The Right to Be Hurt. Testing the Boundaries of Consent.

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Abstract

People’s right to consent to pain, injury or death has always been one of the most controversial issues in criminal law and moral philosophy. In recent years, that issue has moved to the forefront of public, legislative, and academic debates in the United States and abroad due to a series of high-profile criminal trials, which involved consenting victims in various contexts—from sadomasochism and cannibalism to experimental medical treatment and mercy killing.

Currently, American criminal law does not recognize consent of the victim as a defense to bodily harm, except in a few historically defined circumstances. That rule has been criticized for its arbitrary scope, outdated rationales, and potential for moralistic manipulation. Yet, despite those criticisms, no principled alternative has been worked out. This article is an attempt to develop a set of normative requirements for a new rule governing consensual bodily harm and a general defense of consent.

The new rule would treat valid (voluntary and rational) consent of the victim as a defense of partial or complete justification. Partial justification is warranted by the mere fact that consensual harm does not involve at least one aspect of a paradigmatic offense, namely a rights violation. The victim was a “co-author” of his own injury and thus the perpetrator should not bear full responsibility for it. Complete justification, on the other hand, would require that, in addition to the victim’s consent, the perpetrator had a “good reason” for his harmful action: he intended to achieve a better balance of harms/evils and benefits and, in fact, managed to achieve it. This article rejects the absolute character of today’s law. Instead, it promotes a balancing test that takes into account the severity of harm to the victim’s interests and dignity as well as the importance of the reasons that caused the harmful act.
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INTRODUCTION

In late 2000, Armin Meiwes, a 42-year-old German computer technician, posted a message in an Internet chat room devoted to cannibalism: “Seeking well-built man, 18-30 years old, for slaughter.”1 A few months later, Bernd Juergen Brandes, a 43-year-old German microchip engineer, replied: “I offer myself to you and will let you dine from my live body. No butchery, dining!!”2

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

Brandes swallowed 20 sleeping tablets and half a bottle of schnapps. Then Meiwes cut off part of his body and fried it as a snack for them both. Brandes was bleeding to death, but still not dead when Meiwes stabbed him in the neck after a goodbye kiss. Then Meiwes butchered him and froze the flesh. Eventually he ate about 20kg, washing it down with a South African red.4

At his trial, Meiwes admitted to killing, dismembering and eating Brandes. His principal defense was the victim’s consent. Meiwes was convicted of manslaughter and sentenced to eight-and-a-half years in prison. The three-judge German court rejected the prosecution’s plea for a murder on the grounds that Meiwes had followed the victim’s instructions.5 Both the prosecution and the defense appealed the verdict, and the Federal

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2 Id.


4 Id.

5 Mark Landler, Cannibal Convicted of Manslaughter: German Court Orders an 8 1/2-year Sentence, THE INTERNATIONAL HERALD TRIBUNE, Jan. 31, 2004, at 3. Explaining the verdict, the judge said: “This was an act between two extremely disturbed people who both wanted something from each other.” Id. For the
Constitutional Court, Germany’s highest criminal court, ordered a retrial, saying that Meiwes’s manslaughter conviction was too lenient. In May 2006, Meiwes was convicted of murder and sentenced to life in prison.\(^6\)

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

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

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appealed first to the House of Lords and then to the European Court for Human Rights; both appeals failed as the courts refused to expand an individual’s power to consent to injury beyond trivial harm and a few narrowly defined circumstances.\textsuperscript{10}

The court decisions in \textit{Brown} provoked numerous discussions and publications, most of which were critical of the judicial reasoning and the outcome of the case. In the words of the Commission, \textit{Brown} “cast fresh light on the unprincipled way in which [the rules of consent] had developed, and revealed considerable disagreement about the basis and policy of the present law, its detailed limits and its scope for future development.”\textsuperscript{11}

The Commission has assembled and analyzed numerous cases, attempting to develop general principles of the law of consent but the attempt proved to be largely unsuccessful.\textsuperscript{12} No final Report with legislative recommendations was issued and no reforms followed.\textsuperscript{13} Eventually, in 2001, the Commission admitted its inability to reach consensus and terminated the consent project.\textsuperscript{14}

\begin{itemize}
  \item \textbf{10} See R v. Brown, [1994] 1 A.C. 212 (H.L.). See also Roberts, \textit{supra} note 8, at 210-11. Describing procedural history of the case, Roberts wrote:
  
  Their first appeal was rejected by the Court of Appeal, and their convictions were subsequently upheld, by the narrowest margin of three votes to two, in the House of Lords. With all domestic remedies exhausted, the way was open to launch a complaint to the European Court of Human Rights . . . But in a disappointing, poorly argued judgment, the Strasbourg Court simply endorsed the reasoning of the majority in the House of Lords, and unanimously rejected the applicants’ complaint.
  
  \textit{Id.}

  \item \textbf{11} LCC 1995 Paper, \textit{supra} note 7, at 1.

  \item \textbf{12} Roberts, \textit{supra} note 8, at 248 (observing that “the consent project has not been amongst the Commission’s most conspicuous successes.”)

  \item \textbf{13} \textit{Id.} at 233.

  \item \textbf{14} See Law Commission 274, Eighth Programme of Law Reform 44 (2001). The responses to the consultation papers were highly polarised, particularly on the issue of consent for non-sexual offences, and no consensus emerged. Bearing in mind the matters we have already reported on, the amount of work that would be required to reach conclusions on the very difficult and sensitive issues involved, and the urgency attaching to our other work, we have decided it would not be worthwhile for us to produce any further report on this topic.
\end{itemize}
Other countries have been struggling with the issue of consent as well, its application ranging from body piercing to sexual violence\textsuperscript{15} to assisted suicide.\textsuperscript{16} The legislative and public interest in the defense of consent is understandable. The ability to consent is recognized in moral philosophy as a central manifestation of personhood and individual autonomy.\textsuperscript{17} Modern political theory sees the only source of legitimacy of the state power in the “consent of the governed.”\textsuperscript{18} In contrast, today’s criminal law extends to an individual very limited authority to consent as far as his physical wellbeing is concerned. The rules governing individuals’ ability to consent to bodily harm are not merely strict; they are morally and conceptually incoherent. These rules need to be reexamined and revised to reflect the values of autonomy and dignity essential in a democratic society. It has been accurately observed that “American criminal law has yet to appreciate fully the central significance of the consent defense.”\textsuperscript{19}

Questions that I raise in this Article do not yield easy answers. The central ones among them are: why does consent negate criminal harm in some but not all instances, and when should consensual death or injury be legitimate? Despite many excellent works


\textsuperscript{17} See, e.g., Heidi Hurd, \textit{The Moral Magic of Consent}, 2 LEGAL THEORY 121, 121 (1996).


\textsuperscript{19} \textit{Id.} at 509.
about consent published in recent years, those questions remain largely unresolved. The goal of this Article is to put forward a theory that might explain the treatment of consensual bodily harm in law and morality, and to outline a set of normative requirements for a general defense of consent.

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


21 See discussion infra Section I.B.

22 See discussion infra Section I.C.

23 See discussion infra Section I.D.

24 See discussion infra Section II.A.
The fact that it is regrettable leads me to reexamine the traditional meaning of harm, which is usually understood as violation of rights. Yet, if harm were only violation of rights, then consent, being a waiver of rights, would defeat it. Like a few other scholars, I conclude that we need a broader theory of harm and wrongfulness not limited to the violation of one’s rights but encompassing other aspects of people’s humanity as well, first and foremost human dignity. In this broader sense, a wrongful interference with one’s interests includes not merely violation of one’s autonomy but also violation of one’s dignity.25

This conclusion has two normative consequences. One is that consent should always be at least a partial defense, since it defeats at least one aspect of harm, namely violation of rights.26 The other conclusion is that consent alone does not suffice to justify bodily harm. To qualify for a full defense, the perpetrator must establish that he did not wrongfully interfere with the victim’s wellbeing, i.e. that the consensual harmful act either did not significantly set back the victim’s interests or did not disregard the victim’s dignity.

Like other justification defenses, the defense of consent requires that the harmful act produce a positive “balance of evils” and that the perpetrator intend that outcome while causing harm.27 The latter requirement is mandated by the fact that consent of the victim does not impose on the perpetrator an obligation to act. As a free moral agent, the perpetrator needs a good-faith belief in the justifiability of interfering with another

25 See discussion infra Section II.B.
26 See discussion infra Section II.C.
27 See discussion infra Section II.D.
person’s physical wellbeing. In other words, both objectively and subjectively, the perpetrator’s reasons for the injurious act must (i) be overall benevolent and (ii) negate harm either to the victim’s interests or to his dignity.

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

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

I. THE CURRENT STATE OF THE LAW OF CONSENT

A. Development of the Volenti Principle.

The principle underlying the defense of consent, volenti non fit injuria was recognized in Roman law as early as the 6th century.28 The first reported case in England

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28 Volenti non fit injuria means “no wrong is done to one who consents.” See BLACK'S LAW DICTIONARY 1575 (6th ed. 1990). See also Terence Ingman, A History of the Defense of Volenti Non Fit Injuria, 26 JURID. REV. 2 (1981) (discussing the application of the principle in Justinian’s Codex (529 A.D.) and Justinian’s Digest (533 A.D.)).
in which the *volenti* rule was mentioned dates back to the beginning of the 14th century.\(^{29}\) By the 17th century, *volenti* has been established as a “maxim.”\(^{30}\) In “Maxims of Reason: Or, the Reason of the Common Law of England,” it is said that a person invited into a house to dine is not a trespasser for “volenti non fit injuria.”\(^{31}\)

Originally, consent was viewed as a complete ban on prosecution. A person was free to consent to practically anything. As a 14th century case said, “the law will suffer a man of his own folly to bind himself to pay on a certain day if he does not make the Tower of London come to Westminster. ‘Volenti non fit iniuria.’”\(^{32}\)

Changes in the power of an individual to consent to personal harm came in the 17th century. They were a natural consequence of the monopolization of the system of punishment by the state. While in the early ages of criminal justice the victim was the central figure in the prosecution and settlement of any non-public offense,\(^{33}\) in the normative and centralized judicial structure the victim became almost entirely excluded from the criminal process.\(^{34}\) “In contrast to the understanding of crime as a violation of

\(^{29}\) Randolf v. de Richmond (1304) Y.B. Edw. 1, *reprinted in* Ed. Horwood, at 6-10 (1956). In that case, Walter Randolf complained that John de Richmond has tortiously taken his beasts. The defendant replied that he had a right to take them since they were on his land. And in the course of the argument one Hunt reportedly said: “Nay, volenti non fit iniuria.” See Ingman, *supra* note 28, at 2-3.


\(^{31}\) *Id.*

\(^{32}\) *Id.* at 3. Interestingly, this general principle has determined the outcome of the case although it was in direct conflict with the “written law,” which provided for an excuse of impracticability to a breach of contract (“Nemo obligatur ad impossible”).

\(^{33}\) See Harry Elmer Barnes & Negley K. Teeters, *New Horizons in Criminology* 342 (2nd 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.*

\(^{34}\) Clarence Ray Jeffery, *Crime in Early English Society*, 47 J. Crim. L., Criminology and Police Sci. 647, 662 (1957) (“By 1226 an agreement between the criminal and the relatives of a slain man would not
the victim’s interest, the emergence of the state developed another interpretation: the disturbance of the society.”35 An increasing number of historically “private” offenses were reconceptualized as “public.”36 The state (or king) became the ultimate victim and the sole prosecutor of a criminal act. As a result, an individual has lost the power to consent to what the state regarded as harm to itself.

In *Matthew v. Ollerton*, decided in the late 17th century, counsel argued that the victim’s consent is not a defense to assault and battery: “If I licence a man to beat me, such licence is void.”37 The court agreed – “because it’s against the peace.”38 The new rule was followed. Fifty years later, a court said that consent of the victim to participate in an unlawful fight does not bar his action.39 Similar considerations determined the adjudication of the Wright’s Case, which involved the offense of mayhem. In that often cited early 17th century case, a man asked his friend to cut off his hand, so that he would have “more colour to begge.”40 The consent of the victim did not exculpate the perpetrator because, by “violently depriving another of the use of such of his members as 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.”


36 By the 18th century, all crimes and misdemeanors were regarded as public wrongs. *See* 4 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *5 (explaining that “public wrongs, or crimes and misdemeanors, are a breach and violation of the public rights and duties due to the whole community”).


38 *Id.*


40 R. v. Wright, 1 Coke on Littleton #194 (127a, 127b); 1 Matthew Hale, Historia Placitorum Coronae: The History of the Pleas of the Crown 412 (1736).
may render him less able in fighting, either to defend himself, or to annoy his adversary,” he had deprived the king of the aid and assistance of one of his subjects.41

The law of consent has undergone little change since the 17th century. In the following three sections, I explore its meaning in today’s legal theory and practice: what the law says; how courts apply it; and what rationales judges most commonly cite in support of their decisions.

B. What Does the U.S. Law Say?

American law of consent is far from being clear. On the one hand, it is widely recognized that consent of the victim is not a defense in criminal prosecution.42 On the other hand, it is equally widely recognized that consent may completely exculpate a nominally proscribed act.

What is called a “fond embrace” when gladly accepted by a sweetheart is called assault and battery when forced upon another without her consent; the act of one who grabs another by the ankles and causes him to fall violently to the ground may result in a substantial jail sentence under some circumstances, but receives thunderous applause if it stops a ball carrier on the grid-iron.43

Under the Model Penal Code, consent is a defense if it “negatives an element of the offense or precludes the infliction of the harm or evil sought to be prevented by the

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41 BLACKSTONE, supra note 36, * 205.


43 ROLLIN PERKINS, CRIMINAL LAW 962 (2d ed. 1969).
law defining the offense.44 Accordingly, valid consent precludes rape, kidnapping, theft, burglary and many other serious crimes, which are premised on the lack of consent.45

However, this general rule is of limited use in the area of offenses involving bodily harm. Section 2.11(2) invalidates one’s consent to personal harm in all but three sets of circumstances: one, when the injury is not serious;46 two, when the injury or its risk are reasonably foreseeable hazards of participation in a “lawful athletic contest or competitive sport or other concerted activity not forbidden by law;”47 and three, when the consent establishes a justification for the conduct under Article 3 of the MPC.48

Unfortunately, this definition, which reflects the law in the absolute majority of states,49 does not give much practical guidance. What harm is not serious? What

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44 See, e.g., MODEL PENAL CODE § 2.11 (Official Draft and Revised Comments 1980) [hereinafter MPC] (providing that consent is 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).

