.").

81. The MPC is different: its self-defense provision is entirely subjective. As long as the actor *believes* his use of force to be necessary to fend off an unlawful attack, he is justified. *See* MODEL PENAL CODE § 3.04. The actor may still be responsible for reckless (or negligent) homicide or injury if his beliefs were held recklessly (or negligently).

cused). Nor would he be justified if he merely used the attack as a ploy to harm the aggressor (bad faith).

The last point may be illustrated by the following 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,[82] *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*?

Although technically *A* is entitled to an acquittal, I think most of us would view such an outcome 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; 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.

Furthermore, under the MPC, the "choice of evils" is not available as a defense against a reckless (or negligent) crime if the defendant was reckless (or negligent) in bringing about the situation that made the injurious choice necessary.[83] Similarly, the MPC and the law of most states deny the perpetrator the justifications of self-defense and defense of another in prosecution for a reckless (or negligent) crime, if the belief that would otherwise justify his actions was held recklessly (or negligently).[84] 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? The language of the

82. *See, e.g.*, *id.* § 3.05.

83. *Id.* § 3.02(2). In a number of states, the rule is even stricter: 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.

84. *Id.* § 3.09.

MPC certainly suggests this conclusion: in determining the perpetrator's eligibility for self-defense and related defenses, the MPC addresses only the actor who "*believes that the use of force upon or toward the person of another is necessary for any of the purposes for which such belief would establish a justification.*"[85]

Applying the same logic to the defense of consent, we, therefore, should only grant complete justification to the perpetrator who can establish all requirements of the justificatory defense, namely:

(i) the basis for the defense (valid consent of the victim);

(ii) an objectively preferable outcome (a positive balance of harms and evils); and

(iii) the subjective belief in the necessity of hurting the victim in order to achieve this preferable outcome.

In what follows I consider these requirements and their application in more detail.

III. The Defense of Consent

The requirement of valid consent is quite straightforward, at least in theory.[86] To be valid, consent must be rational and voluntary, that is, freely given and informed.[87] Consent obtained by duress or fraud regarding the nature of the perpetrator's act is void ab initio.[88] Certain groups of people (e.g., children, mentally ill, intoxicated), in most instances, are deemed incapable of granting valid consent.[89] In addition, there is a strong argument that courts should require higher levels of rationality and voluntariness of the victim's decision as the amount of inflicted or risked harm increases.[90] For example,

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85. *Id.* § 3.09(2) (emphasis added).

86. For an excellent discussion of confusion between actual and legally valid consent, see WESTEN, *supra* note 72, at 119-24.

87. *See, e.g.*, 3 JOEL FEINBERG, THE MORAL LIMITS OF CRIMINAL LAW: HARM TO SELF 316 (1986) [hereinafter FEINBERG, HARM TO SELF].

88. *See, e.g.*, MODEL PENAL CODE § 2.11(d)(3), § 2.11 cmt. 3 (1980).

89. *See* FEINBERG, HARM TO SELF, *supra* note 87, at 316. Feinberg wrote:

> 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.

Id.

90. *Id.* at 117-21.

simple "sure, why not?" may be sufficient to constitute consent for piercing—but not cutting off—one's ears.[91]

One could argue that, when the perpetrator, acting in good faith, produces a measurably positive outcome, consent of the victim does not matter. And indeed, sometimes the law justifies a benevolent action even though it overrides another person's autonomy. For example, it is permissible to use force against a person in order to stop his suicidal attempt. At least in part, this rule reflects societal perception of suicide as inherently irrational. Whether this perception is accurate and the rule is morally sustainable is a question open for debate. It is clear, however, that the application of the rule is quite limited. It is impermissible to force-feed a competent, free individual who wishes to starve himself to death. It is impermissible to perform a surgery on an unwilling patient, even if that surgery is beneficial for the patient's health. And, it is certainly impermissible to perform involuntary euthanasia on any conscious human being under any circumstances.

Consider *Gilbert v. State*, in which the court convicted a seventy-five-year-old man of first-degree murder for shooting his wife to death.[92] Roswell and Emily Gilbert had been married for fifty-one years.[93] For the last few years of her life, Emily suffered from osteoporosis and Alzheimer's disease, and her condition rapidly deteriorated.[94] Testifying at his trial, Roswell Gilbert said: "'there she was in pain and all this confusion and I guess if I got cold as icewater that's what had happened. I thought to myself, I've got to do it . . . I've got to end her suffering . . . .'"[95] As dramatic and sad as this case is, the appellate court was right to affirm the defendant's conviction. Roswell Gilbert was motivated by compassion and desire to protect his

91. *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.

