

## THE 2008 DAVID J. STOFFER LECTURE

### AUTONOMY, DIGNITY, AND CONSENT TO HARM

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Dean Deutsch, thank you for your kind introduction. I would also like to thank all of you, my colleagues and co-workers; distinguished guests, including members of the bench and bar of New Jersey and New York; and Rutgers alumni and students—thank you for being here this evening. I am honored to be speaking to you as part of the David J. Stoffer lecture series.

In this lecture, I would like to share with you some thoughts about one of the essential doctrines of criminal law—the doctrine of consent and, more specifically, consent to physical harm. It is often said that consent is “morally transformative,” even magical: it transforms what otherwise would be illegal conduct into conduct that is entirely legal.<sup>1</sup> As the famous maxim goes: *volenti non fit injuria*—a person is not wronged by that to which he consents.<sup>2</sup> But how literally should we read this maxim? Does consent of one person always have the power to change the moral and legal character of another person’s actions? It certainly precludes a number of serious offenses. Quoting Professor Heidi Hurd, “[C]onsent turns a rape into love-making, a kidnapping into a Sunday drive, a battery into a

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This lecture is based largely on the following works: Vera Bergelson, *The Right to Be Hurt: Testing the Boundaries of Consent*, 75 GEO. WASH. L. REV. 165 (2007); Vera Bergelson, *Consent to Harm*, in THE ETHICS OF CONSENT: THEORY AND PRACTICE (Alan Wertheimer & Franklin G. Miller eds., forthcoming 2008); Vera Bergelson, *Consent to Harm*, PACE L. REV. (forthcoming 2008).

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

2. See Terence Ingman, *A History of the Defence of Volenti Non Fit Injuria*, 26 JURID. REV. 1, 2 (1981).

football tackle, a theft into a gift, and a trespass into a dinner party.”<sup>3</sup> And yet we can think of numerous cases in which the perpetrator’s actions remain wrongful despite their consensual nature.

One such case happened a few years ago in Germany. In late 2000, Armin Meiwes, a forty-two-year-old computer technician, posted a message “in an Internet chat room devoted to cannibalism: ‘[S]eeking well-built man, 18-30 years old, for slaughter.”<sup>4</sup> A few months later, Bernd Juergen Brandes, a forty-three-year-old microchip engineer, replied: “I offer myself to you and will let you dine from my live body. Not butchery, dining!!!”<sup>5</sup> 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.”<sup>6</sup> A few weeks later, he arrived at Meiwes’s place and the gruesome plan was carried out.

When Meiwes was arrested, he admitted to slaughtering, dismembering, and eating Brandes. At his trial, he raised consent of the victim as his principal defense, and the court, at least in part, agreed with his arguments and rejected the prosecution’s plea for murder. Meiwes was convicted of manslaughter and sentenced to eight-and-a-half years in prison.<sup>7</sup> Both the prosecution and the defense appealed the verdict, and the Federal Court of Justice—Germany’s highest criminal court—found the conviction too lenient and ordered a retrial on the charge of murder. The retrial took place in 2006; Meiwes was convicted of murder and sentenced to life in

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

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

5. *Id.*

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

7. Mark Landler, *Cannibal Convicted of Manslaughter; German Court Orders an 8 1/2-year Sentence*, N.Y. TIMES, Jan. 31, 2004, at 3. For the legal opinion, see Bundesgerichtshof [BGH] [Federal Court of Justice] May 26, 2004, 49 Entscheidungen des Bundesgerichtshofes in Strafsachen [BGHSt] 166 (F.R.G), available at <http://www.bundesgerichtshof.de> (follow “Entscheidungen” hyperlink; then search “Aktenzeichen” for “2 StR 505/03”).

prison.<sup>8</sup> In 2007, this verdict was affirmed by the Federal Court of Justice.<sup>9</sup>