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

46 MPC § 2.11(2)(a).

47 MPC § 2.11(2)(b).

48 MPC § 2.11(2)(c). See also MPC, § 2.11, cmt. 2. Article 3 of the MPC is entitled General Principles of Justification.


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., ILL. COMP. STAT. 5/12-17. (“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. See, e.g., CAL. PENAL CODE § 211 ("An assault is an unlawful attempt, coupled with a present ability, to commit a violent injury on the person of another."); and
harmful “concerted activities” are “not forbidden by law”? And in what circumstances does consent establish a justification for nominally criminal conduct under Article 3 of the MPC? The following section addresses these issues.

**C. What Does the Rule Mean Literally?**

1. What harm is “not serious”?

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

However, if the drafters intended anything beyond a trivial injury to be lawful, they did little to define the permissible boundaries. The existing rules are often puzzling as to why the line between the lawful and unlawful conduct was drawn where it was. For example, shortening one’s toes is so far quite lawful, and a growing number of fashionistas undergo the surgery in order to fit into stylish pointy-toed shoes. Yet, if the

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50 MPC § 2.11, cmt. 2 at 396.

51 MPC § 2.12(2).

52 Dawn Fallik, *High heels might look great but can put feet in ugly state*, THE AUGUSTA CHRONICLE (Georgia) May 29, 2005.
same people wanted to cut off their fingers instead of toes, the legal outcome would likely be totally different. One might say that the discrepancy is historically determined by the impact of the injury on people’s ability to fight. This rationale, however, is not only entirely outdated today but it also does not explain many other similar laws, for instance, why some states criminalize tongue splitting.

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

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

Today’s penal statutes define serious harm as a “bodily injury which creates a substantial risk of death or which causes serious, permanent disfigurement, or protracted

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53 State v. Bass, 120 S.E. 2d 580, 588 (N.C. 1961) (holding that consent of the victim to maiming, specifically cutting off fingers, is invalid).


55 11 DEL. CODE. ANN. § 1114A (2005), 720 ILL. COMP. STAT. ANN. 5/12-10.2; N.Y. PUBLIC HEALTH LAW § 470 (2005); TEX HEALTH & SAFETY CODE. ANN § 146.0126.

56 JAMES FITZJAMES STEPHEN, DIGEST OF THE CRIMINAL LAW 141-42 (3rd ed. 1883). That proposition was reprinted verbatim in “A Digest of the Criminal Law of Canada”, which provided illustrations: it is a maim to strike out a front tooth; it is not a maim to cut off a man’s nose; and castration is a maim. See GEORGE WHEELOCK, A DIGEST OF THE CRIMINAL LAW OF CANADA Art. 262, at 199 (Carswell 1890).

57 BLACKSTONE, supra note 36* 206. Modern statutes define mayhem more broadly. See, e.g., CAL CODE, PENAL § 220 (“Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem.”).
loss or impairment of the function of any bodily member or organ.”58 As this definition indicates, “serious harm” may be deemed to result from two kinds of actions – those that have caused permanent debilitating injuries and those that caused any bodily injury, if such injury creates a “substantial risk of death.” The second category leaves so much room for interpretation that courts often inflate the risk of death to denounce an unwanted activity.

For example, in In re J. A. P., a group of eighth graders played the game of “passout,” the object of which is for one player to make a fellow player faint.59 The defendant grabbed his friend around the neck and proceeded to choke him for a few seconds until that boy lost consciousness and fell on the ground. The victim suffered a few facial lacerations and chipped teeth. By the time of the trial, all his injuries had been treated and healed. Nevertheless, the defendant was found guilty of aggravated assault, an offense which required finding of “serious bodily harm.”

The J. A. P court opined that, in determining whether the evidence supports a finding of such harm, “the relevant issue is the quality of the injury as it was inflicted, not after the effects are ameliorated by medical treatment.”60 The court concluded that a rational juror could determine that the act of choking presented a substantial risk of death; thus “serious harm” element of the charged offense was established. Accordingly, since one may not give valid consent to “serious harm,” whether or not the victim had

58 MPC § 210.0(3). Following the MPC, many states have adopted an identical or similar definition. See e.g., N.J. Stat. § 2C:11-1(b) (2005); Tex. Penal Code § 1.07 (2005).


60 Id. at *10 (quoting Brown v. State, 605 S.W.2d 572, 575 (Tex. Crim. App. 1980)).
consented to the choking was irrelevant for the defendant’s liability.\textsuperscript{61} What the court apparently overlooked is that, under the state law, a “serious injury” was defined as an injury that created a substantial risk of death, not merely an activity that created such a risk.\textsuperscript{62} Otherwise, following the court’s logic, a driver who exceeded the speed limit and was stopped by the police before he had a chance to get into any accident would be automatically guilty of causing serious injuries to his passengers even though none of them have suffered a scratch.

In one particular context, courts have managed to find “serious harm” in virtually every single case, irrespectively of the extent of injuries. Those are cases arising out of consensual sadomasochistic sexual activities. Examples include encounters during which one of the participants was beaten with a belt\textsuperscript{63} or a riding crop\textsuperscript{64} or cut, burned, stabbed and dragged by the hair.\textsuperscript{65} In none of those cases did the consenting victim suffer a permanent debilitating injury or run a “substantial risk of death.”

As the MPC Commentary acknowledges, the “iniquity of the conduct involved” tends to affect judicial assessment of the seriousness of the harm.\textsuperscript{66} In \textit{Iowa v. Collier}, for instance, the victim’s injuries consisted of “a swollen lip, large welts on her ankles,

\begin{itemize}
\item \textsuperscript{61} \textit{Id.}
\item \textsuperscript{62} \textit{Id.} at *10 (quoting § 1.07(a)(46) of Texas Penal Code, which defines serious bodily injury as “injury that creates a substantial risk of death or that causes death, serious permanent disfigurement, or protracted loss or impairment of the function of any bodily member or organ”).
\item \textsuperscript{63} \textit{See Iowa v. Collier}, 372 N.W.2d 303, 304 (Iowa Ct. App. 1985).
\item \textsuperscript{64} \textit{See Commonwealth v. Appleby}, 402 N.E.2d 1051, 1054 (Mass. 1980).
\item \textsuperscript{66} MPC § 2.11 cmt. 2 at note 8. 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. \textit{Id.}
\end{itemize}
wrist, hips, buttocks, and severe bruises on her thighs." The defendant was convicted of assault resulting in a serious injury, and the appellate court agreed, although, as the dissenting judge has pointed out, the inflicted bodily harm did not constitute a serious injury within the meaning of the state statute.

Some state penal codes include physical pain in the definition of "bodily harm." In Washington v. Guinn, for example, the defendant was convicted of inflicting "serious physical injury" in the course of a sexual encounter. There was no evidence that the victim "ever required any medical attention or suffered any wounds of any sort." 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 stung" and nipple clamps were "tight and cutting"), and "serious physical pain".

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67 Collier, 372 N.W.2d at 304. See also R. v. Donovan (1934) 2 K.B. 498, 503 ("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 (bloodshot eyes and a burn, which has completely healed by the time of the trial, sufficed for an assault conviction of a participant of consensual sadomasochistic sex).

68 Collier, 372 N.W.2d at 304. In addition, courts may impose criminal punishment for consensual bodily harm even when the relevant statute does not require the finding of a "serious" injury. For an implicit revision of this rule, see People v. Jovanovic, 263 A.D.2d 182, 197, n. 5 (N.Y. App. Div. 1999) (declaring that consent of the victim may not serve as a defense to assault, yet at the same time reversing the defendant’s conviction of assault in the second degree and third degree because the trial judge improperly excluded evidence indicating the victim’s consent). But see id. at 206-07 (Mazzarelli, J., concurring in part and dissenting in part) (pointing out that court decision goes against the rule adopted in the majority of jurisdictions).

69 See, e.g., MPC § 2.10.0(2); WASH. REV. CODE § 9A.04.110(4)(a) ("Bodily injury, 'physical injury,' or 'bodily harm' means physical pain or injury, illness, or an impairment of physical condition.").

“pain” satisfied the definition of “serious bodily injury.”\textsuperscript{73} Naturally, under a statute of this type, practically any sadomasochistic activity automatically qualifies as criminal.

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

2. What harmful “concerted activities” are “not forbidden by law”?

Originally, Section 2.11(2)(b) recognized consent as a defense for the harmful conduct of the perpetrator and bodily injuries to the victim only when those were “reasonably foreseeable hazards of joint participation in a lawful athletic contest or competitive sport.”\textsuperscript{74} In 1962, this provision was expanded to add at the end “or other concerted activity not forbidden by law.” According to an MPC commentary and materials of the American Law Institute (“ALI”) proceedings, the new language was intended to cover activities that are “more appropriately characterized as exhibitions than as sports or athletic contests.”\textsuperscript{75} But did the drafters intend to limit “other concerted activities not forbidden by law” only to exhibitions? The ALI reporters explicitly excluded certain activities, such as a duel\textsuperscript{76} or a scuffle,\textsuperscript{77} from the protection of new

\textsuperscript{73} Id.

\textsuperscript{74} MPC § 2.11(2)(b).

\textsuperscript{75} Id. at 396-97; n. 10. See also The American Law Institute, 39th Annual Meeting, Proceedings 92-104 (1962) [hereinafter ALI Proceedings] (explaining that the new language is needed to permit activities like stunt flying or professional wrestling). See also State v. Malone, 2001 Tenn. Crim. App. LEXIS 901, *9-10 (Tenn. Crim. App. 2001) (holding that Tennessee Code Annotated allows consent to serve as a defense only “within the context of sporting activities, and the like, in which two parties agree to engage in conduct where some contact is expected or anticipated”).

\textsuperscript{76} ALI Proceedings, supra note 75, at 101.

\textsuperscript{77} Id. at 101 and 104.
Section 2.11(2)(b). It is likely, although not specifically provided, that other harmful hostile activities, such as hazing, are not covered by the revised section either.\textsuperscript{78} What is less clear is whether non-hostile consensual private encounters, such as religious mortification or sadomasochistic sex, may be entitled to legal protection under the MPC.

Historically, courts have viewed religious flagellation as a lawful activity.\textsuperscript{79} In an 1847 Scottish case, the court said: “In some cases, a beating may be consented to as in the case of a father confessor ordering flagellation; but this is not violence or assault because there is consent.”\textsuperscript{80} The practice still exists in a number of nations with the strong Roman Catholic tradition. The Philippines, for example, is famous for its bloody crucifixion re-enactment ceremonies that happen every year on Good Friday and attract large crowds of local and foreign tourists.\textsuperscript{81} Opus Dei, a conservative catholic movement, encourages “corporal mortification,” which can include flagellation done by another person. Such acts are said to help bolster self-discipline and recall the suffering of Christ.\textsuperscript{82}

In the United States religious flagellation is practiced mainly in southwestern states.\textsuperscript{83} Although courts have said that the law may prohibit religiously impelled

\textsuperscript{78} Frank J. Wozniak, \textit{Validity, Construction, and Application of “Hazing” Statutes}, 30 A.L.R.5th 683.

\textsuperscript{79} LCC Paper 1995 \textit{supra} note 7, at 10.1.

\textsuperscript{80} \textit{Id.} at 130. (quoting William Fraser (1847) Ark 280, 302).


\textsuperscript{83} See LCC 1995 Paper, \textit{supra} note 7, at 130.
criminal attacks, my research has revealed no legal cases, which suggests that religious flagellation has not been subject to criminal prosecution. Moreover, some states have statutes regulating ritual mutilation. Illinois Criminal Code, for instance, provides that

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.

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.

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

The discrepancy in the treatment of the two kinds of flagellation is disturbing: in both instances the perpetrator may perform the exact same acts, with consent of the victim, and for the purpose of satisfying the emotional need of the victim. Yet, if that emotional need has a sexual undertone, the perpetrator is likely to be convicted of a

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85 720, ILL. COMP. STAT. ANN. 5/12-32 (emphasis added).

86 See, e.g., People v. Samuels, 250 Cal. App. 2d 501, 506-07 (Ca. 1967) (the Supreme Court of California ruling that “consent of the victim is not generally a defense to assault or battery, except in a situation involving ordinary physical contact or blows incident to sports such as football, boxing, or wrestling.”).

felony. It appears that this rule is a typical example of moral legislation intended to
punish the perpetrator for causing a “wrong” kind of pleasure.

3. What is a “recognized form of treatment”?

Finally, consent may serve as a defense under Section 2.11(2)(c) if it “establishes
a justification for the conduct under Article 3 of the Code.” In fact, there is only one
 provision in Article 3 that conditions justifiability of the actor’s conduct on another
person’s consent. That is Section 3.08(4) which provides that the use of force toward
another is justifiable if the actor is a physician or his assistant and

(a) the force is used for the purpose of administering a recognized form of
treatment which the actor believes to be adapted to promoting the physical or
mental health of the patient; and
(b) the treatment is administered with the consent of the patient . . .

Thus, under Section 2.11(2)(c), consent is a valid defense if the bodily harm was inflicted
for the purpose of a “recognized form of treatment” intended to improve the patient’s
physical or mental health.

Just as it is not easy to define “non-serious” harm, it is hard to draw the line
between recognized and experimental forms of treatment. Sometimes judicial
characterization depends on the “regulatory status of a product or the novelty of a
procedure, while in other instances an established product or procedure may be
categorized as experimental simply because a research protocol aims to investigate its

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88 MPC § 2.11(2)(c).
89 See MPC § 3.08.
90 Ironically, the illustration of such “recognized form of treatment” offered during the discussion of the
draft consent provision at the American Law Institute meeting was electric shock therapy in cases of
“mental trouble.” ALI Proceedings, supra note 75, at 92.
use." A few courts have invalidated as unconstitutionally vague state statutes, which criminalized certain medical procedures characterized as “experimental.”

Examples of what forms of treatment are currently considered “recognized” reveal the law’s inconsistency. A woman who carries a breast cancer gene may choose to have a preventive mastectomy. Such radical surgery 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. The main advantage of the surgery is that it helps to relieve symptoms of the “breast cancer syndrome,” a condition in which women experience stress and anxiety over the substantial likelihood of developing the disease.