92. Gilbert v. State, 487 So. 2d 1185, 1186-88 (Fla. Dist. Ct. App. 1986).

93. *Id.* at 1187.

94. *Id.*

95. *Id.*

wife from suffering and, in fact, he did everything in his power to make her death as painless as possible.[96] But even if her condition was so desperate that Roswell objectively benefited Emily by cutting short her agony, he should not be entitled to justification. Unauthorized homicide 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, or, citing the words of the *Gilbert* opinion, "'[g]ood faith' is not a legal defense to [first-degree] murder."[97]

The requirement to achieve a positive balance of harms and evils raises a more complicated question of law and policy. Traditionally, criminal harm is understood as *wrongful* interference with the victim's essential welfare interests.[98] The interference is deemed wrongful if it violates the victim's rights. From this perspective, consensual physical harm presents a problem: since consent constitutes a waiver of rights, the perpetrator who kills or injures a willing victim does not violate the victim's rights. But can we say that cases of voluntary euthanasia, consensual cannibalistic killing, and sadomasochistic beating are equally free from criminal wrongdoing?

In an attempt to resolve this problem, a number of scholars have recently suggested that the concept of criminal harm should not be limited to a violation of one's autonomy.[99] In their view, such acts as, say, consensual gladiatorial matches are impermissible because they violate the participants' dignity, and dignity is so essential to our humanity that, in cases of a conflict between autonomy and dignity, the former ought to yield.[100]

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96. *Id.* at 1188 (acknowledging the defendant's explanation that he used a gun because it causes instantaneous death).

97. *Id.* at 1191.

98. JOEL FEINBERG, THE MORAL LIMITS OF CRIMINAL LAW: HARM TO OTHERS 62 (1984). Those include "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, emotional stability. . . ." *Id.* at 37.

99. *See, e.g.*, Meir Dan-Cohen, *Basic Values and the Victim's State of Mind*, 88 CAL. L. REV. 759, 769-70 (2000); Dubber, *supra* note 59, at 568; R.A. Duff, *Harms and Wrongs*, 5 BUFF. CRIM. L. REV. 13, 39-44 (2001); R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397, 1399 (1995).

100. Wright, *supra* note 99, at 1399*; see also* Dan-Cohen, *supra* note 99, at 777-78; Dubber, *supra* note 59, at 568 (arguing that personal autonomy includes

For that reason, consent may not serve as a defense to the violation of dignity.

I share the view that certain degrading behavior may be wrongful even when it does not violate the victim's rights. Society may be concerned about human dignity in various circumstances, including those in which a prohibitory norm does not originate in a rights violation. Consider experiments conducted in the 1980s that involved the use of fresh cadavers as "crash dummies."[101] When those experiments became known, they caused public outrage.[102] But why? We usually do not feel offended by autopsies or postmortem organ donation. Perhaps, as Joel Feinberg has suggested, the answer has something to do with the perceived symbolism of the different uses: "In the air bag experiments cadavers were violently smashed to bits, whereas dissections are done in laboratories by white-robed medical technicians in spotless antiseptic rooms, radiating the newly acquired symbolic respectability of professional medicine."[103]

Or perhaps the difference is not merely symbolic, and violently smashing cadavers to bits is, in fact, disrespectful—disrespectful of our only recently shared humanity? An act of autopsy or removal of an organ for transplantation is not qualitatively different from a regular surgery. Extracting a kidney, inter vivo or postmortem, does not reduce one's moral status to that of a thing. Smashing a body in an industrial experiment or using human remains to manufacture soap does have this effect. In other words, even when an act of indignity is committed on an unconscious or dead body or when the victim does not perceive an assault on his dignity as such, a wrongful act has been done.

What is at stake here is people's moral dignity, or dignity of personhood, as opposed to social dignity, or dignity of rank. Social dignity is nonessential; in a society that permits social mobility, it can be gained and lost.[104] "Moral dignity, by contrast,

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dignity, and that the concept of criminal harm should be based on protection of a person rather than a state).

101. Joel Feinberg, *The Mistreatment of Dead Bodies*, 15 HASTINGS CENTER REP. 31, 31-32 (1985).

102. *Id.* at 31.