Not surprisingly, this 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 of England and Wales, an independent governmental organ responsible for the systematic development of criminal legislation in Great Britain, issued two consultation papers that analyzed the law of consent and called for its reform.<sup>10</sup> The event that prompted the work of the law commission was a high-profile police investigation, Operation Spanner, which resulted in criminal prosecution of a group of homosexual men involved in consensual sadomasochistic activities.<sup>11</sup> Although no member of the group has ever filed a police complaint or suffered an injury requiring medical attention, the defendants were convicted and sentenced to prison terms ranging from several months to several years.<sup>12</sup> The case, *R v. Brown*, was appealed first to the Court of Appeal and the House of Lords, and after that to the European Court for Human Rights; all appeals failed, as the courts refused to expand an individual's power to consent to battery beyond a few narrowly defined circumstances.<sup>13</sup>

The court decisions in *Brown* provoked numerous discussions and publications, most of which were critical of the judicial reasoning and the outcome of the case. In the words of the law commission, *Brown* “cast fresh light on the unprincipled way in which [the rules of

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8. See ‘Perverse’ Cannibal Killer Gets Life, CNN.COM, May 9, 2006, <http://www.cnn.com/2006/WORLD/europe/05/09/cannibal.trial/index.html>. For an official comment, see Press Release, Der Bundesgerichtshof, “Kannibale von Rotenburg” jetzt rechtskräftig wegen Mordes verurteilt (Feb. 16, 2007), available at <http://www.jurisonline/Rechtsprechung>.

9. Bundesgerichtshof [BGH] [Federal Court of Justice] Feb. 7, 2007, available at <http://www.bundesgerichtshof.de> (follow “Entscheidungen” hyperlink; then search “Aktenzeichen” for “2 StR 518/06”).

10. LAW COMMISSION CONSULTATION PAPER NO. 139, CONSENT IN THE CRIMINAL LAW, at Part X (1995); LAW COMMISSION CONSULTATION PAPER NO. 134, CRIMINAL LAW CONSENT AND OFFENCES AGAINST THE PERSON (1994).

11. See *R v. Brown*, [1992] Q.B. 491 (A.C.); see also Charles Bremer, *Europe Backs Prosecution of Sadomasochists*, THE TIMES (London), Feb. 20, 1997, at 12.

12. See *R v. Brown*, (1994) 1 A.C. 212, 215 (H.L.).

13. See *id.* at 213, 215.

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.”<sup>14</sup> The law commission has assembled and analyzed dozens of cases, attempting to work out general principles of the law of consent, but the attempt proved to be largely unsuccessful; the law commission issued no legislative recommendations and no reforms followed. Finally, in 2001, the law commission admitted its inability to reach consensus and terminated the consent project.<sup>15</sup>

Other countries have been struggling with the issue of consent as well, its application ranging from body piercing to elective radical surgeries to assisted suicide. The legislative and public interest in the issue of consent is understandable. The ability to consent is recognized in moral philosophy as the central manifestation of personhood and individual autonomy. Modern political theory sees the only source of legitimacy of the state power in the “consent of the governed.”<sup>16</sup> In contrast, today’s criminal law extends to an individual a very limited authority to consent as far as his physical well-being is concerned.

In Anglo-American jurisprudence, this rule dates back to the seventeenth century. Prior to that, an individual was free to consent to practically anything, and consent was viewed as a complete ban on prosecution. Changes came as a result of the monopolization of the system of punishment by the state. Quoting Stephen Schafer, “In contrast to the understanding of crime as a violation of the victim’s interest, the emergence of the state developed another interpretation: the disturbance of the society.”<sup>17</sup> The state (or king) became the ultimate victim and the sole prosecutor of a criminal act.<sup>18</sup> As a result, an individual lost the power to consent to what the state regarded as harm to itself.<sup>19</sup>

In one of the earliest English cases that rejected consent of the victim as a defense to serious bodily harm, the court opined that the defendant was guilty because, by maiming the willing victim, he deprived the king of the aid and assistance of one of his subjects.<sup>20</sup>

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14. LAW COMMISSION CONSULTATION PAPER NO. 139, *supra* note 10, at 1.

15. See LAW COMMISSION, EIGHTH PROGRAMME OF LAW REFORM, 2001, H.C. 227-274, at 44.

16. See, e.g., Markus Dirk Dubber, *Toward a Constitutional Law of Crime and Punishment*, 55 HASTINGS L.J. 509, 570 (2004) (citing THE DECLARATION OF INDEPENDENCE para. 2 (U.S. 1776)).