Yet no amount of emotional pain legitimizes an elective surgery on a patient with the Body Integrity Identity Disorder (“BIID”), a rare ailment whose victims seek to become amputees. The limited statistics seem to indicate that, if they succeed in their pursuit, their quality of life improves dramatically. However, a surgeon who agrees to


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


95 Id. at 452.


97 Id.
perform such an amputation opens himself up to criminal liability because his patients’
consent is legally invalid.98 The BIID patients often compare themselves to those
suffering from Gender Identity Disorders (“GID”), describing the common experience as
“being trapped in the wrong body.”99 The law, however, treats the two groups very
differently: the GID patients can give consent to a sex-change operation, which often
involves removal of healthy sexual organs,100 whereas the BIID sufferers cannot give
consent to amputation of an arm or a leg.101

It remains somewhat unclear whether an individual can give consent to an
experimental treatment that involves serious bodily harm or at least a risk of such harm.
A commentary to Section 3.08 of the MPC provides: “Whether and how far consent
should be effective to exclude liability for forms of treatment that are not ‘recognized’
and that involve risk of death or injury is a problem covered as part of the general
treatment of consent.”102 Since the consent section of the MPC generally does not allow
for serious harm, it appears that, under the MPC, a patient may not give valid consent to

98 See Neil Levy and Tim Bayne, Amputees by Choice: Body Integrity Identity Disorder and the Ethics of
Amputation, 22 J. APPLIED PHILOSOPHY, 1, 75-86 (arguing that, as long as people are legally sane, they
should be allowed to have their limbs amputated by a surgeon).


100 See G.B. v. Lackner, 80 Cal. App. 3d 64, 68 (Cal. Ct. App. 1978) (“The severity of the problem of trans-
sexualism 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.”).

101 See Annemarie Bridy, Confounding Extremities: Surgery at the Medico-ethical Limits of Self-
Modification, 32 J.L. MED & ETHICS 148, 155 (2004) (“To the extent that society and its institution 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.”).

102 MPC § 3.08, cmt. 5 at 144.
experimental treatment that involves a risk of a serious injury, even if the putative benefits significantly outweigh the risks.

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

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

At the first stage, the advocate of any particular criminal prohibition needs to supply a good reason, not just for generalized state interference in the lives of individuals, but for that special form of state regulation represented by criminal sanctions: that is, hard treatment (with serious implications for personal autonomy) administered through procedures specially designed to communicate the sting of blame or "censure."^{103}

Of course, state invalidation of an individual’s consent presents a problem only so far as consent is voluntary, i.e., freely given and informed.^{104} Consent obtained by duress or fraud regarding the nature of the perpetrator’s act is void ab initio.^{105} Certain groups of people (children, mentally ill, intoxicated) in most instances are deemed incapable of issuing valid consent.^{106} For example, minors’ consent to sex is legally invalid.^{107}

^{103} Roberts, supra note 8, at 217 (2001).

^{104} See, e.g., Alexander, supra note 20, at 166 (1996) (observing that, to be able to give valid consent, one must be of a certain age, lack serious mental disease, irrationality or intoxication, and have a certain minimum degree of self-control).

^{105} W. E. Shipley, Consent as Defense to Charge of Criminal Assault and Battery, 58 A.L.R.3d 662 § 4 (2005) (observing that consent obtained by fraud, or from one without capacity to consent, will not be a defense to a charge of criminal assault and battery).

^{106} HARM TO SELF, supra note 20, at 316. (“If he is so impaired or undeveloped cognitively that he doesn’t really know what he is doing, or so impaired or undeveloped volitionally that he cannot help what he is doing, then no matter what expression of assent he may give, it will lack the effect of genuine consent.”).

^{107} See, e.g., MPC § 213.1 cmt. 6 (explaining that pre-pubescent children “are plainly incapable of giving any kind of meaningful consent to intercourse and manifestly inappropriate objects of sexual gratification”).
Thus, if there is a problem with the quality of consent or the decision-making power of the consenter, the court should declare the consent null and void. Such decision enforces rather than impedes the victim’s autonomy. In contrast, paternalistic disregard of private arrangements made by fully responsible agents encroaches upon personal autonomy, which, at least in the liberal tradition, is believed to be essential for a free society.

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

1. Harm to Self: Victim’s Apparent Consent Is Legally Invalid.
   
a. The Victim Was Not Rational.

   From time to time, courts deny the validity of factual consent, arguing that it was irrational or involuntary. In *People v. Samuels*, for example, the defendant was

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

109 See JOHN STUART MILL, ON LIBERTY, ch. IV, ¶¶ 10-11 (New York 1869). Mill wrote: Whenever . . . there is a definite damage, or a definite risk of damage, either to an individual or to the public, the case is taken out of the province of liberty, and placed in that of morality or law. But with regard to the merely contingent, or, as it may be called, constructive injury which a person causes to society, by conduct which neither violates any specific duty to the public, nor occasions perceptible hurt to any assignable individual except himself; the inconvenience is one which society can afford to bear, for the sake of the greater good of human freedom.

Id.

convicted of aggravated assault for whipping an apparently willing victim in the course of production of a pornographic movie. The case was complicated by the fact that the victim could not be found to confirm his consent. However, the court dismissed the very possibility of such consent, saying: “It is a matter of common knowledge that a normal person in full possession of his mental faculties does not freely consent to the use, upon himself, of force likely to produce great bodily harm.”111

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

It is easy to ridicule this logic. Yet there are situations when almost anyone would wonder: how rational was the victim when he consented to that kind of harm? For example, how rational was Brandes when he consented to being killed and eaten by Meiwes? His consent to cutting off his penis some time before his death was hardly valid: by that time Brandes had consumed 20 sleeping tablets and half a bottle of schnapps.112 But when he agreed to the killing, Brandes was not intoxicated. He was informed of every detail of the plan and gave it his full approval, as a video made by Meiwes shows.113 Brandes was a mature man and an educated professional. He was not

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111 Id. at 506-7.


113 Id.
clinically insane, although he apparently suffered from a “strong desire for self-
destruction.”  

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

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

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114 *Id.*

115 *See* Alexander, *supra* note 21, at 167 (discussing similar issues).
b. Consent Was Not Voluntary

Some courts and commentators have expressed concern that, under certain circumstances, people may not act entirely voluntarily, even when they are not subject to formal duress or coercion.116 This, for example, was a matter that troubled the court in the Canadian case of *R v. Carriere*:

The consent in many of these “fair fights” with fists is often more apparent than real. Challengers are, most often, those who feel assured that they can overwhelm opponents. Those who accept the challenge often do so, not because they wish to fight, or truly consent to it, but because they fear being branded as cowards by their peers.117

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

But certainly the most serious concern about the rationality and voluntariness of consent arises in connection with assisted suicide and mercy killings. It has been shown that those who attempt suicide usually suffer from depression or other mental disorders.118 Often people feel particularly vulnerable due to constant pain, and this

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116 See, e.g., Wright, *supra* note 20, at 1414-21 (1995) (discussing social, economic, and psychological considerations that can impair one’s freedom of choice); Simons, *supra* note 20, at 214 (advocating a change in the traditional tort doctrine of assumption of risk to reflect scope of information and choices available to an individual).


118 Washington v. Glucksberg, 521 U.S. 702, 730 (1997). The opinion cited the finding by the New York Task Force on Life and the Law that “more than 95% of those who commit suicide had a major psychiatric illness at the time of death.” *Id.*
vulnerability may be exploited by others. Courts have been duly suspicious to the claims that a sick individual has voluntarily requested death.

In *Gilbert v. State of Florida*, the appellate court affirmed the defendant’s conviction of a first-degree murder for shooting his ill wife: “It is ridiculous and dangerous to suggest that a constructive mercy will was left when the wife said ‘I am so sick I want to die.’ Such a holding would judicially sanction open season on people who, although sick, are also chronic complainers.”

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

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119 See generally Daniel Callahan & Margot White, *The Legalization of Physician-Assisted Suicide: Creating a Regulatory Potemkin Village*, 30 U. RICH. L. REV. 1 (1996) (opposing euthanasia and physician assisted suicide both on moral and practical grounds). The authors observe that “[i]llness is a quintessential state of vulnerability; it entails a loss of confidence in one’s body and one’s future.” Id. at 28. They also express concern that physicians may influence their patient’s choice. Id. at 28-29.

120 See, e.g., Washington v. Glucksberg, 521 U.S. 702, 738 (1997) (J. O’Connor concurring) (“The difficulty in defining terminal illness and the risk that a dying patient’s request for assistance in ending his or her life might not be truly voluntary justifies the prohibitions on assisted suicide.”).

121 487 So. 2d 1185 (4th Dist. 1986).

122 Id. at 1191.

123 See HARM TO SELF, *supra* note 20, at 117-21.

124 Id. at 124-27. Feinberg wrote:

In the cases of “presumably nonvoluntary behavior,” what we “presume” is either that 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.
However, the fear of abuse may not be the basis of a rule prohibiting consensual harm altogether. As I argued elsewhere,\textsuperscript{125} it is important to distinguish a rule from an abuse of that rule. The abuse is something that is \textit{not} the rule, something that is outside of the rule. Practically anything, even a good thing, can be abused and turned into a bad thing, but this does not justify prohibiting the good thing itself. Sexual abuse, for instance, is a bad thing, but we do not criminalize sex because of that. In other words, when the reason for a criminal ban lies in an uncertainty regarding the validity (voluntariness and rationality) of an individual’s consent, the law should be directed at those uncertainties by demanding persuasive proof of the valid consent and not by taking away the power to give it.\textsuperscript{126}

c. People Are Incapable of Rational Voluntary Consent.

Distinguished from the concerns about the validity of consent in specific circumstances should be a truly paternalistic argument that people are inherently incapable of rational and voluntary choices and thus should not be trusted to make important decisions about their lives. That was, for instance, the position of H.L.A. Hart who rejected Mill’s vision of liberty, citing numerous factors that “diminish the significance to be attached to an apparently free choice or to consent.”\textsuperscript{127} Hart wrote:

\begin{quote}
Choices may be made or consent given without adequate reflection or appreciation of the consequences; or in pursuit of merely transitory desires; or in various predicaments when the judgment is likely to be clouded; or under inner
\end{quote}


\textsuperscript{126} See, e.g., Franklin G. Miller et al., \textit{Regulating Physician-Assisted Death}, 331 \textit{NEW ENG. J. MED.} 119, 120 (1994) (arguing in favor of legitimizing voluntary euthanasia upon adoption of “clear criteria, rigorous procedures, and adequate safeguards” protecting individuals’ right to decide for themselves).

\textsuperscript{127} H.L.A. HART, LAW, LIBERTY, AND MORALITY 21 (1963).
psychological compulsion; or under pressure by others of a kind too subtle to be susceptible of proof in a law court.\textsuperscript{128}

Few would disagree that people can make “bad” decisions (no matter how we define this term) and that their choices are seldom, if ever, free from various influences. Moreover, as Robin West has persuasively argued in her critique of Richard Posner’s rationalistic vision of the world, people are often driven by self-destructive forces, desires of failure or humiliation, and the ultimate yearning for authority.\textsuperscript{129} In many instances, people’s consent is socially predetermined, and choices people make may not be in their best interests.\textsuperscript{130}

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

\begin{enumerate}
\item[128] Id. at 21-22.
\item[129] See generally Robin West, Authority, Autonomy, and Choice: The Role of Consent in the Moral and Political Visions of Franz Kafka and Richard Posner, 99 HARV. L. REV. 384 (1985). Criticizing the simplistic understanding of human nature by Posner and comparing his vision of the world with Kafka’s, West wrote:

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

Id. at 387.
\item[130] See, e.g., Robin L. West, The Difference in Women’s Hedonic Lives: A Phenomenological Critique of Feminist Legal Theory, 3 WIS. WOMEN’S L.J. 81, 96-97 (1987) (arguing that women consent and redefine relationships as consensual in order not to be violated); Mary Gibson, Rationality, 6 PHIL. & PUB. AFF. 193, 214-16 (1977) (discussing how people’s choices are determined by their socialization).
\end{enumerate}
that the Big Brother is more likely to make better choices for them. As Raul Roberts has correctly pointed out,

Paternalism at its best entails well-meaning and justified interference with autonomous choice. But if in practice things do not work out for the best - if, for example, one's leaders are incompetent, corrupt, stupid, or evil - paternalism is the royal road to totalitarianism, since it invites government to substitute for its citizens' expressed preferences that which the state judges they “really” (objectively) want or need. This is a recipe for tyranny.\(^\text{131}\)

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

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

Most of non-paternalistic arguments used by courts to invalidate private arrangements involving bodily harm draw on Mill’s liberal theory and maintain that it is not the individual whom the state paternalistically seeks to protect from his own unwise decisions; it is rather society at large who will suffer if the individual is permitted to act as he wishes.\(^\text{132}\) As Joel Feinberg, whose famous four-volume treatise seeks to apply Mill’s principles to modern law, phrased it,

\(^{131}\) Roberts, supra note 8, at 228.

\(^{132}\) John Stuart Mill, On Liberty, ch. IV, ¶¶ 10-11 (New York 1869) (stating that “the only purpose for which power can rightfully be exercised over any member of a civilized community against his will is to prevent harm to others”).
It is always a good reason in support of penal legislation that it would probably be effective in preventing (eliminating, reducing) harm to persons other than the actor (the one prohibited from acting) and there is probably no other means that is equally effective at no greater cost to other values.\textsuperscript{133}

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

a. Military Service.

Following the common law tradition,\textsuperscript{134} some courts continue to invalidate consent to personal harm, opining that a person may not consent to an act that would deprive society of his military service.\textsuperscript{135} In State v. Bass, the court remarked that the “commonwealth needs the services of its citizens quite as much as the kings of England needed the services of theirs.”\textsuperscript{136} Considering the realities of the modern day military operations, this argument is very much out of date.\textsuperscript{137}

In addition, military courts have found service-related arguments for invalidating consent to sadomasochistic activities, even when the harmed person was a civilian spouse. One cited reason was the correlation between “family violence or dysfunction and soldiers’ ability to properly perform their military duties.”\textsuperscript{138} Another reason was the military’s interest in the servicemen’s reputation: some of the wife’s bruises were visible and could “lead friends and neighbors to form a negative opinion of her soldier-

\textsuperscript{133} 2 JOEL FEINBERG, THE MORAL LIMITS OF CRIMINAL LAW: OFFENSE TO OTHERS (1985) [hereinafter OFFENSE TO OTHERS] (defining the harm principle).

\textsuperscript{134} See discussion supra, note 41 and the accompanying text.


\textsuperscript{137} See, e.g., Regina v. Brown, [1994] 1 AC 212 (Lord Mustill’s opinion) (arguing that the military service rationale for punishing consensual bodily harm “is now quite out of date”).