103. *Id.*

104. Dubber, *supra* note 59, at 535.

HeinOnline -- 28 Pace L. Rev. 704 2007-2008

is an essential characteristic of all" human beings.[105] It is so important for our collective humanity that we extend it not only to those "who satisfy the minimum requirements of personhood,"[106] but even to those who closely miss them.

And yet, as important as moral dignity is, its violation should not be criminalized lightly. Whenever the state prohibits consensual behavior, for the sake of dignity or any other reason, it suppresses individual liberty and autonomy—partly paternalistically, but mostly for the benefit of society at large.[107] Therefore, the threat to society should be serious enough to warrant use of criminal sanctions. For instance, the careless attitude to human dignity exhibited by "Fear Factor," a popular television reality show, has raised concerns of a number of its viewers. 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!'"[108]

It is understandable that those pictures could disturb some members of the public, but the nature and magnitude of the personal and societal harm brought about by the show did not rise to the level that would justify a criminal ban—that harm was simply "not the law's business,"[109] at least, not the criminal law's business. Anthony Duff has accurately observed that not punishing someone's conduct does not mean approving of it; instead, that can mean the lack of standing to judge or condemn

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105. *See id.* Dan-Cohen makes a similar point when he observes that the term "dignity" should be understood as "moral worth" and not "social status." *See* MEIR DAN-COHEN, HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY 169 n.23 (2002).

106. Dubber, *supra* note 59, at 535.

107. FEINBERG, HARM TO SELF, *supra* note 87, at 172. "When *B* requests that *A* do something for (or to) him that is directly harmful or dangerous to *B*'s interests, or when the idea originates with *A* and he solicits and receives *B*'s permission to do that thing, then (in either case) *B* can be said to have 'consented' to *A*'s action. If nevertheless the criminal law prohibits *A* from acting in such cases, it invades *B*'s liberty (by preventing him from getting what he wanted from *A*) or his autonomy (by depriving his voluntary consent of its effect)." *Id.*

108. Tim Goodman, *Reality TV Hits a Tailspin with NBC's "Fear Factor."* SAN FRANCISCO CHRONICLE, June 11, 2001, at E-1.

109. THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 133 (Stein & Day 1963) (1957).

such conduct.[110] We do not have to approve of radical cosmetic surgery, religious flagellation, or sadomasochistic brutality; however, society may be better served by not prosecuting those consensual activities.

In other words, not every violation of human dignity deserves criminal punishment, but only such that affects society at large. As I argued elsewhere, to avoid over-criminalization yet capture the most egregious cases, the criminal doctrine should be revised to explicitly include dignity violations in the concept of wrongdoing.[111] Criminal harm then would retain its current meaning as a wrongful setback to an important welfare interest, but "wrongful" would mean either (i) such as violates the victim's autonomy, or (ii) such as violates the victim's dignity.[112] The two kinds of criminal harm comprise the same evil—objectification of another human being. That evil may be brought about by an injury to a vital human interest, combined with either a rights violation (e.g., theft) or disregard of the victim's dignity (e.g., consensual deadly torture). The absolute majority of criminal offenses, being *non-consensual*, include both kinds of harm.

As for *consensual* physical harm, it should be punishable only when an important welfare interest normally protected by criminal law is set back in a way that denies the victim his equal moral worth. The recent German case in which Armin Meiwes killed his willing victim, Bernd Juergen Brandes, and then cannibalized on his flesh, may serve as an example.[113] By killing Brandes, Meiwes did not violate Brandes's right to life. 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 the desired cannibalistic experience, and thus disregarded his dignity.

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110. Duff, *supra* note 99, at 36.

111. Bergelson, *supra* note 69, at 219-221.

112. Interestingly, the Universal Declaration of Human Rights makes this distinction quite clear when it states in Article 1: "All human beings are born free and equal in dignity and rights." Universal Declaration of Human Rights, G.A. Res. 217A, at 71, U.N. GAOR, 3d Sess., 1st plen. mtg., U.N. Doc. A/810 (Dec. 12, 1948).

113. *See* 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.