17. STEPHEN SCHAFFER, VICTIMOLOGY: THE VICTIM AND HIS CRIMINAL 22 (1977).

18. See *id.*

19. See *id.*

20. EDWARD COKE, THE FIRST PART OF THE INSTITUTES OF THE LAWS OF ENGLAND; OR, A COMMENTARY UPON LITTLETON § 194, at 127a-127b (Prof. Books Ltd. 1985)

Three centuries later, an American court used a very similar argument, explaining that the “commonwealth needs the services of its citizens quite as much as the kings of England needed the services of theirs.”<sup>21</sup>

Today, American law, as well as English law, continues to maintain that one’s life and body do not quite belong to him. Accordingly, consent of the victim may not serve as a defense to homicide or serious injury, with two exceptions: recognized medical treatment and athletic activities.<sup>22</sup> This rule has been criticized for its narrow scope and arbitrary boundaries. As one judge remarked, it is “very strange that a fight in private between two youths where one may, at most, get a bloody nose should be unlawful, whereas a boxing match where one heavyweight fighter seeks to knock out his opponent and possibly do him very serious damage should be lawful.”<sup>23</sup>

The current rule is not merely arbitrary and strict; it is also autocratic and absolute. People are allowed to consent to harm only if their activities are on the list of things approved by the state. The law envisions no balancing or accommodation of the conflicting interests of an individual and society. The disregard for an individual, inherent in this rule, goes against the basic principles of autonomy and personal responsibility defining American criminal law. Moreover, the authoritarian presumption that it is not the individual, but rather the state that is the victim of every crime is plainly wrong because, if that were so, then consent would not be a defense to any harm, not merely physical harm.<sup>24</sup> Yet, we know that individuals are free to consent to all kinds of harm—emotional, financial, or reputational—as long as those harms are not physical.

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

I suggest that the answer to the first question is determined by the different nature of the acts in cases of theft, rape, or kidnapping, on the one hand; and cases of killing or maiming on the other hand. In the first group of cases, the *act itself* does not violate a prohibitory

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(Francis Hargrave & Charles Butler eds., 19th ed. 1832) (1628); 1 SIR MATTHEW HALE, HISTORIA PLACITORUM CORONAE 412 (Philadelphia, Robert H. Small 1847).

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

22. See MODEL PENAL CODE § 2.11 cmt. 2 (Official Draft and Revised Comments) (1980).

23. R v. Brown, (1994) 1 A.C. 212, 278 (H.L.) (judgment of Lord Slynn).

24. See Dubber, *supra* note 16, at 570.

norm. Having sex, transporting someone to a different location, or taking other people's property is not bad *in itself*. It becomes bad *only* due to the absence of consent. In other words, in cases of theft, rape, or kidnapping, the role of consent is *inculpatory*—nonconsent is a part of the definition of the offense.<sup>25</sup> To see that, perform a simple mental experiment: think about the conduct rule we want to convey to the community. Should it say: Do not have sex? Do not take other people's possessions? Do not break other people's property? Certainly not. Even the last rule, the most controversial of the three, would be unmerited and impracticable. There is nothing wrong with breaking things. People may need to break things, including those belonging to others, in the process of construction, repair, cleaning, cooking, or just having fun. We do not want to prohibit useful or morally neutral activities. What we want to prohibit is engaging in these activities *under the circumstances* that make such activities wrongful.

In contrast, causing pain, injury, or death is not morally neutral—it is regrettable. Bringing about a regrettable state of events is bad and should be avoided. Therefore, we would want a conduct rule that prohibits the very *act* of killing or hurting, providing, of course, for the necessary exceptions such as self-defense. However, the fact that a person may be legally justified in killing an aggressor does not make the killing as morally neutral as borrowing a book—it is still regrettable. It is still regrettable that a dental patient has to suffer pain, even though the dentist is justified in causing it, whereas there is nothing regrettable in consensual sex or consensual change of ownership. To lose or reduce its inherent wrongfulness, the act of killing or hurting requires justification. The role of consent here is *exculpatory*; it may only serve as a defense.