\textsuperscript{138} Arab, 55 M.J. at 517.
husband.” The Army certainly has an interest in the well-being and good service of its members. Yet, criminal sanctions are hardly appropriate when one’s crime amounts merely to jeopardizing the quality of one’s work and one’s reputation among neighbors.

b. Public Charge.

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

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

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

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139 Id.

140 See e.g., State v. Bass, 120 S.E. 2d 580, 586 (N.C. 1961). (“Our government is deeply concerned, financially and otherwise, for the health of its citizens and that they not become a public charge.”).

141 Id.

142 HARM TO SELF, supra note 20, at 80-81.

143 Id. at 81.
The problem with this argument lies in its assumption that people may not behave in a way that imposes moral or economic costs on society, and that society is justified in restricting people’s rights solely on utilitarian grounds. According to this logic, people who live below the poverty line may be criminally banned from having children. And the mentally retarded may continue to be sterilized against their will. This is exactly the kind of reasoning that Justice Holmes has used in his infamous *Buck v. Bell* opinion: “It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind.”

**c. Breach of Peace.**

Another common argument, which has been successfully invoked for the past three hundred years, is that the state has the right to intervene in consensual activities if they constitute a breach of peace. Duels and prize fights have been held to threaten peace, therefore, an agreement to fight has been held invalid. Similarly, the defense of mutual combatants has been rejected because unregulated fights disturb public order.

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145 See *Matthew v. Ollerton* (1692) Comb. 218, cited in Ingman, *supra* note 28, at 4 (holding that, if one licensed another to beat him, such license is no defense, because it is against the peace); *R.v. Donovan* 1934 2 K.B. 498 (opining that “combatants in prize fights commit assaults, as also do those who participate in breaches of the king’s peace or cause public disturbances”); *Wright v. Starr*, 179 P. 877, 878 (Nev. 1919) (holding that consent of the parties is invalid because fighting is a wrong committed against the public peace).

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

147 See, e.g., *U.S. v. Wilhelm*, 36 M.J. 891, 893 (U.S. Air Force C.M.R. 1993) (holding that both parties to a mutual combat are wrongdoers, which precludes a claim that each participant in the affray has consented to the touching of his person).
The reasoning behind this policy has been that, when assaults are committed publicly or in the presence of others, they tend to incite riotous and disorderly or offensive behavior.\textsuperscript{148}

To the extent this argument is supported by data, it may have merit. But then sports that generate violence should be outlawed as well, since spectator violence is a major sports-related problem.\textsuperscript{149} To be fair, the law has to be consistent. Moreover, as English Court of Appeals has admitted, in the times of well established police force and numerous statutory offenses directed at specific instances of public disorder, the “breach of peace” rationale for disregarding consent to harm is outdated and unpersuasive.\textsuperscript{150}

d. Social Utility.

To distinguish between sports and unregulated fights some courts have invoked the rationale of “social utility.” That rationale validates or invalidates certain consensual behavior based on the resulting harms and benefits to the public. For example, the common law recognizes lawful sports calculated to give bodily strength, skill and activity, and “to fit people for defense, public as well as personal, in time of need.”\textsuperscript{151} Conversely, “it is not in the public interest that people should try to cause or should cause each other actual bodily harm for no good reason.”\textsuperscript{152}

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\textsuperscript{148} See, e.g., State v. White 28 A. 968, 970 (R.I. 1894) (quoting Blackstone that, “besides actual breaches of peace, anything that tends to provoke or excite others to break it is an offense of the same denomination”).

\textsuperscript{149} Abdal-Haq, Ismat, \textit{Violence in Sports}. ERIC DIGEST 1-89, available at http://www.ericdigests.org/pre-9214/sports.htm (observing that group solidarity with players and coaches leads fans to view the opposing teams as enemies, and fosters hostility towards the “outgroup” and, by extension, to its supporters, geographical locale, ethnic group, and perceived social class).


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Whether the utility of violent sports is high enough to justify their special
treatment is an open question.\textsuperscript{153} Quoting a British judge, it is “very strange that a fight in
private between two youths where one may, at most, get a bloody nose should be
unlawful, whereas a boxing match where one heavyweight fighter seeks to knock out his
opponent and possibly do him very serious damage should be lawful.”\textsuperscript{154}

Not surprisingly, sadomasochistic activities have not passed the utility test.\textsuperscript{155} In
that context, a person may not give valid consent even to minor injuries, such as those
caused by hot wax or needles.\textsuperscript{156} However, courts are much more tolerant if they can find
a reason, other than sexual pleasure, behind the injurious acts. In a British case, a man
was convicted of assaulting his wife when, at her request, he branded his initials on her
buttocks with a hot knife. The appellate court reversed the conviction, saying that what
the defendant did was rather akin to tattooing and, therefore, legitimate.\textsuperscript{157}

Aside from the obvious problems, such as inconsistency of treatment and poorly
camouflaged moralism, the social utility rationale is hardly defensible even on the most
basic level. It presumes that the state has the right to criminalize any conduct merely for
not being useful to society. This presumption dangerously extends the “moral limits” of
criminal law. Consider, for instance, one of the biggest public health problems in the

strength of character with prowess at fisticuffs.”).


\textsuperscript{155} See, e.g., A-G Ref. (No. 6 of 1980) [1981] Q.B. 715, 719 (opining that “the satisfying of sadomasochistic libido does not come within the category of good reason”).


\textsuperscript{157} R. v. Wilson, [1997] Q.B. 47 (explaining that the defendant assisted his wife in “what she regarded as
the acquisition of a desirable piece of personal adornment, perhaps in this day and age no less
understandable than the piercing of nostrils or even tongues for the purposes of inserting decorative
jewelry”).
United States today – the overweight and obesity of a significant portion of the population. Should that allow the state to criminalize possession and distribution of unhealthy food substances?

e. Social Order and Respect to Law.

This rationale is typically used to explain why one law is “good for all,” and why the state may not permit individuals to contract out of it. In *State v. Brown*, an alcoholic-wife and her husband had an agreement that, every time the wife became drunk, the husband would beat her up.\(^\text{158}\) As problematic as this arrangement is, it was invalidated not because of the apparent inadequacy of the wife’s consent (an alcoholic, quite likely suffering from the battered-spouse syndrome, and more than likely not agreeing to the beating at the very time of the beating). Had the court convicted the husband because it found that the wife’s consent was either not given voluntarily or given voluntarily but later revoked, such decision would have been consistent with respect to personal autonomy, a key category for the concept of criminal responsibility.

Instead, the court expressed complete indifference to the circumstances of the wife’s consent, saying that, in a criminal prosecution, “there is more at stake than a victim’s rights.”\(^\text{159}\) The court held that “[t]o allow an otherwise criminal act to go unpunished because of the victim’s consent would not only threaten the security of our society but also might tend to detract from the force of the moral principles underlying the criminal law.”\(^\text{160}\)


\(^\text{159}\) *Id.*

\(^\text{160}\) *Id.*
Preserving the rule of law certainly has public value. Respect for law on each level of governance is the essence of a legal society. That respect, however, would only suffer, if citizens perceive laws applied in particular cases as unfair or unnecessarily intrusive. The appellate court in *Wilson* (the case, in which a man was convicted for branding his initials on his wife’s buttocks), reversed the conviction, prudently observing that “[c]onsensual activity between husband and wife, in the privacy of the matrimonial home, is not in our judgment, normally a proper matter for criminal investigation, let alone criminal prosecution.”\(^{161}\)

Suppose we change the facts of *Brown* to eradicate doubts about the validity of the wife’s consent. Suppose she is not an alcoholic. Instead, she is a deeply religious woman, like the one sympathetically described by the U.K. Law Commission in a consultation paper about consent in criminal law:

She is on the liberal edge of the Roman Catholic church and was catechized in the pre-Vatican II church. She takes her religion seriously . . . . For many years she has occasionally found self-mortification the appropriate penance, if she has behaved in a way that falls gravely short of what a committed Christian faith involves. . . . Now that she is married, her husband helps her. He inflicts an adequate level of pain to ensure that the punishment is full and effective. As she put it, the threshold for “actual bodily harm” is clearly exceeded.\(^{162}\)

People may approve or disapprove of the way this couple practices religion. However, under the current law – in theory and in practice – the “religious” husband is not guilty of any offence. Comparing the two situations, I suggest that the rationale of *Brown* is misleading and the real question the court should have dealt with was the highly

suspicious character of the wife’s consent to beating rather than an individual’s ability to consent to beating as such.

By invalidating private consensual arrangements that have no significant public impact, society disempowers and alienates its citizens, and often jeopardizes the very values it seeks to protect. It is well documented that the public’s view of consensual harm differs dramatically from the one promoted by law. A famous study of the American jury has shown that, from the jury perspective, “insofar as the victim is disqualified from complaining, there is no cause for intervention by the state and its criminal law.”163 As a result, jurors tend to use the power of nullification and disregard both the formal instructions and their own oath to follow these instructions when they perceive that the law goes against the community’s principles of appropriate liability and punishment.164

f. Immorality.

The immorality argument165 is similar to the “social order and respect to law” argument. It has been used by American courts primarily to ban perceived sexual transgressions. Historically, examples of moral legislation criminalizing consensual conduct have included laws against sodomy, fornication, bigamy, adultery, adult incest, and prostitution. In addition, courts have routinely disqualified sadomasochistic activities from any defense or statutory exclusion. In Collier, for example, the court opined: “[I]t is obvious to this court that the legislature did not intend [to legitimize] an activity which


165 Here I address only the immorality argument within the paradigm of “harm to others.” It should be distinguished from the argument promoted by legal moralists, according to whom an act may be criminalized simply because it is immoral. See infra notes 247-53 and the accompanying text.
has been repeatedly disapproved by other jurisdictions and considered to be in conflict
with the general moral principles of our society.”

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

It is noteworthy that, at the time when *Bowers* was decided, twenty-four States
and the District of Columbia criminalized consensual sodomy. Logically, if *Bowers*
was a wrong decision, despite the legislative condemnation of sodomy by half of the
nation, then the *Collier* court’s deference to the moral disapproval of sadomasochism in
other jurisdictions may be equally unwarranted.

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166 *Collier*, 372 N.W.2d at 307.

167 *Bowers* v. Hardwick, 478 U.S. 186, 196 (1986). *See also* Williams v. Pryor, 240 F.3d 944, 949 (11th Cir. 2001) (citing *Bowers* in upholding Alabama's prohibition on the sale of sex toys on the ground that safeguarding public morality is a legitimate government interest).


169 *Id.* at 571.

170 *Id.* (“Our obligation is to define the liberty of all, not to mandate our own moral code.”) (quoting Planned Parenthood of Southeastern Pa. v. Casey, 505 U.S. 833, 850 (1992)). *See also* R v. Brown, [1994] 1 A.C. 212 (“There is a realm of sexual behaviour which, although the majority of people would condemn on moral grounds, should not be the subject of the criminal law.”).


172 This is particularly so if we consider the latest report by Kinsey’s Institute, according to which five to ten percent of the U.S. population engages in sadomasochistic sex on at least an occasional basis. JUNE M.
Criticizing the Court’s changed views, Justice Scalia wrote in his dissenting opinion:

The Texas statute undeniably seeks to further the belief of its citizens that certain forms of sexual behavior are “immoral and unacceptable,” -- the same interest furthered by criminal laws against fornication, bigamy, adultery, adult incest, bestiality, and obscenity. Bowers held that this was a legitimate state interest. The Court today reaches the opposite conclusion. ... This effectively decrees the end of all morals legislation.173

Indeed, the Lawrence opinion seems to prohibit any legislation adopted on purely moral grounds. Moreover, some of the laws listed by Justice Scalia (e.g., against fornication, adultery, and to some extent adult incest)174 have been repealed prior to Lawrence. That makes “immorality” alone a weak rationale in a prosecution for consensual bodily harm.

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To sum up various “public harm” rationales, it appears rather uncontroversial that the state has a legitimate right to criminalize public behavior to the extent it harms or offends others. Therefore, laws directed at conduct that constitutes a public nuisance or is likely to stir up violence are completely justifiable.175 As for private conduct between consenting adults, the standard rationales cited by courts do not sound compelling.

In addition to specific flaws discussed above, these rationales do not explain one major contradiction. If we truly criminalize certain behavior in order to avoid negative

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173 Lawrence, 539 U.S. at 599 (citations omitted).


consequences to society, how come an individual is free to cause himself all the same harms and not be liable for that? Neither attempted suicide nor any form of self-inflicted torture or mayhem is criminally punishable today.\(^{176}\)

One might argue that, by criminalizing assistance to harm, we significantly reduce the number of instances when that harm is actually done.\(^{177}\) That may be true. Yet, we should acknowledge that, by reducing the sheer number of harmful incidents, we impose significant pain and indignity on the ultimate victims, i.e. those whose exercise of autonomy is thus infringed.\(^{178}\) Consider some examples of what the BIID sufferers encounter in order to achieve their goal – the amputation of unwanted limbs.

In May of 1998 a seventy-nine-year-old man from New York traveled to Mexico and paid $10,000 for a black-market leg amputation; he died of gangrene in a motel. On October 1999 a mentally competent man in Milwaukee severed his arm with a homemade guillotine, and threatened to sever it again if surgeons reattached it. That same month a legal investigator for the California state bar, after being refused a hospital amputation, tied off her legs with tourniquets and began to pack them on ice, hoping that gangrene would set in, necessitating an amputation. She passed out and ultimately gave up. Now she says she will probably have to lie under a train, or shoot her legs off with a shotgun.\(^{179}\)

Choices regarding death are even more dramatic. Based on the recent Supreme Court’s decisions, one has no constitutionally protected right to assisted suicide.\(^{180}\)

\(^{176}\)See 2 WAYNE R. LAFAVE, SUBSTANTIVE CRIMINAL LAW § 15.6, 543 n.3 (2d ed. 2003) (“No state has a statute making successful suicide a crime.”).


\(^{178}\)See, e.g., JOSEPH RAZ, THE MORALITY OF FREEDOM 413 (1988) (“Depriving a person of opportunities or of the ability to use them is a way of causing him harm.”); Duff, supra note 20, at 30 (opining that limiting one’s ability to make self-regarding choices is “in some sense, an evil that seriously impairs the life, the flourishing, the well-being . . . of the person whose exercise of autonomy is thus infringed”).

\(^{179}\)Elliot, supra note 99.