HeinOnline -- 28 Pace L. Rev. 706 2007-2008

In contrast, consensual mercy killing destroys the patient's interest in continued living but, when warranted by the patient's condition and motivated by compassion, respects and preserves his dignity. Such killing, therefore, should not be subject to criminal sanctions. Unfortunately, the current law does not recognize this difference. In *Michigan v. Kevorkian*, for example, the state prosecuted Dr. Kevorkian for administering a lethal injection to a former racecar driver who, due to advanced Lou Gehrig's disease, was no longer able to move, eat, or breathe on his own.[114] Even the patient's family had accepted his choice to escape the suffering and indignity of the slow demise.[115] But not the trial court or the appellate court: Dr. Kevorkian was convicted of second-degree murder, and his conviction was affirmed.[116]

To summarize, in order to satisfy the second requirement of the defense of consent, the perpetrator must establish that, to the extent he set back the victim's welfare interests and, at the same time, disregarded the victim's dignity, the harmful act nevertheless produced an objectively positive outcome. In other words, the more serious (disabling and irreversible) the harm to the victim, the more significant the benefits of the injurious action must be. 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 a beating offends the victim's dignity would probably agree that it does not significantly affect the victim's long-term interests. On the other hand, only extraordinary circumstances might be able to justify consensual deadly torture.

Finally, for complete justification, the perpetrator would have to establish that he not only achieved a positive balance of harms and evils but also intended it while causing harm. This subjective requirement, common to all justification defenses, is particularly appropriate in application to the defense of consent. Just like in cases of necessity or self-defense, consent does not impose on the perpetrator an *obligation* to act; it merely provides him with an *option*. However, unlike necessity or a

114. People v. Kevorkian, 639 N.W.2d 291, 296-98 (Mich. Ct. App. 2001).
115. *Id.* at 330.
116. *Id.* at 296-97, 332.

life-threatening attack, consent of the victim creates a very weak content-independent reason for action.

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 a defense. What we want to know is whether the child had a good reason for violating the 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)?" In the same sense, consent of the victim may justify the defendant only if the defendant had a morally sustainable reason for inflicting pain, injury, or death.

The proposed conceptualization of the defense of consent has two normative consequences. One is that consent alone does not suffice to justify the victim's death or injury; the other is that consent should always be at least a partial defense, because it defeats at least one aspect of harm, namely violation of rights. A partial justification does not make a wrongful act right; it only makes it *less wrongful* compared to an identical but non-consensual act. Take a lifeboat scenario, in which all will die, unless a few sacrifice their lives by jumping overboard. Assume that the necessary numbers 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 believe that even if it would be wrong, it would certainly be less wrong than drowning those who have not volunteered.[117] It would be less wrong because the person who threw the victims over did not violate their rights. Accordingly, he brought about less harm than in an identical but non-consensual act and, thus, deserves a lesser punishment.

The perpetrator should be entitled only to partial justification if any of the following is true:

117. *See* MICHAEL MOORE, PLACING BLAME 708 (1997) (making a similar argument).

HeinOnline -- 28 Pace L. Rev. 708 2007-2008

(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 financially ruined when he dies); or

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

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.[118] If the perpetrator's mistake was reasonable, 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.

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

118. *See, e.g.*, Vera Bergelson, *Victims and Perpetrators: An Argument for Comparative Liability in Criminal Law*, 8 BUFF. CRIM. L. REV. 385, 407-08 (2005) (discussing why mistake should be a defense of excuse and not justification, and citing conflicting views of the issue).

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 somewhat 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 my 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.

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 destroying 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.

IV. Conclusion

Intentionally injuring or killing another person is presumptively wrong. To overcome this presumption, the perpetrator must establish a defense of justification. Consent of the victim may serve as one of the grounds for such a defense. For complete justification, the perpetrator's reasons for a consensual injurious act must be subjectively benevolent and the act must produce an overall positive balance of harms and evils, including harm to the victim's welfare interests and dignity. If these requirements are not met, the defense should be only partial.

The proposed rule makes sense both theoretically and practically. From the theoretical perspective, it places consent squarely within the family of justification defenses. All of them, from self-defense to necessity, seek to overcome the deontological constraint against intentional infliction of harm. These defenses may be granted to a person who chose a certain course of action *despite* its negative effects (as opposed to *for the sake* of its negative effects) and succeeded in producing a better outcome. From the practical perspective, this rule leaves room for balancing the harms and benefits caused by the perpetrator. This is an important difference from the current law, which is absolute in what it allows and disallows. Overall, adopting a rule based on a uniform principle common to other justification defenses would lead to more fair, consistent, and morally sustainable verdicts.

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