In practical terms, it means that consent precludes even a *prima facie* case of rape or theft, regardless of whether the consensual act brings about more good than harm and regardless of whether the defendant is aware of the victim's consent. Significantly more is required for a successful defense. Why is that so? Mainly because we view a defense of justification as a limited license to commit an otherwise prohibited act in order to achieve a socially and morally desirable outcome.<sup>26</sup> For instance, if a group of mountaineers caught by a snowstorm took refuge in a deserted cabin and consumed the owner's provisions, they would be justified under the defense of necessity.<sup>27</sup> This limited license is teleological in nature; it presumes

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25. See GEORGE P. FLETCHER, *RETHINKING CRIMINAL LAW* 707 (1978) (presenting arguments that nonconsent is part of the definition of rape).

26. See MODEL PENAL CODE § 3.02(1)(a) cmt. 1.

27. See, e.g., *id.*

an objectively preferable outcome and the good faith of the actors.<sup>28</sup> If, say, the mountaineers simply decided to have a party in the cabin, we would not grant them the defense of necessity even if, unknowingly, they in fact saved their lives by hiding from the upcoming snowstorm. In order to be justified, the mountaineers must establish three elements: (1) the basis for the defense (actual necessity), (2) an objectively preferable outcome (a positive balance of harms and evils), and (3) the subjective intent directed at achieving this preferable outcome.<sup>29</sup>

Applying the same logic to the defense of consent, we, therefore, should only grant complete justification to the perpetrator who, in addition to having consent of the victim—the basis for the defense—also achieved a better balance of harms and evils and was motivated by the desire to achieve that result.

Naturally, not all harms and evils are in the jurisdiction of criminal law. Traditionally, criminal harm is understood as *wrongful* interference with the victim's essential "welfare interests."<sup>30</sup> The interference is deemed wrongful if it violates the victim's autonomy—namely, the victim's rights. Harm unaccompanied by a rights violation is usually not punishable by criminal law. For example, a competitor's success may financially harm a neighboring business owner. However, the competitor is guilty of no offense because the business owner does not have a right guaranteeing protection from competition.

From this perspective, consent to physical harm presents a problem. Since consent constitutes a waiver of rights, the perpetrator who kills or injures a willing victim does not violate the victim's autonomy. Thus, in theory, the consent of the victim should equally preclude criminal wrongdoing in cases of euthanasia, consensual cannibalistic killing, and sadomasochistic beating. Under the current law, however, the outcome is completely opposite: in all three cases, the defendants would be guilty, and in the first two cases guilty of the same offense—murder. Yet, many of us would probably perceive a meaningful difference between the character of harm in these three cases, a difference that is not accounted for by either current legal rules or traditional criminal law doctrine. What is this difference and

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28. *See id.* cmt. 2.

29. *See id.*

30. JOEL FEINBERG, *THE MORAL LIMITS OF THE CRIMINAL LAW: HARM TO OTHERS* 37 (1984). Those include "interests in the continuance for a foreseeable interval of one's life, and the interests in one's own physical health and vigor, the integrity and normal functioning of one's body, the absence of absorbing pain and suffering or grotesque disfigurement, minimal intellectual acuity, emotional stability . . ." *Id.* at 37.

how should law and doctrine be revised to accurately reflect the perpetrator's culpability?

In recent years, a number of scholars have suggested that the concept of criminal harm should not be limited to a violation of one's autonomy. In their view, such acts as, say, consensual gladiatorial matches are impermissible because they violate the participants' dignity, and dignity is so essential to our humanity that, in cases of a conflict between autonomy and dignity, the former ought to yield.<sup>31</sup> Accordingly, consent may not serve as a defense to the violation of dignity.