\(^{180}\)See Glucksberg, 521 U.S. at 736 (O’Connor concurring) (opining that “our Nation’s history, legal traditions, and practices” do not support one’s right to commit a suicide).
However, one has the right to starve oneself to death.\textsuperscript{181} It is quite possible that fewer people choose this torturous way of dying compared to the death by a lethal injection. But is this a sufficient reason to continue criminalizing assisted suicide?

To answer this question, suppose that a legislature considers a bill, which advocates a new level of capital punishment for particularly egregious crimes: death by starvation. Assume further that the bill is accompanied by a convincing study, which shows that, by this simple change in the form of the death penalty, we can reduce the violent crime rate by 50 percent. Deterrence is one of the main priorities of criminal justice. Yet it is highly unlikely that the reduction of crime (and even the accompanying reduction in the number of death penalties) would make us adopt such a law. If we are not willing to make criminals suffer a painful and degrading death despite any potential reduction in the number of crimes and executions, how then can we use the same numerical argument to prohibit humane forms of dying to non-criminals?

\textbf{E. Where to Go from Here?}

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

I then explored how courts apply statutory provisions to various instances of consensual harm. The results of that quest were not quite satisfactory either. Over the

\textsuperscript{181} See Cruzan v. Director, Mo. Dept. of Health, 497 U.S. 261, 279 (1990) (confirming one’s constitutionally protected right to refuse lifesaving hydration and nutrition).
years, courts have treated similar cases very differently, allowing or disallowing particular harm depending on judges’ personal moral beliefs; often without much consistency or explanation.

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

In addition to being autocratic, the rule of consensual harm is absolute. People are allowed to consent to harm only if their activities are on the list of things approved by the state. A mere inconvenience to the state overrides individuals’ interests in autonomy and personal fulfillment. No balancing or accommodation of conflicting interests is envisioned. The disregard for an individual, inherent in that rule, goes against the basic principles of fairness and responsibility defining American criminal law. Moreover, the authoritarian presumption that it is not individuals but rather the state that is the victim of every crime is plainly wrong because, if this were so, then consent would not be a defense to any, not merely physical, harm.182

This critique prompts a difficult question: if the statutory line between the lawful and unlawful activities is arbitrary; the application of the law is inconsistent; and the articulated rationales for the law are unpersuasive, shall we get rid of any limitations on one’s power to consent to personal harm? Were we to choose this route, we could

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182 See Dubber, supra note 19, at 569 (pointing out that, “if the state were indeed the victim of every crime, then consent should be a defense to none.”).
certainly accommodate some of the valid legislative and judicial concerns. For instance, to avoid breach of peace and “offense to others,” we could limit permissible harm to private activities outside of the public view. And to address legitimate worries about the voluntariness and rationality of consent to harm, we could provide for strict procedural requirements that would guard putative victims from abuse. We should understand, however, that these substantive and procedural concessions would not necessarily outlaw such phenomena as consensual deadly torture, live cannibalism or gladiatorial contests.

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

183 See OFFENSE TO OTHERS, supra note 132, at xiii (“It is always a good reason in support of a proposed criminal prohibition that it is probably necessary to prevent serious offense to persons other than the actor and would probably be an effective means to that end if enacted.”).

184 This is the approach taken by the United Kingdom with respect to prostitution. See THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION, (Stein & Day 1963).
II. UNDERSTANDING AND REVISING THE DEFENSE OF CONSENT

A. Two Roles of Consent.

1. Offense or Defense: Why Does It Matter?

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

That question, in fact, reveals an important conceptual confusion, specifically, the legislative and judicial failure to distinguish the two roles that consent may play in connection with an offense. First, the lack of consent may be a part of the definition of an offense, i.e. a part of “the minimal set of elements necessary to incriminate the actor.” For example, a person may not be guilty of rape if his sexual partner has given him valid consent. Non-consent plays an inculpatory role in the offense of rape.

The other role consent may play is exculpatory. That happens when consent is used as a defense of justification to negate a prima facie criminal violation. Consent to physical harm in a lawful athletic contest, as we remember, is a defense under the

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185 These two roles are widely recognized, for example, in German criminal law scholarship. See Gregor Bachmann, Volenti non fit iniuria - How to make a principle work, 4 GERMAN LAW JOURNAL No. 10 (1 October 2003), (pointing out that most scholars accept the distinction between an element of an offense and a defense as helpful systematization).

186 FLETCHER, supra note 20, at 705.

187 Naturally, consent may be legally invalid (e.g., due to minority of age or mental incapacity). In that case, the factual consent may be disregarded. See, e.g., MPC § 213.1(1)(d) (the perpetrator is guilty of rape if the female is less than 10 years old); MPC § 213.1(2)(b) (holding the perpetrator guilty of rape if he knows that the female “suffers from a mental disease of defect which her incapable of appraising the nature of her conduct”).
MPC. How shall we determine in which case consent plays which role and why does that matter?

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

Logically, one could claim that the norm was directed against all driving. In exceptional cases, safe (or non-reckless) driving would justify a violation of the norm. In this mode of thinking, a case of safe driving would be treated as a justified violation of the norm; if recklessness were an element of the definition, non-reckless or safe driving would not violate the norm. Fletcher is certainly right that, in our society, it would be unthinkable to prohibit driving altogether. The only morally coherent norm would be one that prohibits reckless driving. It follows that “recklessly” is an element of the definition and not a defense.

The above example is rather uncontroversial. Consent raises more serious problems. Fletcher, for instance, leaves the question open in its application to larceny. “We find it hard to determine whether taking and using another’s property is sufficiently incriminating to constitute an incriminating event.”

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188 MPC § 2.11(2)(b). See also Hurd, supra note 17, at 133 (pointing out the difference between consent that can transform a wrong act into a right act, and consent that merely grants another a right to do wrong).

189 FLETCHER, supra note 20, at 562.

190 Id. at 567.

191 Id.

192 Id. at 568 (“The issue of consent in larceny is particularly difficult to classify.”).

193 Id.
I disagree with this expansive vision of criminal law. The law that creates a presumption of guilt whenever there is a mere suspicion of foul play paves the road to a police state. Such law would discourage socially useful behavior and unjustifiably intervene with people’s autonomy. For instance, all trade that involves exchange of goods (i.e. taking and using another’s property) would be under the criminal suspicion. In addition, such a law may have a disparate effect on different social groups. The poor and socially disenfranchised would be disproportionally under suspicion whenever they are seen “taking and using another’s property.” For all these reasons, consent should play an inculpatory role in the offense of larceny.

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

The allocation of burdens of production and persuasion between the government and the defendant often depends on whether the element in question is a part of an offense or an affirmative defense. In the first case, both burdens are on the prosecutor. He must prove each element of an offense beyond a reasonable doubt. In the second case, the burden of production is usually on the defendant. If he produces evidence with respect to self-defense but not with respect to insanity, the judge will have to instruct the jury on the law of self-defense but not insanity, and the defendant will not be entitled to have the issue of insanity considered by the jury in its deliberations. Who has the

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194 Fletcher himself made a similar point in his earlier work. See George P. Fletcher, The Right Deed for the Wrong Reason, 23 UCLA L. Rev. 293, 319 (1975).

195 JOSHUA DRESSLER, UNDERSTANDING CRIMINAL LAW 64 (3rd ed.).

196 Id. at 65.
burden of persuasion with respect to an affirmative defense depends on the jurisdiction: in some states it is the government; in other states the defendant. 197 Clearly, it is in the defendant’s interests that an element be characterized as included in the definition of an offense rather than a defense, since in that case the full burden of proof will be on the prosecution.

The second important consequence of treating consent as an exculpatory rather than inculpatory element involves the defendant’s mens rea. The specific question is: must the defendant be aware of the victim’s consent in order to be acquitted? If consent is an element of the charged offense, the answer is no, since the very presence of consent negates an element required for conviction. For example, consensual sex is not rape, even if one of the partners is not aware of the other’s consent. 198

However, when consent is a defense, the knowledge of the justifying circumstance is essential. 199 This difference stems from the very nature of justification as

197 Id. at 73.

198 It may be an attempted rape though under MPC § 5.01(1)(a) and its state analogues. See MPC § 5.01(1)(a) (“A person is guilty of an attempt to commit a crime if, acting with the kind of culpability otherwise required for commission of the crime, he . . . purposely engages in conduct which would constitute the crime if the attendant circumstances were as he believes them to be.”). In the majority of states, an attempt is treated as a less serious crime than the target offense. See Kadish & Shulhoffer, Criminal Law and Its Processes: Cases and Materials 554 (7th ed.).

199 See MPC § 3.02 cmt. 2 at 11 (stating that, to qualify for the defense of necessity, “the actor must actually believe that his conduct is necessary to avoid an evil”). R. v. Dadson (1850) 4 Cox. C.C. 358 (stating that “whenever justification or excuse appear in a criminal case, not only must the circumstances of justification or excuse appear but the defendant must have known of, or believed in, those circumstances”). See also Fletcher, supra note 192, at 318-21 (arguing that, when the absence of consent is an element of an offense, even un-communicated consent releases the actor from liability; however, when consent serves as a defense, the actor must be aware of it); Anthony M. Dillof, Unraveling Unknowing Justification, 77 Notre Dame L. Rev. 1547, 1595-1600 (2002) (arguing in favor of subjective theory of justification, according to which the actor is justified when he is aware of justifying circumstances and takes them into account when choosing his course of action). But see Paul 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); Larry Alexander, Lesser Evils: A closer look at the Paradigmatic Justification, 24 Law & Phil’y 611, 626-36 (arguing that self-defense but not other defenses requires defendant’s knowledge of justifying circumstances).
a limited privilege given to those who have committed a *prima facie* violation but whose actions “the law does not condemn, [and] even welcomes.”

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

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

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201 See, e.g., MPC § 3.04(2) (listing limitations on the use of force).
Now, how shall courts determine the role of consent in a particular case? An easy way would be to use the formal criteria and rely on the wording of the relevant statute. This approach, however, is problematic for at least two reasons. One is conceptual incoherence of legislative labeling of consent, and the other is the questionable constitutionality of such random labeling and re-labeling.

2. The Problem of Conceptual Incoherence.

For an illustration of the first problem, take the offense of criminal mischief (destruction of property of another) punishable in all states and under the MPC. Pursuant to thirty-one state codes, non-consent is, explicitly or implicitly, an element of the offense.\(^202\) In the remaining jurisdictions, consent is either included in the penal code as an affirmative defense\(^203\) or is not specifically part of the code.\(^204\) In the case of any ambiguity, courts have to interpret the functional meaning of consent, and these interpretations differ quite dramatically.

\(^202\) ALA. CODE § 13A-7-21 (2003); ALASKA STAT. § 11.46.475; ARIZ. REV. STAT. ANN § 13-1604; ARK. CODE ANN §§ 5-38-203 (1987); CAL. PENAL CODE § 594; CONN. GEN. STAT. ANN. § 53a. 15; FLA. STAT. ANN. § 806.13; GA. CODE ANN § 16-7-21; HAW. REV. STAT. ANN §§ 708-820; IDAHO CODE ANN. § 18-7001; 720 ILL. COMP. STAT. ANN. 5/21-1; IND. CODE ANN. § 35-43-1-2; IOWA CODE §§ 716.3; KAN. CRIM. CODE. ANN § 21-3720; KY REV. STAT. ANN. §§ 512.020; LA. REV. STAT. ANN. § 14:56; ME. REV. STAT. ANN. tit. 17-A, § 14:56; MASS GEN. LAWS ch. 266 §104; MINN. STAT. ANN. § 609.595; MONT. CODE. ANN. § 45-6-101; N.H. REV. STAT. § 634.2; N.M. STAT. ANN. § 30-15-1; N.Y. PENAL LAW § 145.12; OHIO REV. CODE. ANN. § 2909.07; OR. REV. STAT. § 164.365; S.D. CODIFIED LAWS § 22-34-1; TENN. CODE. ANN. § 39-14-408; TEX. PENAL. CODE. ANN. § 28.03; VT. STAT. ANN. tit. 13 § 3701; WIS STAT. § 943.01; WYO. STAT. ANN. § 6-3-201.

\(^203\) See, e.g., COL. REV. STAT. ANN. § 18-4-501; DEL. CODE ANN. tit. 11 § 811; N.J. STAT. ANN § 2C:17-3; 18 PA. CONS. STAT. ANN. § 3304.

\(^204\) See, e.g., D.C. CODE ANN. § 22-303; MD. CODE. ANN., CRIM. LAW § 6-301; MICH. COMP. LAWS ANN. § 750.377a; MISS. CODE ANN. § 97-17-67; NEB. REV. STAT. § 28-519; NEV. REV. STAT. ANN. § 206.310; N.C. GEN. STAT. § 14-127; OKLA. STAT. tit. 21 § 1760; R.I. GEN. LAWS § 11-44-1; S.C. CODE ANN. §§ 16-11-510; UTAH. CODE. ANN. § 76-6-106; VA. CODE. ANN. § 18.2-137.
For example, neither in Pennsylvania, nor in New Jersey is non-consent explicitly listed as an element of criminal mischief. Each statute describes the offense through damage to the “property of another” but neither defines the term “property of another” either in the relevant section or generally. A comment to the New Jersey Penal Code, however, explains that “‘property of another’ has been defined in other sections of the Code to include any property in which a person other than the defendant has an interest and which the defendant is not privileged to infringe.”\textsuperscript{205} This explanation, similar to the one offered in an MPC commentary,\textsuperscript{206} effectively incorporates the requirement of non-consent into the definition of criminal mischief.

A Pennsylvania court, however, has reached an opposite conclusion when it held that the criminal mischief statute does not require the prosecution to prove the lack of consent by the owner of the property.\textsuperscript{207} “All that is required under [the statute] regarding the owner is that the property belong to another person.”\textsuperscript{208}

Moreover, even when the language of the statute implies that the owner’s non-consent is an element of the offense but does not say so specifically, courts may interpret the statute as not requiring proof of the owner’s non-consent for the defendant’s conviction. Under New York law, for instance, a person is guilty of criminal mischief when he intentionally damages property of another person, “having no right to do so nor

\textsuperscript{205} 33 GERALD D MILLER, N.J. PRAC. CRIMINAL LAW § 13.6 (3rd ed.) (commenting on N.J. STAT. § 2C:17-3).

\textsuperscript{206} The MPC does not list non-consent as an element of criminal mischief and does not define “property of another” with respect to criminal mischief. However, a commentary to the criminal mischief section says that “there would seem no reason not to apply the term ‘property of another’ as defined in ‘[the Theft and Related Offenses]’.” MPC § 220.3, cmt. 3 at 45.


\textsuperscript{208} Id.
any reasonable ground to believe that he has such right.”

Despite this rather suggestive language, a court held that the proof of the owner’s lack of consent was not necessary to convict the defendant, among other things, of criminal mischief for breaking into a tavern and stealing some money.

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

3. The Problem of Questionable Constitutionality

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

Those two cases were similar in that, in each of them, the state had attempted to present the “heat of passion” or “extreme emotional disturbance” as a defense that had to


be proven by the defendant in order to reduce the charge of murder to manslaughter. In *Mullaney*, the Supreme Court unanimously held the state’s theory unconstitutional because it was the prosecutor’s, not the defendant’s, task to prove that the killing was premeditated and not provoked.214 According to a commentator, *Mullaney* “clearly carried within it the potential to invalidate all ‘affirmative defenses’ that shifted the burden of persuasion to the defendant on any matter relating to guilt, innocence, or degrees of culpability.”215

However, in *Patterson* decided only two years later, the narrowly divided Supreme Court has significantly weakened the import of *Mullaney* by declining “to adopt as a constitutional imperative, operative countrywide, that a State must disprove beyond a reasonable doubt every fact constituting any and all affirmative defenses related to the culpability of an accused.”216 The Court has recognized that its holding “may seem to permit state legislatures to reallocate burdens of proof by labeling as affirmative defenses at least some of the elements of the crimes now defined in their statutes.”217 At the same time, the *Patterson* majority has warned that “there are obviously constitutional limits beyond which the States may not go in this regard.”218

Unfortunately, neither in *Patterson*, nor in later cases did the Court identify those “constitutional limits,” except for the basic requirement that the legislature may not

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214 421 U.S. at 698.


216 432 U.S. at 210.

217 *Id.*

218 *Id.*
“declare an individual guilty or presumptively guilty of a crime.” As one scholar has pointed out, the “Winship/Mullaney/Patterson line of ‘affirmative defense’ decisions essentially died out, with barely a whimper.”

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

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

4. Determining the Role of Consent.

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

What Fletcher does not tell us is how to apply this norm
to the suspect element in order to determine its function, and without that, this methodology is of limited practical use.\footnote{221} 

I suggest that, to understand the role of consent with respect to a particular offense, we should identify the prohibitory norm underlying that offense and then apply it to the perpetrator’s voluntary act (its nature and result, using the MPC categories).\footnote{222} In other words, we should evaluate the moral quality of the act independently of the justifying circumstance of consent.\footnote{223} If there is no \textit{prima facie} moral prohibition against that act, consent should play the inculpatory role and be an element of the definition. Only when the act itself violates a prohibitory norm, should consent be a defense.

Consider offenses of rape, kidnapping, theft, and trespass,\footnote{224} to name just a few. In all of them, the \textit{act itself} does not violate a prohibitory norm. Having sex, transporting someone to a different location, taking other people’s property or entering someone’s home is not bad \textit{per se}. It becomes bad \textit{only} due to the attendant circumstance, namely, the lack of consent; i.e., unless consent is missing, the conduct is outside the boundaries of criminal law. Therefore, in each of these offenses, non-consent should be included in the language of the definition.

\footnote{221} Fletcher himself admits that his methodology may be insufficiently precise to resolve cases in the borderline between definition and justification. See \textit{id}.

\footnote{222} See MPC § 1.13(9) & 1.13(10). See also MPC § 2.02 cmt. 1 (observing that “material elements” of an offense include conduct, attendant circumstances and the result included in the description of the offense).

\footnote{223} I use the term “voluntary act,” and not “actus reus,” since the latter has been traditionally used to include the absence of justification and, sometimes, even excuse. See, e.g., \textit{Michael Moore, ACT AND CRIME} 177-83 (1993) (including justification but not excuse); Meir Dan-Cohen, \textit{Actus Reus}, \textit{IN ENCYCLOPEDIA OF CRIME AND JUSTICE} 15 (S. Kading ed. 1983) (including both justification and excuse); \textit{Glannville Williams, CRIMINAL LAW: THE GENERAL PART} 20 (2d ed.) (including both justification and excuse).

\footnote{224} For definitions of offenses, see, e.g., MPC §§ 213.1 (rape); 212.1 (kidnapping); 223.2 (theft); 221.2 (tresspass).
Conversely, killing or hurting another is bad *per se*. The fact that a person may be legally justified in, say, killing of another in self-defense does not make the killing as morally neutral as borrowing a book; it is still regrettable.\textsuperscript{225} It is still regrettable that a dental patient has to suffer pain, even though the dentist is justified in causing it. To lose or reduce its inherent wrongfulness, the act of killing or hurting requires justification. To the extent consent can affect the moral character of that act, its role is exculpatory. It should, therefore, be a defense, full or partial, and not a part of the definition.

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

In contrast, causing pain, injury or death is not morally neutral.\textsuperscript{226} Bringing about a regrettable state of events is bad and should be avoided.\textsuperscript{227} Therefore, we would want a conduct rule that prohibits the very *act* of killing or hurting, providing of course for the

\textsuperscript{225} *Cf.*, Douglas N. Husak, *Partial Defenses*, 11 CAN. J.L. & JURIS. 167, 172 (1998) (“No one who believes that killings in self-defense are completely justified need suppose that the quantum of wrongfulness in all such killings is equivalent to that in, say, scratching one’s head.”).

\textsuperscript{226} *See, e.g.*, R. v. Brown, [1994] 1 AC 212 (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”).

\textsuperscript{227} *See, e.g.*, 4 JOEL FEINBERG, THE MORAL LIMITS OF THE CRIMINAL LAW: HARMLESS WRONGDOING 18 (1988) [hereinafter HARMLESS WRONGDOING] (defining evil in the most generic sense as “occurrence or state of affairs that is rather seriously to be regretted”).
necessary exceptions (e.g., medical treatment, minimal harm or, in a non-consensual context, self-defense).

In this regard, I disagree with those who view consent only as an event of non-criminalization. Among them is, for instance, Paul Roberts who objects to the treatment of consent as a general defense. In his view, it is neither “general” nor a “defense”. Instead, according to Roberts, “the significance of consent in the criminal law can only be ascertained through particularistic inquiries into specific types of injury,” e.g., such as may result from consensual fighting, dangerous sports, risky sex, medical treatment, cosmetic surgery, and euthanasia.

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

Moreover, in a coherent legal system that accounts for important moral distinctions, consent to bodily harm has to be conceptualized as an affirmative defense. Think of a mountaineer (A) who cuts off the leg of his injured friend (B) in order to save

228 See, e.g., Roberts, supra note 8, at 252-53 (opining that British consent project failed because consent was conceptualized as a general defense instead of a part of the definition of each relevant offense); Dubber, supra note 18, at 569 (suggesting that consent is “less a defense than a general limitation”); Paul H. Robinson, Rules of Conduct and Principles of Adjudication, 57 U. Chi. L. Rev. 729, 753-54 (1990) (criticizing the view that consent is a justification). It is possible that Robinson’s claim was affected by the examples he reviewed. All of them are indeed cases of non-criminalization and not justification.

229 Roberts, supra note 8, at 252.

230 Id. at 253.

231 Id.
B’s life. Assuming B has consented to the procedure, A would be justified. This is a justification and not a non-criminalization case because justified conduct always has a negative side effect, which we accept and forgive, yet we would much prefer if that accompanying evil could be avoided. For instance, we justify people who kill in self-defense or violate property rights of others in order to prevent a greater harm or evil.

Similarly, we justify A, although we are sorry for B’s loss. In contrast, we have no need to justify people who have consensual sex, visit each other or exchange property; their actions leave no undesirable residue that requires justification.

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

Recognizing this difference can help, among other things, in drafting more consistent and fair legislation. For example, in sexual offenses, offenses against property, burglary and trespass, the absence of consent should be expressly included in the relevant definition. This revision is particularly needed and overdue in the area of sexual offenses. Most states still define rape through “forcible compulsion” and do not list the

232 I also assume that A was right in his assessment of B’s condition. If he was wrong but his mistake was reasonable, he should also be acquitted but pursuant to the defense of excuse. See, e.g., FLETCHER, supra note 20, at 696-97, 762-69 (arguing that a mistake regarding the presence of justifying conditions negates justification). See also Bergelson, supra note 124, at 404-06 (discussing why mistake should be a defense of excuse and not justification).

233 By “absence” of consent, I mean its factual or legal deficiency. E.g., consent given under duress or consent of a minor is legally invalid.
absence of consent as an element of the statute. This is unfair to both the victim and the defendant charged with rape. As far as the victim is concerned, the gist of rape is nonconsensual intercourse; force is merely an important evidentiary and aggravating factor. The use of force or its absence can be taken into account at various stages of the trial without being a requisite element of the offense. As David Bryden has persuasively argued,

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

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

To conclude, it is important to distinguish between offenses, in which the act becomes wrongful due to the lack of consent, from offenses, in which the very conduct constitutes a prima facie norm violation. All offenses involving injury or death belong

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236 Id.

237 See, e.g., CONN.GEN.STAT.ANN. § 53a-70; HAW. REV. STAT. § 707-730; MICH.COMP.LAWS.ANN. § 750.520b; N. M. STAT. ANN. § 30-9-11; OHIO. REV. CODE ANN. § 2907.05; WASH.REV.CODE ANN. § 9A.44.040.

238 See WESTEN, supra note 20, at 129 n. 1 (observing that the State of Washington and the District of Columbia impose the burden of proof with respect to consent on defendants while at the same time imposing the burden of proof with respect to the use of force on the prosecution).
to the second group; therefore, with respect to those offenses, the victim’s consent may play only an exculpatory role. Accordingly, those criminal statutes should be drafted without reference to consent.

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

B. Kinds of Harm and Wrongdoing.

Traditional Anglo-American legal theory distinguishes two kinds of harm to an individual.239 One is a setback to interests not accompanied by a violation of rights.240 Usually, this kind of harm is insufficient for criminal liability. A person may suffer an injury or loss due to a completely innocent act of another. For example, a competitor’s success may financially harm a neighboring business owner, yet the competitor has done nothing wrong.

The second kind of harm is a “morally indefensible”241 right violation, which is often conceptualized as an unjustifiable setback to interests.242 Voluntary consent

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239 HARM TO OTHERS, supra note 174, at 31-36.

240 For a detailed discussion of harms as setbacks to interests see, HARM TO OTHERS, supra note 174 at 31-64. The most essential, “welfare” interests are interests “in the necessary means to . . . more ultimate goals, whatever the latter may be or later come to be.” Id. at 37. Those include, among other interests, “the interests in the continuance for a foreseeable interval of one’s life, and the interests in one’s own physical health and vigor, the integrity and normal functioning of one’s body, the absence of absorbing pain and suffering or grotesque disfigurement, minimal intellectual acuity, emotional stability.” Id.

241 Id. at 105-06.

242 See, e.g., Hamish Stewart, Harms, Wrongs, and Set-Backs in Feinberg’s Moral Limits of the Criminal Law, 5 BUFF. CRIM. L.REV. 47, 65-66 (2001). It is important to understand that one’s interest in personal liberty is violated even when the violation advances other victim’s interests. For example, a person who was wrongfully prevented from taking a plane could turn out to be lucky if everyone on board was killed in a crash. Yet the happy outcome does not relieve the wrongdoer from liability.
eliminates this kind of harm to the consenting individual. For example, I have a right not to be physically hurt by others. By giving my consent to a dental treatment, I waive my claim of physical inviolability against my dentist and transfer to him the privilege and power of doing things that otherwise would constitute assault and battery. But does consent always have the power to change the moral and legal character of another person’s actions? What about the already mentioned acts that remain intuitively wrongful despite the valid consent of the victim, such as consensual gladiatorial contests, live cannibalism, deadly torture, and organ-harvesting killings?

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

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

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243 HARM TO OTHERS supra note 174, at 115-17; JUDITH JARVIS THOMSON, THE REALM OF RIGHTS 348-54, 361 (1990) [hereinafter THOMSON] (explaining that consent is a mechanism by which a person may divest himself of a claim and transfer to another a privilege, a power, or an immunity).

244 See HARMLESS WRONGDOING, supra note 225 at 3-33.

245 MOORE, supra note 20, at 649 (1997).
example, even the most selfish and cynical breach of a contract has remedies outside of criminal law.

Criminalization of all moral transgressions (and that’s what the legal moralist legislator, according to Moore, should do)\(^\text{246}\) would require a lot of police enforcement, which is likely to result in a society marked with fear, persecution and alienation. Moreover, the majority of citizens in this Brave New World would likely be criminals. To give just one example, for a legal moralist legislator, “adultery should be made illegal because it is immoral.”\(^\text{247}\) Recent studies show that, were we to criminalize adultery today, we might end up with 50% of married adults being criminals.\(^\text{248}\) And there are many more ways to breach a moral obligation besides adultery.

Granted, there are private immoralities that deserve condemnation, yet they are simply “not the law’s business.”\(^\text{249}\) Not punishing someone’s conduct does not mean approving of it; instead, that can mean the lack of standing to judge or condemn it.\(^\text{250}\) But if moral legislation is not a desirable option, do we necessarily have to permit any consensual harm?

\(^{246}\) See id. at 645.

\(^{247}\) Id.


\(^{249}\) Duff, supra note 20, at 36-37.

\(^{250}\) Id.
Recently, a number of scholars have suggested that the concept of criminal harm should not be limited to a right violation. In their view, gladiatorial contests and similar acts are impermissible because they violate the participants’ dignity, and dignity is so essential to our humanity that, in cases of conflict between legally valid consent and dignity, the former ought to yield. Accordingly, consent may not serve as a defense to the violation of dignity.

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

251 Wright, supra note 20, at 1399. Meir Dan-Cohen, Basic Values and the Victim’s State of Mind, 88 CALIF. L. REV. 759, 770 (2000), Dubber, supra note 18, at 568 (opining that criminal harm is “harm to a person, and harm to a person's very personhood, as opposed to his morally irrelevant attributes, such as his social dignity); Duff, supra note 20, at 13, 39-44 (referring to the harm as violation of humanity).

252 See Wright, supra note 20, at 1399; Dan-Cohen, supra note 249, at 777-78. See also Dubber, supra note 19, at 567-68 (arguing that personal autonomy includes dignity, and that the concept of criminal harm should be based on protection of a person rather than a state).

253 See generally DON HERZOG, HAPPY SLAVES (1989).

254 Dan-Cohen supra note 249, at 770. Dan-Cohen defines dignity as “an expressive value demanding that people's behavior, physical and verbal, convey a certain attitude to other people, namely an attitude of respect.” Id. at 771.