I share this view and believe that certain degrading behavior may be wrongful even when it does not violate the victim's rights. Society may be concerned about human dignity in various circumstances, including those in which a prohibitory norm does not originate in a rights violation. Consider experiments conducted in the 1980s that involved the use of fresh cadavers as "crash dummies." When those experiments became known, they caused public outrage. But why? We usually do not feel the same way about autopsies or postmortem organ donation. Perhaps, as Professor Joel Feinberg suggested, the answer has something to do with the perceived symbolism of the different uses. I quote: "In the air bag experiments cadavers were violently smashed to bits, whereas dissections are done in laboratories by white-robed medical technicians in spotless antiseptic rooms, radiating the newly acquired symbolic respectability of professional medicine."<sup>32</sup>

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

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31. See, e.g., Meir Dan-Cohen, *Basic Values and the Victim's State of Mind*, 88 CAL. L. REV. 759, 777-78 (2000); Dubber, *supra* note 16, at 568; R.A. Duff, *Harms and Wrongs*, 5 BUFF. CRIM. L. REV. 13, 39-44 (2001); R. George Wright, *Consenting Adults: The Problem of Enhancing Human Dignity Non-Coercively*, 75 B.U. L. REV. 1397, 1399 (1995).

32. Joel Feinberg, *The Mistreatment of Dead Bodies*, HASTINGS CTR. REP., Feb. 1985, at 31.

concept of dignity, therefore, does not reflect the subjective state of mind of the perpetrator or the victim, but instead has an “objective,” normative meaning.

What is at stake here is people’s moral dignity, or dignity of personhood, as opposed to social dignity, or dignity of rank. Social dignity is nonessential; in a society that permits social mobility, it can be gained and lost. Moral dignity, by contrast, is an essential characteristic of all human beings.<sup>33</sup> It is so important for our collective humanity that we extend it not only to those who satisfy “the minimum requirements of personhood,”<sup>34</sup> but even to those who closely miss them.

And yet, as important as moral dignity is, its violation should not be criminalized lightly. Whenever the state prohibits consensual behavior, for the sake of dignity or any other reason, it suppresses individual liberty and autonomy—partly paternalistically, but mostly for the benefit of society at large. Therefore, the threat to society should be serious enough to warrant use of criminal sanctions. For instance, the careless attitude to human dignity exhibited by *Fear Factor*, a popular television reality show, raised concerns of a number of its viewers. However, the nature and magnitude of the personal and societal harm brought about by the show did not rise to the level that would justify a criminal ban—that harm was simply not the law’s business,<sup>35</sup> at least not the criminal law’s business. Professor Duff has accurately observed that not punishing someone’s conduct does not mean approving of it; instead, it can mean the lack of standing to judge or condemn such conduct.<sup>36</sup> We do not have to approve of radical cosmetic surgery, religious flagellation, or the sadomasochistic practices of the *Brown* defendants; however, society may be better served by not prosecuting those consensual activities.

In other words, not every violation of human dignity deserves criminal punishment, but only those that affect society at large. To avoid over-criminalization, yet capture the most egregious cases, 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. To that end, the criminal doctrine should explicitly include dignity

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33. Dubber, *supra* note 16, at 567. Dan-Cohen makes a similar point when he observes that the term “dignity” should be understood as “moral worth” and not “social status.” See MEIR DAN-COHEN, HARMFUL THOUGHTS: ESSAYS ON LAW, SELF, AND MORALITY 169 n.23 (2002).

34. Dubber, *supra* note 16, at 535 (“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.”).

35. See THE WOLFENDEN REPORT: REPORT OF THE COMMITTEE ON HOMOSEXUAL OFFENSES AND PROSTITUTION 133 (1963).

36. Duff, *supra* note 31, at 37.

violation in the concept of wrongdoing. Criminal harm then would retain its current meaning as a wrongful setback to an important welfare interest, but “wrongful” would mean either (1) such as violates the victim’s autonomy or (2) such as violates the victim’s dignity. The two kinds of criminal harm comprise the same evil—objectification of another human being. That evil may be brought about by an injury to a vital human interest, combined with either a rights violation (e.g., arson) or disregard of the victim’s dignity (e.g., consensual deadly torture). The absolute majority of criminal offenses being *nonconsensual* include both kinds of harm.

As for *consensual* physical harm, it should be punishable only when an important welfare interest, normally protected by criminal law, is set back in a way that denies the victim his equal moral worth. For example, by killing Brandes, Meiwes did not violate Brandes’s right to life. However, he not only defeated the most essential interest of Brandes—his interest in continued living—but also used Brandes as an object, a means of obtaining the desired cannibalistic experience and thus disregarded his dignity. In contrast, a consensual mercy killing of a suffering, terminally ill patient certainly also destroys the patient’s interest in continued living. Yet, when warranted by the patient’s condition and motivated by compassion, such killing respects and preserves the dignity of the dying individual and, therefore, should not be subject to criminal liability. In *People v. Kevorkian*,<sup>37</sup> Michigan prosecuted Dr. Kevorkian for administering a lethal injection to a former racecar driver who, due to advanced Lou Gehrig’s disease, was no longer able to move, eat, or breathe on his own.<sup>38</sup> Even the patient’s family had accepted his choice to escape the suffering and indignity of the slow demise.<sup>39</sup> But not the trial court or the appellate court: Dr. Kevorkian was convicted of second-degree murder and that conviction was affirmed.<sup>40</sup> I suggest that both decisions were erroneous.

The proposed revision of the concept of criminal harm has two normative consequences. One is that consent should always be at least a partial defense, because it defeats at least one aspect of harm—namely, violation of rights. A partial justification does not make a wrongful act right, it only makes it *less wrongful* compared to an identical but nonconsensual act. Consider *United States v. Holmes*, a famous mid-nineteenth-century case in which a ship crew and thirty-two passengers were cast adrift on a lifeboat after a

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37. 639 N.W.2d 291 (Mich. Ct. App. 2001).

38. *Id.* at 296, 298.

39. *Id.* at 298.

40. *Id.* at 296-97.

shipwreck on the high seas.<sup>41</sup> The boat was grossly overcrowded, and it soon became apparent that it would sink unless some lives were sacrificed.<sup>42</sup> The first mate ordered the crew to throw overboard all male passengers whose wives were not on the boat.<sup>43</sup> Holmes, the defendant, was one of the crewmembers who followed the order.<sup>44</sup> By the time a rescue ship arrived, sixteen passengers were jettisoned, fourteen men and two women—two sisters—although the circumstances surrounding the deaths of these women were not quite certain.<sup>45</sup> The court noted that when Holmes seized the women's brother, they asked to be thrown over too; they said that "they wished to die the death of their brother."<sup>46</sup> Holmes was convicted of manslaughter.<sup>47</sup> The court pointed out that, while normally people do not have a duty to save each other by sacrificing their own lives, in this case such a duty existed—the duty of the crew to the passengers.<sup>48</sup>

Now, suppose that the lifeboat carried no crewmembers, and the passengers did not forcibly throw selected people overboard, but instead asked for volunteers. Suppose further that two sisters, along with their brother, offered their lives in order to save the others. Would it be wrong for their fellow passengers to accept this sacrifice and throw them overboard? I think that, even if it were wrong, it would certainly be less wrong than drowning those who have not volunteered. It would be less wrong because the person who threw them over did not violate the victims' rights. Accordingly, he brought about less harm than in an identical but nonconsensual act and, thus, should deserve a lesser punishment.

Moreover, there is a strong argument that the perpetrator in this case deserves not merely partial, but complete justification. As I suggested earlier, a consensual act should be punished only if it both sets back an important welfare interest of the victim *and* infringes upon the victim's dignity. In the modified *Holmes* case, the perpetrator destroyed the victims' interests in continued living, but he did not disregard their dignity. Instead, he assisted them in carrying out their noble decision to save numerous human lives, which otherwise would have been lost.

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41. 26 F. Cas. 360, 360 (C.C.E.D. Pa. 1842) (No. 15,383).

42. *Id.* at 361.

43. *Id.*

44. *Id.*

45. *Id.*

46. *Id.* at 360 n.5.

47. *Id.* at 368.

48. *Id.* at 366-67.