255 Duff, supra note 20, at 39.
I agree with both Dan-Cohen and Duff that certain degrading behavior may be harmful, even though it does not violate the victim’s rights.256 Society may be concerned about human dignity even in cases, in which a prohibitory norm does not originate in a rights violation, such as experiments involving fresh cadavers as “crash dummies”257 or pieces of art made with body parts of dead fetuses.258

Moreover, no matter how respectfully Armin Meiwes treated his victim,259 cannibalism by its very terms denies people equal moral worth, and thus assaults the victim’s dignity. The concept of dignity, therefore, does not refer to the subjective state of mind of the perpetrator or the victim but has an “objective” meaning.

Where should society look for this meaning? Dan-Cohen suggests that the meaning of dignity ought to be determined by deference to a community in which the nominally criminal act occurred. In this regard, he criticizes the court which, in People v. Samuels, has convicted the defendant for a sadomasochistic beating of his partner.260 Dan-Cohen argues that, since violence does not have a meaning of disrespect in the sadomasochistic community, Samuels should have been acquitted.261

256 See id. at 38-39, 42 (arguing that a dehumanizing act may be criminalized only if it is a “public” rather than “private” wrong, i.e. such that concerns “the whole political community as a kind of wrong that should (in principle) be publicly condemned by the criminal law”).


258 See Seagull Body and Fetus Head, POOR MOJO NEWSWIRE, August 30, 2005 (observing that a sculpture made with the pickled head of a dead fetus attached to a seagull’s body has fueled a furor in Switzerland about the boundaries of art), available at http://www.poormojo.org/pmjadaily/archives/2005_08.html.

259 See discussion supra, notes 1-6 and the accompanying text.


261 Dan-Cohen, supra note 249, at 777 (“Acquitting Samuels could, accordingly, be an expression of the court’s deference to a community other than its own and to a meaning the court does not share.”).
This approach appears flawed. Following Dan-Cohen’s logic, we would have to allow voluntary crucifixions, similar to the ones practiced in the Philippines, because the person who volunteers for the ritual is treated with the utmost respect in his religious community. What about cannibalism? According to German investigators, there are hundreds of people interested in cannibalism in Europe.\textsuperscript{262} Should we defer to them for the ethical meaning of cannibalism?

Dan-Cohen answers these questions in the negative. According to him, we may be able to do both – accept the meaning that is assigned to a particular act by a cultural group, and give the act moral assessment based on our own moral views.\textsuperscript{263} Thus, we may criticize and outlaw female circumcision even though it does not mean indignity to women in those communities in which it is practiced.\textsuperscript{264} I doubt that this method adds much to our understanding of dignity though. If we are to use dignity as an objective moral criterion, it should not matter how a degrading act is perceived by the perpetrator, the victim or their neighbors. And conversely, if, as Dan-Cohen maintains, Samuels should have been acquitted, it is not because pain does not mean indignity in the sadomasochistic community; it may only be because, in general, pain does not necessarily mean indignity.

In my view, the “harm to dignity,” not accompanied by a rights violation, should be limited to the treatment that denies the victim the basic respect to which every person is entitled just by virtue of being a human being, no matter where he lives or to what

\textsuperscript{262} Cook, \textit{supra}, note 3, at 17.

\textsuperscript{263} \textit{See} MEIR DAN-COHEN, HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY 164 (2002).

\textsuperscript{264} \textit{Id.}
cultural group he belongs. To be morally convincing, this understanding of dignity has to be shared by the community at large, not merely some of its segments.

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

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

265 I agree with Markus Dubber that only moral dignity, or dignity of personhood, as opposed to social dignity, or dignity or rank, should be protected by criminal law. See Dubber, supra note 18, at 567. Distinguishing the two kinds of dignity, Dubber explains:
Social dignity is not only hierarchical and relative. It is also nonessential; it can be gained and lost, at least in a society that permits social mobility upward and downward. . . .
Moral dignity, by contrast, is an essential characteristic of all persons as such. It is a necessary attribute of individuals who satisfy the minimum requirements of personhood.
Whoever qualifies for personhood enjoys human dignity for that reason, and that reason alone.
Id. at 535.

Meir Dan-Cohen makes a similar point when he observes that the term “dignity” should be understood as “moral worth” and not “social status.” See DAN-COHEN, supra note 263 at 169, n. 23.

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

267 See Duff, supra note 20, at 44.
violations of autonomy is because we view autonomy as an essential aspect of humanity.\textsuperscript{268}

But if we then recognize the inadequacy of a Kantian conception of humanity, which focuses only on our autonomy as formally rational beings, and develop a richer conception that does justice to the morally significant aspects of our nature as social, embodied and impassioned beings, we will see that there are more ways to deny or radically fail to respect humanity than by violating autonomy. We will then also see that we therefore have good reason – reason of the same kind as we have to criminalize violations of autonomy – to criminalize other modes of conduct that deny or radically fail to respect the humanity of those against or on whom they are perpetrated.\textsuperscript{269}

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

Conceptually, a rights violation is a wrongful setback to an interest.\textsuperscript{270} Traditional criminal theory protects most essential welfare interests from wrongful interference by others, where “wrongfulness” is understood as violation of autonomy.\textsuperscript{271} In my view, the concept that requires revision, in order to reflect a broader meaning of harm, is the concept of wrongfulness: what we find morally objectionable is not only disregarding one’s will but also rejecting one’s human dignity.

If we include violation of dignity in the concept of “wrong,” then harm can continue to be defined as a wrongful setback to an interest, where “wrongful” means either (i) such as violates a right (i.e. autonomy), or (ii) such as violates the victim’s dignity. The two kinds of harm would include the same evil – objectification of another.

\textsuperscript{268} Id.

\textsuperscript{269} Id.

\textsuperscript{270} Harm to Others supra note 174, at 34, 144. See also Stewart, supra note 240, at 65-66 (proposing to redefine harm as a set-back to interests).

\textsuperscript{271} Id. at 62 (explaining that criminal law protects “welfare interests of the most vital kind.”).
human being, which may happen through a rights violation (e.g., murder) or, alternatively, through a setback to interests combined with the disregard of the victim’s dignity (e.g., consensual deadly torture).

A setback to interests alone (e.g., due to a successful competitor) or disrespect to dignity alone (e.g., during a “Fear Factor”-like competition) should not be criminalized. I am underscoring this point in order to express a concern in connection with the practical application of dignity-related arguments. It is only to be expected that such a broad and politically charged concept as human dignity would cause profound disagreement among people. To avoid over-criminalization yet capture the kind of harm most of us would want to ban despite its consensual nature, I suggest that disregard of one’s dignity should be criminalized only if it is combined with a setback to interests protected by criminal law.

Based on this broader theory of harm, two kinds of conduct should be prosecuted. One is a violation of rights protected by criminal law, regardless of any additional setback to interests. As an example, consider Gilbert v. State of Florida, in which a 75-year-old old man was convicted of a first-degree murder for shooting his wife. Roswell and Emily Gilbert had been married for 51 years. For the last few years of her life, Emily was suffering from osteoporosis and Alzheimer’s disease, and her

272 For instance, Dan-Cohen and Duff seem to have opposite views on whether sadomasochistic activities deny participants their dignity. See Dan-Cohen, supra note 249, at 777 (maintaining that sadomasochistic beating does not mean disrespect to the victim); Duff, supra note 20, at 41-43 (observing that sadomasochistic activities of R. v. Brown dehumanize and degrade its participants).

273 Here, and throughout the article, I am talking only about situations that do not provide grounds for criminalization pursuant to the “offense to others” rationale. See generally, OFFENSE TO OTHERS supra note 132.

274 487 So. 2d 1185 (4th Dist. 1986).
condition was rapidly deteriorating. Testifying at his trial, Roswell Gilbert tried to explain the killing: “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 . . .” Roswell admitted that Emily had never asked him to kill her.275

As dramatic and sad as this case is, the appellate court was right to affirm the defendant’s conviction. Even though he was motivated by compassion and desire to protect his wife’s dignity and, in fact, did everything to make her death as painless as possible,276 she did not consent to being killed. An unauthorized mercy killing of an autonomous human being is, and should be, murder. No one has the right to decide for another person that his life is not worth living.

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

One other point may be worth making. All criminal offenses are wrongful by definition. Either violation of rights or setback to interests combined with disrespect to the victim’s dignity should be sufficient for criminal prosecution. However, to be fair, the law should distinguish the relative wrongfulness of an act, which depends on the

275 Id. at 1188.
276 Id. (explaining that he used a gun because it causes instantaneous death).
importance of the affected rights, the extent of a setback to an interest, and the seriousness of failure to respect the victim’s dignity. For example, theft is a serious offense that violates the victim’s property rights and sets back his interests (the larger the amount, the more substantial is the setback). However, it is not as serious as, say, rape, which not only violates a more essential personal interest and the corresponding right in physical and sexual inviolability but also involves the indignity of using the victim as an object, and not a subject, of sexual intercourse. Accordingly, the rapist deserves a more severe punishment than a thief. And a thief who stole $100,000 deserves a more severe punishment than a thief who stole $100.

C. Consent as a Partial Justification.

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

What follows is that, in order to be entitled to a full defense, the perpetrator has to prove that the prima facie criminal violation did not in fact set back the victim’s essential interests or did not violate his dignity in a way that may hurt society at large. This proposal is very commonsensical: if no welfare interests protected by criminal law are at

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278 For example, according to Feinberg’s typology, interests may be “set back,” “defeated,” “thwarted” and “impeded.” E.g., to “set back an interest is to reverse its course, turn it away, put it back toward the point from which it started.” HARM TO OTHERS supra note 174, at 53).
stake, the mere violation of dignity is most likely a private thing, in which society has no business to interfere (e.g., sexual role-playing that involves humiliation of one partner). If, on the other hand, people’s dignity is not violated, there is no reason to disregard their autonomy, i.e. not to let them make important, even if hurtful, personal choices.

Let’s start with the supposition that the defendant has failed this task. Does that mean that the victim’s consent has no impact on his culpability? In this Section, I argue that, even in that case, the defendant should be entitled to partial justification. Partial justification does not make a wrongful act right; it merely renders the act less wrongful compared to what it would have been in the absence of the mitigating circumstance (in our case, consent).279

Take a lifeboat scenario, in which all will die, unless a few sacrifice their lives by jumping overboard. Assume that the necessary number of people has volunteered but, for whatever reason (say, they are too weak to be able to move), they cannot complete the suicidal act on their own. Would it be wrong to push them off? I agree with Michael Moore that, even if it would, it would certainly be less wrong than drowning those who have not volunteered.280

Why would this consensual killing be less wrongful? Now that we have briefly reviewed various kinds of harm, we can answer this question. This is so mainly because, compared to an identical non-consensual act, the consensual killing would not involve a certain kind of harm, namely, violation of rights.281 It was the victims’ choice to sacrifice

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279 Husak, supra note 223, at 170.

280 See MOORE supra note 20, at 708.

281 It is also plausible that a consensual act causes less indignity because it at least respects the victim’s autonomy.
their lives; therefore, the victims are to a large degree responsible for the harm. Accordingly, the perpetrator has brought about less harm than in a non-consensual act and thus deserves a lesser punishment.

The idea that a less harmful act deserves a lesser punishment, although not universally accepted, has strong support in both our law and our morality. We decide whether people deserve praise or penalty based, in part, on the end results of their actions. A sprinter who almost won the race does not deserve the same medal as the sprinter who, in fact, came first. Similarly, a driver who almost hit a pedestrian does not deserve the same punishment as a driver who did, in fact, hit and kill someone.

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

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282 See, e.g., Michael Moore, Victims and Retribution: A Reply to Professor Fletcher, 3 BUFF. CRIM. L. REV. 65, 70 (1999). [hereinafter Victims and Retribution] (arguing that “it’s not culpability alone that counts in determining desert. . . . Rather, the amount of harm caused determines the seriousness of the wrong done, and the amount of wrong done does affect desert”). The opposing school of thought maintains that the amount of harm is irrelevant to the perpetrator’s desert. See, e.g., HART, supra note 126, at 131 (“Why should the accidental fact that an intended harmful outcome has not occurred be a ground for punishing less a criminal who may be equally dangerous and equally wicked?”). The debate over the moral and legal significance of the resulting harm has a long history and still continues. For the insightful analysis of advocated positions on both sides of the debate, see, e.g., MOORE supra note 20, at 191-247.


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

Id. at 688.

284 See, e.g., MPC § 3.02.
A deserted house would not be justified in what he did.

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

In fact, the victim’s consent or participation is already taken into account at the sentencing stage of the criminal trial. The victim’s consent to homicide is a mitigating factor for capital sentencing purposes in twenty-three of the thirty-two death penalty jurisdictions listing statutory mitigating factors. The MPC comments that, in the situation of a mercy killing, “the defendant’s homicidal act may not have occurred had the victim not consented to it. [In that case], the conduct of the victim in bringing about his own death deserves consideration as a mitigating factor in assigning a death sentence.”

However, reducing the role of consent to a sentencing mitigator is unwarranted: a consideration that changes the very wrongfulness of an act should be taken into account at all stages of a criminal trial. If consent of the victim is legally valid, the actor should

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

286 Presently, twenty-three states and the federal government recognize the victim’s participation in the crime or consent to the criminal conduct as a mitigating factor. See Bergelson, supra note 124, at 436.


288 MPC § 210.6 cmt. 6(b) at 140-141.

289 See Bergelson supra note 124, at 430-39 (discussing why the victim’s actions should be considered at the guilt adjudication stage and not merely at the sentencing stage). See also Kyron Huigens, Rethinking the Penalty Phase, 32 ARIZ. ST. L.J. 1195, 1250-52 (2000) (explaining the difference between the “fault and the “eligibility” mitigators).
be entitled to at least a partial justification, which should result in conviction of a lesser offense, not merely a milder punishment.  

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

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

Certainly, human dignity and ability to pursue one’s life plans are important values on personal as well as societal levels. However, if the reason for criminalizing consensual harm stemmed only from the desire to promote those values, we would continue to prosecute a person who has attempted to commit a suicide or severely tortured himself. The fact that we do not punish self-dehumanizing and self-destructive acts, yet punish identical acts when they are done by another person, suggests that the real moral difference lies in the involvement of that other person. That supposition brings us back to the theory of rights and the role of consent.