The second normative consequence of the proposed revision of the doctrine of criminal harm is that consent alone does not suffice to justify the victim's death or injury. To qualify for a full justification, the perpetrator has to establish that his harmful act has produced an overall positive "balance of evils." That harmful act may advance interests of people other than the victim—as in the modified *Holmes* hypothetical—provided, however, the perpetrator did not significantly set back the victim's interests *and, at the same time*, disregard the victim's dignity. Naturally, the more serious (disabling and irreversible) the harm to the victim, the more serious must be the benefits brought about by the injurious action. A sadomasochistic beating, which leaves no permanent damage as in *R v. Brown*, should be justified by the mere fact that its participants desired it.<sup>49</sup> Even those who believe that such a beating offends the victim's dignity would probably agree that it does not significantly affect the victim's long-term interests. On the other hand, only extraordinary circumstances might be able to justify consensual, deadly torture.

In addition to showing the objectively positive outcome, the perpetrator would have to establish that he intended it while causing harm. This subjective requirement, common to other justification defenses, is mandated by the fact that consent—as well as necessity or self-defense—does not impose on the perpetrator an *obligation* to act; it merely provides him with an *option*.<sup>50</sup> But unlike necessity or self-defense, consent of the victim creates a very weak content-independent reason for action.<sup>51</sup>

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

A good reason for breaking the rule is a necessary condition for a successful defense of justification, but it is not sufficient even when the injurious act is committed in order to advance the victim's interests. Consider one more case, *Gilbert v. State*,<sup>52</sup> in which the

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

50. This does not apply to justifications known as "public duty" defenses. See Vera Bergelson, *Rights, Wrongs, and Comparative Justifications*, 28 CARDOZO L. REV. 2481, 2484 (2007).

51. See *id.* at 2487; see, e.g., JOSEPH RAZ, *THE MORALITY OF FREEDOM* 413 (1988).

52. 487 So. 2d 1185 (Fla. Dist. Ct. App. 1986).

court convicted a seventy-five-year-old man of first-degree murder for shooting his wife to death.<sup>53</sup> Roswell and Emily Gilbert had been married for fifty-one years.<sup>54</sup> For the last few years of her life, “Emily suffered from osteoporosis and Alzheimer’s disease,” and her condition rapidly deteriorated.<sup>55</sup> Testifying at his trial, Roswell Gilbert said, “[T]here 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 . . .”<sup>56</sup> As dramatic and sad as this case is, the appellate court was right to affirm the defendant’s conviction. Roswell Gilbert was motivated by compassion and desire to protect his wife from suffering and, in fact, he did everything in his power to make her death as painless as possible. But even if her condition was so desperate that Roswell objectively benefited Emily by cutting short her agony, he should not be entitled to justification. Unauthorized homicide of an autonomous human being is, and should be, murder. No one has the right to decide for another person that his life is not worth living; or, citing the words of the *Gilbert* opinion, “‘Good faith’ is not a legal defense to first degree murder.”<sup>57</sup>

To summarize, consent to physical harm does not automatically preclude a criminal wrongdoing; it may only serve as a defense of justification. For complete justification, the perpetrator’s reasons for the consensual injurious act, both objectively and subjectively, must (1) be overall benevolent and (2) not significantly injure both the victim’s welfare interests and dignity.

These normative requirements make sense both theoretically and practically. From the theoretical perspective, they place consent squarely within the family of justification defenses. All of them, from self-defense to necessity, seek to overcome the deontological constraint against intentional infliction of harm. These defenses may be granted to a person who chose a certain course of action *despite* its negative effects—as opposed to *for the sake* of its negative effects—and succeeded in producing a better outcome. From the practical perspective, these requirements leave room for balancing the harms and benefits caused by the perpetrator. This is an important difference from the current law, which is absolute in what it allows and disallows.

The proposed rule would also strike a good balance between private and public interests. On the one hand, by giving legal weight

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53. *Id.* at 1186-87.

54. *Id.* at 1187.

55. *Id.*

56. *Id.*

57. *Id.* at 1191.

to self-regarding decisions of the victim, the law would respect the autonomy of the victim as well as the perpetrator. On the other hand, by protecting the victim's dignity from the most egregious abuse, the law 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 consistent, fair, and morally sustainable verdicts.