To have a right means to have a certain moral status. Consent is a way to unilaterally change this status by transferring to another person a claim, a privilege, a power or an immunity. For example, by promising a colleague to read his piece, I give

290 See Vera Bergelson, Conditional Rights and Comparative Wrongs, 8 BUFF. CRIM L. R. 567, 594-97 (discussing practical implementation of the proposed mitigation of offenses).

291 See discussion in the last paragraph of Section II.B.

292 See THOMSON, supra note 241, at 360-61.
him a claim against me with regard to that promise. By consenting to a surgery, I give
the physician a privilege to perform it. By telling my daughter that she may do whatever
she wants with an extra copy of *Harry Potter*, I give her a power to do so.

In all those instances I waive a right I used to have and give other people rights
they did not have before. My consent or promise does not impose any obligations on
them; it merely provides them with an option. Even when I combine my waiver of rights
with a request, these other people still have no duty to follow it. For example, I may
request (and simultaneously consent to) a surgery. If my doctor does not believe I need
one or does not want to perform it himself, he is under no duty to do so. In other words,
my consent or even request creates a very weak content-independent reason for action,
compared to, say, threats or orders of an authority.\(^{293}\)

When a child breaks a rule, we demand: “Why did you do that?” This is a
question about a moral reason for action and effectively about the availability of
defenses. What we want to know is whether the child had a good reason for violating a
rule of conduct. We are unlikely to accept “because such-and-such has 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, have you chosen to break the rule
(cause harm)?”

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\(^{293}\) See, e.g., RAZ, *supra* note 177, at 413. Based on Raz’s definition, a “reason is content-independent if
there is no direct connection between the reason and the action for which it is a reason. *Id.* at 35. See also
MOORE *supra* note 20, at 708-11 (discussing the victim’s assumption of risk as a consideration reducing
wrongfulness of the perpetrator’s action).
The question about a “good reason” addresses both prongs of the evil we wanted to prevent by criminalizing consensual acts that set back important human interests and disregard victims’ dignity. The “good reason” to hurt another must negate either kind of harm (since, as was discussed earlier, only the combination of the two harms warrants criminal sanctions for a consensual act) on the objective and subjective levels.

1. The Objective Meaning of a “Good Reason” to Cause Harm.

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

Similarly, a setback to the victim’s interests that protects the victim’s dignity should be justifiable. For instance, a mercy killing of a suffering terminally ill patient certainly destroys his interest in continued living. However, when based on the patient’s plea, such killing respects and preserves the dignity of the dying individual, and, therefore, should not be subject to criminal liability. That was the story behind *Michigan v. Kevorkian*, in which Dr. Kevorkian gave a lethal injection to a former racecar driver who, due to Lou Gehrig’s disease, was no longer able to move, eat or breathe on his own. Even the patient’s family has accepted his choice to escape the suffering and indignity of the slow demise. But not the trial court or the appellate court:

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294 In addition, as has been discussed before, to qualify for either full or partial justification, (a) the harmful act must be based on legally sufficient consent, and (b) the perpetrator must be aware of that consent. See discussion *supra*, notes 103-25 and 199-02 and the accompanying text.

295 See, e.g., People v. Kevorkian, 527 N.W.2d 714, 716 (Mich. 1994) (citing defendant’s unsuccessful claim that assisted suicide is the choice “crucial to one’s dignity, personhood, and autonomy”).

the former has convicted Dr. Kevorkian of the second-degree murder, and the latter has affirmed the conviction. In my view, both decisions were erroneous.

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

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

I realize that it may be difficult sometimes to determine what qualifies as a “good reason” and to measure harm to interests or dignity against the benefits produced by an

297 See id. at 443.
298 See LCC 1994 Paper supra note 7, at 43; Roberts, supra note 8, at 253.
injurious act. Yet there is little new in this task. The justificatory defense of necessity is based on very similar considerations.\textsuperscript{299} In order to successfully claim that defense, the defendant has to establish that the harm or evil sought to be avoided by his conduct was greater than the harm or evil sought to be prevented by the law he has breached.\textsuperscript{300}

In fact, practically all justification defenses have this “balance of evils” component to them. For example, a target of a wrongful deadly attack may kill in self-defense not merely because, if he does not, he himself may be killed, but also because he is “right” and the aggressor is “wrong.”\textsuperscript{301} By attacking an innocent person, the attacker loses moral parity with him.\textsuperscript{302} That is why the law prefers the life of an innocent person to the life of an aggressor and concludes, on balance, that the death of the aggressor is a lesser evil than the death of an innocent person.

Similarly, consent of the victim may serve as a defense of justification only if the perpetrator’s act results in the objectively positive balance of harms/evils and benefits. For example, consensual gladiatorial matches are unacceptable not only because of the potential for death and injury (i.e., setback to the participants’ vital interests) and the indignity of turning human death into a show, but also because the benefits they produce (entertainment for the spectators and a chance to strike it rich for the participants) are

\textsuperscript{299} See, e.g., MPC § 3.02(1) (“Conduct which the actor believes to be necessary to avoid a harm or evil to himself or to another is justifiable, provided that the harm or evil sought to be avoided by such conduct is greater than that sought to be prevented by the law defining the offense charged”).

\textsuperscript{300} Id. See also MPC § 3.02 cmt 2 at 12. The comment explains that “the balancing of evils is not committed to the private judgment of the actor; it is an issue for determination at the trial.” Id.

\textsuperscript{301} If the target of the attack was also at fault, he may lose the right to use deadly force in return to a deadly attack either completely or until he satisfies certain rather onerous requirements (e.g., the initial aggressor has a heightened obligation to retreat). See, e.g., MPC § 3.04(2)(b).

\textsuperscript{302} See, e.g., SUZANNE UNIACKE, PERMISSIBLE KILLING: THE SELF-DEFENSE JUSTIFICATION OF HOMICIDE 198 (1996) (suggesting that “the aggressor sacrifices something morally weighty when he becomes an unjust immediate threat; and if he does not forfeit the right to life itself, then he forfeits moral parity in respect of that right”).
quite frivolous compared to the quantity and quality of the harm involved. In contrast, many advocate legalization of organ sale, since donation does not produce nearly enough needed organs. There is a sound argument that the setback to sellers’ health may be balanced by benefits purchased with the proceeds of the sale, and that the sellers’ dignity will not suffer more than in the currently legal sale of blood, sperm or ova. At the same time, the benefit of saved human lives would add dignity to the transaction and, on balance, produce more good than evil.

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

One might claim that, if an act produces a measurably positive outcome, that act is justified by the outcome alone, and consent of the victim is irrelevant. This claim is untrue. If the victims in the lifeboat hypothetical did not volunteer, no number of saved

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303 See, e.g., Steve P. Calandrillo, Cash for Kidneys? Utilizing Incentives to End America's Organ Shortage, 13 GEO. MASON L. REV. 69, 69, (2004) (observing that over a half of eighty-five thousand Americans waiting to receive kidneys, livers, hearts or other human organs will die while waiting).
lives would justify their killing. Moreover, even if the victim himself benefited from violation of his rights, the harm would not be justifiable. If, say, B, the injured friend of the mountaineer A discussed in the beginning of this section, vehemently objected to the impromptu surgery, unwilling to take its risks and consequences, but A overpowered him and cut off his leg anyway, A would not be justified under the “balance of evils” defense. We penalize even medical doctors for operating on non-consenting patients, and medical doctors normally have a stronger claim than a layperson that violating a patient’s autonomy was a lesser evil than taking the risk that the patient’s condition may deteriorate. Conceptually, this is so because hurting a conscious, rational person against his will constitutes an evil of such magnitude that it cannot be outweighed either by best intentions of the perpetrator or by the overall advancement of the victim’s interests.

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

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


305 See supra notes 199-202 and the accompanying text. See also Fletcher, The Right Deed for the Wrong Reason, supra note 192, at 320-21 (arguing that objective necessity is not enough for justification).
What should be the level of the perpetrator’s awareness of the justifying circumstances to deserve moral and legal justification? There are grounds to believe that it should be purpose.306 For example, under the MPC, a person may not defend his life with deadly force if he provoked the attack “with the purpose of causing death or serious bodily harm”307 to the current attacker. In comparison, an initial aggressor who did not have such a purpose still retains the right to use deadly force.308 An earlier wrongful purpose thus destroys the privilege of self-defense by putting a cloud on the current purpose for deadly actions. That would not be the law if the subjective reason for one’s objectively justified actions were irrelevant.

Take another example: suppose a 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,309 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?

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

307 See MPC § 3.04(2)(B)(i) (emphasis added). See also MPC § 3.04 cmt 4(b) at 51-52 (observing that an actor is deprived of the privilege of self-defense if he “provokes a struggle [with the] purpose that the outcome shall be the death of his victim or his serious bodily harm”).

308 See MPC § 3.04(2)(B)(i). See also MPC, § 3.04 cmt 4(b) at 50 (“Subsection 2(b)(i), depriving [the actor] of his justification on the ground of initial aggression, would not become operative unless [the actor] entered the encounter with the purpose of causing death or serious bodily harm.”).

309 See, e.g., MPC § 3.05.
I think most of us would view such acquittal as mockery of justice. Justification defenses are not intended to provide people with convenient opportunities to commit crimes. Any justifiable conduct requires good faith;\(^{310}\) and, in the context of a limited license to overstep the prohibitory norm, the good faith must include that the subjective purpose of the perpetrator be directed towards the goals for which that license is granted.\(^{311}\)

Furthermore, the “choice of evils” is not available as a defense against a negligent (or reckless) crime if the defendant was negligent (or reckless) in bringing about the situation that made the injurious choice necessary.\(^{312}\) Under this logic, should not a defendant who intentionally placed himself in a situation, in which he would be able to use the defense of another as a cover-up for intentional homicide, be denied the defense of justification?

All these arguments support my view that, to qualify for the defense of justification, one must have both the knowledge of the justifying circumstance and a purpose specifically directed at it.\(^{313}\) Pursuant to this reasoning, self-defense or defense of another should require the knowledge as to the fact of the attack, its imminence and seriousness, and the purpose to protect oneself or another from that attack. Similarly, the “balance of evils” defense should require the knowledge of a threat and the purpose to

\(^{310}\) FLETCHER, supra note 20, 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).

\(^{311}\) In contrast, when consent plays an inculpatory role, the perpetrator is not required to act in good faith to avoid criminal liability.

\(^{312}\) MPC § 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 MPC §3.02 cmt at 20 n. 27.

\(^{313}\) MPC § 3.02 cmt. 2 at 12 (“It is not enough that the actor believes that his behavior possibly may be conducive to ameliorating certain evils; he must believe it ‘necessary’ to avoid the evils.”).
avoid it. Here comes a question: in order to use the victim’s consent as a defense, the perpetrator certainly should be aware of that consent but what should be his purpose?

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

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

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


315 Finn, *Cannibal Case Grips Germany: Suspect Says Internet Correspondent Volunteered to Die*, supra note 1, at A26.
This theory makes sense, both theoretically and practically. From the theoretical perspective, it places consent squarely within the family of justification defenses. All of them seek to overcome the deontological constraint against intentional infliction of harm. The ethical doctrine of double effect directed at the same moral constraint maintains, for instance, that an act that produces harm may be permissible if the harm is outweighed by good consequences and the harm is not directly intended.316

Even those who do not subscribe to the doctrine of double effect would perhaps agree that there is a moral difference in choosing a certain course of action despite its negative effects as opposed to for the sake of its negative effects.317 Aiming at evil makes one more culpable.318 For example, killing, torturing, or disfiguring for the sheer joy of it is paradigmatic of true evil.319 In that sense, consensual killing, torturing or disfiguring for the sheer joy of it is not much different. I concur with Thomas Nagel that, when a person volunteers to be subjected to some kind of pain or damage, either for his own good or for some other end which is important to him, the evil at which the perpetrator is constrained not to aim is “his victim’s evil, rather than just a particular bad thing.”320 Nagel’s observation corresponds with my claim that the evil criminal law

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

317 See, e.g., Antony Duff, Intention, Responsibility and Double Effect, 32 PHILOSOPHICAL QUARTERLY 1, 2-3 (1982).

318 MOORE supra note 20, at 409 (“We are authors of evil when we aim to achieve it in a way we are not if we merely anticipate that evil coming about as a result of our actions.”).

319 Id. at 408.

320 See NAGEL supra note 312, at 182. I do not completely agree with what Nagel argues further, i.e. that “each individual has considerable authority in defining what will count as harming him for the purpose of this restriction.” Id. To be more accurate, I accept the individual’s limited authority to determine harm, as
should seek to prevent is objectification of another human being, which, in a consensual act, is a combination of significant setback to interests and violation of dignity.

This test makes sense as a practical matter as well. On the one hand, it requires the proof of the perpetrator’s good faith and benevolent purpose. In that it is similar to other justification defenses; therefore, the requirement will not be new either to the general public or to the judiciary. On the other hand, to be justified in a consensual harmful act, the defendant would not have to prove that his motivation was of a particular noble kind.

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

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

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

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

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

(iv) the perpetrator’s conscious goal was to set back significantly the victim’s interests and dignity (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.322 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.

322 See, e.g., Bergelson, supra note 124, at 404-06 (discussing why mistake should be a defense of excuse and not justification and citing conflicting views of the issue).
The second example involves the kind of harm which, as discussed above, should be prohibited by criminal law, irrespectively of the parties’ intentions and preferences.323

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’s simply lacks a good reason necessary for justification: hatred does not justify intentional killing.

In the last example (still assuming the frustration of purpose), the perpetrator’s wrongdoing is similar to an attempt. In the case of an attempt, the perpetrator commits a wrongful act with a culpable state of mind but does not cause 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. Here, 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 since it is consensual. It is nevertheless wrongful under the advocated here theory of harm 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

323 See discussion supra notes 252-77 and the accompanying text.
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 would reduce the perpetrator’s punishment to the minimal level. In the third example, 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; yet, that does not mean he ought to be sent 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.

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

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

Instead of the current absolute rule, which recognizes consent to serious bodily harm only in a few circumstances, I propose a balancing test, which would take into account the severity of harm to the victim’s interests and dignity as well as the importance of the reasons that have prompted the perpetrator’s act. The advocated approach would, on the one hand, give judges and jurors more freedom to balance relevant considerations and thus bring about more fine-tuned and fair decisions. On the other hand, by limiting punishment only to cases of double injury to the victim’s interests and dignity, this approach would put an end to the prosecution of “harmless immoralities.” Ultimately, the new rule would better reflect the goals of a free democratic society that respects the autonomy and dignity of its members.

CONCLUSION

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

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

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